British Institute of
International and
Comparative Law

Ideas and Perspectives for a Climate Emergency Bill:
Developing a Toolkit for Legislators to Tackle Climate Change

Ivano Alogna and Jean-Pierre Gauci

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International and
Comparative Law

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Vision

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Overview

On 2nd April 2020 the British Institute of International and Comparative Law convened a webinar entitled 'Ideas and Perspectives for a Climate Emergency Bill: Developing a Toolkit for Legislators to Tackle Climate Change'. The webinar was convened in collaboration with Landmark Chambers and Rights Community Action. The event discussed legal developments in the field of climate change from a comparative perspective, emphasising the legislative solutions developed in the UK, France and Denmark. The focus of the event was on the possibility and need for a new Climate Emergency Act in the UK. The webinar, which followed an event on climate change litigation held in January 2020, was part of the programme of work on climate change and environmental law being developed by BIICL. The webinar recording is available on the BIICL website.

This report provides an overview of the discussions and synthesises some of the conclusions.

BIICL wishes to thank the distinguished speakers for their participation and for making the event a success. Special thanks to the logistical support staff at BIICL, for their help in ensuring the smooth running of the webinar.

Speakers

Richard Drabble QC (Chair)

Richard Drabble QC was called to the Bar in 1975 and took silk in 1995. He is a Bencher of Inner Temple, a former Chairman of the Administrative Law Bar Association and currently member of the Bar Council's Law Reform Committee. He has long been one of the leading public and environmental lawyers in the UK and has acted in many of the most significant environmental law cases at every level of the UK and European Courts.

Baroness Worthington

Baroness Bryony Worthington is a Crossbench member of the House of Lords since 2011, having spent a career working on conservation, energy and climate change issues. She was the lead author in the team which drafted the 2008 Climate Change Act. In 2008, she launched Sandbag, an NGO that uses data insights to advocate for a swift transition to clean energy. She served as Shadow Spokesperson for Energy and Climate Change and led on two Energy Bills for the Shadow Ministerial Team. From 2016 to 2019 she was the Executive Director of Environmental Defence Fund Europe. Her current roles include co-chairing the cross party caucus Peers for the Planet and devising grant-making strategies for the Quadrature Climate Foundation.

Marc Clément

Marc Clément is presiding judge at the Administrative Court of Lyon (France). He is also member of the French Environmental Authority, the Deontological Committee of the Institute for Radiological Protection and Nuclear Safety, and the Aarhus Convention Compliance Committee (UNECE). He was administrative judge at Administrative Court of Appeal of Lyon from 2012 to 2018. Between 2006 and 2012 he was a lawyer at the Directorate General Environment of the European Commission. Between 2004 and 2006, he was legal adviser of the European Environment Agency. He is joint founder of the European Law Institute.

Birgitte Egelund Olsen

Birgitte Egelund Olsen is professor of Law at Aarhus University and President of the Danish Environment and Food Board of Appeal (a specialised administrative 'court'). She is a member of the Danish Energy Board of Appeal and until 2019 Chairperson of the Danish Wind Turbine Valuation Authority. Her work focuses on analysing various policy designs and regulatory mechanisms that may help governments and businesses to identify appropriate policy incentives to facilitate sustainable transitions to a low carbon society.

Alex Goodman

Alex Goodman is a barrister practising in environmental, planning and public law at Landmark Chambers. He was called to the bar in 2003. He was appointed to the Equality and Human Rights Commission's 'A' Panel of counsel in May 2019. He was formerly a councillor and leader of Camden Green Party. He was a fellow of the Bingham Centre for the Rule of Law with whom he continues to work principally on constitutional law, and is currently engaged on the constitution of the Gambia. He also works with Rights Community Action.

Lord Carnwath CVO

Lord Carnwath of Notting Hill, CVO has been a Justice of the Supreme Court from April 2012 to March 2020. He was called to the Bar (Middle Temple) in 1968 and took silk in 1985. He served as Attorney General to the Prince of Wales from 1988 to 1994. He was a judge of the Chancery Division from 1994 to 2002, during which time he was also Chairman of the Law Commission. He was appointed to the Court of Appeal in 2002. Between 2007 and 2012 he was Senior President of Tribunals. Lord Carnwath has a long-standing interest in environmental issues and is President of the UK Environmental Law Association.

