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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.

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

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Keywords:

Law and the Anthropocene, Climate change litigation, Comparative environmental law

I. Introductory remarks

The final question at the end of our dossier is the following: is public law capable of meeting the challenges of the Anthropocene?

We believe that the contributions to our dossier confirm the breadth and depth of the challenge that climate change poses to the law. The question whether public law as it stands – in terms of positive law, doctrine and institutions – is ready to stand those challenges is evidently one that equally applies to the remainder of the legal system, yet for the purpose of this Yearbook we will evidently limit ourselves to public law only.

We can hardly avoid placing these considerations under the heading of crisis. In a sense, the climate problem, combined with further traumatic aspects of this time – the health crisis, the war in Europe, the economic crisis, etc. – exposes the law, like all social and political realities, to a series of disruptive factors. To quote Michel Serres - this upheaval is so strong that there is no turning back.[1]

The truth, as is often the case, may lie somewhere in the middle. It appears that public law had to accommodate the Anthropocene, and perhaps even played a role in its development. Yet today public law is asked to respond to this new situation, to accompany it, to fight against it, to compensate for it and to help humanity live with it – if there is still time.

II. A two-layered response to the crisis:

A. The 'functional' solution: how can public law instruments and concepts be bent to support the fight against to climate change?

Underlying this solution is the idea that instruments and concepts of public law could be 'functionally' steered to, for instance, ensure that public decisions take account of their climatic consequences, that public procurement takes account of the climate dimension, that public officials are made aware of the climate issue, and so on. One could also imagine adapting public law concepts too, some of which could be influenced by a "functional crossing", as Laurent Millet explained.[2] This may require overthinking various institutions, concepts and mechanisms, but could then even be applied to, among others, fundamental freedoms.[3]

We may also discover that there is a need to modify institutional arrangements, particularly in terms of coordination: see for instance the French 'basin coordinating prefect' in the field of water as already mentioned in the introduction to this dossier. At the same time, institutional arrangements could equally be altered in terms of a change of direction, potentially rendering the old territorial, administrative and conceptual structures obsolete in certain respects.

1 Serres, M., "Le temps des crises", 2009, Le Pommier, coll. « Manifeste ».

2 *Contribution à l'étude des fonctions sociale et écologique du droit de propriété,* thèse Université Paris I Panthéon-Sorbonne, 2015.

3 See Honneth, A., «Le droit de la liberté. Esquisse d'une éthicité démocratique», 2015, Gallimard.

B. The 'conceptual' solution: to what extent do public law concepts and theoretical bases hinder the fight against climate change?

This approach is different from the previous one, although the two may very well be combined. This solution would require an examination of public law concepts in light of their historical origin and their resonance in both positive law and doctrine, in order to determine whether they might somehow hinder in one way or another the changes necessary to adequately address the climate issue. If a difficulty of this kind were to arise, one would have to envisage a 'functional' evolution as mentioned above.

III. The 'functional' adaptation of public law to climate change

Concretely, the functional approach envisaged here seeks to determine whether concepts, institutions and mechanisms of public law could possibly contribute to climate change mitigation. In doing so, one may consider three different routes: (1) public law as providing tools for public action, (2) public law as a normative system and (3) public law as an institutional architecture.

A. Public law as providing tools for public action

The question here is to what extent public law dictates that the urgency of climate change must be taken into account in public decisions, public choices and public budgets. This is currently done to some extent, but there certainly is room for improvement.

The first thing to consider is whether public law sufficiently instructs public authorities to take strategic standpoints and to assess the consequences of their action in the long run. In general, it can be said that public law is by its very nature capable of dealing with systemic issues, coordination and planning. Yet, nowadays public bodies quite frequently refrain from traditional supervisory models and instead contract out these tasks – thus take a 'neo-liberal' attitude. It is however questionable, whether the use of such soft law techniques, such as compliance and nudge, might not hamper coherent policies in the long run.

Scholars have raised serious concerns as regards to the efficiency of these instruments. They argue that compliance is the art of being accountable without actually being accountable. They are convinced that the deployment of corporate freedom is driven by dynamics that make it rather impossible for businesses to think about needs in an eminently political way.

One further might be critical about the institutions itself, given that public administration might have to introduce significant internal changes in order to take climate change sufficiently into account. The multiple layers of public law potentially relevant to address the issue, call for a thorough analysis of the underlying problem. The latter may differ depending on how the problem is to be addressed - through adaptation, mitigation or combating climate change, and whether it is approached in a coordination logic, potentially avoiding a simple disorderly juxtaposition of isolated responses.

