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HOW CONSTITUTIONAL COURTS NAVIGATE CLIMATE LITIGATION

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Abstract. Despite continuous warnings of global warming by scientists, the legislatives and the executives around the world are failing to implement sufficient countermeasures. This has led to an influx of climate litigation cases. From 2017 to 2020, climate litigation cases almost doubled worldwide. As a result of climate litigation courts often refine environmental protection mechanisms. Those are either vested in constitutions as a subjective right of the individual or as a state directive (policy goals). In deviation from previous interpretation some courts now interpret state directives more widely than before: Courts namely discover substantive environmental rights based on a state directive in combination with other civil liberties vested in the constitution. These interpretations of environmental state directives are (beyond their immediate impact on the climate commitments of a country) of interest from a comparative law point of view, given that many other social rights have also been enshrined as state directives in constitutions. Climate litigations can be broadly divided into three categories: (1) the state is required to take a certain action to protect the environment, (2) the state is prohibited from initiating or continuing harmful environmental actions and (3) the standard of environmental protection is strengthened by the interpretation of the constitution. International agreements such as the Paris Agreement also have noticeably impacted national jurisprudence. This demonstrates that national courts can enforce compliance with international climate protection agreements and related constitutional environmental protection claims such as ensuring intergenerational equity. General environmental principles, such as the "polluter pays principle" are beginning to form part of the debate of negotiated solutions. In general, climate litigation and their adjudication have in several countries become a tool to compel policymakers and executives to act in a climate conscious manner, enforcing and achieving climate goals that their countries have committed to.

Keywords: Climate Litigation, Human Rights, Climate Justice, Environmental constitutional law

1. Disaster ahead – Courts to the Rescue

We all face an unprecedented threat: the last time the earth had a similar amount of CO_2 in its atmosphere[1], which was at least 3 million years ago, the sea level was about 6 meters higher than the current sea level. Batumi, Sokhumi, Sochi and other coastal cities would have been submerged under water if they existed at the time.

Whilst time runs out for an organised energy transition, it is more and more evident that two of the ordinary state powers, the legislature and the executive are unable to achieve change rapidly enough to save mankind from another mass extinction. At international negotiation forums such as COP26 or COP27, fossil fuel lobbyists outnumber science driven politicians. Executives seem to be unable to make bold decisions. The COVID-19 crisis has however demonstrated how democratic governments are able to achieve rapid societal change if the desire is there.

Whilst larger business, and some with genuine intentions, are now establishing ESG committees, ESG reporting and developing ESG strategies, the banking sector with its ESG commitments is perhaps the best example for an easily uncovered greenwashing. They are continuing to steadily finance newly commissioned carbon projects, even though these are repeatedly dismissed by the UN Secretary General. We can all be fooled by false numbers and promises; however, the planet will not be.

If we ignore the admirable efforts by the young and most affected generation in movements like “Fridays For Future”[2], which was founded in 2018 by the then 15-year-old Greta Thunberg, national courts would appear to be the last bastion of meaningful opposition to a suicidal path of mankind. There is no surprise, that in light of the warnings of scientists about global warming and biodiversity destruction[3], that climate litigation is exponentially rising.

2. Climate Litigation and Climate Justice

Over recent years an increasing number of successful climate litigation cases in the field of environmental constitutional law have occurred[4]. As a result of the rising awareness regarding the climate crisis, more and more individuals and organisations are trying to

1. The current CO2 level in the atmosphere amounts to approximately 420 ppm.
2. For more information see https://fridaysforfuture.org/what-we-do/who-we-are/.
3. See the Technical Summary of the IPCC, available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_TS.pdf.
4. For the following also see Chapter 10 of Babeck/Weber (2023), Writing Constitutions, Vol II, (Fundamental Rights), Springer.

achieve environmental protection through legal action. The latest UNEP report indicates that the number of climate litigation cases worldwide almost doubled from 2017 to 2020; in 2020 UNEP reported at least 1,550 cases in 38 countries, compared to only 884 cases in 24 countries in 2017[5].

These climate litigations can be broadly divided into three categories, nevertheless these categories may overlap. The first category (1) includes cases in which a state is required to take specific action to protect the environment, the second category (2) consists of cases in which the state is prohibited from initiating or continuing harmful environmental actions, and the third category (3) includes cases in which the result strengthens the environmental protection standard through the interpretation of the Constitution. Rightsholders in these cases are citizens, non-citizens, ecosystems, animals, and others.