Introduction

In the report "Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of Covid-19" published in March, the United Nations recognised that the world is facing something more than a health crisis: a "human crisis" caused by a common enemy "attacking societies at their core". In particular, the UN Secretary-General, António Guterres noted that, "had we been further advanced in meeting the Sustainable Development Goals and the Paris Agreement on Climate Change, we could better face this challenge." Meanwhile, the measures to curb the spread of the virus have also resulted in seemingly significant reductions in CO_2 emissions. However, in order to take lessons from the Covid-19 crisis and apply them to the collective efforts to address climate change and "build back better", it is necessary to work together towards structural measures and reforms.

Indeed, a critical tool in this regard is legislation. That was the idea behind the webinar and this report: to think about legislative options towards securing a duty across the whole of society, so that climate change considerations become inbuilt in decision making across business, local authorities, government, and society as a whole. Moreover, this opportunity is matched by the opportunity of the moment. In May 2019, the United Kingdom was the first country in the world to declare a Climate emergency, and in 2021 the next COP26 on Climate change should be held in Glasgow. As Richard Drabble QC highlighted, it is important to keep the pressure on, exploring the potential contribution that legislation can make, in order to create a climate in which Climate Change is at the top of the agenda.

This webinar sought to provide a comparative legal overview, focusing initially on the UK Climate Change Act, before exploring perspectives from France and Denmark and ending with a discussion of proposals for legislative provisions moving forward. The response to the current health crisis has highlighted the potential of legislation in securing the behavioural change necessary to adequately address emergencies. Therefore, shall national legislation be considered the more effective tool in the arsenal of measures to tackle climate emergency?

The Climate Change Act: Origins, Implementation and Challenges

Baroness Worthington kicked off the discussion by illustrating some of the challenges that explain the lack of further legislative action on climate change in the UK. She noted the confluence of four tragedies. First, the tragedy of the commons, meaning that no single actor can really make a difference but rather action is required from all actors across the globe. This, in turn raises questions as to the value of action in the UK, if countries like China or the US are not acting in the same direction. Second, the tragedy of the horizon, according to which climate change is a long-term problem whilst politics has a very short term frame of reference. Third, the tragedy of the incumbents, namely that we've had more than a hundred years of fossil fuel development and intensive agriculture, which have created some very powerful incumbent players, very well capitalised infrastructure and supply chains. They won't go into the night gently. Finally, and perhaps the least talked about, the tragedy of ideology, according to which the groups that are most vocal often have a range of very strongly felt ideologies that rule out potentially effective solutions, and rule in other solutions that actually make the job of legislating for positive measures more difficult. Hence, it is important to be very lucid in thinking about what is the top priority, and ensuring to be using data and science rather than ideology to help us identify the right solutions to push forward. Through reference to figures from the Intergovernmental Panel on Climate Change (IPCC), Baroness Worthington noted the need for a 'handbrake turn', if we want to start seeing negative emissions to reduce their concentration in the atmosphere.

Baroness Worthington then moved on to focus on the existing legislative framework in the UK, namely the Climate Change Act, which came into being in 2008. The campaign for it started at the turn of the millennium and included activism, research and projections by a number of NGOs (including the Royal Society for Environmental Protection). This was coupled by government leadership at the highest levels, partly driven by the realisation that support by environmentalists was politically expedient. At this stage, a campaign started around the fact that the government's approach to mitigation was failing: it wasn't constraining emissions or the main drivers in society causing emissions to rise. It was still fundamentally cheaper to do the wrong thing, than it was to do the right thing. The economics were pointing in favour of coal because it suddenly become cheaper than gas. This resulted in rising emissions.

Baroness Worthington noted that the Climate Change Act was built on the back of analysis which highlighted the need for a strong legal framework that drove action across all government departments, and which treated climate considerations as a priority rather than an afterthought. This, she noted, was done by creating a piece of framework legislation that enshrined legislative targets, both long-term one for 2050, and importantly short-term ones that constrained the emissions at the area under the curve of the emissions trajectory. These targets are what eventually took.

A hugely important part of the Act, according to Baroness Worthington, was the creation of a Committee on Climate Change that would depoliticise the setting of those short-term targets. That, Baroness Worthington noted, remains one of the greatest strengths of the Act.