Concerning the need for coordination, one particular flaw presented by public institutions is that they tend to be organized in "silos", i.e. divided in segments devoted to different functions and often indifferent to one another. Yet, the climate issue, like any environmental problem, must be tackled in a systemic way. This does not mean, of course, that individual policies cannot be successful, but considering each aspect of climate policy as separate from the others can do no good.

B. Public law as a normative system

Public law is not just a toolbox for public action; it is also a set of standards that frames these tools and limits their use. It constitutes a system within the State's normative apparatus, organised according to hierarchical modalities, usually culminating in the Constitution. The central question is, to what extent and how the various components of this normative system can be mobilised to address climate change.

1. Constitution

Since in most legal systems the Constitution is considered to be the ultimate standard, it is obviously desirable if the requirements to positively contribute to the fight against climate change are clearly and formally enshrined therein. As Laurent Fonbaustier and Juliette Charreire show in their contribution to the dossier – this seems to be increasingly the case. The Constitution should stand everywhere as the horizon of the ecological institution. Nevertheless, if the constitution is a space-time of values, bodies and procedures which might very well be useful, its efficiency has obvious limits.

The effectiveness of a Constitution in terms of supporting climate action is largely dependent on the sanction system provided by the state. We have seen in the dossier how climate change arose, and continues to arise before the courts responsible for challenging its constitutionality.

Notably though, it should not be forgotten that what equally matters is the wording of constitutional environmental protection standards. As we have seen, these may differ in terms of clarity and precision.

A central point is also the extent to which they take into account the revelation of contemporary ecological thinking – which might contradict our vision of the world that separates man from the environment, man from non-humans. Unfortunately, existing constitutions differ greatly from Italo Calvino's hero in "The Baron in the Trees", who devotes himself to drafting a Constitution "*for a Republican City with Declaration of the Rights of Man, Woman, Child, Domestic and Wild Animals, including Birds, Fish and Insects, as well as Plants, whether Large Trees or Vegetables and Aromatic Herbs*".

2. EU Law

European Union law certainly takes an essential part in enforcing the desirable climatic politics: if only because it is situated at a particularly adequate level, between being too big and too small, and has a rather homogenous cultural base.

It is true that EU Law has its drawbacks, sometimes quite visible ones: the ambiguity of the Green Deal, the founding rationale being resolutely ecologically unsound, and for good reason, with the climate turnaround based on a shift or transition that merits some serious questioning. At the same time it is questionable whether the internal market, free movement and Union's international ecological commitments can be compatible, Equally the consequences of the Covid crisis, the energy crisis and inflation on the exceptions, exemptions and derogations and many more might be mentioned as potential setbacks to achieving the climate goals. One might recall Sicco Mansholdt's famous letter of February 1972 following his reading of the forthcoming online of the Meadows Report: the famous turn that was not taken...

Apart from that, we must keep an eye on the interactions between EU law and the in-

spiration of the European Convention on Human Rights, with some of the Strasbourg Court's case law seeming to serve as a framework for the Commission and the Luxembourg Court in some lateral aspects of our subject, like transparency, access to information, participation, etc. An indirect, yet substantive, contribution to combat climate change might emerge from EU law.

3. International law

There is no doubt that a successful response to climate change requires international standards – climate change evidentially does not stop at national borders. When we call for an international law response, we not only mean public international law in its classic form, but also contemporary developments such as global administrative law – the subjection of global administrative entities to the law – and transnational administrative law – the regulation of 'horizontal' relationships between national administrations. All these components must be mobilized.

In fact, they have already been mobilized to a large extent, as shown by the contributions of Sandrine Maljean-Dubois and Yseult Marique.

Yet one cannot ignore the fact that international law continues to lack strong and efficient enforcement mechanisms which makes it inherently fragile. Enforcement continues to depend on national enforcement mechanisms.

4. Fundamental rights: compatible with the climate emergency?

This is a somewhat transversal problem: to what extent can individualistic fundamental rights be reconciled with the principles related to the protection of the environment and the fight against/adaptation to climate change? From a domestic law perspective, but also from a European law perspective, a 'liberal' logic would argue in favour of conciliation, and rejects any explicit hierarchy between the types or categories of fundamental rights. This is to say that when a normative system simultaneously enshrines rights and freedoms that are likely to have an effect on the environment and, more specifically, a climate footprint (e.g., the judgment of the German Court of 24 March 2021, paragraph 254), there is no need to question the free movement of enterprise and the right to property.

