CLIMATE CHANGE LITIGATION – A PROMISING PERSPECTIVE?

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Like climate change, climate lawsuits are a global phenomenon. Under the guise of "strategic litigation", individuals and groups try to advance sufficient efforts to mitigate climate change by states and companies, citing constitutional fundamental and human rights. The majority of the litigation has so far been unsuccessful. With the Dutch judgments in the Urgenda and Shell cases and the decision of the German Federal Constitutional Court of March 2021, case-law precedent for concrete measures has recently become available. The article sheds light on the discussion on climate lawsuits, lets critics have their say and concludes with an outlook on the effects of these proceedings on liberal parliamentary democracies and the emergence of global ecological human rights and possibly even of nature's rights for its own sake.

Key words: climate change; climate lawsuits; strategic litigation; global ecological human rights

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1. INTRODUCTION[1] [2]

It is a special honour for me to be involved in the commemorative publication for *Željko Potočnjak*. We met more than 30 years ago and, I hope I can say so, have become friends through our participation in the new Croatian Labour Code.[3] While *Željko Potočnjak* has risen to the highest levels of legal expertise and distinction and, as a professor at the University of Zagreb and as a judge of the Croatian Constitutional Court, has played a significant role in the development of Croatian law since independence, I found my professional fulfillment in practical work as an in-house lawyer with its diverse, often worldwide challenges.

One of these challenges is climate change. Legal and other measures taken to mitigate the harmful consequences of climate change require not only companies, but all of us to make enormous adjustments and behavioral changes. For some time now, climate change has also become the focus of legal disputes. Since I have always known *Željko Potočnjak* as a lawyer interested in new questions, I dare to dedicate this paper to him, although it lies outside the core area of his work in labour and social law.

The following thoughts are to be understood as a sketch of the problem. They do not provide definitive answers, but want to unfold a panorama of possible developments, mainly based on a German legal perspective.

In view of the rather limited results in the fight against climate change to date, the article describes a noticeably stronger dynamic in the legal handling of this future challenge. This dynamic is driven by so-called climate change litigation, with which individuals or groups try to force states or private companies to drastically reduce their CO_2 emissions through court decisions. Such "strategic litigation" has a long tradition, not least in environmental protection law. The core element of the legal argumentation is the reference to fundamental and human rights, from which the plaintiffs derive special protection and

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1 The author expresses solely his personal individual opinions.

2 The author thanks Lee Braem and Greg Mulligan for their corrections and always helpful advice in preparing the English version of this paper, which was finalized by April 15, 2023.

3 Kreuder, T.; Potočnjak, Ž., *Die Entwicklung des kroatischen Arbeitsrechts seit der Verabschiedung des neuen Arbeitsgesetzes*, in: Höland, A.; Hohmann-Dennhardt, C.; Schmidt, M.; Seifert, A. (eds.), *Arbeitnehmermitwirkung in einer sich globalisierenden Welt*, Berliner Wissenschaft-Verlag, Berlin 2005, pp. 403; Kreuder, T.; Potočnjak, Ž., *Gradanskopravni elementi radnoga prava*, Pravo u gospodarstvu, *vol*. 33, no. 5-6, 1994, pp. 370; Kreuder, T.; Potočnjak, Ž., *Die Transformation von Arbeitsbeziehungen und Arbeitsrecht in Kroatien*, Arbeit und Recht, *vol*. XLII, 1994, pp. 438.

action claims with regard to the consequences of climate change. After a series of unsuccessful attempts, three decisions have recently been handed down by Dutch and German courts that have attracted widespread attention. The further development of civil lawsuits against private companies is being observed with growing tension. In Germany, there are many indications that, unlike in the Netherlands, such proceedings are highly likely to be unsuccessful. But this is not certain. It should be remembered that even proponents of climate lawsuits had not expected the decision of the Federal Constitutional Court of March 2021 itself.[4]

There is much to suggest that the momentum set in motion will continue to grow. Numerous other cases are pending before the courts and new, economically powerful players have emerged. In the international context, the push for decisive action will become more forceful. And finally, the appeal to fundamental and human rights will be covering more and more scopes of society and politics when claiming recognition, protection and (affirmative) action. It is already evident that, in addition to environmental and climate protection with the safeguarding of adequate living and working conditions or sexual and identitarian self-determination, other socially controversial areas have become part of an expanded human rights discourse. All these developments will influence and reinforce each other. This also challenges the established system of liberal parliamentary democracies. As a potential future result, even the recognition of nature's own rights is not excluded.

2. COP27, WAR AGAINST UKRAINE, LAST GENERATION – OR: IN THE PAST, EVEN THE FUTURE WAS BETTER (KARL VALENTIN)

In November 2022, the 27th United Nations Conference of Parties (COP27) met in Sharm el-Sheikh. The United Nations efforts to address climate change began in 1992 in Rio de Janeiro with the adoption of the World Climate Convention. Five years later in 1997 the Kyoto Protocol was adopted at COP3. According to media reports, expectations were low for the negotiations in the seaside resort in the Sinai desert to achieve actual results to curb global warming with this further follow-up conference. It was celebrated as a success that the industrialised countries acknowledged in principle their responsibility for their CO_2 emissions and thus their contribution to global warming. They agreed to an insurance fund called "Global Shield" to compensate for the losses in the 55 countries most affected by the climate crisis. In view of losses and

[4] Verheyen, R., *Klagen für Klimaschutz*, Zeitschrift für Rechtspolitik (ZRP), no. 4, 2021, p. 133.

damage caused by climate change estimated at USD 200 billion per year, the EUR 170 million pledged by Germany is only a modest start. At the end of the conference on 19 November, it was still unclear whether the necessary funds would arrive. The negotiations have been postponed, especially since large CO_2 emitters such as China continue to refuse to pay any contributions at all.[5]

On the other hand, the pressure from international bodies remains strong. Great hopes are pinned on the opinion of the *International Court of Justice of the United Nations (ICJ)*, which is to define the requirements for climate justice and is expected in about two years. A General Assembly resolution initiated by the island nation of Vanuatu and unanimously adopted on 29 March 2023 asks the *ICJ* for a legal opinion on the "actions" of states responsible for global warming and their "obligations" towards particularly affected states and the inhabitants of the earth today and tomorrow. In the words of UN Secretary-General *Guterres*, an *ICJ* statement on climate justice would "support the General Assembly, the UN and member states in taking the bolder and more powerful decisions on climate change that our world so desperately needs", even if it lacks the direct binding force under international law.[6]

The COP27 itself failed in the task of defining concrete steps to achieve the 1.5° C-target of the 2015 Paris Climate Agreement. It is not surprising that voices from science now consider it unlikely to achieve this distant goal.[7] In view of the current pace of implementation, an average global warming increase of 2.5° C is possible in 2100. In this case, large parts of the earth would become uninhabitable due to heat, drought and flooding, with the result that a migration of unprecedented proportions would begin. At the same time, it is to be expected that certain "tipping points"[8] will be exceeded. The associated irreversible consequences of this temperature rise, such as the thawing of Arctic ice sheets and permafrost soils, and changes in seawater levels and currents, would cause further temperature increases without the possibility of correction. Consequently, it is imperative to stick to the 1.5°C-target and to align all efforts with it in order to avoid catastrophes of apocalyptic proportions.[9] This finding was confirmed by the report of the *Intergovernmental Panel*

5 *Konferenz scheitert bei der Reduktion von Treibhausgasen*, Frankfurter Rundschau (FR), 21.11.2022, p. 2.

6 UN-Generalversammlung verabschiedet wegweisende Klimaresolution, https://unric.org/de/klimaresolution30032023-2/ (13.4.2023).

7 Wegener, B., *Menschenrecht auf Klimaschutz?*, Neue Juristische Wochenschrift (NJW), no. 7, 2022, p. 427.

8 Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *Grundgesetz-Kommentar*, Beck Verlag, München, 2022, Art. 20a GG, Rn. 42.

9 *Was wir tun, ist nicht umsonst*, Frankfurter Allgemeine Sonntagszeitung (FASZ),

on Climate Change (IPCC) published in March 2023 and stated that from now on only a global "total CO_2 budget" of 380 billion tons is available to achieve the 1.5° C target. With emissions remaining at the current level of 40 billion tons per year, this "credit" will be used up in less than ten years.[10] The decisive decade for averting the consequences of climate change has begun.

