CHAPTER 4

Constitutionalising Climate Mitigation Norms in Europe

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1 Introduction

Climate Litigation is emerging in many jurisdictions in Europe, in the national context but also before the European Court of Human Rights (ECtHR). A category of these cases, that is particularly salient for constitutionalisation of mitigation norms, targets states for failing to reduce emissions in line with their international commitments within the context of the UN Framework Convention on Climate Change (UNFCCC). The first successful case against a state worldwide was the Dutch *Urgenda* case,[1] followed by the Irish climate case,[2] and *Neubauer* in Germany.[3] Other partially successful cases of this kind are the *Grande-Synthe* and *Notre Affaire à Tous* in France,[4] *Klimaatzaak* in Belgium,[5] and *Net Zero Strategy* case in UK.[6] The (ultimately) unsuccessful cases of *Plan B* in UK,[7] *Natur og Ungdom* in Norway,[8] the ongoing case of *Klimatická žaloba ČR* in Czech Republic,[9] the Finnish climate case,[10] and *Klimaseniorinnen* in

1 *State of the Netherlands* (*Ministry of Economic Affairs and Climate Policy*) *v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, Civil Division).

2 *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] Appeal no. 205/19 (Supreme Court) (*Irish case*).

3 *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court).

4 *Commune de Grande-Synthe v France* [2021] No. 427301 (Conseil d'Etat); *Notre Affaire à Tous and Others v France* [2021] Nos. 1904967, 1904968, 1904972, 1904976/4–1 (Paris Administrative Court).

5 *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] 2015/4585/A (Brussels Court of First Instance).

6 *R v Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 (*'Net Zero Strategy Case'*).

7 *Plan B Earth et al v Secretary of State for Transport* [2020] EWCA Civ 214.

8 *Nature and Youth Norway and others v Norway* [2020] HR-2020-24720P (Supreme Court).

9 *Klimatická žaloba ČR v Czech Republic* [2023] 9 As 116/2022 – 166 (Czech Supreme Court).

10 *Greenpeace Nordic and the Finnish Association for Nature Conservation v Finland* [2023] ECLI:FI:KHO:2023:62 (Supreme Administrative Court of Finland) ('*Finnish climate case*'). See for an analysis in English: K Kulovesi et al, 'Finland's first climate judgment: Putting

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Switzerland,[11] while not imposing emission reduction obligations, contributed to the ongoing climate constitutionalisation. Some of these unsuccessful cases have been escalated (*Klimaseniorinnen*[12] and *Carême/Grande-Synthe*[13]) and new cases (*Duarte Augustino*[14]) have been brought to the ECtHR.

This chapter examines the emerging phenomenon of '*climate* constitutionalisation'[15] in the multi-layered legal landscape of Europe. It focusses on cases against states attempting to address governance failure to mitigate climate change by relying on international or regional norms. Mushrooming climate cases against states directly and indirectly vest these norms that originate outside the domestic legal order with a higher legal rank than the domestic executive and legislative actions and choices to remain inactive that they challenge. This constitutionalises these norms relating to mitigation commitments and makes them into (enforceable) legal obligations. Often, later cases replicate successful legal arguments and strategies of earlier cases and hereby confers additional authority on their reasoning and outcome.[16]

Climate constitutionalism is a new and multifaceted phenomenon. We can see it emerging as the result of judges acknowledging the relevance of a stable climate for the enjoyment of fundamental rights, interpreting constitutional provisions in relation to the climate emergency, or vesting (international) political commitments with legal force by connecting them directly or via ordinary law with constitutional norms or human rights.

This chapter takes a 'court-centric approach', different from other approaches that have focused on the constitutionalisation of the climate in

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the government on notice' (*CCEEL*, 12 June 2023) <https://sites.uef.fi/cceel/finlands-first-climate-judgment-putting-the-government-on-notice> accessed 15 June 2023.

11 *KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications* [2020] 1C_37/2019 (Switzerland Supreme Court).

12 *KlimaSeniorinnen Schweiz et al v Switzerland*, no. 53600/20 (application communicated to the Swiss Government in March 2021 – Relinquishment in favour of the Grand Chamber in April 2022).

13 *Carême v France*, no. 7189/21 (Relinquishment in favour of the Grand Chamber in May 2022).

14 *Duarte Agostinho and Others v Portugal and 32 Other States*, no. 39371/20 (application communicated to the defending governments in November 2020 – Relinquishment in favour of the Grand Chamber in June 2022).