Yet, that position can be challenged by elements which on the face of it are unrelated to climate, but might nevertheless be interlinked with climate in the long run - such as intergenerational equity or the right to live in a healthy environment, which is somewhat expanding towards a right to live on a habitable planet, in a viable, balanced climate, etc. One might equally want to consider the questions of time and urgency. On the one hand, the climate emergency is unfolding in a context that is doubly affected: the extreme urgency, hammered home by ever more insistent IPCC reports, means that in some respects we need to take action, without which there might be little left for us to do – keeping in mind though that evidently we are working 20 or 25 years ahead to achieve concrete results – again, provided that actions converge, of course.

On the other hand, there is little doubt that we are beginning to see, particularly from judges themselves, a tendency to grasp the seriousness of the issues at stake and to move

in a direction that could, ultimately introduce a hierarchy between rights.[4]

In any case, what we have to hope for is that the body of fundamental rights that we find in more or less the same configuration in democratic systems will eventually unfold in favour of the action against climate change. However, this may require changes to the national and international documents proclaiming these rights, so as to make it clear that they should give priority to the climate emergency.

C. Public law as an institutional architecture

Public law is not just a toolkit, or a normative system, since it forms the institutional foundation of the state by providing legal bases for a series of organs and institutions, which are entrusted to accomplish public functions. The question that should be raised here is how to mobilize these institutions in order to successfully combat climate change.

This, in turn, raises at least three further questions.

1. State/global

The climate is a global issue: it does not stop at national territorial borders, flooding, storms, and further natural disaster are a showcase thereof. But how can we tackle the problem on an international level when despite globalization the world continues to be organized according to the Westphalian model?

Of course, international cooperation is ever increasing (eg COPs). Yet there are periods of national withdrawal, associated with a wider phenomenon of re-strengthening of national powers in reaction to the economic crisis, the health crisis, war. So a kind of concertina logic prevails, and one has to admit that it is not necessarily illogical when several seemingly "opposing" movements overlap. Dominique Bourg suggested[5] that ecological issues, particularly climate issues, are also an opportunity to maintain a 'square peg' of vested interests, of which governments like Trump or Bolsonaro are in a way the guardians (fossilised, fossilised interests, wealth acquired through the logic of thermo-industrial growth).

That said, there is no other choice than to push this development forward and to force the state, from the inside, to adjust its policies for the sake of its citizens. This is then when one has to consider the notion of democracy.

2. Pluralism, democracy, separation of powers, decentralization

The social and political balance of today's society is built on complex institutional arrangements meant to allow the development of effective public policies, in which divergent interests can be taken into account. Public policies should aim to ensure that certain parts of society do not exercise excessive power - a general concern for pluralism, and reflected in amongst others the principle of separation of powers, decentralization or independent administrative authorities. Evidently, society also provides for democratic tools such as the right to participation, or effective representation. In such a society, it

4 E.g., the judgment of the German Court, which is often and rightly commented on as a judgment that is truly foundational for European paradigms, even if, of course, the German Basic Law has certain irreducible particularities.

5 Bourg, D. in: Démocratie et écologie. Une pensée indisciplinée, 2022, Hermann.

is of course questionable whether the required consensus for what might be though to be the best response to climate change could ever be reached. Given the urgency of the matter, alternative routes should be considered where the required consensus cannot be reached (in time). Not less relevant is the question of how to align divergent interests between generations, classes and so on. Aligning these interests not only requires consensus on the possible solution, but equally on the underlying problem and execution of the solution.

Climate action calls for synthetical policies, which is rather complex to combine with the afore mentioned complex institutional structure through which societies are organized.

It might be argued, for example, that the old concept of separation of powers has to be rethought, in the light of conflicting interests or lobbying (in particular that of fossil fuels, but the question is broader). But also further notions should be considered such as space-time which should somewhat be reflected in the institutions and mechanisms, particularly considering the future and the representation of affected non-nationals.[6]

Obviously, democratic tools and pluralistic arrangements in our societies have to be revisited in order to make them more capable to take into account both the urgency and the long term, the protection of current citizens and of future generations, local and partial interests and the salvation of the whole community.

Some are convinced that it is only through an extreme development of direct participation of the people that this objective could be attained, while others rather think that only strong concentrated national powers will be able to impose the necessary policies.

3. Judges (national, international)

Given the central role of climate disputes in front of constitutional and administrative courts, part four of this dossier has been devoted to this aspect.

Clearly, judges have become an important lever for those who believe that the political class is too fixated on short-termism and various conflicts of interest to act effectively. However, there are clear limits to the competences of judges in this respect, which particularly lawyers should further reflect upon. There is a fine line between supervising democratically elected parliamentary and/or government authorities and substituting the latter's decisions with its own assessment.