Just in time for the start of the 2022/23 winter sports season, *National Geographi*c gave a foretaste of the impact not only from an economic perspective resulting from the absence of snow in the Alps, even at the highest altitudes.[11]

In the words of the French philosopher Jean-Luc Nancy, one could say that our "bloated" civilization is running out of steam, or in other words, that it is blowing its own light out against all reason.[12]

The Russian war of aggression against Ukraine has further aggravated the situation. Since 24 February 2022, the "reality of the climate emergency" has included a "security crisis", which abruptly eliminates the "dependence ... of dictatorial regimes through the purchase of fossil fuels". The climate and security crisis must and could be tackled immediately by phasing out fossil energy imports and rapidly switching to sustainable energy sources.[13]

Parallel to the sobering results of climate protection policy to date, the social debate about suitable and sufficient measures is intensifying, at least in those countries where public protest is possible. Groups such as "Extinction Rebellion" or "Last Generation" glue or lock themselves to roads or structures and thus block run- and motorways as well as inner-city traffic intersections or defacing world-famous cultural assets in museums. On the one hand, such provocative actions deliberately disrupt climate-relevant behaviors such as air and motorized road traffic and, on the other hand, point to the vulnerability of beauty, the loss of which can be threatened by climate change. These protests are highly controversial and there are numerous voices in politics calling for harsh punishment.[14] Nevertheless, further resistance is announced.[15] Projects to expand coal production or motorways are also attracting sharp protests.

6.11.2022, p. 2; *Das Langfrist-Ziel heißt Klima-Reparatur*, FR, 13.9.2022, p. 2; *Klimapläne reichen laut Studie bei weitem nicht aus*, Taunuszeitung (TZ), 7.12.2022, p. 3

10 *Ein entscheidendes Jahrzehnt*, FR, 21.2.2023, p. 8

11 *Ist der Winter noch zu retten?*, National Geographic, Dezember 2022, pp. 38.

12 Nancy, J.-L., *Des Atems beraubt*, Lettre international, no. 139, 2022/2023, pp. 8.

13 Stäsche, U., *Entwicklungen des Klimaschutzrechts und der Klimaschutzpolitik 2021-2022*, Zeitschrift für das gesamte Recht der Energiewirtschaft (EnWZ), *vol*. 11, no. 6, 2022, pp. 202.

14 *Wie weit reicht die Versammlungsfreiheit ?*, FR, 24.11.2022, p. 6; *Härtere Strafen wären destruktiv*, FR, 26.11.2022, p. 9; *Mutiger Protest*, FR, 26.11.2022, p. 11.

15 *"Der Widerstand wird größer als je zuvor"*, TZ, 24.1.2023, p. 4.

In Germany, for example, the demonstrations against the clearing of forests and the expansion of lignite mines resulted in associated large-scale police operations stretched out over several weeks.

"Last generation" is also a familiar protest term in China. The term stands for voluntarily remaining childless in order not to bring more people under an oppressive regime. A sharper accusation is hard to imagine.[16]

3. CLIMATE CHANGE LITIGATION – A BRIEF OVERVIEW OF FAILED AND SUCCESSFUL

Like climate change, climate change litigation is a global phenomenon. Starting with the USA and the *Environmental Justice* movement there in the 1980s, countless environmental protection proceedings have been heard in courts worldwide.[17] However, success was largely absent, not least because the *U.S. Supreme Court*, invoking the principle of separation of powers, saw civil *Common Law* superseded by the *Clean Air Act*. The basic principle of judicial self-restraint is strictly observed: "Not every problem posing a threat – even a clear and present danger – to the American Experiment can be solved by Federal Judges."[18] These actions also failed due to the lack of proof of causality between the claimed damage and harmful conduct.[19]

A brief exemplary list of more recent cases includes unsuccessful lawsuits in Norway against oil production in the North Sea[20] or in Germany before the local Administrative Court (VG) Berlin against the former climate protection program of the German Federal Government. In the German case, the claim was dismissed because the alleged violation of fundamental rights had not been proven specifically and the challenged climate protection program with its reduction target of 40% could also be regarded as ambitious by international standards. Consequently, the court determined that the measures to be implemented by the executive branch of government are not inappropriate and therefore the State did not fail in its duty to protect.[21] Proceedings concer-

16 *Generation No Future*, Le Monde diplomatique, Januar 2023, p. 5.

17 Hanschel, D.; Schultze, M., *Menschenrechtliche Aspekte des Klimaschutzes*, Klima und Recht (KlimR), no. 6, 2022, pp. 166.

18 Juliana et al. vs. United States, 947 F3 d 1159 (1174) (9th Cir 220, Hurwitz, J.).

19 Weller, M.-P.; Tran, M.-L., *Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?*, Zeitschrift für Europäisches Privatrecht (ZEuP), no. 3, 2021, pp. 578.

20 *Umweltschützer scheitern in Norwegen erneut mit Klimaklage*, Nachrichten, Pressemitteilungen, Fachnews, Redaktion beck-aktuell, becklink 2015281.

21 VG Berlin 31.10.2019 – 10 K 412/18, NVwZ, 2020, pp. 1292.

ning an increased level of savings in France and before the *European Court of Justice (ECJ)* were also rejected. In view of the principle of separation of powers, the French Constitutional Court was prevented from setting targets to combat climate change.[22] And the *ECJ* dismissed the action for annulment under Article 263(4) TFEU ("People's Climate Case/Carvalho"), since the plaintiffs were not directly concerned as required by the "Plaumann formula".[23]

In contrast, the *Hoge Rad*[24] decided in the *Urgenta* procedure that the Netherlands must reduce its CO_2 emissions by 25% by the end of 2020 compared to the reference year 1990.[25] In March 2021 the German Federal Constitutional Court (*BVerfG*) upheld various constitutional complaints and ruled that the German Climate Protection Act must be adapted with regard to its level of ambition.[26] The circle of more prominent climate actions also includes numerous proceedings before the *European Court of Human Rights* (*ECtHR*), where such actions were successful because the plaintiffs were able to demonstrate that their individual fundamental rights were specifically violated by the challenged activities or the omission of corresponding protective measures.[27] Reference is essentially made to Article 2 ECHR (right to life) and Article 8 ECHR (right to respect for private and family life and home). The latter, according to general opinion, does not imply the right to a clean and quiet environment, and nature conservation, but it guarantees the physical integrity of the person.[28]

At first glance, all successful claims appear to have in common a connection to constitutional rights, in particular to life and health, property and freedom. The plaintiffs complain of the violation of these absolute rights, which are threatened or already violated by the consequences of climate change. At a

22 Conseil constitutionnel 13.8.2021 – No. 2021-825 DC.

23 EuGH 25.3.2021 – C-565/19, BeckRS, 2021, 5531.

24 High Court of The Hague.

25 Hoge Rad 20.12.2019 – Rs. 19/00135, ECLI:NL:HR:2019:2006.

26 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30.

27 Regarding Art. 8 EMRK: EGMR 9.12.1994 – 16798/90 – Lopez Ostra vs. Spain, Europäische Grundrechtezeitschrift (EuGRZ) 1995, p. 530; regarding Art. 2 EGMK: EGMR 30.1.2004 – 48939/99 – Öneryildiz vs. Turkey; EGMR 20.3.2008 – 15339/02 - Budayeva vs. Russia; Groß, T., *Die Ableitung von Klimaschutzmaßnahmen aus grundrechtlichen Schutzpflichten*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 6, 2020, p. 338; Meyer-Ladewig, J., *Das Umweltrecht in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 1, 2007, pp. 27; Beyerlin, U., *Umweltschutz und Menschenrechte*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), no. 3, 2005, pp. 528.

28 Meyer-Ladewig, *op. cit.* (fn. 27), p. 26.

second glance, it becomes apparent that a shift is taking place from directly affected individual rights to collective concerns, even if such collective concerns are only asserted abstractly for the future.[29] In more general terms, one could speak of a change from local environmental justice to *Global Climate Justice*. This change is fed by developments in international law and treaties, such as the "Aarhus Convention"[30], which combine subjective (human) rights with interests objectively worthy of protection.[31] This process corresponds to the preamble of the Paris Climate Agreement of 2015, which also establishes a link between climate protection and human rights.[32]

Essential decisions for the further course of the debate on fundamental and human rights are expected from the outcome of the climate litigation action of a group of six young people against 33 countries before the *ECtHR*.[33] It should be emphasised that the Court has accepted the matter for decision, although the respective court proceedings have not yet been concluded. The juveniles could not be expected to conclude their proceedings in all 33 defendant Convention states. It is also to be expected that the expansion of the possibility of legal action by the "Aarhus Regulation", which was amended in October 2021, will give further impetus to climate lawsuits. Under Article 11 thereof, environmental EU acts may now be reviewed before the Courts of the European Union. The collective relevance of these actions becomes clear in the admission requirements, which require the support of the application by at least 4,000 persons, of which at least 250 must come from a Member State, and that there must be a demonstrated public interest.[34]

An explicit reference to fundamental and human rights can also be found in the civil lawsuits against individual companies. In the first-instance proceedings before the *Rechtbank Den Haag*[35], the oil company *Royal Dutch Shell PLC* was ordered to reduce its own CO_2 and the CO_2 emissions of suppliers and customers by 45% by 2030 compared to 2019.[36] The company, which had already

29 For example Hoge Raad 20.12.2019 – Rs. 19/00135, ECLI:NL:HR:2019:2006; Conseil constitutionnel 13.8.2021 – No. 2021-825 DC; EuGH 25.3.2021 – C-565/19, BeckRS 2021, 5531; Groß, T., *op. cit.* (fn. 27), p. 340.