Baroness Worthington then turned to some of the strengths and weaknesses of the Act as it is today. One of its strengths is that it managed to get – and still has – extraordinary level of cross-party support. It achieved this by being a pragmatic and yet ambitious framework for action. It didn't seek to dictate too many specific actions on government but rather created processes through which government could

manage the problem. It also won the support of citizens and the business community still remaining a robust and popular piece of legislation today.

One of its main realisations was that in order to be ambitious, it needed to be flexible in allowing government, industry, and citizens to work out what the solutions were. The Act was not about the selection of actual solutions but rather about the creation of the framework that would allow those solutions to emerge over time. A further strength is that the act sets deadlines which create a "legal metronome" of activity that Government has to undertake. The Government has a certain period of time by which they must act on advice from the Committee on Climate Change. The Committee itself has to produce reports against a certain set timetable, and it means that there is no slowing down or stopping. Those milestones, set through the Act, have to be met. Those, in turn, helped Members of Parliament hold government to account even throughout politically tumultuous periods such as Brexit.

However, the Act also has weaknesses. One such weakness, Baroness Worthington noted, is that the Act was conceived as legislation with enabling powers for the Government to introduce policies into sectors as and when they needed to bring emissions down. Those are all articulated in part three of the Act. However, those powers have yet to be used.

Another weakness concerns the first three carbon budgets, that started in 2008 and ran for the next 15 years. They were introduced on the back of advice from the Committee on Climate Change, but unfortunately that was done at a rather lenient level. Hence, they didn't bring in the expected stringency of action. According to Baroness Worthington, suggesting two sets of budgets – "interim" and "intended" budgets[1] – the Committee learned a lesson: never give government two choices. It will always choose the most lenient. So the intended budgets were never implemented and the interim budgets were. That meant a loss of time in basically bringing in much more ambitious set of budgets in the first three (for 2008-2023). However, some improvements were made during the fourth (for 2023-2027, set in 2011), fifth (for 2028-2032, set in 2016) and quite likely the sixth (for 2033-2037, to be set), which are all much more ambitious then the first three, and they will drive much needed action. Further weaknesses concern a lack of clarity over measurement of emissions, and a number of loopholes. The emissions are currently counted on the basis of the UK allocation of allowances under the European emissions trading scheme (ETS). That means that the UK is not actually counting the emissions occurring in its territory, using deemed set of emissions for at least half of the economy. Another question relates to how one accounts for emissions occurring overseas but related to domestic activities.

Finally, Baroness Worthington focused on next steps. Considering the robustness of the Climate Change Act and especially during the fourth, fifth, and sixth carbon budgets, the pressure on Government to introduce new policies is going to be brought to bear. The transport sector was particularly identified as an area where action is needed. Baroness Worthington admitted to be a little sceptical on the need of a whole new Act.

According to her, in the post-Covid-19, government stimulus and public spending will be crucial: how that is conceived and delivered is going to determine the pathway over the next decade. Yet this decade

[1] The Committee on Climate Change proposed two sets of carbon budgets (five-year, statutory cap on total greenhouse gas emissions) for the period 2008 to 2022: the "intended" budgets that would apply after a global deal on climate change, and "interim" budgets in the meantime. Both budgets are the same for the period 2008–12, but the intended budget requires a reduction of 42% in GHG by 2020 relative to 1990, and the interim budget a reduction of 34%, both relative to 1990.

is crucial for both addressing the post-Covid-19 realities but also in terms of addressing climate change. The pivotal question is therefore: how to ensure that public spending, government involvement and the private sector are going to be organised and managed in order to have a green stimulus?

Another point stressed by Baroness Worthington is the absolute necessity to think internationally. It would be important to think about the impacts of the transition toward a zero carbon target for 2050 on the UK trade, and on carbon border adjustments to stop carbon leakage (such as dumping high carbon products into the domestic economy). Moreover, it is necessary to look at the UK overseas development, especially its export guarantees in the finance sector, which drive emissions overseas. Therefore, pluri-lateral and multilateral approaches are going to be a huge focus in the coming months and years, especially with the COP26 delayed. That delay offers a bit more time to make sure that the UK isn't just leading by example, but also in terms of its diplomatic effort, by getting other countries to join its march towards the zero carbon economy, to be hopefully attained well before 2050. Baroness Worthington concluded her presentation with a positive message, being confident in the absolute possibility and even certainty of reaching this goal earlier, also thanks to the Climate Change Act and its ability to adapt to this complex and challenging context, thus allowing the UK to accomplish the necessary transition.

