Towards a deeper judicial protection against floods in France

By Thomas THUILLIER[i]
Column for the EU-funded research project STAR-FLOOD[ii]
Published the August 5, 2014.

French judges play an important role in the field of flood risk management. Even if they cannot be considered as the main actors of flood risk management, they are developing, through legality reviews or actions for damages, an original judicial policy in favor of a more protective land planning.

Since the decentralization phenomenon initiated in the 1980s (see previous STAR-FLOOD column), local authorities are entrusted with specific competences in the field of land planning. Indeed, municipalities, public establishments have the power to develop their own land planning policy provided that they respect the national framework (adopted by the French Parliament) and some specific land documents considered being superior by the legislator. Yet, not all the powers in the field of land-planning have been decentralized to local authorities. The State is still competent in the field of natural risks to develop sectorial land-planning documents: the flood risk prevention plan (plan de prévention des risques d'inondation — PPRI). Those documents allow the State to declare a building area non-constructible because of high flood risk.
For both local authorities and the State, the judge does a legality review limited to the manifest error of assessment (or manifest unreasonableness) in order to protect their discretionary powers in the elaboration of general and sectorial land-planning documents. The notion of manifest error of assessment can be defined as the judicial sanction of an obvious error invoked by the parties and recognized by the judge. For instance, without any deep legality check, the judge will sanction a local authority that granted a building permit in a high flood risk area, even if there is a PPRI over this area. This room to maneuver, in addition to the former powers decentralized in the 1980s, given to local authorities and to the representative of the State at the local level encourages the development of local land-planning policies. This judicial self-control limited to the manifest error of assessment can also be explained by the complexity and the heterogeneity of the data that must be taken into account by the local land planning documents[1].

Yet, through a precise analysis of the case law in this specific field, one may see there are different appreciations of the notion of manifest unreasonableness depending on the facts of every case.
For the PPRIs, judges have developed a hybrid legality review switching between a limited legality review and a normal one. In the aforementioned kind of review, judges realize a deeper analysis of the facts and their legal qualifications. This kind of judicial review is used when the plaintiff considers the delimitation as too permissive, which can be more dangerous in case of flood

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[ii] Thomas Thuillier is a PhD candidate in Public Law at the University François-Rabelais, Tours.
[ii] This column has been written for the STAR-FLOOD project, for « STrengthening And Rede-signing European FLOOD risk practices: Towards appropriate and resilient flood risk governance arrangements », which is a EU-funded research project focusing on analysing, explaining, evaluating and designing policies to better deal with flood risks from rivers in urban agglomerations across Europe. It has been published on their website on August 5, 2014.

disaster. In this particular case, the judge will use important investigatory powers (such as the use of experts) in order to appreciate the content of the document, the topography of the area, the nature of the risk, the instructions and the precautions taken by the authority (i.e. Lyon Administrative Court of Appeal, 29 April 2008, Ministry for Ecology and Sustainable Development, req. no 06LY01101). Even if the judge formally qualifies his judicial review as limited to the manifest unreasonableness, one may consider it as an in concreto control limited to the manifest unreasonableness, equal to a normal legality review.
On the contrary, administrative courts realize a real legality review limited to the manifest unreasonableness when the administration considered an area as at-risk and restrain the construction there. In conclusion, when appreciating the legality of PPRIs, the judge seems more protective than the administration, and does not hesitate to annul the absence of instructions or non-constructability dispositions[2].

Such a judicial approach cannot be used for general land-planning documents elaborated by local authorities. Indeed, at first sight, judges seem to use only a legality review limited to the manifest unreasonableness. It can be explained by the fact that those documents are much more general than the aforementioned one; they do not only take into account a specific natural risk as it is the case for PPRIs. Furthermore, general land planning documents such as Urban Local Plan (plan local d'urbanisme — PLU) or schéma de cohérence territoriale (—SCoT) elaborate a general land-planning policy for a local area. It seems to be more of a political document rather than the former ones that are more technical documents. Flood risk prevention is one of the main principles that have to be taken into account by the local authorities when elaborating their land-planning documents. They have to use a balanced approach in order to reconcile those very heterogeneous principles. Thus, the legality review used by the judge is de facto limited, since there is no hybrid review as it is the case for the PPRIs.

Judges can be considered as a way to ensure effective flood risk management. Even if this approach cannot be the only prism of assessment, it is important to keep in mind the importance of the role played by the judge in this particular issue.

Even if this column specifically focuses on the French case, such results could also be applied for other STAR-FLOOD countries. Thus, through an analysis of the judicial control in each flood risk management strategies (FRMS), the STAR-FLOOD consortium should consider (or not) judges
Through an analysis of the judicial control in each flood risk management strategies (FRMS), the STAR-FLOOD consortium might consider (or not) judges as a specific actor allowing a better flood risk prevention and protection of the population.

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[1] DEBONO (A.-L.), « Le contrôle de légalité interne des plans de prévention des risques naturels », *AJDA*,
[2] CALDERARO (N.), « Le juge administratif et les risques naturels », *RFDA*, 2001, p. 895.