30 Calliess, C., *Klimapolitik und Grundrechtsschutz*, Zeitschrift für Umweltrecht (ZUR), no. 6, 2021, p. 327.

31 Hanschel, D.; Schultze, M., *op. cit.* (fn. 17), p. 167.

32 *Ibid*.

33 Agostinho et al. vs. Portugal et al., EGMR No. 39370/20.

34 Fellenberg, F., *Rechtschutz als Instrument des Klimaschutzes – ein Zwischenstand*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 13, 2022, p. 918.

35 Local Civil Court of The Hague.

36 Rechtbank Den Haag 26.5.2021 – C-09/571932, ECLI:NL:RBDHA:2021:5339.

suffered its second defeat in court within a short time in environmental protection proceedings, reacted immediately.[37] It appealed, changed its name to merely *Shell* and moved its headquarters to London.[38] Similar lawsuits brought in Germany against car manufacturers, however, have not been successful so far.[39] The claim for damages brought by a Peruvian farmer against the energy company *RWE AG* was initially dismissed.[40] The farmer argues that climate change has significantly increased the water level of a glacial lake above his village and that flooding is therefore to be expected, which could adversely affect his house and thus his property rights. He is claiming damages in the amount of the share attributable to *RWE* of the previous CO_2 emissions. The proceedings are currently in the second stage, under an order for the taking of evidence, which means that the court initially considers the claim to be conclusive.[41] And even in Australia, which gains a significant part of its economic output through the export of coal, a court has ruled against setting up another coal mine because it would disproportionately strain Australia's CO_2 budget.[42] Just a few weeks earlier, Australia, which has been affected by severe environmental disasters for several years, had passed a climate protection law that requires a 43% reduction in CO_2 emissions by 2030.[43]

4. THE NEW MOMENTUM – LANDMARK DECISIONS IN THE NETHERLANDS AND GERMANY

The climate lawsuits described above belong to the category of "strategic litigation".[44] Such "model cases" have been around for a long time. With the help of particularly exemplary cases, the field is to be prepared for the most favorable decision possible in other similar disputes. The *European Center for Con-*

37 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 590.

38 Heymann, T., *Klimaklagen - von grundrechtlichen Schutzpflichten und zivilrechtlicher Haftung*, Infrastrukturrecht (IR), 2022, p. 62.

39 LG Stuttgart 13.9.2922 – 17 O 789/21, NVwZ, 2022, p. 1663; *Klimaklage (LG Detmold 1 O 199/22) gegen VW: Zweifel am Erfolg*, Nachrichten, Pressemitteilungen, Fachnews, Redaktion beck-aktuell, becklink 2023316; LG München, 7.2.2023 - 3 O 12581/21, Haufe-NEWS (www.Haufe.de) (8.2.2023).

40 LG Essen, 15.12.2016 – 2 O 285/15, NVwZ, 2017, p. 734.

41 OLG Hamm 30.11.2017 – I-5 U 15/17, ZUR, 2018, pp. 118.

42 *Menschenrechte wichtiger als Kohle*, Frankfurter Allgemeine Zeitung (FAZ), 29.11.2022, p. 23; *Mutige Richterin*, FR, 5.12.2022, p. 9.

43 *Australien beschließt historisches Klimagesetz*, Nachrichten, Pressemitteilungen, Fachnews, Redaktion beck-aktuell, becklink 2024227.

44 Graser, A., *Vermeintliche Fesseln der Demokratie: Warum die Klimaklagen ein vielversprechender Weg sind*, Zeitschrift für Umweltrecht (ZUR), no. 5, 2019, pp. 275.

stitutional and Human Rights defines it as follows: "Strategic litigation aims to bring societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics. ... Successful strategic litigation brings about lasting political, economical or social changes and develops the existing law."[45]

The criticism of this is ignited by the "abusive exploitation" of special problems and concerns for less significant incidents and the effects on the existing law. It can remain open whether this accusation applies to climate lawsuits. It is hard to dismiss, and occasionally admitted by the protagonists, that the courtroom is being used as a political stage along with a media campaign as an offensive tool. Moreover, blatant "forum shopping" is carried out by a corresponding selection of plaintiffs, claims, and location of the court.[46]

Not surprisingly, such criticism bounces off the proponents of such lawsuits.[47] To some, "strategic litigation" is classified soberly and professionally. In view of the undeniably meager results of climate protection efforts to date, the justification of such procedures is not seriously disputed. At the same time, attention is drawn to the fact that, according to the applicable Codes of Procedure, possible internal motives and a possible campaign chasm are irrelevant to the admissibility of an action.[48] In addition, it is not unreasonable to assume that individuals may have certain subjective rights to protect and to eliminate the consequences of climate change which affect themselves. Consequently, the existence and scope of such strategic litigation must be subject to judicial review.[49] And finally, regarding use of the media, it is noted that judicial proceedings in democratic constitutional states are a natural part of the public opinion-forming process. Even unsuccessful litigation can have an influence on public opinion and the legislative bodies.[50]

There is no doubt that climate lawsuits enjoy broad public attention and scientific and university interest in them is growing. This is proven by the topic being included in numerous legal publications. The 73rd German Lawyers' Day, the country's biggest convention of lawyers, held every two years, descri-

45 ECCHR, https://www.ecchr.eu/en/glossary/strategic-litigation/ (15.2.2021).

46 Rodi, M.; Kalis, M., *Klimaklagen als Instrument des Klimaschutzes*, Klima und Recht (KlimR), no. 1, 2022, p. 9.

47 Verheyen, R., *op. cit.* (fn. 4), p. 133

48 Hanschel, D.; Schultze, M., *op. cit.* (fn. 17), p. 170; Oexle, A.; Lammers, T., *Klimapolitik vor den Verwaltungsgerichten – Herausforderungen der "climate change litigation"*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 23, 2020, p. 1724; Fellenberg, F., *op. cit.* (fn. 34), p. 913.

49 Oexle, A.; Lammers, T., *op. cit.* (fn. 48), p. 1724.

50 Oexle, A.; Lammers, T., *op. cit.* (fn. 48), p. 1724; Graser, *op. cit.* (fn. 44), p. 277.

bed the *BVerfG's* decision of March 2021 on climate protection as a "big bang" and set "Climate protection through courts?" as the topic for its closing event on 23 September 2022.[51] Such a decision demonstrates that legal tackling of climate change is a real issue. A wide range of activities go beyond expert circles. A good example of this is a series of lectures by the Friends and Sponsors of the Faculty of Law of the University of Potsdam in spring 2022.[52] Climate protection has a strong social mobilization potential. Younger people are rightly interested in the topic. The intensified occupation with the subject in studies, in seminars and theses, in dissertations and other high level academic credentials will generate ideas and argumentations that will unfold their effect in the future. There are concrete examples of this, especially in recent decisions.[53] The global phenomenon of climate change litigation will generate worldwide interactions: the courts will increasingly open up to the focus on human rights[54] and take into account the considerations of other foreign courts and jurisdictions.[55] There are also already concrete examples of this.[56]

Previous case-law has already produced "landmark decisions": the Dutch judgments on *Urgenda* and *Shell* as well as the decision of the *BVerfG* of March 2021. From these, we can expect an increase in similar proceedings and outcomes[57] and, presumably, cases that exceed "legal tipping points" beyond which neither states, courts nor companies can retreat. The climate lawsuits are still being pursued by activists motivated by environmental policy. But powerful economic interests could soon be added if, for example, insurance companies that have paid for climate damages try to sue for the rights of the injured policy-holders assigned to them.[58]

Faster than expected, the involvement of strong economic interests in climate lawsuits became real: On 9 February 2023, the environmental organisa-

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51 Deutscher Juristentag e.V., *73. Deutscher Juristentag, Bonn 2022*. Programmheft, p. 16.

52 Herrmann, K., *Strategisch klagen für Klimaschutz und Menschenrechte – Auftakt zur Veranstaltungsreihe "Jura praktisch" des Fördervereins der Juristischen Fakultät in Potsdam*, Landes- und Kommunalverwaltung (LKV), no. 2, 2022, p. 64.

53 Ekardt, F., *Klimaklagen gegen Unternehmen – Das Den Haager Shell-Urteil*, Klima und Recht (KlimR), no. 1, 2022, p. 15.

