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Protecting Human Rights through Climate Law Litigation

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Protecting Human Rights through Climate Law Litigation

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I. The Impact of Global Warming

The main effects of global warming are known since more than forty years.[1] What scientists all over the world tell us since the 1980s, is that global warming will cause more extreme weather events, more disasters, more casualties, more people needing help to survive. A recent study published in the Proceedings of the National Academy of Sciences in the US has even warned that "there are ample reasons to suspect that climate change could result in a global catastrophe".[2] The renowned authors demand to explore the potential for climate change to drive "mass extinction events".

As the strategy of most scientists and environmental organisations to convince politicians that they must act against global warming has more or less failed in almost all countries, since some years litigation in national and European courts has been chosen as a new instrument to speed up policy to protect the climate. One of the main arguments brought forward by the plaintiffs has been that more state action to reduce greenhouse gas emissions is mandatory because this is required by human rights.

There is no serious doubt that the effects of global warming have a negative impact on the rights of human beings. The rising number of heat waves is a grave menace especially for vulnerable persons like elderly people.[3] The higher probability of thunder storms and floods increases the risk of injuries and the loss of human lives. Last year a flood in western parts of Germany and in Belgium has cost the life of more than 220 people. Moreover, more than 10.000 houses have been destroyed or heavily damaged. But the number of adversely affected people by the recent

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1 Rich, *Losing Earth*, 2019.

2 Kemp et al., Climate Endgame: Exploring catastrophic climate change scenarios, *Proceedings of the National Academy of Sciences* 119 (2022), No. 34 (https://www.pnas.org/doi/epdf/10.1073/pnas.2108146119 , 1.9.2022).

3 Bähr/Brunner/Casper/Lustig, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, *Journal of Human Rights and the Environment* 9 (2018), 194, 201.

catastrophic floods in Pakistan is much higher. Both events make clear that also the right of property is at stake.

I will first elaborate how human rights are relevant in environmental cases already decided by the European Court of Human Rights. Then I will discuss important court decisions concerning climate change in the three countries Netherlands, Germany and France. Although they show that courts can play an active role, in the end I will argue that the responsibility to act cannot be taken away from elected politicians.

II. Human Rights and Environmental Law

Many national constitutional courts as well as the European Court of Human Rights and international human rights bodies have recognized for decades that human rights cannot only be claimed against state action restricting individual freedom, but also impose a duty on the state to prevent violations of human rights by other human actors or natural disasters.[4] Although the foundation of duties to protect human rights is rarely disputed, the question what kind of duties can be derived, especially if they are imposed on the legislator, is often controversial. It is obvious that courts cannot require that governments prevent all environmental harm but only those ecological effects seriously affecting human rights.[5]

As the European Convention of Human Rights is the basis of fundamental rights in almost all European countries I will start with this authoritative source. Meanwhile several climate cases are pending in the Grand Chamber of the European Court of Human Rights.[6] As long as no pertinent decision has been published, we have to look at earlier case law in order to find out how the Court might argue.[7] It concerns positive obligations to protect against dangerous activities as well against natural disasters. Both aspects are relevant as global warming combines them because the growing number of harmful disasters is a consequence of human behaviour, the emission of greenhouse gases.

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4 *Cf., e.g.*, Bates, *The Evolution of the European Convention on Human Rights*, 2010, 346-7; Knox, Human Rights Principles and Climate Change, in Gray/Tarasofsky/Carlarne (eds), *The Oxford Handbook of International Climate Change Law*, 2016, 213, 223.

5 Cullet, Human Rights and Climate Change: Broadening the Right to Environment, in Gray/Tarasofsky/Carlarne (eds), *The Oxford Handbook of International Climate Change Law*, 2016, 496, 502.

6 Schmahl, Internationale Klimaklagen aufgrund von Menschenrechtsverträgen: sinnvoll oder vergeblich?, *Juristenzeitung* 77 (2022), 317, 320 f.; Torre-Schaub, *The Future of European Climate Change Litigation: The Carême case before the European Court of Human Rights*, *VerfBlog*, 2022/8/10, https://verfassungsblog.de/the-future-of-european-climate-change-litigation/ (1.9.2022).

7 The following analysis of the jurisprudence of the ECtHR is based on Groß, Climate change and duties to protect with regard to fundamental rights, in Kahl/Weller (eds), *Climate Change Litigation*, 2021, 81-96.