Perspectives from France on Climate Change Legislation

Speaking about the French experience, Marc Clément started by highlighting the need for climate change legislations to be based on a holistic approach, that captures and addresses the inherent complexity of society. A starting point in climate change legislation in France could be identified around 2000, yet the main pieces of legislation took over a decade from that date to come to fruition. Of note are landmark pieces of legislation. First, the Energy Transition for Green Growth Act[2] was adopted in 2015 in the context of French preparation toward the Paris Agreement. The major aspects of this Act were to propose two sets of targets: a reduction of greenhouse gas emissions by 40 percent by 2030 (compared with 1990 levels), and a reduction of 75 percent on emissions by 2050. This law addressed various aspects, such as energy production and consumption, with the objective of reducing emissions. It also proposed a reduction of the share of nuclear energy in electricity by 50 percent by 2025. The measure of cutting nuclear energy in a package related to climate change seemed incongruous, because by definition that creates a need to replace the lost nuclear energy.

The second main piece of legislation is the Energy and Climate Act,[3] which was adopted in November 2019, enshrining the notion of "ecological and climate emergency"[4] in French law. It created more substantial targets for cutting carbon emissions, with the objective of achieving carbon neutrality by 2050. Moreover, the Act postponed to 2035 the objective of reducing the share of the nuclear energy in electricity by 50 percent, taking into consideration the difficulty to reduce at the same time nuclear energy share and carbon emissions in France.

A further key tool is the National Low-Carbon Strategy, adopted in 2015, which serves as France's policy road map in terms of climate change reduction, setting its carbon budgets. Mr Clément noted that the first part of the carbon budget, concerning 2015-18, was not adequately followed, resulting in an increase of emissions rather than the planned reductions. In the next step, there should be a revision of the budgets, along with a new carbon strategy, which is current being debated and should be adopted shortly although its adoption is likely going to be postponed due to the health crisis. The main takeaway is that France has increased its emissions and is failing to meet its own targets. In order to achieve the carbon neutrality by 2050, as the target established within the strategy, France needs a very sharp decrease of emissions and a small increase in carbon sinks.

Mr Clément identified three key areas of lessons from the French experience. The "easy part" concerns the policies related to the production of electricity, such as the question of nuclear energy, which could be regulated through national decisions. The "not so easy" part regards policies like housing renovation, which need to be regulated through the development of incentives, such as the provision of subsidies for people (renovation costs, heating, etc.). A "difficult" kind of policy-making concerns the transport sector, in which much higher levels of investment are required. Moreover, it is also extremely difficult to address the issue of the usage of cars in cities or outside cities, where notably people are used to have them as means of transportation. Finally, considered by Mr Clément as "extremely difficult", there are two different

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[2] *Loi de Transition Energétique pour la Croissance Verte n°2015-992,* 17 August 2015.
[3] *Loi relative à l'energie et au climat n° 2019-1147*, 8 November 2019.
[4] "*[U]rgence écologique et climatique*", added to the Energy Code, articles L.100-1 A-I and L.100-4.

sectors: agriculture and urban planning. The emissions reduction originated by agriculture is very difficult to manage. In fact, even in the French national strategy the main emissions remaining at the horizon 2050 come from agriculture. Also urban planning is challenging, as a clear expression of the above mentioned "tragedy of the commons".

The complexity of French climate change policy is underscored by a multitude of plans. Across France, and at different levels, a range of plans have been developed addressing different aspects related to climate change. Examples of such policies include: the National Adaptation Plans for Climate Change[5], the National Flood Risk Management Strategy[6] or the Habitat Energy Renovation Plan[7].