15 N Singh Ghaleigh, J Setzer and A Welikala, 'The Complexities of Comparative Climate Constitutionalism' (2022) 34 Journal of Environmental Law 517; J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019).

16 M Wewerinke-Singh and S Mead (eds), *Judicial Handbook on Climate Litigation, lawyers and legal scholars* (project of IUCN's World Commission on Environmental Law (WCEL) Climate Change Law Specialist Group (CCLSG), 2023).

codified norms.[17] It only engages with *European cases* and only with climate cases *against states that aims for general emission reduction*. This chapter contributes a perspective different from earlier work in at least two ways: First, it focusses on multi-layered legal interaction in climate litigation that is characteristic for *Europe*. Its approach is hence limited geographically and includes cases pending before ECtHR. Second, it pays specific attention to how judicial decisions attach legal value to political commitments within the context of the UNFCCC, predominantly by reading them in light of open-textured binding legal norms. This leads us to examine in particular the implications of constitutionalisation for the powers of the three branches of government, i.e. the implications for separation of powers.

In terms of legal basis, human rights norms are at the centre of climate constitutionalisation. The Dutch Supreme Court in *Urgenda,* for example, relied on the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR) in order to oblige the state to reduce the overall emissions from its territory.[18] Neither of these provisions directly refers to the climate or even the environment. While the ECtHR had earlier interpreted these rights to cover situations where people's (private) lives were affected by environmental pollution, the courts in *Urgenda* pioneered by interpreting Articles 2 and 8 ECHR to entail an obligation to mitigate climate change.

These legally binding norms are interpreted in light of strong and repeated political commitments and interpretations. Political leaders and governments have for their states repeatedly stated what they consider necessary to mitigate climate change. They have repeatedly strengthened and tightened their commitments considering the climate emergency that is currently unfolding. The judicial reasoning process uses these political commitments as means of interpretation to concretise what open-textured legally binding norms mean in practice and for the individual case. The concomitant of this process is that these political commitments, when they are (repeatedly) relied on by judges, are vested with legal legitimacy. This chapter traces the process of constitutionalisation, identifies the implications of its multi-layered dimension in

17 For other 'court-centric approaches' see: C Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 American Journal of International Law 40; JR May and E Daly, ′Global climate constitutionalism and justice in the courts′ in J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019). For an approach also concentrating on codified law: N Singh Ghaleigh, J Setzer and A Welikala, 'The Complexities of Comparative Climate Constitutionalism' (n 15).

18 So have the cases now pending before the ECtHR (see n 12–14).

Europe, and examines its implications through a lens of separation of powers. The chapter argues that climate constitutionalisation strengthens the judiciary but rather than undermining democratic will-formation, it contributes to an institutional setting where will-formation of the polity is enabled to deal with longer-term challenges and maintain credibility in an era of fast-moving over-information.

Section 2 offers conceptual clarifications, background considerations, and links constitutionalisation to separation of powers considerations. Section 3 analyses the entire population of all general mitigation cases against states in Europe that have been decided until 31 December 2022. This population comprises seven (partially) successful and five unsuccessful cases, some of which have not been decided in final instance.[19] It demonstrates the constitutionalisation of the climate emergency as a human rights issue (3.1), of political climate commitments (3.2), and of the normative effects of climate science (3.3). Section 4 turns to the ECtHR as an additional layer of climate constitutionalisation that, because of the great relevance and status of the Strasbourg Court, will be one factor that either strengthens or slows down the stringency of judicial review, once the decisions in the first climate cases are delivered. It introduces the pending cases and sketches how the applications and the eventual decisions may contribute to constitutionalizing climate related understanding of human rights norms. Section 5 explains the role of climate litigation in demanding justification for inaction. Section 6 concludes.

2 Climate Constitutionalisation, Separation of Powers, and Democratic Will-Formation

2.1 *Climate Constitutionalisation*

'*Climate* constitutionalism'[20] refers to an outcome of a process of establishing and consolidating legal (constitutional) principles governing the climate emergency. Developing a vocabulary, i.e., a stock of shared concepts that are

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19 Successful: *Urgenda* [2019] (n 1); *Friends of the Irish Environment/Irish case* [2020] (n 2); *Neubauer* [2021] (n 3); *Notre Affaire à Tous* [2021] (n 4); *Grande-Synthe* [2021] (n 4); *VZW Klimaatzaak* [2021] (n 5); *Net Zero Strategy* Case [2022] (n 6). Unsuccessful: *Nature and Youth* [2020] (n 8) *KlimaSeniorinnen* [2020] (n 11); *Plan B Earth* [2020] (n 7); *Klimatická žaloba ČR* [2023] (n 9); Finnish Climate Case (n 10).