1. Positive Obligations to Protect against Dangerous Activities

For several decades, the Strasbourg Court has been following a jurisprudence developing positive obligations to protect against dangerous activities causing environmental harm.[8] As there is no explicit right to health in the Convention, most of the complaints are based on Art. 8 ECHR stating that every one has the right to respect for his private and family life, his home and his correspondence. From the wording as a "right to respect" the Court has concluded that it entails negative as well as positive obligations.[9] The states must not only abstain from interferences by public authorities but they also have to protect individuals from infringements by others. In the landmark judgement *Lopez Ostra* v. *Spain* the Court has given the following reasoning: "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[10]

Even if the pollution affects the rights guaranteed by Art. 8 ECHR, this does not necessarily mean that the Convention is violated. From the very beginning, the Court has stressed that a fair balance has to be struck between the competing interests of the individual and of the community as a whole. Therefore, the state enjoys a certain margin of appreciation in any case.[11] As the governmental decision-making process concerns complex issues of environmental and economic policy, the authorities must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.[12] Especially in cases involving environmental issues, the state must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations.[13]

The measures a state must take in order to prevent harm from the victims of environmental pollution may include a duty to introduce legislation if such a regulation is necessary to ensure

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8 A summary of more than 100 cases in Braig, *Umweltschutz durch die Europäische Menschenrechtskonvention*, 2013, 7-181.

9 Hart, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004, 181-186; Schabas, *The European Convention on Human Rights*, 2015, 367-369.

10 *ECtHR, Lopez Ostra* v. *Spain*, Application no. 16798/90, Judgement 9 December 1994, margin no. 51; cf. also *ECtHR, Tatar* v. *Romania*, Application no. 67021/01, Judgement 27 January 2009, margin no 85-88.

11 *ECtHR, Lopez Ostra* v. *Spain*, margin no. 51.

12 *ECtHR, Hatton* and others v. *United Kingdom*, Application no. 36022/97, Judgement 8 July 2003, margin no. 128.

13 *ECtHR, Dubetska* and others v. *Ukraine*, Application no 30499/03, 10 February 2011, margin no. 141.

an effective protection against the dangerous activity.[14] If the state had at its disposal a number of other tools capable of preventing or minimising pollution, the Court may examine whether, in adopting measures of a general character, it complied with its positive duties under the Convention.[15]

If the effects of a harmful activity are so grave that they threaten human life, Art. 2 ECHR is also applicable.[16] This has been recognized by the Court in a case related to an explosion of methane gas at a rubbish dump killing numerous persons, whereas the national authorities had not taken appropriate measures to address that risk which was well known. The Court argued that the "positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 … entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[17] But also in this case it is noteworthy that the Court did not acknowledge deficiencies in the national legislation, but only a lack of implementation.[18]

2. Positive Obligations to Protect against Natural Disasters

A second constellation in the field of environmental law is the protection against natural disasters. In that case the origin of the harm for the individual victims is not human actions, especially emissions by factories or other installations, but the effect of natural hazards, mainly extreme weather events. In these cases, complaints have been based on the right to life (Art. 2 ECHR) and the protection of property (Art. 1 Protocol No. 1).

The positive obligation of the states to protect human life derived from Art. 2 ECHR is not only relevant if the danger for life is caused by humans, but it includes the protection against natural hazards if the circumstances of a particular case point to the imminence of such a hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use. The scope of the positive obligations, imputable to the state in the particular circumstances, depends on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.[19] In the pertinent case, the Court recognized that there were serious administrative flaws because mud slides had occurred

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14 *ECtHR, Di Sarno* v. *Italy*, Application no. 30765/08, Judgement 10 January 2012, margin no. 106; Schabas (fn. 9), 388: "appropriate regulatory framework".

15 *ECtHR, Fadeyeva* v. *Russia*, Application no. 55723/00, Judgement 9 June 2005, margin no. 124.

16 Overview by Sicilianos, Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR, *Cyprus Human Rights Law Review* 3 (2014), 117; Jacobs/White/Ovey, *The European Convention on Human Rights*, 7th ed. 2017, 161-167.

17 *ECtHR, Öneryildiz* v. *Turkey*, Application no. 48939/99, Judgement 30 January 2004, margin no. 89.