The case *Urgenda Foundation v. State of the Netherlands*[6] is one of the most consequential rulings in climate litigation and can be placed in the first category (1). In this case, the Urgenda Foundation (a Dutch environmental group) and hundreds of Dutch citizens sued the Dutch government to take positive action to prevent global climate change by reducing greenhouse gas emissions. In this case, the Supreme Court of the Netherlands found that the government is obligated to take such action to address the challenge of climate change. In addition, in the case *Friends of the Earth v. BEIS* [7], the U.K. Supreme Court found that the government failed to consider material considerations for its emission targets when formulating climate policies in the UK's net zero strategy.

As an example of the second category (2) is the case of *Future Generations v. Ministry of the Environment and Others* [8]. In this case, the Colombian Supreme Court obliged the State to refrain from deforestation by elaborating and enacting a corresponding plan. In this regard, this judicial decision, falls under both the second (2) and third category (3), since the Colombian Supreme Court also interpreted that the fundamental rights of the Colombian Constitution are related to the environment and the ecosystem, and even stated that the Amazon should be considered a legal entity with its own rights.

A case from India illustrates another example example of the third category (3), in which the Madras High Court gave an even broader interpretation of the constitutional rights of nature; stating that "Mother Nature" as a "living being" is a juridical legal person having the status of a juridical person, with all the corresponding rights, duties

5. UNEP, GCLR 2020, p. 2, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y.
6. Urgenda Foundation v. State of the Netherlands, ECLI:NL:HR:2019:2006.
7. Friends of the Earth, ClientEarth, Good Law Project v Secretary of State for Business, Energy and Industrial Strategy, [2022] EWHC 1841 (Admin). Case No: CO/126/2022.
8. Corte Suprema de Justicia [C.S.J.] [Supreme Court], April 5, 2018, M.P: L. Villabona, Expediente: 11001-22-03-000-2018-00319-01 (Colomb.).

and liabilities of a living person to preserve and protect them. The judges also granted rights corresponding to the fundamental rights for their survival, security, maintenance and resurrection to maintain their status and also to promote their health and welfare. According to the Madras High Court's jurisprudence, the state government and the central government are directed to take appropriate measures to protect Mother Nature in every possible way[9].

These court decisions illustrate that climate litigation is an important step in enforcing and achieving climate goals. The lawsuits show that the intervention of the judiciary is often necessary to "force" policy makers to act in a climate-friendly manner.

3. Constitutional Pathways: Policy Directives v. Environmental Rights

Environmental protection claims have now been expanded in many constitutions, in some as a right of the population to environmental protection (environmental rights) and in others as a policy directive. Today, almost 80 % of the 229 existing constitutions worldwide contain a reference to environmental protection[10].

Whilst judges are seeking for different means to give environmental concerns effect, courts can only do so within the framework of the national law. This is because international agreements rarely contain enforceable county commitments that claimants could use as a basis for their claim. In the absence of a national climate change law in a country or in light of the inadequacy of that, the basis for claims are usually found in the constitution of a country itself.

Under a bird's eye view, environmental provisions in a constitution can be divided into two categories: Traditionally, constitutions only contain a policy or state directive regarding environmental protection, some countries have however embedded subjective and enforceable environmental rights in their constitution, which can also directly be relied upon by individuals.

3.1. Substantive Environmental Rights

In some constitutions, such as the constitution of Italy (Article 9) and Cuba (Article 75), the protection of the environment is secured as a material constitutional right. In principle, citizens can assert material constitutional rights before the courts. How this will be implemented in the context of environmental lawsuits in Italy and Cuba, remains to be seen.

9. Madurai Bench of Madras High Court, Periyakaruppan v The Principal Secretary to Government, Revenue Department, Secretariat et al., W.P. (MD)Nos. 18636 of 2013 and 3070 of 2020.
10. See https://www.constituteproject.org/topics?lang=en. A similar picture emerges in the cognitions of Boyd, 2013, p. 6, when he pointed out that ¾ of the existing constitutions included environmental protection in their constitutions.

3.2. State Directives

In most constitutions however, environmental law is merely a state objective, which traditionally could not be claimed as a subjective right by individuals. This means that the state has the duty to protect the environment, but the individual citizen usually cannot sue the state to enact specific actions[11].

Courts in various countries have already needed to interpret how far these policy objectives can protect individuals, thereby illustrating the extent to which jurisdiction can prevail when environmental protection is not adequately ensured by a respective subjective norm.

State directives do not only cover environmental issues, but stretch across many rights and principles of the Economic, Social and Cultural Order (ESCR). Principles are legal rules, which characterise a system of law and give them a special direction, identified by the respective principle. Among those are e.g the economic order of a country, the right to work (right to decent work, right to fair wages, right to collective bargaining and action), rights of the social order, such as the right to social security, right to health or the right to social assistance or cultural rights, such as the right to education, freedom of the arts and science and the right to access to universal services. Further state directives cover global collective rights such as the right to development, the right to peace and to an international order based on Human Rights. From a perspective of constitutional development it is therefore of utmost interest to observe the development that a state directive such as the right to protection of the environment is currently taking[12].