20 N Singh Ghaleigh, J Setzer and A Welikala, 'The Complexities of Comparative Climate Constitutionalism' (n 15). J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (n 15).

or become comprehensible beyond the individual case. It builds on an equally ongoing process of 'environmental constitutionalisation'[21] and has direct implications for the division of powers between the three branches of government, the legislature, executive and judiciary.

One of the 'more powerful conventions of the legal argument', that Duncan Kennedy points out in a very different context, is helpful to understand the relevance of constitutionalisation: namely, that 'arguments proceed, both within a given case and over a series of cases, from the more general choices to the more particular, arguing and then re-arguing, rather than debating the merits of a point on the continuum versus all the other points on the continuum'.[22] Few legal scholars dispute that legal reasoning is a process of choosing between alternatives and that the stakes differ depending on whether one goes down one path or the other with the argumentation in any given case. At the same time and this is also implied in Kennedy's quote, the process of norm interpreting and creating is prone to unfold in a path-dependent way. Climate constitutionalism is no exception. Interpretations and norm constructions of the past shape the arguments of the parties and the reasoning of the courts in future cases.

On the one hand, climate litigation contribute to a norm interpretation that concretises legal rights and obligations in relation to the climate emergency. On the other hand, climate litigation makes visible what the legal obstacles are that stand in the way of meeting the demands of those who are climate victims. Usually, the legal process focusses on a limited, legally determined realm of arguments and actors. It is not able to include or even disclose the vast array of situational considerations, affected interests, and involved persons. Often, unsuccessful cases contribute to better understanding the legal opportunity structures and allow for more strategic choices for future climate litigation.[23]

In addition, what has been legally established frames the argumentation of plaintiffs and judges. Interpretations by higher instance courts and references

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21 Cf., inter alia, JR May and E Daly, *Environmental Constitutionalism* (Cambridge University Press 2015); L Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016) – also touched upon in G Ganguly, J Setzer and V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841.

22 D Kennedy, 'A Semiotics of Legal Argument' (1991) 42 Syracuse Law Review 75, 101.

23 See for learning from failure: A Steinbach, 'Constitutional economics and transnational governance failures' in this volume; for literature on strategic choices and legal opportunity structures: L Vanhalla, 'Legal opportunity structures and the legal mobilization by the environmental movement in the UK' (2012) 46 Law & Society Review 523. See also: R Verheyen, *Wir alle haben ein Recht auf Zukunft* (DTV Verlag 2023), 13.

to constitutional norms have a particularly authoritative value. They create norms of higher rank, which are taken as a point of reference rather than a point of discussion in the exchanges before lower instance courts – a point of reference from which one can distinguish one's own case and argument but that cannot be changed through argumentation. Overall, climate litigation has opened new understandings and opportunities to use the law and in particular constitutional law to force those in charge and those with exceptionally high emissions to take climate action.

Judges must decide. On the one hand, courts may only act when cases are brought to them. On the other hand, when a case is brought to them, judges must deliver justice.[24] They may of course deny or decline jurisdiction but also the decision not to exercise jurisdiction contributes to the understanding of the law, i.e., what conflicts and situations it governs and what it does not govern or what boundaries separation of powers considerations imposes on the judiciary. In other words, climate litigation necessarily develops the law – whether it considers the climate emergency as a matter of constitutional nature or not.

2.2 *Separation of Powers*

Constitutionalism is intrinsically linked to the concept of separation of powers. It is based on the understanding that the exercise of public power must be controlled in light of pre-determined norms of higher rank than those flowing form that very exercise of public power.[25] The climate emergency is widely seen as (one of) the greatest challenge to human rights and democracy in the 21st century.[26] It is a challenge to the functioning of our democratic state institutions. Central issues in the many different attempts to grapple, internationally, regionally, nationally, and locally, with this exceptional and existential challenge, relate to the power division, responsibility, and duty to act. In this

24 *E.g.,* Art. 13 Wet AB neergelegde verbod van rechtsweigering (prohibition to deny justice). This is also how 'duty' is read in the famous citation: 'It is emphatically the province and duty of the judicial department to say what the law is' form *Marbury v Madison* [1803] 5 U.S. (1 Cranch) 137 (1803) (US Supreme Court).