Secondly, the effectiveness of judicial intervention is seriously hampered where enforcement is poor. When the State – ordered by Court to take certain climate actions – refuses to act, serious rule of law questions emerge.

IV. The 'conceptual' adaptation of public law to climate change

Moving from a 'functional' reasoning to a 'conceptual" one, it must be determined whether the essential concepts on which these existing mechanisms of public law are based do not occasionally contain biases that would hinder effective climate action. This consideration, in turn, invites us to reflect on two aspects: 'climatic anthropology' of public law and 'climatic ethics'.

6 Fonbaustier, L., «Separation of powers, environment and health», Title VII, n º 3, Oct. 2019. Available at: https://www.conseil-constitutional.fr/publications/titre-vii/separation-des-pouvoirs-environment-et-sante.

A. The 'climatic anthropology' of public law

In questioning the 'climatic anthropology' of public law we wonder how public law concept envisages the relationship between mankind and its environment. Climatic anthropology is thus about determining to what extent these concepts capture public action in a naturalistic vision of this relationship, which encourages public authorities to act in favour of nature when using natural resources: i.e. which seems to be the opposite to what contemporary ecology suggests (e.g.,. Philippe Descola), which in turn consists of "landing" (Bruno Latour) and constantly perceiving human communities as immersed in territories that connect them to physical realities and non-humans.

1. Anthropomorphism: public spaces, territories, commons, social contract

How does public law understand the relationship between humans and their surrounding? One can easily make the case that it considers this relationship as one of exteriority rather than of coexistence and interrelation. This becomes evident in the way in which public law understands the notion of territory. Basically, this notion is linked to the seats of public authorities and the delimitation of their competences. It is only secondarily that it is associated with the definition of human communities, in the sense of decentralization. In any case, it remains at a distance from a vision that would include not only human communities but also their physical environment and surrounding non-humans. Only certain urban or environmental planning tools come close to this vision. Current reflections on the 'commons' could advance in this inclusive direction: they tend to be human-centered, however.

A similar bias can be seen in the way public law defines the notion of public good, and in particular public space. To guarantee the protection of both these notions from human encroachment and nevertheless allow their use as a matter of economic resource, they have been interpreted to allow for ownership of public persons over them. It is difficult to imagine a more anthropocentric approach to goods and spaces that are sometimes precious because of the physical elements and the biodiversity they shelter. The result is sometimes questionable given that the public authorities in charge of these goods and spaces are often trapped in contradictory interests. In response some legal systems decided to grant legal personality to certain natural areas, so as to organize their protection.

This highlights the importance to question the concept of classic conceptualization - that of public assets.

But also a more general concept should be called into question: the concept of social contract. The latter is a key notion of public law and considers the way in which society understands what makes us exist as a political society, the existence of certain institutions, in which the will of the citizens can be expressed. While the specificities of this concept may all seem to have in common that they believe in a pact made between humans – thus excluding the environment, plants or animals.

It is however conceivable to plead for the definition of social contracts – which would integrate the notion of environment: in a reflex of inclusion analogous to that which leads to the personification of certain natural spaces.

2. Police and public services

In defining the functions performed by administrative institutions, public law em-

ploys concepts which seem to vary but generally boil down to a distinction between the functions relating to defending the public order and the service provision. French administrative law, for example highlights two concepts recognized in a number of its counterparts: that of police and that of public service. The central question is of course to distinguish between these theories particularly in light of the vision of the human-environment relationship that public law conceals.

Traditionally, the purpose of policing has always been to protect human communities. This is true even of the oldest environmental policies such as that of hazardous establishments. It is only in the contemporary era that one can witness the emergence of environmental policies whose purpose was to protect animals or plant species, natural resources, etc.

The concept of public service deserves to be questioned here in two ways. Firstly, there seems to be a natural temptation to constantly extend public intervention. It is sometimes used as justification for this extension in cases where climatic concerns could invite abstention: such a municipality will not resist the temptation to light up its beautiful monuments all night, to build a new swimming pool, and so on, while ecological concerns would suggest a restraint in such a case.

Conversely, the public service theory contains as one of its basic principles that of adaptation: public services must adapt as much as possible to the new techniques likely to make them more effective. One might admit that this principle implies an obligation for all public service managers to adapt them to the constraints of climate change.

B. The 'climatic ethics' of public law

The next question that needs to be raised is whether the way in which the values public authorities are to respect do not in themselves contain biases, or simply intrinsic limits, which would limit the pressure on these authorities to carry out the policies required by the climate emergency. This double *problematique* – so to say – calls into question the obligations and responsibilities of both States and individuals (officials, citizens).