In this context, particular reference will be made to a decision by the Norwegian Supreme Court, which held that enforceable rights are not created by the state directives. In addition, a German case law precedent of the Federal Constitutional Court will be presented, which, although it takes a similar view as the Norwegian Supreme Court on state directives, additionally establishes environmental protection as an enforceable right based on subjective fundamental rights.

3.2.1. Norway

Norway is an example of a constitution in which environmental protection is "only" embedded by a state directive, as interpreted by the Supreme Court of Norway in the case *People v. Arctic Oil* [13]. According to the Supreme Court's interpretation, a government directive, such as that found in Article 112 of the Norwegian Constitution, does not contain implicit enforceable human rights and is to be seen merely as a substantive restriction on government action. Article 112 (1) states, *"Everyone has the right to*

11. *Compare Heselhaus,* 2018, Rn. 16ss.; Leisner, 2015, Art. 20a Rn. 8.
12. *For all see Eichenhofer* (2023), Chapter 7 in Babeck/Weber, Writing Constitutions, Vol II., Springer
13. Greenpeace Nordic Association v Ministry of Petroleum and Energy (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (People v Arctic Oil).

an environment conducive to health and to a natural environment whose productive capacity and diversity are maintained. The management of natural resources shall be based on comprehensive and long-term considerations that safeguard this right for future generations".

3.2.2. Germany

The German constitution equally only contains a policy directive on environmental protection (Article 20a of the Basic Law: "*Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.*"[14]). Consequently, German individuals could traditionally not sue for environmental protection based on Article 20a of the Basic Law[15]. However, an exception in this regard is the decision of the Federal Constitutional Court of 24 of March 2021, in which the Federal Constitutional Court ruled on four constitutional complaints directed against selected provisions of the Federal Climate Protection Act (Bundes-Klimaschutzgesetz – KSG) and against the federal government's failure to take further measures to reduce greenhouse gas emissions[16]. The Court declared that certain provisions of the German Federal Climate Change Act are unconstitutional as they lack provisions that satisfy the requirements of (substantive) fundamental rights. The court essentially based this decision on two constitutional provisions. Firstly, it stated that the protection of life and physical integrity under the first sentence of Article 2 (2) of the Basic Law implied protection against impairment of constitutionally guaranteed interests by environmental pollution, regardless of who or what circumstances are the cause. The state's duty to protect under Article 2 (2) first sentence of the Basic Law also includes the duty to protect life and health from the dangers of climate change. This may also give rise to an objective duty to protect future generations which is also safeguarded by Article 20a of the Basic Law. Secondly, the court found that the scope of protection of Article 20a of the Basic Law in its objective dimension includes the need to treat the natural foundations of life and to leave them in such a state that future generations wishing to preserve these foundations of life are not forced into radical abstinence. Germany is therefore an example of how general human rights provisions – in this case, the protection of life and physical integrity – imply subjective and enforceable environmental rights. Importantly, these general human rights provisions are vested outside of the core environmental clause of the constitution.

As a result of the further development of the climate crisis, it can be assumed that further courts will interpret environmental protection as a subjective right, as was done in the

14. See Article 20a GG, available at https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en.
15. For more details Durner (2021), p. 1648ss.
16. BVerfG, Order of the First Senate of 24 March 2021 (1 BvR 2656/18), paras. 1-270, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

above-mentioned decision of the German Federal Constitutional Court. This serves to protect individuals if this protection is not guaranteed by the constitution and if politicians continue to fail to meaningfully enforce international environmental commitments.

4. Developments in Georgia

In Georgia the protection of the environment is vested in Article 29 of the constitution:

"Right to environmental protection

1. *Everyone has the right to live in a healthy environment and enjoy the natural environment and public space. Everyone has the right to receive full information about the state of the environment in a timely manner. Everyone has the right to care for the protection of the environment. The right to participate in the adoption of decisions related to the environment shall be ensured by law.*

2. *Environmental protection and the rational use of natural resources shall be ensured by law, taking into account the interests of current and future generations".*

This article is anchored in the chapter on fundamental human rights of the Georgian constitution. Fundamental rights were primarily developed to bind the executive and administrative branches of the state and to provide individual citizens with a defensive against an otherwise overbearing state[17]. Therefore, it can be assumed that Article 29 (2) will likely be interpreted as providing individuals a material constitutional right which is enforceable, especially since Georgia has announced the launch of a climate change law in October 2022[18]. However, the exact content of the law and the scope of the regulations remain to be seen.