54 Wegener, B., *Urgenda – Weltrettung per Gerichtsbeschluss?*, Zeitschrift für Umweltrecht (ZUR 2019), no. 1, pp. 3; Verheyen, R., *op. cit.* (fn. 47), pp. 135.

55 Giesberts, L.; Haas, W., *Klimawandel vor Gericht*, Zeitschrift für materielles und prozessuales Klimaschutzrecht (KlimaRZ), no. 1, 2022, p. 3.

56 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 203, 253.

57 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 592; Rodi, M.; Kalis, M., *op. cit.* (fn. 46), p. 10.

58 See Verheyen, R., *op. cit.* (fn. 4), pp. 135.

tion *ClientEarth*, supported by several pension funds from Belgium, Denmark, France and Great Britain, which together hold more than twelve million shares, filed a shareholder lawsuit against the board of *Shell PLC* before the *High Court for England and Wales*. *ClientEarth* accuses the *Shell* board of failing to present an "energy transition strategy" with effective short- and medium-term goals, thereby failing to address the material and foreseeable risks that climate change poses to the company. This is the world's first shareholder lawsuit on the table of a court, which one fund representative hopes will finally wake up the energy industry.[59]

5. CLIMATE PROTECTION UNDER GERMAN CONSTITUTIONAL LAW – THE RECENT DECISIONS BY THE FEDERAL CONSTITUTIONAL COURT

For a long time, environmental and even more so climate protection had not been given special consideration in the *Grundgesetz* (GG), the German Federal Constitution. Only after many attempts was the protection of natural foundations of life enshrined as a state objective in Art. 20a GG.[60] Through the decision of the *BVerfG* of 24 March 2021, the provision of Art. 20a GG, and climate protection have experienced a significant constitutional upgrade.

First of all, the court confirms the admissibility of all constitutional complaints lodged by individuals and thus clearly distinguishes itself from the *ECJ*. While according to the "Plaumann formula" applied by the *ECJ*, legal protection is granted only in the event of concrete individual concern. By contrast, in the opinion of the *BVerfG*, a large number of potentially affected persons do not preclude an individual right to fundamental rights.[61] The court thus escapes the criticism that effective legal protection would come too late in the event of damage that has already occurred.[62]

In its guiding principles, which became binding law in Germany according to § 31 of *BVerfG's* Rules of Procedure, the Court stipulates a duty of the state

[59] ClientEarth files climate risk lawsuit against Shell's Board with support from institutional investors, Press release 9.2.2023, https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/.

[60] Calliess, C., *op. cit.* (fn. 30), p. 324; Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 19 pp.

[61] BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 110.

[62] Meyer, S., *Grundrechtschutz in Sachen Klimawandel?*, Neue Juristische Wochenschrift (NJW), no. 13, 2020, p. 899; Freytag, C., *Klimaklagen gegen die EU und Deutschland. Tagungsbericht*, Zeitschrift für Umweltrecht (ZUR), no. 10, 2019, p. 572.

to protect life and health from the dangers of climate change. This duty of protection under objective law also applies to future generations. Art. 20a GG obliges the state to enforce climate protection and the establishment of climate neutrality but does not grant climate protection priority over other constitutional interests with which it must be balanced. However, as climate change progresses, the relative weight of the climate protection imperative is growing. Art. 20a GG is a justiciable legal norm that is intended to bind the political process in favor of ecological concerns, also with a view to future generations. Regardless of the global nature of climate change and the multitude of causes and polluters, the state cannot shirk its responsibility. In the view of *BVerfG* fundamental rights guarantee an intertemporal safeguard of freedom and protect against a unilateral shift of the CO_2 reduction burdens according to Art. 20a GG in the future. The protection of future freedom therefore requires that the transition to climate neutrality be initiated in good time.[63] One major content of the argument was the determination of a residual CO_2 budget for Germany.[64] In doing so, the court relied on the statements of the *IPCC* and the described necessity to stop climate change through CO_2 reduction, in particular to avoid reaching tipping points.[65] The remaining budget has become thus part of the constitutional principles of climate protection.[66]

In response to the decision, the Federal Government and the *Bundestag*, the Federal Parliament, amended the Climate Protection Act just a few months later in August of the same year and significantly increased the level of ambition for CO_2 reductions by 2030. The determination of a residual CO_2 budget has twofold practical significance: On the one hand, there is no longer any legal doubt about the existence of climate change and, on the other hand, the respective achievement of the reduction targets becomes binding and judicially verifiable. The commitment to a residual budget already had two rather surprising consequences: For example, constitutional complaints against individual federal states on climate protection were rejected for lack of state-specific climate targets[67] and for the same reason a procedure for setting a speed limit on motorways failed.[68] In a further March 2022 ruling on a wind farm, the *BVerfG* reiterated its decision from the previous year. The Court again cla-

63 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30.

64 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 187 pp., 203 pp.

65 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 16 pp., 31 pp.; Britz, G., *Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 12, 2022, p. 825.

66 Rodi, M.; Kalis, M., *op. cit.* (fn. 46), p. 10.

67 BVerfG 18.1.2022 – 1 BvR 1565/21 pp.; Britz, G., *op. cit.* (fn. 65), p. 832.

68 BVerfG 15.12.2022 - 1 BvR 2146/22, NVwZ, 2023, pp. 158.

rified that the objection of only a slight improvement as a result of regional reductions compared to global CO_2 pollution was ineffective. The expansion of renewable energies serves the climate protection goal of Art. 20a GG, because with the electricity generated CO_2-free reduces the consumption of fossil fuels and the dependence on energy imports.[69]

The *BVerfG* bases its decision of March 2021 on an intertemporal safeguarding of freedom, which would be impaired by insufficient climate protection measures and thus on an unconstitutional interference with fundamental rights. In this respect, this argument for a future-oriented protection of liberty reinforces the climate protection requirement currently to be observed under Art. 20a GG.[70] Climate protection measures could also be derived from the recognised general protection rights of the German Constitution[71], which are also open to extensions through the legal development of the EU-Charter of Basic Rights and the European Convention of Human Rights (ECHR).[72] The constitutional claims for protection result in an obligation to protect the holders of fundamental rights by acting positively against non-sovereign dangers[73] and a requirement of the effective fulfilment of duty.[74] This leads to parallels with the safeguards to avert terrorist threats. Here, too, it is a question of averting a damage effect on a large scale with a based on the individually and collectively high probability of occurrence of the violation of high-ranking protected interests. In this case, it is sufficient that the occurrence of damage as such is sufficiently probable to trigger the state's obligation to protect, the proof of a specific causal course is not required.[75] In German law, the principle of proportionality is of great importance. It contains a so-called prohibition of excess, which limits measures that are not necessary and interfere too deeply with fundamental rights. The so-called undersize prohibition, on the other hand, serves as a corrective for omitted or insufficient measures. The prohibition of undersize associated with protection rights serves as a control norm and refers to future events and developments. In contrast to other interferences with fundamental rights positions, the prohibition of undersize is not bound by concrete and present violations. With regard to climate protection, the prohibition of undersize is to be measured against the optimisation requ-

69 BVerfG 23.3.2022 – 1 BvR 118/17, NVwZ, 2022, pp. 861.
70 Britz, G., *op. cit.* (fn. 65), pp. 830.
71 Britz, G., *op. cit.* (fn. 65), p. 831.
72 Callies, *op. cit.* (fn. 30), pp. 337; Fellenberg, F., *op. cit.* (fn. 34), p. 915.
73 Klein, O., *Das Untermaßverbot – Über die Justiziabilität grundrechtlicher Schutzpflichterfüllung*, Juristische Schulung (JuS), no. 46, 2006, p. 960.
74 Klein, *op. cit.* (fn. 73), p. 961.
75 Meyer, S., *op. cit.* (fn. 62), p. 896.

irement under Art. 20a GG, which was strengthened recently by the *BVerfG* decision. This obligation is violated in case of inaction or inadequate action.[76] Accordingly, certain distance requirements must be observed in order to avoid the achievement of irreversible tipping points.[77] In this respect, the decision of 24 March 2021 marks a "turnaround in environmental constitutional law": from now on, it can be reviewed in court whether legislators are fulfilling their obligations.[78] And this judicial review is all the more effective if distance requirements are defined.[79] The rest is mechanics: If there are corresponding infringements of protection rights, suitable reduction measures have to follow.[80] And finally, Article 20a GG now provides justifications with which the legislature can justify interferences with fundamental rights for the purposes of climate protection,[81] which the *BVerfG* itself has already used in its recent wind farm decision.[82]

6. CLIMATE CHANGE LITIGATION UNDER GERMAN CIVIL LAW

For some time now, private companies have also been subject to the above mentioned automatic reduction requirements. Large emitters in particular, such as companies in the energy industry or the automotive industry, are exposed to corresponding climate lawsuits. Members of other industries could soon follow, including food producers, especially meat producers. In fact, the civil lawsuits also respond to the problem of the commons: the atmosphere as a freely accessible space for all, in which the restraint of one side enables and encourages overuse by the other side.[83] In this respect, civil liability "prices" the originally free access and is thus a way to internalize the social costs of climate change.[84]

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76 Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 220 pp.