A critical point is that each plan needs public participation, through discussion with citizens and stakeholders, thus allowing a better understanding of the different arguments and points of view and the development of a sense of shared ownership. That is necessary for working toward a more climate neutral society. This is particularly important when one considers the French context and its history of social movements. The situation was not always positive however. An example was given by the adoption of an "ecotax" in 2013 on truck transport which led political oppositions and violent reactions, led by a movement called "red caps". In 2018-2019, the reaction was similar with the "yellow vests" movement which developed from the projected 2019 increase in fuel taxes. This projected increase had the effect to trigger this movement, and showed, according to Mr Clément, that the social capacity to accept this new policy was very low.

As a means to responding to these concerns, the French President announced a Citizens' Convention for Climate: 150 people, all randomly selected, representing the diversity of French society will formulate a series of proposals for achieving a reduction of at least 40% in greenhouse gas emissions by 2030 (compared to 1990) in a spirit of social justice. Mr Clement suggested that it will be interesting to see how far this experiment can go and if this process could provide more social acceptance of the policies. Indeed, it can potentially be another interesting way to democratise climate change law-making.

In conclusion, Mr Clément noted two lessons from the French experience, namely the involvement of all governance levels, especially local one, and the need to compensate for loss of income, especially when impacts will be unequally felt by different socio-economic groups.

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[5] *1er Plan national d'adaptation au changement climatique (2011-2015)* and *2ème Plan national d'adaptation au changement climatique (2018-2022)*: see https://www.ecologique-solidaire.gouv.fr/adaptation-france-au-changement-climatique.

[6] *La stratégie nationale de gestion des risques d'inondation,* 7 October 2014: https://www.ecologiquesolidaire.gouv.fr/sites/default/files/2014_Strategie_nationale_gestion_risques_inondations.pdf.

[7] *Le Plan de rénovation énergétique de l'habitat,* 21 March 2013: https://www.ecologiquesolidaire.gouv.fr/sites/default/files/Plan%20de%20rénovation%20énergétique_0.pdf.

Perspectives from Denmark on Climate Change Legislation

Focusing on the Danish experience and the Climate Act in particular, Professor Olsen noted how Denmark joined early the club of the countries that had enacted national climate laws back in 2014. Whilst the initial idea was to draw on the example of the UK Climate Change Act, the final piece of legislation as adopted was quite far from the desired model. The current Danish Climate Act has probably been one of the least known acts in Denmark. That is because it is an act without clear objectives, trajectories, obligations, instruments, incentives but rather just an institutional framework for the creation of an independent advisory body: the Climate Council.[8] The Act provides a framework for a government reporting mechanism which takes the form of an obligation to produce annual reports. These reports provide an overview of the Danish climate policy and efforts to lower greenhouse gas emissions, including in response to the suggestions of the Climate Council. Finally, the Act provides a rather vague long-term target for the reduction of emissions. Critically, in Denmark, the basis for the transition to climate neutrality is only consensus-based political agreements and not the Climate Act. Following the adoption of the Act by a slim majority, a change of Government in Denmark meant that besides a very vague Climate Act, there was also a government predominantly against the Act. This government was now responsible for providing the details of the framework under the Act.

The turning point has been the rise of public awareness on climate change. In January 2019, a citizens' initiative for a new climate law was launched and, shortly after, presented as a proposal for a parliamentary resolution. However, this process lapsed when the government called an election in May. Contrary to expectations, the climate crisis was actually decisive for how the Danish people voted in the general election. The government platform for the current one-party minority government, the Social Democrats, is a New Climate Act.

Currently, Denmark is in the middle of negotiating a new climate act. A bill was presented in late February 2020 and the negotiations are currently on hold due to the Covid-19 crisis. The Bill is based on a recent political agreement between the government and all other parties of the parliament, except for two small right-wing parties. The Bill, a framework law, contains all the elements expected of climate legislation: greenhouse gas emission reduction targets, procedural mechanisms for planning monitoring and reporting, institutional arrangement for advisory bodies, and also review mechanisms.

First of all, the Bill is highly target-oriented. It features both a long term target of net zero emissions by 2050, and an interim target of 70% greenhouse gas reductions by 2030. These targets stem from consensus-based political agreements which are already in place and the Bill seeks to legislate those agreements. Moreover, the Bill contains a procedure for the setting of interim targets every five years, with a 10-year perspective. The interim target for 2025 will be the first to be set according to this procedure and these targets will also become law by future amendments to the Act. In line with the Paris Agreement principle of no backsliding, the proposed text provides that such interim targets cannot be less ambitious than the most recently set target. To meet the targets, the Bill only allows "real domestic

[8] The Danish Council on Climate Change consists of six members and a chairman, all appointed for a four-year term of office by the incumbent minister of climate and energy. https://klimaraadet.dk/en.

reductions"; however, if it turns out that the 70% reduction target cannot be met, the purchasing of offsets may be considered by Parliament.