25 MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967), 1.

26 *E.g.*, World Health Organisation, 'Health and climate change' (*WHO News Room*, 5 December 2018) <https://www.who.int/news-room/facts-in-pictures/detail/health-and-climate-change> accessed 15 June 2023; *e.g.*, E Darian-Smith, *Global Burning: Rising Anti-Democracy and the Climate Crisis* (Stanford University Press 2022). This is also widely the perception: see UNESCO, 'UNESCO 'World in 2023' Survey Report highlights youth concerns over climate change and biodiversity loss' (*UNESCO*, 31 March 2021) <https://en.unesco.org/news/unesco-world-2030-survey-report-highlights-youth-concerns-over-climate-change-and-biodiversity> accessed 15 June 2023.

context, the question arises of who is competent or even mandated to frame and decide these issues. This question concerns the horizontal (between the three branches of government) and vertical (which layer of law and governance) separation of powers.

Climate cases brought against states pursue the objective of compelling states to accelerate their efforts to implement emissions reduction targets, exposing that national goals are insufficiently ambitious, or holding states responsible for their contribution to the climate emergency.[27] Because of the objective of 'forcing the hand of the executive and the legislature' climate cases against states are generally considered to be particularly controversial from a separation of powers perspective as they regularly ask the judge to impose foreword looking policy goals concretised into specific reduction percentages, which often need to be deduced relying on internationally agreed (not legally binding) political commitments, legally binding but open-textured human rights norms, and complex climate science expressing probabilities of consequences.[28] One could argue that, in mitigation cases against states, the judiciary is faced with a request by the litigants to engage in pro-active expert law-making – to force the policymakers to act and justify their actions in light of 'best available science'.

Separation of powers is the well-known and time-tested foundation of modern democracies committed to the rule of law. Not only in practice but also as an ideal, separation of powers refers to a designation and delimitation (rather than strict separation) of powers that enables constructive interaction as well as mutual constraints between the three branches. I here purport a *relational* understanding that emphasises the need for constructive interaction, while acknowledging the need for mutual control.[29] I distinguish between separation of powers as a *concept* that serves as a regulatory ideal that has an

27 Insufficiently ambitious: *Friends of the Irish Environment/Irish case* [2020] (n 2); *Family Farmers and Greenpeace Germany v Germany* [2018] 00271/17/R/SP (Administrative Court Berlin).

28 B Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' (2021) 115 American Journal of International Law 409; L Besselink, 'The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives: Hoge Raad (Netherlands Supreme Court) 20 December 2019, Urgenda v The State of the Netherlands' (2022) 18 European Constitutional Law Review 155.

29 A relational understanding can be contrasted with the functionalist approach of *e.g.,* MJC Vile, *Constitutionalism and the Separation of Powers* (n 25); J Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 441, referring to John Locke.

identifiable purpose but cannot (logically) be realised entirely and the different *conceptions* of separation of powers, *i.e.*, realisations of that purpose in different jurisdictions.

The purpose of the *concept* of separation of powers is primarily to prevent the concentration of power in a single source as opposed to pursuing any identifiable substantive outcome.[30] Its focus is on the procedural and institutional 'how' of law-making. The non-concentration of power aims to serve the double objectives of collective will-formation and control of those in power.[31] Public will-formation is ensured by establishing through the means of separated powers a process of expressing, mediating, and mitigating – and, indeed, protecting and perpetuating – the at times contradictory claims of individual and collective autonomy; put differently, between liberalism and a republican-Rousseauist idea.[32] Separated powers create the institutional conditions for discursive justificatory exchanges, in which no one branch can in the long run dominate the others. The judiciary traditionally represents individual autonomy (*ex post*) in these exchanges and is mandated to require public justification for human rights interferences by the other branches.

As a natural part of democratic processes, the understanding of the different *conceptions* of separation of powers are subject to change, including changes that affect the precise division of powers between the branches. They are legally prescribed but dynamically develop through practice. One driving question in the analysis of the suitability of any specific understanding of separation of powers, including the interpretations given to the different (usually national) conceptions of separation of powers in climate litigation, should therefore be whether that understanding establishes a process of reason-giving and hereby establishes institutional interactions that contribute to creating the conditions that activate will-formation.