77 Callies, *op. cit.* (fn. 30), pp. 329; Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 42; Freytag, C., *op. cit.* (fn. 62), p. 573.

78 Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 49; Britz, G., *op. cit.* (fn. 65), p. 827.

79 Callies, C., *op. cit.* (fn. 30), p. 331.

80 Meyer, S., *op. cit.* (fn. 62), pp. 898.

81 Britz, G., *op. cit.* (fn. 65), p. 829.

82 BVerfG 23.3.2022 – 1 BvR 118/17, NVwZ, 2022, pp. 861, Rn. 100 pp.

83 Wagner, G., *Klimaschutz durch Gerichte*, Neue Juristische Wochenschrift (NJW), no. 31, 2021, p. 2257.

84 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 577; Wagner, G., *op. cit.* (fn. 83), p. 2262.

Regardless of the global nature of climate change, it is undisputed that national courts can be called upon in climate claims. International jurisdiction exists in the courts of the EU member states for actions against companies at their registered office or their administration or principal place of business. In doing so, damages can be asserted at the respective place of success or action, which must be decided according to the law of the damage or the chosen place of jurisdiction.[85]

In Germany, two lines of argument can currently be observed. On the one hand, the plaintiffs request that the defendant companies reduce their CO_2 emissions by specified quantities over a certain period of time and refrain from manufacturing and distributing certain products. With regard to the increased reduction targets, it is argued that without compliance with them, absolute rights of the plaintiffs, such as life and health, liberty and property, would be violated. Claims like this have been brought in cases concerning the automotive industry. On the other hand, in some cases, such as those against energy companies, compensation is sought for imminent property damage caused by climate change.

The plaintiffs are individuals; a model declaratory action under § 606 Civil Procedure Code (ZPO) would also be possible if many people claim to suffer the same damage due to climate-damaging behaviour of a company.[86]

In substantive law, various bases for claims come into consideration, and while these have similar threshold requirements, they are not easy to explain in German civil law and even more difficult to prove.

When it comes to the omission of climate-damaging behaviour or the elimination of the corresponding damage, § 1004 Sec. 1 of the German Civil Code (BGB), comes into consideration as a standard. The prerequisite is that the property of the injured party is affected. General phenomena such as drought and heat or financial losses, such as loss of income, for example suffered by a ski lift operator as a result of a lack of snowfall cannot be made clear.[87] § 1004 Sec. 1 BGB in conjunction with § 823 Sec. 1 BGB analogously allows an extended liability. This also covers other absolute rights, in particular life and health, as well as the general personal right. Accordingly, the plaintiffs can also rely on health impairments or - with reference to the *BVerfG* decision - on their intertemporal right to freedom and a disturbed development of personality in the event of the CO_2 budget being used up. Effects of an intertemporal right of

85 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), pp. 593.
86 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 4.
87 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 597.

freedom in the circle of protected interests according to § 1004 Sec. 1 BGB in conjunction with § 823 Sec. 1 BGB analogously exist, if fundamental rights are directly binding. This applies to public undertakings or those entities which are predominantly publicly owned.[88] These include, for example, airports. In the case of exclusively private companies, the interests of both parties must be weighed against each other. To the extent that the challenged conduct can still be regarded as proportionate and not exclusively self-serving, the reliance on the intertemporal right to freedom should not lead to success.[89] In addition, the civil law basis for claims refers to a present, still existing damage[90], which has not yet occurred in the case of future impairments and therefore liability is excluded.[91]

The next high hurdle of liability is the causality between the damage and its causation, more precisely in the attribution of the cause to the defendant.[92] Global climate change has many causes. As a result, a defendant's contribution can easily be disregarded without the damage event being omitted.[93] Even in the case of "climate sinners", the individual contribution is so small globally that it is not significant.[94] Admittedly, the co-causality of an individual damage contribution may also be sufficient for liability. However, case-law also requires individualized causal contributions here.[95] This problem is acknowledged even by the operators of corresponding climate lawsuits. Although, in the case of the Peruvian farmer's complaint, even though there is no doubt as to the causality of floods to climate change[96], *RWE's* individual contribution has not yet been proven.[97]

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88 BVerfG 22.2.2011 – 1 BvR 699/06, NJW 2011, p. 1201.

89 BVerfG 22.2.2011 – 1 BvR 699/06, NJW 2011, p. 1207; BVerfG 11.4.2018 – 1 BvR 3080/09, NJW 2018, p., 1667, p. 1670.

90 Berger, C., in: Jauernig, O. (ed.), *Bürgerliches Gesetzbuch. Kommentar*, 18. Aufl., Beck-Verlag, München 2021, BGB § 1004 Rn. 7.

91 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), pp. 5.

92 Berger, C. *op. cit.* (fn. 90), Rn. 16.

93 Teichmann, A., in: Jauernig, O. (ed.), *Bürgerliches Gesetzbuch. Kommentar*, 18. Aufl., Beck-Verlag, München 2021, BGB § 823 Rn. 22 pp.; Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 6; Risse, J.; Haller, H., *Klimaschutzklagen und Streitverkündung gegen den Staat*, Neue Juristische Wochenschrift (NJW), no. 48, 2021, p. 3502; Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 599; Voland, T., *Zur Reichweite von Menschenrechten im Klimaschutz*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 3, 2019, p. 118.

94 LG Essen 15.12.2016 – 2 O 285/15, NVwZ, 2017, p. 734.

95 BGH 10.12.1987 – III ZR 220/86, NJW 1988, p. 480; BVerfG 25.6.1998 – 1 BvR 180/88, NJW 1998, p. 3265.

96 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 599

97 Verheyen, R., *op. cit.* (fn. 4), p. 134.

Finally, the defendant must have acted unlawfully. As a rule, companies will be able to rely on having acted within the permits granted to them by the state, which is why a breach of duty cannot be assumed.[98] In addition, energy suppliers can claim to serve important interests of the general public.[99] This argument will be less likely to be put forward by other companies whose products cannot demonstrate a substantive linkage to the general interest. It could also be argued that the conduct covered by permits, allowing certain emissions under licensing law, should also be permissible under international law and that the approval criteria at the place of origin should also correspond to those of the place of damage. In addition, it should have been possible for the injured parties to participate in the proceedings.[100]

Such considerations, which address the global character of climate change and problem the relationships between causation and place of damage, challenge the civil law methodology and its attribution criteria. In the Netherlands, with its civil law system open to general principles, the *Rechtbank Den Haag* argued in the proceedings against *Shell* with "soft law". This consists of elements of international law, such as agreements, guidelines, resolutions and declarations, in contrast to the "hard law" of legally binding obligations enforceable at court.[101] Using the "soft law"-argument the Dutch court established a standard of care that defines additional due diligence obligations independent of the local approval framework. In interpreting the "unwritten standard of care", "human rights and the values they embody" must also be taken into account.[102] This standard of care goes beyond compliance with national laws and regulations.[103] Consequently, an appeal to participation in emissions trading is also ruled out if it specifies less ambitious reduction targets.[104] As a result, the judgment obliges *Shell* to do nothing less than to change its business model, insofar as existing obligations towards third parties allow it to do so.[105] The court is fully aware of the consequences it demands and states succinctly:

98 Fellenberg, F., *op. cit.* (fn. 34), p. 920.

99 Weller, M.-P.; Tran, M.-L., *op. cit.* fn. 19, p. 599; Giesberts, L.; Haas, W., *op. cit.* fn. 55, p. 7.

100 Weller, M.-P.; Tran, M.-L., *op. cit.* fn. 19, pp. 595.

101 *Hard law/soft law*, https: // www.ecchr.eu/glossar/hard-law-soft-law (13.4.2023).

102 Rechtbank Den Haag 26.5.2021 – C-09/571932, ECLI:NL:RBDHA:2021:5339, sec. 4.4.9.

103 Rechtbank Den Haag 26.5.2021 – C-09/571932, ECLI:NL:RBDHA:2021:5339, sec. 4.4.9.

104 Verheyen, R.; Franke, J., *Deliktsrechtlich begründete CO_2-Reduktionspflichten von Privatunternehmen*, Zeitschrift für Umweltrecht (ZUR), no. 11, 2021, p. 629.