The second element is procedural mechanisms for planning, monitoring and reporting. The Bill introduces a long-term planning initiative and two annual reporting mechanisms. Beyond the obligation to devise a climate action plan covering a ten-year period and setting interim targets, the proposed Bill imposes an obligation on the government to draw up an annual status report including projections for greenhouse gas emissions overall and in five specific sectors. This will include a separate report on the international effects of Danish climate policy, including the reductions from international aviation, shipping, exports of renewable electricity, etc.

Moreover, the Bill requires the preparation of a Climate Programme, that is presented to the Parliament every year, and whose main elements are: 1) the measures initiated to achieve the set targets; 2) an account of the annual recommendations from the Climate Council on the government's position, and its response to these recommendations; and 3) finally, an obligation to produce a strategy for mitigation efforts outside Denmark including through development aid policy, trade policies and other initiatives.

The third element is the institutional arrangements of the Bill. The Bill upholds the independent expert advisory body: the Danish Climate Council. Here can be noted the influence of the UK Climate Change Act. The Council, which was established under the 2014 Act, is strengthened under the Bill in at least two ways. First, the institutional independence of the Climate Council is re-enforced. In fact, under the Bill, the Council selects its own members, its own chair, and head of Secretariat and adopts its rules of procedure. Second, two additional members have been added, and the Council is allocated further funds on the national budget, for now until 2023. Under the Bill, the Climate Council is assigned a number of tasks some of which are new. These include: providing impartial advice, including an assessment of whether the government initiatives and measures are sufficient to reach the set targets. Under the proposed law, the Council is obliged to comment on the annual government status report on climate change, and the projection for the following year. In addition, the Council is obliged to provide a catalogue of measures and instruments. An important difference should be mentioned: unlike the UK Climate Change Act, the current Danish legislation doesn't have a climate budget approach.

A final element of the Bill is a duty to act: a review and revise mechanism. This duty to act is linked to the targets and it reoccurs every year as part of the annual reporting and revising mechanism. The duty to act entails that if national targets cannot be achieved, government is obliged to present new initiatives with a reduction effect both on short-term and long-term, and a reduction effect that will fulfil the national targets. In this way, government is accountable to parliament. Compared to the current Climate Act, the procedural mechanisms are significantly stronger, entailing – as an important step forward – a so-called "fixed annual circle for climate action". Professor Olsen highlighted that strong procedural mechanisms and this fixed annual circle will ensure that climate action has priority, no matter the political development.

In conclusion, the current Danish Climate Act is what could be called a child of its time. It reflects and underlies political disagreements and it definitely exposes that climate laws are vulnerable to political developments. According to Professor Olsen, a new climate act in Denmark is imperative. On the one hand, the new Bill represents a more robust framework law. It contains multi-year targets set well in advance; it includes a procedure for the setting of future interim targets; and also it establishes a review and revise mechanism. It also stipulates that climate action is closely linked to the national budget bill, and then it sets out this fixed annual circle for climate action.

However, Professor Olsen noted areas for improvement. First, the duty to act does not come with a duty to deliver. Second, the Bill allows the government broad discretion in defining when a revision is sufficient

and which policy packages are adequate. Whilst overseen by parliament, it will be a simple majority in parliament that will conduct such oversight. Moreover, this negatively impacts the likelihood of litigation against the government on the vein of *Urgenda*[9].

Furthermore, the Danish Bill focuses very narrowly on climate mitigation and lacks dedicated objectives linked policy areas and sectors, as is the case in French Climate legislation. Professor Olsen suggested that there could be room for a range of targets for the different sectors, for example the energy sector, such as an obligation to increase renewable energy, increase energy efficiency, etc.