Considering the common constitutional duty of courts to protect fundamental rights[33] it may seem odd that some argue that the judiciary has little to no role in addressing the climate emergency as the most pressing concern for human rights of this century. This impression is reinforced by the fact that the

30 C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013), 77–79.

31 Ibid.

32 Ibid, 108; see also: J Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (MIT Press 1996).

33 E.g., in Germany, Article 94(1)4a GG, setting out the German Constitutional Court's duty and mandate to review the exercise of public power for its compatibility with fundamental rights; in Ireland the 'solemn duty' of courts to review executive action: *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 IR 798, [813].

legislature and the executive widely fail to adequately address this concern. What is and should be the role of the judiciary?

In climate cases against states, a distinction can be made between cases that challenge the actions or more often *inactions* of, on the one hand, the executive and, on the other, the legislature.[34] The trailblazer of climate cases against states for general emission reduction, the *Urgenda* case, is an example that could be said to concern both the executive and the legislature.[35] The Dutch state was required to adopt mitigation measures that required government to take actions, likely including making legislative proposals to parliament. Yet, parliament could not be obliged to adopt these proposals but always retained the right to reject them.

In all climate cases against states, the judiciary is asked to specify legal limits to acceptable actions or inactions of the other branches. A growing consensus is emerging that even though addressing climate change requires reconciling numerous interests pulling in different directions, which is a task for the legislature and the executive, courts must play a role in response to challenges pointing out the blatant inadequacy of climate action in light of science.[36] This is a form of exerting political influence. Court decisions can influence the political debate.[37] They provide legal, symbolic, and argumentative reasons for or against action that are used by political actors who prefer policies in line with these reasons.[38] These reasons usually have a longevity beyond a short election cycle.

However, this is not to be misunderstood that litigation is the perfect fix. Courts equally struggle to give climate justice beyond borders any legal relevance.[39] Their constitutional mandate is given and limited by a specific

34 Examples of the former are: *Friends of the Irish Environment* [2020] (n 2); *Net Zero Strategy* Case [2022] (n 6); *Notre Affaire à Tous* [2021] (n 4). Examples of the latter are: *Neubauer* [2021] (n 3); Plan B Earth [2020] (n 7).

35 *Urgenda* [2019] (n 1); *State of the Netherlands v Stichting Urgenda* [2018] ECLI:NL:GHDHA:2018:2591 (Court of Appeal); *Stichting Urgenda v State of the Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court).

36 C Eckes, J Nedevska and J Setzer, 'Climate litigation and separation of powers' in M Wewerinke-Singh and S Mead (eds), *Judicial Handbook on Climate Litigation, lawyers and legal scholars* (project of IUCN's World Commission on Environmental Law (WCEL) Climate Change Law Specialist Group (CCLSG), 2023).

37 Dutch Minister for climate and energy Rob Jetten at: Al Jazeera English, 'The Case for the Climate: Forcing systems change in court | earthrise' (26 April 2023) <https://www.youtube.com/watch?v=MJXpOooZwpc> accessed 15 June 2023.

38 Ibid.

39 May and Daly, 'Global Climate Constitutionalism and Justice in the Courts' (n 17).

jurisdiction. Judicial process is slow. Judges need to look towards the past, even if they establish prospective obligations.

2.3 *Climate Change and Democratic Will-Formation*

The climate emergency is an exceptional test of the capacities of our democracies.[40] So far, our democracies are failing to 'prevent dangerous anthropogenic interference with the climate system'.[41] The consequences are already felt today and will be much greater in the future.[42] The climate emergency is 'crying out for action from leaders around the world.'[43]

Increasingly, scholars and courts are identifying the tensions between the 'democracy's short-sightedness that makes politics stumble in our increasingly connected world'[44] and the need to mitigate climate change, which may first seem to come with steep costs. Some argue that they have higher costs than benefits for those states that are the greatest polluters.[45] However, first, already today, one needs to also take into account adaptation, loss and damage, as well as diffuse social-economic costs that are often, because of the long causation chains, difficult to directly link to climate change. Second, ultimately, the lack of mitigating actions today will increase all these costs in the future. Hence, the calculation of costs and benefits strongly depends on the time frame and geographical focus (place), as well as how wholistic diffuse and indirect costs of climate change are considered. Political organisation is still largely concentrated in the nation-state and hence reasons from that perspective. Politicians work in incentive structures that relate to the short-term interests of present-day voters. The rights and interests of future generations are structurally insufficiently represented in the political institutions.