1. State obligations and state liability

The multiple climate disputes discussed throughout this dossier show that, in principle, it is possible to hold public institutions accountable in tort when they fail to meet their commitments in terms of climate action. Nevertheless, these disputes equally show the limits of such guarantees. Apart from those which concern the effectiveness of jurisdictional mechanisms in general judges can only sanction states if they can clearly identify the obligations which might have been breached. Very often, this will be reduced to the obligations they have agreed to impose on themselves, in international instruments or in national texts of constitutional or legislative type.

One may then wonder whether it should not be admissible that the obligation to act in the face of the climate emergency constitutes a standard superior to others, one that would be binding on the state without the necessity to consent: this would then constitute a norm of "jus cogens", similar to the prohibition of genocide, slavery and torture.[7]

7 Auby, J. B., « La lutte contre le changement climatique comme impératif juridique catégorique », Chemins publics, 6 Feb. 2021. Available at: https://www.chemins-publics.org/articles/la-lutte-contre-le-changement-climatique-comme-

States' liability is also sometimes invokes in the face of climate change. Yet, many legal systems still find it difficult to invoked such a liability in the event of purely ecological damage - that is to say damage which is not embodied in specific natural or legal persons. A further limit of the public responsibility theory which should not be ignored results from the fact that its natural domain is the sanctioning of obligations to refrain from doing something – refraining from pollution, destruction of plants or animal species, etc. It often remains difficult to recognize and sanction such negative obligations.

2. Personal liability: public servants and citizens

In light of the limits on public authorities' obligations and the sanctions of the latter, one may wonder whether public law contains any means of shifting parts of the burden onto politicians and civil servants, individually, or/and onto citizens.

All legal systems contain mechanisms through which personal liability of political leaders and civil servants might be called into question: under criminal or civil law, or even specific mechanisms. Could such mechanisms be effective in situations where political leaders or civil servants are blamed for their personal inertia in the face of climate change? This is rather unlikely, given the fact that this calls for general measures rather than specific actions, which would require broad policies rather than a single response or a particular accident.

As far as citizens are concerned, the idea that a significant part of the action against climate change is their responsibility is quite widespread, but it is hard to see which role public law mechanisms could play in this context given that liability of public institutions would be out of reach. At most, one could imagine sanctions against citizens who do not respect the regulations intended to fight against climate change – for example in the case of non-compliance with an insulation prescribed by a building permit –, but these sanctions would have little impact taken in isolation. Yet taken together they might give rise to a general movement in society, eventually forcing public authorities to act.

V. What's next? How to adapt public law?

The foregoing considerations lead us to pose a couple of final questions.

For example, would it be desirable to fix a hierarchy of objectives? If so, how would such a hierarchy look like? Where would one have to situate the issue of climate change? It might be worth highlighting here that the 'climate problem' consists of three components: climate, biodiversity, "resources". The current ineffectiveness of climatic policies highlights public law's inability to turn this trend around and to introduce a hierarchy.

Law is a social phenomenon, and the climate seems to confront us with multiple problems of social dimension, such as questions of social justice or equal access. Through climate change it becomes evident that the world is getting ever smaller.[8] In doing so, climate change evidently has to address social themes and the related different conceptions of justice. Climate refugees, the availability of food, collective and inter-individual relationships at different scales, all of those are central components which ultimately raises the central question: Where should politics take place? Dealing with climate change with-

imperatif-juridique-categorique.

8 Hartmut, R., Making the world unavailable, 2020, Discovery.

out embedding it in a more global and systemic whole equates to refusing intervention. Climate change can never, due to both its causes and effects, really be detached from either local or global situations, from social and technological issues, and more fundamentally perhaps, it might eventually occupy the world as a whole. It is not enough for the world to become cooler in terms of climate; it is also necessary that it does not become too cold for humans to survive.

Public law has promising days ahead in terms of its ability to touch politics very closely (as Hanna Arendt thought). But the problem is that it has not really coped so far. Wouldn't it have been better to just be the lazy/passive accomplice to a slow decay that has led to the issue we are concerned with, without of course having a monopoly? If this hypothesis were to hold, even if only partly, we would not even have to consider the centrality of public law, but would be able to address the matter through a three component solution: (1) hierarchy of values or norms and actors; (2) a map of territories and geographical and social spaces relevant for the law to be updated, without forgetting (3) the central relevance procedures, which build the bridge between a normative intention to the concrete final act. We remain fairly convinced, however, that public law, alone, even if deeply rethought, cannot do everything. Many meta-legal conditions must be met to accommodate any new positioning of public law: non-legal conditions to the fulfilment of which the law itself can only contribute under certain conditions...

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June 2023