18 *ECtHR, Öneryildiz* v. *Turkey*, margin no. 132.

19 *ECtHR, Budayeva* v. *Russia*, Application no. 15339/02, Judgement 20 March 2008, margin no. 137.

on several occasions and a causal link between the authorities' omissions and the death of many people existed.[20]

The European Court of Human Rights has also recognized that the right of every person to the peaceful enjoyment of his possessions may entail positive obligations, which may require the state to take the measures necessary to protect property rights.[21] But it has also stressed that the states enjoy a wide margin of appreciation in cases involving environmental and planning issues.[22] Nevertheless, it draws a "distinction between the positive obligations under Article 2 of the Convention and those under Article 1 of Protocol No. 1 to the Convention. While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives."[23] Therefore, in the mudslide case, a violation of Art. 1 Protocol No. 1 was not recognized.

III. Three Examples of National Jurisprudence

The adaption of the principles developed in the jurisprudence of the Strasbourg court to the problems of global warming poses difficult problems how to derive legal duties to reach certain targets.[24] I do not dare to predict whether the European Court of Human Rights will use the climate cases to decide for the first time that new legislation to curb emissions in required. Until now there is no such example in the jurisprudence of national courts deciding climate cases based on human rights, although meanwhile many decisions in several European states have already been taken and other cases are pending. I will focus on three examples.

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20 *Ibid*, margin no. 158.

21 *ECtHR, Allen* and others v. *United Kingdom*, Application no. 5591/07, Judgement 6 October 2009, margin no. 55.

22 *ECtHR, Allen* and others v. *United Kingdom*, margin no. 60.

23 *ECtHR, Budayeva* v. *Russia*, margin no. 175.

24 *Cf., e.g.*, Hänni, Menschenrechtlicher Schutz in der Klimakrise – das Leiturteil Urgenda, *Europäische Grundrechte-Zeitschrift* 47 (2020), 616, 627; Groß (fn. 7), 88-95.

1. Netherlands

The landmark case in Europe is the decision following the complaint of the Dutch foundation Urgenda. The final judgement of the Supreme Court[25] is the first positive decision of a highest national court in a climate case against state actors. Originally a tort law case, the Court of Appeal has argued that the claim can be based directly in the duty to protect human rights, i.e. Art. 2 and 8 of the European Convention on Human Rights.[26] This has been confirmed by the Supreme Court.

In the Urgenda case, the District Court ordered "the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25 % at the end of 2020 compared to the level of the year 1990".[27] This ruling was upheld by the Court of Appeal and the Supreme Court. The District Court clarified that the reduction target can be based on the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2° C target.[28] The result is thus based on the principle of fair distribution requiring that all states act according to their contribution to global emissions.[29] The postponement of mitigation efforts would lead to accumulation effects and therefore increase the risk of climate change hazards. Nonetheless the court saw insufficient grounds to compel the state to adopt a higher level than the minimum level of 25 %, without specifying these grounds.

The court decisions do not specify what kind of action should be taken. The Dutch government has adopted several measures in order to comply with the judgement. The pandemic was also helpful to reduce emissions. Therefore it seems that the goals required by the courts have been met in 2020.[30] Future action to combat climate change is not covered by the judgement.

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25 https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007 (1.9.2022).

26 Hesselmann, Human rights and EU climate law, in Woerdman/Roggenkamp/Holwerda (eds), *Essential EU Climate Law*, Cheltenham 2021, 259, 287.

27 Rechtbank Den Haag, Application no. C/09/456689, Judgement 24 June 2015, no. 5.1; English translation available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&showbutton=true&keyword=C%2f09%2f456689 (1.9.2022).

28 *Ibid*., no. 4.83-86.

29 Hänni, Menschenrechtsverletzungen infolge Klimawandels, *Europäische Grundrechte-Zeitschrift* 46 (2019), 1, 15.

30 https://www.dutchnews.nl/news/2021/09/netherlands-likely-to-reach-urgenda-climate-goals-for-2020/?utm_source=newsletter (1.9.2022).