Another concern is that the Bill lacks a dedicated mechanism that requires intergovernmental coordination across sectors. Such coordination could help ensure effective cooperation and void potential conflicts. Whilst there is a mechanism of this kind in Denmark, the Standing Government Committee for the Green Transition, some important members of the government are not listed among the members, such as the Prime Minister and the Minister for Finance. Moreover, the Standing Committee lacks a legal basis and may therefore be disbanded if there is a change of government.

[9] The landmark climate case against the government of the Netherlands, according to which the Dutch Supreme Court upheld the previous decisions of the District Court of The Hague and the Court of Appeal, finding that the Dutch government had obligations to urgently and significantly reduce emissions in line with its human rights duties. See https://www.urgenda.nl/en/themas/climate-case/.

Ideas and Proposals Toward a *Climate Emergency Bill*

Alex Goodman focused his intervention on two means towards advancement in the UK climate policy: legislation and litigation. In his intervention, Mr Goodman proposed a more general obligation that would broaden the ambit of legislative duties: beyond the duties that are generally imposed on the state, into a set of duties that can be imposed on everyone: all organizations, private, companies, charities, NGOs, and perhaps even down to the level of individual. At the moment, most legislation across the world seems to be focusing on this idea of duties incumbent on the state. It seems necessary to look at how far legislation could go in encouraging a much broader set of obligations, and a broader collective buy-in towards contributing to the fight against climate change.

Mr Goodman proposed a "Strategic Decision Duty" article, which could be considered at the core of a Climate Emergency Bill:

> *"Every organization when making decisions or taking actions of a strategic nature must:*
>
> *a) not increased greenhouse gas emissions;*
>
> *b) progressively reduced their own and any greenhouse gas emissions to which they directly or indirectly contribute so as to eliminate net greenhouse gas emissions by at least 100 percent as soon as possible;*
>
> *c) have due regard to the need to eliminate net greenhouse gas emissions by at least 100 percent as soon as possible."*

This article is modelled on the duties of the Equality Act. The intentions behind it are: first, that every organisation must not increase the greenhouse gas emissions; second, that an organisation must go further than that, reducing its emissions. For this purpose, "organisation" can be defined by parliament in various ways: it could start with very large organizations, trickle-down to medium organizations at a later stage, or it could seek to impose this discipline across the spectrum of organisations. And then, finally, they must have due regard to the need to eliminate greenhouse gas emissions. Being very similar to the existing duty to have due regard to the need to eliminate discrimination, this duty could encourage a culture of consideration for climate change in every organisation.

The introduction of a universal obligation, able to set a level playing field where there's no competitive disadvantage in acting for the sake of the climate, would have the potential to bring about a culture change, introducing a variety of measures across organisations. According to Mr Goodman, that could be done with a light touch of regulation. Reflecting on the current health crisis, Mr Goodman noted that regulation might be essential given that whilst nudging had not been successful, as soon as a set of rules were adopted there was almost universal buy-in and an extraordinary degree of compliance, despite the inconvenience of the measures required.

Mr Goodman's next legislative proposal concerned "a climate right": a rights-based approach. Across the world, climate rights or environmental rights are being built into Constitutions. The most recent one is the Constitution of Gambia, published at the end of March, which has environmental rights within it, which are derived from the South African and the Kenyan Constitution, showing how across Africa environmental rights have made their way into Constitutions. Mr Goodman noted how European States are behind the curve, not having introduced environmental rights into constitutional documents. That is

why in cases like the *Urgenda* case in the Netherlands, the courts are now resorting to marshalling human rights in support of the environment. In fact, in the *Urgenda* case was the Supreme Court of the Netherlands directing the government to take action on climate change as a result of the right to life and the right to a home, under the European Convention of Human Rights.

In order to avoid the need for that kind of judicial inventiveness, it is necessary to legislate for environmental rights. Certainly, there are a number of models across the world that could be used, yet in the UK is possible to build upon the already existing model of the Human Rights Act. That would be something along these lines:

> *"Everyone has the right to be free from harmful impacts of climate change".*

This can be supplemented by well-known mechanisms that have already been litigated over 20 years, such as Section Three of the Human Rights Act 1998[10] which provides that the courts have been given the remit to interpret statutory legislation to comply with the European Convention of Human Rights "so far as it's possible to do so". That would allow to start reading existing legislation as subject to those rights, and it would provide a basis for individuals to bring climate-based litigation.