5. International agreements and principles

It is worth noting that the climate organizations and the courts often refer to the Paris Agreement of 2016[19] in the above-mentioned jurisdictions. This shows that agreements such as the Paris Agreement also help to influence policy in national jurisdictions unless they implement the goals from the agreement. At the same time, some fear it might not be enough and critics point out that the ratifying nations must implement those existing treaties to make them effective[20]. For example, the former President of the United States Donald Trump was able to withdraw the United States from the treaty with few penalties

17. Compare Durner, W, 2021, p. 1644.
18. *Otar Shamugia,* Minister of Environmental Protection and Agriculture of Georgia, commented on the announcement of the climate change law that important issues related to climate change will be regulated. See the press release from WFD, available at https://www.wfd.org/press-releases/georgia-launches-work-climate-change-law.
19. See the Paris Agreement, available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf.
20. *May/Daly,* (2019), p. 95.; Frenz, (2020), p. 34ss.

only[21]. Even though the US-President Joe Biden rejoined the treaty on his first day in the office[22], the withdrawal of one of the biggest industry nations shows that international treaties alone cannot guarantee a comprehensive environmental protection[23].

Another topical issue regarding climate litigation is the polluter pays principle. Next to the polluter pays principle legal scholars have established at least four more principles[24] governing environmental law, namely (1) the precautionary principle, (2) the cooperation principle, (3) the integration principle and (4) the sustainability principle[25].

The precautionary principle states that that by acting prudently, environmental pollution can be prevented from occurring in the first place, thereby preserving the ecological foundations in the long term[26].

The cooperation principle aims to bring the state and its respective society together to solve environmental problems in cooperation[27].

The integration principle requires a holistic view of all environmental sectors, such as air, water, soil, etc. in order to achieve a comprehensive environmental protection[28].

The fourth principle, the sustainability principle, can be seen as one of the core principles of environmental protection[29]. It sets out that natural resources are used in such a way as to preserve the environment for future generations.

The long-established polluter pays principle requires that whoever causes the pollution must also bear the corresponding costs. The polluter pays principle was already mentioned in the Rio Declaration of 1992[30] and since the Treaty of Lisbon from 2007[31] it is embedded in Article 191 (2) TFEU (Treaty on the functioning of the European Union) and will undoubtedly continue to play an important role in the international financing

21. *See McGrath, M.* (2020). Climate change: US formally withdraws from Paris agreement. BBC-News available at https://www.bbc.com/news/science-environment-54797743; see also Milman, O./Smith, D./Carrington, D. (2017). Donald Trump confirms US will quit Paris climate agreement. The Guardian available at https://www.theguardian.com/environment/2017/jun/01/donald-trump-confirms-us-will-quit-paris-climate-deal.
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23. *Betaah/Albrecht/Egute,* (2019), p. 94.
24. Though sometimes even more principles are mentioned, see for example the RIO DECLARATION (18), containing 27 principles, or an article by the American bar which mentions ten principles, see https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/10-key-principles-in-international-environmental-law/.
25. *See Schmidt/Kahl,* (2006), p. 8ss.
26. *Schmidt/Kahl,* 2006, p. 9. The precautionary principle was also stated in the so-called Oslo Principles. For further information on the oslo principles and the implementation of the precautionary said principles see Kirby, (2019), p. 189.
27. *Sands/Peel/Fabra/MacKenzie,* (2018), p. 213ss.; *Schmidt/Kahl,* (2006), p. 12.
28. *Schmidt/Kahl,* (2006), p. 13ss.
29. *Sands/Peel/Fabra/MacKenzie,* (2018), p. 217ss.; *Schmidt/Kahl,* (2006), p. 15ss.
30. RIO DECLARATION (18), principle 16. See also Sands/Peel/Fabra/MacKenzie, (2018), p. 240ss.; *Schmidt/Kahl,* (2006), p. 10ss, for climate reparations: Tan, (2023).
31. See the Treaty of Lisbon, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2007.306.01.0001.01.ENG&toc=OJ%3AC%3A2007%3A306%3ATOC.

and reimbursement discussion that are currently taking place between – in simplified terms – Western industrialised countries and the Global South.

An example for a payment by the polluter is the carbon tax or emission trading system, which currently covers 23.17% of the world's greenhouse gas emissions[32]. Through further measures, by which polluters are obliged to make payments, financial pressure can be exerted that more climate-friendly action will become financially desirable. This should be the joint world-wide goal and be secured by constitutions and courts.

It seems essential that climate processes do not only take place at the national level, as described above, but also between the (developed) countries that have caused or are causing the environmental damage and the countries that are suffering from the environmental damage. This would lead to a certain responsibility for climate damage, which could put some pressure on policy makers to implement more climate friendly decisions. The difficulty lies in establishing an overarching consent for such liability for climate damage to justify an obligation to provide financial support for the energy transition and decarbonisation in compensation for climate damage[33].

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