2. Germany

The decision by the German Federal Constitutional Court published in spring 2021 has been widely conceived as a victory for the complainants, but this is only half the truth. The main request has been to order that suitable statutory provisions and measures to tackle climate change be adopted by federal legislation. The Court recognized the duty to protect life and health against the risks posed by climate change.[31] But based on its previous jurisprudence on environmental law the Court stated also in this climate case that there is a margin of appreciation and evaluation of the legislator. As after filing the suit the German parliament had adopted a Federal Climate Change Act defining reduction goals and a mechanism to ensure that they are complied with, the Court found that "the legislator has taken precautionary measures that are not manifestly unsuitable."[32]

A partial success was only awarded to the complaint, as the Court also found that the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens. Therefore the Court required that transparent specifications for the further course of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty. The practical consequences of this part of the judgement were limited as the national legislator only had to amend the Federal Climate Change Act by provisions updating the reduction targets for the periods starting from 2031. But for the quantity of emissions of greenhouse gases in Germany the decision has no immediate impact.

This innovative argument that the measures necessary to reach the reduction goals will inevitably cause restrictions of human rights in the future has found much criticism as it somewhat blurs the distinction between state action and inaction.[33] Until now the impact of the decision has been limited as several follow-up cases have been dismissed, although there is evidence that the reduction targets have not been met in all sectors and remedial action proposed

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31 An English translation is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html (1.9.2022).

32 *Ibid*., margin no. 154.

33 E. Hofmann, Der Klimaschutzbeschluss des BVerfG, *Neue Zeitschrift für Verwaltungsrecht* 40 (2021), 1587, 1588; Franzius, Prävention durch Verwaltungsrecht: Klimaschutz, *Verhandlungen der Vereinigung der Deutschen Staatsrechtslehrer* 81 (2022), 383, 404.

by the national government is insufficient according to the findings of an expert advisory body.[34]

3. France

In France we have several important courts decisions on climate protection obligations. I will concentrate on two of them. While the Constitutional Council gave a negative ruling a complaint in the Council of State was partly successful.

The Constitutional Council in 2021 has partly rejected a complaint brought by 60 members of Parliament against a statute on climate change. They had argued inter alia that this statute was not sufficient to meet the requirements of art. 1 of the French Charter for the Environment guaranteeing the right to live in a balanced environment which shows due respect for health. The Council dismissed this claim without entering into detail arguing that it has no power to order (pouvoir d'injonction) what the French legislator should do.[35]

More successful was a complaint lodged by the small coastal town of Grande Synthe in the Council of State against the French government. In two decisions the highest administrative court decided that the government had failed to take action in order to comply with the requirements to curb greenhouse gas emissions.[36] In a first decision it refused to order that the government must initiate pertinent legislation as this was not covered by the mandate of an administrative court. But in the second decision which was taken after the government was allowed to introduce more information on the measures already adopted, the Council of State ordered that the Prime Minister had to take all useful measures to change the direction of the curve of greenhouse gas emissions in France. What kind of measures this could be is not part of the judgement.[37]

The Council of State argued that the reduction target enshrined in the annex of EU regulation 2018/842 and in the French Energy Code was binding for the government. Although in the list of legal texts the court took into consideration, the European Convention on Human Rights is mentioned, human rights are not present in the arguments.[38] As the duty imposed on the Prime

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34 Expertenrat für Klimafragen, *Prüfbericht zu den Sofortprogrammen 2022 für den Gebäude- und Verkehrssektor*, available at https://expertenrat-klima.de/ (1.9.2022).

35 https://www.conseil-constitutionnel.fr/decision/2021/2021825DC.htm (1.9.2022).

36 English summary available at http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/ (1.9.2022).

37 On the problem of the power of injunction in French law cf. Van Lang/Perrin/Deffairi, Le contentieux climatique devant le juge administratif, *Revue Française de Droit Administratif* 37 (2021), 747, 768-770.

38 Fuchs/Amadori, Aktuelle Entwicklungen des verwaltungsgerichtlichen Umweltrechtsschutzes in Frankreich, *Neue Zeitschrift für Verwaltungsrecht* 40 (2021), 1748, 1752; this is criticized by Van Lang/Perrin/Deffairi, *Revue Française de Droit Administratif* 37 (2021), 747, 752 f.

Minister had a basis in the existing legislation, no constitutional provision was necessary to found the claim.

According to a recent government report, France has been able to reduce its greenhouse gas emissions until 2021 in accordance with its goals.[39] Whether France will reach the long term goal of climate neutrality in 2050 which is also relevant in the decisions of the Council of State[40] is to be seen.