105 Verheyen, R.; Franke, J., *op. cit.* fn. 104, p. 628.

"Due to the serious threats and risks to human rights ... [through climate change] private companies such as ... [Shell] will be forced to take drastic measures and make financial sacrifices".[106] The critical comments are also drastic: "From the point of view of the company concerned, one's own situation must appear as the far-reaching lawlessness in the face of a comprehensive judicial freedom of decision reminiscent of arbitrariness."[107]

In Germany, too, fundamental rights have indirect effect[108], but it can hardly be assumed there is a similar openness to the application of other sources of law under German civil law.[109] Nevertheless, the statements on the "disruptive behavior" of the defendant and the associated legal duty to take care, the advantages derived from the economic activity and the legal consequences could certainly be included in the overall consideration and weighing to be carried out according to § 1004 BGB in conjunction with § 823 Sec. 1 BGB analogously.[110] At the latest since the *BVerfG* decision of March 2021, intertemporal civil liberties and Art. 20a GG have had an impact on civil law standards. But, in contrast, the *BVerfG* decided at the same time that Germany's CO_2 reduction obligation is regulated in the Climate Protection Act.[111] Irrespective of any future adjustments, this means that the framework is thus defined and everything that moves within it and the corresponding authorizations is to be regarded as permissible. This argument is also used by the District Court of Munich in its dismissive judgment on the climate lawsuit against *BMW*.[112] In the view of the *BVerfG*, the constitutionally required climate protection refers to the regulation and reduction of emissions as a whole and not to individual measures taken or omitted.[113]

In addition, § 906 Sec. 2 sentence 2 BGB provides that in an event of impairment of a property can be considered as a no-fault claim for compenzation in German civil law. It is a claim for compensation under neighbouring

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106 Rechtbank Den Haag 26.5.2021 – C-09/571932, ECLI:NL:RBDHA:2021:5339, sec. 4.4.54.

107 Wegener, B. *op. cit.* (fn. 7), p. 430.

108 BVerfG 15.1.1958 – 1 BvR 400/51, BVerfGE 7, p. 198.

109 Fellenberg, F., *op. cit.* (fn. 34), p. 919; Rodi, M.; Kalis, M., *op. cit.* (fn. 46), p. 10; Voland, T., *op. cit.* (fn. 93), p. 117.

110 Verheyen, R.; Franke, J., *op. cit.* (fn. 104), p. 631; Ekardt, F., *op. cit.* (fn. 53), p. 16.

111 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 7.

112 LG München, 7.2.2023 - 3 O 12581/21, Haufe-NEWS (www.Haufe.de) 8.2.2023.

113 BVerfG 18.1.2022 – 1 BvR 1565/21 pp., Rn. 4; Ekardt, F., *BVerfG-Nichtannahmebeschluss zu den Landesklimaklagen*, Zeitschrift für Umweltrecht (ZUR), no. 5, 2022, p. 288.

law[114], which is why the provision does not apply in the case of distant damage or remote effects of causes of damage.[115] The Higher Regional Court (OLG) Hamm as the appellate court in the *RWE* case apparently takes a different view. However, the court does not elaborate on its reasoning.[116]

Difficulties of presentation and proof arise also in the case of general tort claims under § 823 Sec. 1 BGB. Here, too, causality and illegality are likely to be doubtful. Fault in the form of negligence is also required, for example, due to the breach of duty of care obligations. Any fault, in turn, would have to be denied if approvals were complied with.[117] An intentional act can also be considered as fault. Cases of deliberate damage are theoretically possible but excluded for the cases dealt with so far in Germany. Whether and to what extent the recently known behavior of *ExxonMobil*, which is said to have known since the 1970s about the consequences of the CO_2 emissions caused not least by them,[118] already falls into this category, is an open question. This would have to be answered in the affirmative if licenses granted had been misused in this respect. There is currently a lack of evidence for this.

The two remaining options in German civil law, namely § 823 Sec. 2 BGB and § 826 BGB, also do not help climate lawsuits to succeed. On the one hand, there is a lack of third-party protection of the corresponding public law provisions, which would be violated by emissions that are then contrary to approval, or by the intent of a defendant to cause damage.[119]

Irrespective of the rather difficult-to-enforce direct civil liability for climate damage, companies will increasingly be exposed to corresponding market mechanisms. The financial and capital markets are already sufficiently sensitized to climate protection requirements, and the Taxonomy Regulation, EU 2020/852, provides a corresponding legal framework for sustainable investments.[120] In addition, companies open themselves up to extended liability by claiming a corporate environmental purpose for themselves as a whole and making promises within the framework of *Corporate Social Responsibility (CSR)*. In doing so, they are subject to corresponding reporting, planning and due dili-

114 Berger, C., in: Jauernig, O. (ed.), *Bürgerliches Gesetzbuch. Kommentar*, 18. Aufl., Beck-Verlag, München 2021, BGB § 906 Rn. 14.

115 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 7.

116 OLG Hamm 30.11.2017 – I-5 U 15/17, ZUR 2018, p. 119; Heymann, T., *op. cit.* (fn. 38), p. 62.

117 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 8.

118 *Das Geld, der Planet und das Öl*, FASZ, 15.1.2023, p. 53; *Im Namen des Profits*, FR, 30.1.2023, pp. 18

119 Giesberts, L.; Haas, W., *op. cit.* (fn. 55), p. 8.

120 Heymann, T., *op. cit.* (fn. 38), p. 63.

gence obligations to comply with *CSR* standards, which in turn have an impact on the capital market and investor behaviour.[121] Deviations or even acts of infringement from such promises or claims then justify liability. Furthermore, the new Supply Chain Due Diligence Acts establish detailed reporting requirements and result in additional liability obligations.[122] This also gives rise to liability risks. The importance of such special due diligence measures has led to two court proceedings against the energy group *Total S.A.* in France on the basis of the *Loi de vigilance*, which have not yet been decided.[123]

7. CLIMATE CHANGE LITIGATION – FUNDAMENTAL PROS AND CONS

Climate lawsuits are facing fierce criticism. The most important accusation is that the principle of the separation of powers is violated. The argument is that any necessary measures against climate change are reserved solely for the democratically elected executive and legislative branches.[124] These entities would have to select the appropriate means and weigh them against other interests. Examples include economic prosperity and the preservation of jobs, low prices for energy and social stability, but also other environmental protection aspects such as nature conservation or animal welfare in connection with the expansion of alternative energies or the continued use of nuclear power. The freedom of choice of governments and legislators also includes taking adaptation measures instead of reduction measures and, for example, expanding flood protection.[125]

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121 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 19), p. 600.

122 Bomsdorf, T.; Blatecki-Burgert, B., *Haftung deutscher Unternehmen für "Menschenrechtsverstöße"*, Zeitschrift für Rechtspolitik (ZRP), no. 2, 2020, pp. 42; Giesberts, L., *Sorgfaltspflichten für die Lieferkette*, Neue Zeitschrift für Verwaltungsrecht (NVwZ), no. 20, 2022, pp. 1497, 1501; Lavite, C., *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence*, VerfBlog, 2022/6/16, https://the-french-loi-de-vigilance-prospects and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/, DOI: 10.17176/20200616-124112-0.(16.6.2020).

123 Weller, M.-P.; Tran, M.-L., *op. cit.* (fn. 16), pp. 588; *Total en Ouganda: Point d'étape sur la première action en justice sur le fondement de la loi sur le devoir de vigilance*, https://www.business-humanrights.org/fr/dernières-actualités/total-en-ouganda-point-détape-sur-la-première-action-en-justice-sur-le-fondement-de-la-loi-sur-le-devoir-de-vigilance-par-survie-et-les-amis-de-la-terre/ (22.10.2020).

124 Wagner, G., *op. cit.* (fn. 83), p. 2259; Wegener, B., *op. cit.* (fn. 51), p. 5.

125 Groß, T., *op. cit.* fn. 27, p. 341.

Above all, "decisions about sacrifice" (Bernhard Wegener), about renunciation and prioritization, can only be made by the legislature.[126] The latter must have flexible room to maneuver, as situations and priorities can change rapidly and previous requirements must be corrected.[127] This only became apparent again in the wake of the COVID-19 pandemic and Russia's war of aggression on Ukraine.[128] In both cases, the executive and the legislature had demonstrated their ability to act quickly and decisively.[129] This criticism weighs heavily, especially when it is combined with the reference to the fact that in 2012 the Federal Government submitted a report to the *Bundestag* on future challenges in civil protection.[130] The report also unfolds scenarios of a pandemic caused by modified SARS viruses, exactly what COVID-19 has caused since 2019. Hypothetically, it is asked how the *BVerfG* would have decided in 2013 on the necessity of precautions to avert risks to life and health and to avoid restrictions on freedom.[131] Apparently, the topic met with little interest, no one worried, and the *BVerfG* did not have to decide. After the outbreak of the pandemic, it quickly became apparent that Germany lacked many items, among many others face masks, ventilators, and air purification devices and, above all, vaccines and medicines. And, not to mention the limited resources in hospitals. The seven years of preparation were not used, with the result that tens of thousands died and protective measures led to drastic restrictions on freedom.