A further option would be "An Enforceable Climate Duty" that is a duty on the State, in a formulation "perhaps a bit more tangible than the existing Section One of the Climate Change Act":

> *"It is unlawful for a public authority to act in a way which is incompatible with section 1 of the Climate Change Act 2008 (requiring the net UK carbon account for the year 2050 to be at least 100% below the 1990 baseline)".*

Furthermore, the proposal includes the setting up of a "Climate Emergency Commission". That Commission could model its role on the Equality and Human Rights Commission, as to "*exercise its functions with a view to encouraging a society which:*

> *a) eliminates UK and global greenhouse gas emissions as soon as possible;*
>
> *b) adapt to climate change.*
>
> *The Commission may:*
>
> *a) investigate anybody in relation to securing the fulfilment of the rights and duties set out above;*
>
> *b) bring proceedings for any contravention of the provisions above;*
>
> *c) the Schedule makes further provision as to the powers of the Commission."*

Finally, Mr Goodman noted also the possible role of litigation to push forward positive measures in addressing climate change. Building on the positive decision in the Heathrow case,[11] he highlighted a number of other possible cases moving forward.

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10 "3. Interpretation of legislation.
(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section — (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

11 R v Secretary of State for Transport [2020] EWCA Civ 214, available at <https://www.judiciary.uk/wp-content/uploads/2020/02/Heathrow-judgment-on-planning-issues-27-February-2020.pdf> accessed 22 May 2020.

Conclusion

Legislation remains the most critical instrument in addressing climate change and its consequences. It represents the will of a country, of a nation, and the results of the negotiation among its manifold authorities, lobbies, and citizens, actors of an always more complex society. Through the different approaches highlighted in this webinar and report, a common message emerges: the necessity of the evolution of the legal regimes against the most important issue currently facing humankind, which is becoming everyday always more of an emergency, in every country and in every part of the world.

The emergency, at the centre of the whole discussion, was apprehended by Baroness Worthington as the confluence of four 'tragedies' – commons, horizon, incumbents and ideology – which constitutes different pieces of the same complexity, translated in the effort made by the British legislator to find the right formula for adapting the law to the need for a 'handbrake turn'. The same complexity was at the basis of Marc Clément analysis of the French legal context, which, strengthened in the last decade by legislative and regulatory initiatives in many and different sectors, has had to confront itself with the emergency as lived and fought by the citizens (through 'red-caps' and 'yellow-vests' movements). Their ultimate contribution, through a 'Citizens' Convention' for the development of better and more inclusive climate change policies, is likely to become an interesting legal model. Professor Olsen showed the importance of the political contours of the climate emergency, for which Danish people are calling (and almost settling) for a new climate act, reflecting and underlying political agreements and developments. This new-born bill, which through Professor Olsen critical analysis appeared far from perfect, constitutes nonetheless an interesting and useful new framework, especially in a legal context where there seems to be limited scope for climate litigation. Indeed, talking about litigation and remedies, the response to the emergency took another aspect in Alex Goodman's proposals for a Climate Emergency Bill, 'complementary to the existing legislation': proposals for an extended set of duties, potentially imposed on everyone, from organizations to NGOs and eventually individuals, in order to fight climate change with every tool available: as an obligation, as a human right; as an 'enforceable climate duty' on the State; and through the function of a new 'Climate Emergency Commission'.

These proposals might seem like a 'radical solution' yet 'certainly very interesting', as suggested by Lord Carnwath, who accords his preference to this more consensual form of law-making, over the litigation ('the courts are important in the background but they are never going to be the whole solution'). That is even more interesting, according to his concluding remarks, in consideration of the multitude of international initiatives, rising everywhere: from the Sabin Center at Columbia University (with its study on legal pathways to decarbonisation) to the Asian Development Bank (which published a report on the litigation and legislative solutions to climate change in Asia and the Pacific), to the Commonwealth Secretariat (which is developing also more toolkits in the field), and across a number of groups who are giving advice to States on developing solutions to the climate crisis. Therefore, Lord Carnwath stressed the need to draw together these different initiatives and works arisen in different parts of the world, toward a more effective climate change law. In conclusion, he highlighted the important role currently played by the UK, whose leadership will be critical and necessary on the road to the next COP26 in Glasgow, and thus in order to globally face this climate emergency.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

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