IV. Final Considerations

Courts will not save the world. They can only remember governments and/or parliaments what obligations they have accepted in the past, but they did not and cannot demand that specific measures against global warming be taken.[41] All national decisions mentioned before have not transgressed the limits of legitimate judicial power.[42] The courts do not act as lawmakers, they adapt the existing human rights law to the circumstances of a global problem with a completely new dimension.[43]

The real problem is that the unprecedented challenge by global warming cannot be handled with old rules and traditional judicial instruments.[44] Our western legal orders have the primary purpose of protecting individual and corporate freedom of action and therefore law is essentially the corollary of a market economy. The consequence of this approach is that new legislation restricting emissions of industrial installations as well as the private use of fossil fuels has to be justified as they are seen as an infringement of economic human rights.

Of course, these rights of polluters can be restricted in order to protect public goods as the environment and human rights of others. Nevertheless, these restrictions have to be proportionate and this is where the problems begin. In order to meet the reduction targets in the short time remaining we need more regulation in many parts of private life as well as in industrial activities. Many experts tell us that energy supply based on fossil fuels cannot be

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39 https://www.euractiv.fr/section/climat/news/la-france-en-avance-sur-ses-objectifs-de-reduction-des-emissions-de-gaz-a-effet-de-serre/?_ga=2.77436501.15769281.1656055376-1208313780.1646221674 (1.9.2022).

40 Torre-Schaub, Le contentieux climatique: du passé vers l'avenir, *Revue Française de Droit Administratif* 38 (2022), 75, 81.

41 Torre-Schaub, *Revue Française de Droit Administratif* 38 (2022), 75, 76; Franzius, *Verhandlungen der Vereinigung der Deutschen Staatsrechtslehrer* 81 (2022), 383, 426.

42 Fellenberg, Rechtsschutz als Instrument des Klimaschutzes – ein Zwischenstand, *Neue Zeitschrift für Verwaltungsrecht* 41 (2022), 913, 920.

43 Burgers, Should Judges Make Climate Change Law?, *Transnational Environmental Law* 9 (2020), 55–75.

44 *Cf.* Maxwell, (Not) going Dutch: compelling states to reduce greenhouse gas emission through positive human rights, *Public Law* 67 (2020), 620, 630.

replaced fast enough by new technologies. Therefore, we must discuss real restrictions of what many regard as part of their personal freedom. A parallel problem concerns the production sphere and therefore the question if all products available on our markets are legitimate or must be questioned because they need excessive fossil energy. The debate about these problems of scarcity has just begun, although primarily in order to become independent from Russian energy supply.

Coming back to the human rights dimension this problem has to be translated in the justification of restrictions imposed on producers, traders and consumers. Will the courts, e.g., accept that private cars using fossil fuels may not be used beyond a time limit in the near future, although electric cars will probably be too expensive for some of the consumers and public transport will not be a suitable alternative in all regions? Will they accept that the use of grain or soy for animal feed will be restricted in order to reduce the emissions by animal farms? How can these individual disadvantages which might be grave in some cases be weighed against an existential threat to mankind? These are only some of the difficult questions which will arise soon. I am not sure whether the existing theories on judicial deference will be appropriate to answer them.

As the climate problem is much bigger than all other environmental topics handled by the states and their courts until now, immediate and rigorous action is urgently needed. It seems quite clear for me that this transformation must be accompanied by institutional innovations. The experiences made in the last years with citizen assemblies in the field of climate change seem to indicate that this might be a useful tool.[45] They all show that popular support for resolute action is stronger than many politicians believe. In the end, human rights protection against the negative impact of global warming must be taken serious by all democratic institutions. Litigation can help to remind governments what obligations they have to protect human rights, but the decisions how to act will remain in the political sphere.

abstract

Global warming has a negative impact on the rights of human beings. The jurisprudence of the European Court of Human Rights has recognized positive obligations to protect against dangerous activities as well against natural disasters. Duties to take measures against climate

[45] Duvic-Paoli, Re-imagining the Making of Climate Law and Policy in Citizens' Assemblies, *Transnational Environmental Law* 11 (2022), 235-261.

change have been recognized by several national courts but they did not act as lawmakers. The judiciary has to adapt the existing human rights law to the circumstances of a global problem with a completely new dimension, but in the end the decisions how to act will remain in the political sphere.