However, both examples can also be interpreted differently. The lack of precautionary measures to protect against a pandemic caused by SARS viruses could be taken as evidence that legislators react too late to science based forecasts concerning serious dangers and set priorities inappropriately. Even before Russia's war of aggression against Ukraine, there were sufficient signs of the Russian Federation's aggressive foreign policy, which did not shy away from violence: the invasion of Georgia in 2008, the occupation and annexation of Crimea in 2014, and military support for separatists in Donbass in the same year, as well as carpet bombing in support of the *Assad* regime in the Syrian civil war. From today's perspective, it can be stated that neither the Federal Government nor the *Bundestag* reacted to these warning signals. Futhermore Germany deepened its energy dependence on Russia. A change of course has

126 Freytag, C., *op. cit.* (fn. 62), p. 572; Fellenberg, F., *op. cit.* (fn. 34), p. 914.
127 Oexle, A.; /Lammers, T., *op. cit.* fn. 48, pp. 1726.
128 Oexle, A.; /Lammers, T., *op. cit.* fn. 48, pp. 1726.
129 Verheyen, R., *op. cit.* fn. 4, p. 135.
130 Wagner, G., *op. cit.* fn. 83, p. 2259.
131 *Ibid*.

only taken place since the "turning point" proclaimed by Federal Chancellor *Scholz* on 27 February 2022. However, both examples are very well suited as evidence for the need for timely action, because later measures lead to much higher costs.[132]

The European Parliament has recognised the signs of the times. On 28 November 2019, it declared a climate and environmental emergency for the EU, while at the same time reaffirming the principle of the separation of powers: the necessary measures to achieve the 1.5° C-target must be taken within the framework of the democratic process and, taking into account competitiveness, the stability of democratic institutions, and the undiminished preservation of fundamental rights.[133] With regard to climate actions brought before national courts, it is also argued that climate protection in the EU falls within the competence of the Union and therefore belongs exclusively before EU courts.[134] In terms of content, however, this would change little according to the opposing view, since climate protection requirements are also possible and necessary under EU law.[135]

There is also criticism that decisions by courts regularly lead to final, individualised specifications. This inappropriately limits the discretion of the government and legislature to act for the public as a whole. Such an approach is completely unacceptable if courts order certain results but have neither indications nor knowledge of the means and technologies how the goals are to be achieved.[136] No court may condemn a government or legislature unless it itself is convinced of the actual achievability of a proposed solution and believes it can be the basis for a judgment or ruling. It is the plaintiff's task to make sufficient submissions in this regard in the proceedings, otherwise the action should be dismissed.[137] It is also emphasized that the contribution of individual countries or emitters is far too small to be relevant at all in view of the diversity and complexity of the causes of climate change. The emissions that may have been reduced as a result of individual court rulings would quickly be replaced by others.

The criticism does not deny climate change. Rather, it is stated that the

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132 This argument was explicitly used by Gerechtshof Den Haag 200.178 245/01, ECLI:NL:GHDHA: 2018:2591 Rn. 59.

133 Entschließung des Europäischen Parlaments v. 28.11.2019 zum Klima- und Umweltnotstand, P9_TA-PROV(2019)0078.

134 Wegener, B., *op. cit.* (fn. 7), p. 429.

135 Frenz, W., *Klimaschutz und EU-Grundrechte*, Europarecht (EUR), no. 1, 2022, pp. 5.

136 Breuer, R., *Klimaschutz durch Gerichte ?*, Neue Juristische Wochenschrift (NVwZ), no. 31, 2022, pp. 1236.

137 Oexle, A.; Lammers, T., *op. cit.* (fn. 48), p. 1724.

efforts made so far have not yet led to sufficient results.[138] This is where the advocates of climate lawsuits come in and affirm that collective causation does not exempt from individual responsibility.[139] It is undeniable that the state must face up to the problem.[140] This even includes a commitment to extra-territorial climate protection. In any case, climate lawsuits are the right means to demand compliance with obligations to act and protect. This would not violate the principle of separation of powers and the rights of government and parliament. Rather, fundamental rights have the very purpose of "narrowing the scope for such solutions where certain fundamental values are affected. Ultimately, they define a certain corridor within which democratically achieved solutions are found."[141] The more concretely negative consequences can be determined that occur in the event of the absence of defensive measures, the more likely a fundamental right is to be assumed.[142] This idea resurfaces in the fundamental arguments of the *BVerfG* decision on the Climate Protection Act.[143]

8. CHALLENGES TO THE SYSTEM OF LIBERAL PARLIAMENTARY DEMOCRACIES

Undeniably, climate lawsuits have yielded results. For Germany, this applies in particular to the *BVerfG* decision of 24 March 2021. In administrative practice, the climate protection requirement under Art. 20a GG will gain great weight and play an increasing role in future approval decisions.[144] If the remaining CO_2-budget is reached or even exceeded in accordance with §§ 3, 4 of the Climate Protection Act, further emission permits appear to be excluded. Subsidies linked to the use of fossil fuel energies must also be questioned. It does not seem to make much sense to reduce greenhouse gases at great expense while at the same time promoting their production with state subsidies. A corresponding subsidy reduction was also mentioned at COP26 in Glasgow in 2021.[145]

The comments on the *BVerfG* decision indicate considerably more far-reaching consequences for politics and democracy. The court had specified "plane-

138 Hanschel, D.; Schultze, M., *op. cit.* (fn. 17), p. 169.
139 See VG Berlin 31.10.2019 – 10 K 412/18, NVwZ, 2020, p. 1293.
140 Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 54 pp.
141 Hanschel, D.; Schultze, M., *op. cit.* (fn. 17), p. 169.
142 Oexle, A.; Lammers, T., *op. cit.* (fn. 48), p. 1725; Groß, T., *op. cit.* (fn. 27), p. 342.
143 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 117, 120 pp.
144 Britz, G., *op. cit.* (fn. 65), p. 834.
145 Stäsche, U., *op. cit.* (fn. 13), pp. 205.

tary laws" as absolute guidelines for politics.[146] From now on, ecological limits would dictate politics.[147] "Never before has a state reservation of provision, planning and distribution been derived from fundamental rights in a more comprehensive and unrestricted manner."[148] The possibilities of judicial review praised by the proponents are precisely the result of the violation of the principle of separation of powers and the resulting transgression of competences.[149]

It seems, however, that the critics are losing the argument. They admit that climate lawsuits are an expression of a dramatic loss of trust in state authorities that are unable and not willing to act and an outlet for frustrations in proper representation within the parliamentary system.[150] With climate lawsuits, well-organized individuals and groups gain an influence on the political decision-making process that they could never get in the parliamentary process due to a lack of a majority. As a result, the objective law adopted by the parliamentary majority is suspended because individuals with divergent preferences rely on their subjective rights in court and thus succeed.[151]

These plaintiff groups are characterized by the fact that they organize themselves along certain personal identity concepts. In this respect, for example, origin, skin colour, sexual orientation, or other essential characteristics or insights that require unconditional willingness to follow are identity-forming.[152] From these concepts of identity result demands for representation. That is, a minority that is defeated in the democratic process provides itself with an instrument to reflect its point of view in the law, because a qualitative, affected minority may not be ignored.[153] The claim to representation is secured by accusing society of structural defects that ignore minority interests – or of dubious intentions, such as outright racism or capitalist greed for profit.[154] In extreme cases, this development can lead to neutralization of the majority principle in representative democracy.[155] Accordingly, "climate protection,

146 *Ibid*.
147 Wegener, B., *op. cit.* (fn. 7), p. 428.
148 Rodi, M.; Kalis, M., *op. cit.* (fn. 46), p. 8.
149 Breuer, *op. cit.* (fn. 136), pp. 1237.
150 Wegener, B., *op. cit.* (fn. 7), p. 427.
151 Schorkopf, F., *Menschenrechte und Mehrheiten*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), no. 1, 2022, p. 26.
152 *"Meine Person ist uninteressant – es ging darum, den Forst zu retten"*, FR, 26.1.2023, pp. F 2.
153 Schorkopf, *op. cit.* fn. 151, p. 34.
154 *Ibid*., p. 36.
155 *Ibid*., pp. 37.

which is forced by human rights and fundamental rights [have]... the potential to divide society, because the costs of this large-scale project are difficult to reconcile with what is considered necessary in terms of climate policy."[156] As a further consequence, the "question of truth" with its irreconcilable contradictions threatens to return to liberal democracy, provided that possibilities and compromises are narrowed by courts by identifying a certain option as the only correct solution on human rights grounds.[157] This consideration casts a glaring light on the criticized violation of the separation of powers and the prerogative of decision-making by the legislature.

However, "truths" also exist in liberal democracies. They form the basis for an internal consensus, and thereby compromises. Such values include human dignity and the rule of law. In the EU, there has been a dispute for years about whether the governments of Poland and Hungary may give the principle of the rule of law its own content, contrary to the view of the EU Commission, based on their own special "national identities".[158]

Incidentally, in the historical development towards liberal parliamentary democracy, fundamental and human rights have contributed to suppressing claims to truth, precisely because a minimum level of protection was always guaranteed in connection with the guarantee of the rule of law and therefore one's own position did not have to be fought without compromise.[159] Especially in view of the enormous challenges of coping with climate change and the necessary decisions to be taken in the conflict between numerous different interests, it is indispensable to keep the democratic process open and to enable majorities.[160]

The result of the referendum "Berlin 2030 climate-neutral" on 26 March 2023 provided a realistic indication of the contrary positions within the German population. The 442,210 votes in favour were offset by 423,418 against. The popular initiative to initiate a corresponding legislative procedure ultimately failed due to the minimum quorum of 607,518 votes in favour, which were clearly missed.[161] If one interprets the near-stalemate of the votes as an

156 *Ibid*., p. 41.
157 *Ibid*., p. 41.
158 *Ibid*., p. 42.
159 *Ibid*., p. 45.
160 *Ibid*., p. 45.
161 *Klima-Volksentscheid gescheitert – Initiative hat nötige Anzahl an Ja-Stimmen verfehlt*, Neue Zürcher Zeitung 28.3.2023, https://www.nzz.ch/international/volksentscheid-berlin-entscheidet-ueber-klimaziele-2030-ld.1732104; *Klimaschutz? Nicht ohne das Volk!*, FAZ, 27.3.2023, https://www.faz.net/aktuell/politik/inland/klimaschutz-geht-nicht-ohne-den-buerger-volksentscheid-in-berlin-18780247.

expression of about half of the approval or rejection of more ambitious climate protection goals, the significant low voter turnout stands for a widespread indifference to climate protection as an absolutely urgent issue for political action. For many people, the Russian war of aggression against Ukraine, the enormously increased energy costs, the generally gloomy economic forecasts and the noticeable inflation seem more important than the rather abstract danger of future dramatic climate changes. All this underlines the importance of openness and flexibility in the political process. Viewed soberly, these options continue to exist without restriction.

The role and scope for the legislature are affected by the three "landmark decisions" in the Netherlands and Germany, but not inadmissibly restricted. All defendants have announced their intention to achieve the prescribed objectives;[162] in Germany, the law was amended immediately. In the judgments themselves, the courts emphasise that the principle of the separation of powers remains intact and that essential further measures must be taken to implement minimum requirements for the government and legislature.[163]

It is also conceivable that a more intensive reference to fundamental values can further promote climate protection. From an evolutionary biological and cultural anthropological point of view, it is recognized that human morality has evolved to solve problems that require collective rather than individual rationality. Especially in the case of common goods, the problem of the commons becomes apparent, in which rational individual interests necessarily lead to overuse and destruction. Morality, on the other hand, has the effect of behaving contrary to individual rationality in such a way that this is conducive to community interests and goods. In this respect, values such as care, fairness and loyalty do not stand in the way of mere reason but complement it in order to express collective rationality. In this respect, basic moral values are suitable for supporting the "socio-technical transformation" deemed necessary by the *BVerfG*[164] for achieving climate protection goals by supporting the willingness to behave accordingly in consumption, mobility and other energy use.[165]

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162 Voland, T., *op. cit.* (fn. 93), p. 115.

163 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 213; Britz, G., *op. cit.* (fn. 65), pp. 827; Ekardt, F. *op. cit.* (fn. 53), pp. 16.

164 BVerfG 24.3.2021 – 1 BvR 2566/18 pp., BVerfGE 157, pp. 30, Rn. 121.

165 Welsch, H., *Allein mit Vernunft ist das Klima nicht zu retten*, FR, 11.1.2023, pp.28.

9. THE FUTURE: GLOBAL ECOLOGICAL HUMAN RIGHTS?

It cannot be ruled out that the fallout triggered by the climate lawsuits extends far beyond climate protection as such to not only claims of a worldwide human right but to an "ecological subsistence minimum" and – further – to a subjective individual right of nature. This perspective may seem irritating at first glance, since human rights stem from the focus on the individual by liberal constitutional states;[166] collective references to nature, on the other hand, are more likely to be found in indigenous societies or states, such as Bolivia and especially Ecuador[167], in which these groups occupy a strong position. Observers say that nature there is "conceived as part of the third generation of human rights".[168]

However, the debate about averting man-made climate change does not seem to be a weak starting point to think about the replacement of the anthropocentric worldview and to start protecting nature for its own sake. The idea of an intrinsic value of nature as a barrier to individual freedom is still relatively new and neither recognized nor enforced.[169] One should not deceive oneself about the possible consequences. Anyone who complains that the revaluation of Art. 20a GG leads to considerable restriction of the freedom of choice and decision-making of government and parliament, and thus in the practical freedom of choice of countless citizens, is likely to worry even more about the incalculable consequences of legally manifested obligations towards nature. Such a shift from a current anthropocentric to an ecocentric model would have far-reaching consequences for all of us.[170] At the same time, the faults of our current legal system and the prerequisites that it ignores relative to climate action can hardly be seriously dismissed from the very existence of us all. When there was an extensive seal death in the northern German coastal area as a result of the spread of industrial waste, legal measures failed because the "seals ... would not have granted a power of attorney" to represent them before court.[171]

There should be no doubt that, in any case, all human beings have a right

166 Wegener, B., *op. cit.* (fn. 7), p. 425.

167 Gudynas, E., *Politische Ökologie: Natur in den Verfassungen von Bolivien und Ecuador*, Juridicum, no. 4, 2009, pp. 214.

168 *Ibid*.

169 Dürig, D.; Herzog, R.; Scholz, R.; Calliess, C., *op. cit.* (fn. 8), Rn. 56 pp.

170 Hanschel, D.; Schultze, M., *op. cit.* (fn. 17), pp. 170.

171 Klinger, R., *Das Sterben der Kohlekraftwerke oder: Zeit für eine Klimaschutzverbandsklage?*, Zeitschrift für Umweltrecht (ZUR), no. 4, 2010, p. 170.

to adequate living conditions. Insofar as human rights guarantees are affected by climate change, there is a justified obligation to act. Without an ecological subsistence minimum, without life and health, freedom is not meaningfully conceivable.[172] This also challenges the basic understanding of liberal constitutional states with their orientation towards the individual. Consequently, human rights must always be included in the balancing process and precautions must be taken.[173] At the same time, this means that successful individual lawsuits strengthen the protection of human rights in international environmental law.[174]

To ensure that such claims and rights of participation do not come to nothing, since the obligated state cannot be required to do more than it can afford[175], those affected must be involved more than before in the conclusion of environmental protection agreements.[176] The standards set in this way then mark new boundaries and targets that can help to ensure the survival of human civilization. That would be a great success for climate change litigation.

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173 *Ibid*., pp. 585.

174 Beyerlin, *op. cit.* (fn. 27), p. 542.

175 *Ibid*., p. 537.

176 *Ibid*., p. 540.

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Sažetak

Thomas Kreuder*

SUDSKI SPOROVI U VEZI S KLIMATSKIM PROMJENAMA – PERSPEKTIVA KOJA OBEĆAVA?

Poput klimatskih promjena, i tužbe zbog klimatskih promjena globalni su fenomen. Pod krinkom "strateških parnica" pojedinci i skupine nastoje uložiti dovoljne napore kako bi potaknuli države i kompanije na ublažavanje klimatskih promjena, pozivajući se pritom na temeljna ustavna i ljudska prava. Većina je tužbi do sada bila neuspješna. Nakon presuda nizozemskih sudova u predmetima Urgenda i Shell te odluke njemačkog Saveznog ustavnog suda iz ožujka 2021. godine stvoreni su sudski presedani za konkretne mjere. U ovome radu analiziraju se rasprave o tužbama zbog klimatskih promjena, dopuštajući kritičarima da kažu svoja mišljenja, te se iznose zaključci u pogledu učinaka tih sudskih postupaka na liberalne parlamentarne demokracije i nastanak globalnih ekoloških ljudskih prava, a možda čak i prava prirode.

Ključne riječi: klimatske promjene, tužbe zbog klimatskih promjena, strateške parnice, globalna ekološka ljudska prava

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