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40 D Fiorino, *Can Democracy Handle Climate Change?* (Polity Press 2018); F Fischer, 'Ecological Crisis and Climate Change: From States of Emergency to 'Fortress World'?' in F Fischer (ed), *Climate Crisis and the Democratic Prospect: Participatory Governance in Sustainable Communities* (Oxford University Press 2017); S Dover, 'Sustainability: Demands on Policy' (1997) 16 Journal of Public Policy 303; D Shearman and JW Smith, *The Climate Challenge and the Failure of Democracy* (Praeger 2007).

41 Art. 2 UNFCCC.

42 IPCC, *Global Warming of 1.5°C* (IPCC 2019) <https://www.ipcc.ch/sr15/download/> accessed 15 June 2023.

43 Olivier Knox, 'The Daily 202: The Alarming Climate Report Is Also a Huge Politics Story' (*Washington Post* 10 August 2021) <https://www.washingtonpost.com/politics/2021/08/10/daily-202-alarming-climate-report-is-also-huge-politics-story/> accessed 15 June 2023.

44 J Zielonka, *The Lost Future and How to Reclaim It* (Yale University Press 2023).

45 B Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2022) 20 Journal of Environmental Law 1.

The German Constitutional Court framed this tension between climate change and institutional conditions of democracies pointedly:

> [T]he democratic political process is organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term. […] [F]uture generations – those who will be most affected – naturally have no voice of their own in shaping the current political agenda.[46]

3 A Repeat Game under Increasing Pressure: Climate Litigation in Europe

Obligations under international treaties regularly require implementation within domestic legal orders. In this case, domestic courts are 'the first port of call and the last line of defense for the interpretation and application of international law'.[47] In climate cases, we see how courts weave together international, regional, and national obligations and give meaning to them considering scientific facts and political acknowledgement of these facts. This leads them to draw conclusions on what is legally necessary for the state to meet its duty of care and protection of its citizens. It also highlights the widespread and continuous governance failures when it comes to mitigating climate change.

Increasingly, climate litigation relies on human rights, globally and in Europe.[48] In the United States, where numerically most climate case are brought international norms and political commitments have a very different value in court. This is a confirmation of the need for and relevance of a study of climate constitutionalisation in the European context, where commitment to

46 *Neubauer* [2021] (n 3), p. 61.

47 A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loy. L.A. Int'l & Comp. L. Rev 33.

48 See for the human rights trend: G Ganguly, 'Judicial transnationalization' in V Heyvaert and LA Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar 2020), Section 3.2; C Rodríguez-Garavito, *International Human Rights and Climate Governance: The 'Rights Turn' in Climate Litigation* (Unpublished manuscript), and for the exception of the US: J Peel and H Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21. See specifically for Economic, Social, and Cultural Rights: S Gloppen and C Vallejo, 'The climate crisis: litigation and economic, social and cultural rights' in J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020).

and compliance with international law, including human rights treaties, such as the ECHR, create a very different legal landscape for climate litigation.

3.1 *Reliance on Human Rights Norms*

A rights-based approach as opposed to other legal grounds gives equal emphasis to the individual autonomy of all humans, including underrepresented and disadvantaged groups.[49] Considering that the climate emergency exacerbates inequalities both between countries and within countries, and that its impacts are affecting persons of different race, gender, and class, very differently,[50] human rights are a way of empowering each individual person.

At the same time, a rights-based approach bears the interrelated dangers of either having to demonstrate the *individualised* rights-impact of climate change to meet standing requirements and establish a violation and empowering courts to carry out a balancing of general interests that is – in light of separation of powers considerations – traditionally reserved for the legislature. Protecting individualised interests is the core function of the judiciary; however, litigating for the public good stands inherently in tension with demonstrating an individualised rights infringement. While climate cases aim to protect individual rights of those affected by climate change, regularly these rights are invoked by public interest organisations or large number of citizens that are affected in a way comparable to many other citizens of that state or even all those states that are in a similar geographical and economic position. Arguably, the climate emergency 'threatens the world's entire population'.[51] However, when courts protect the rights of the collective and no specific individual is distinguishable by the gravity of the rights violation that they are facing, courts are asked to consider and balance general interests. This blurs the

49 Amnesty International, 'After UN Climate Action Summit, Urgent Action Needed by All States to Avoid Human Rights Violations on Massive Scale' (Public statement, Index number IOR 40/1239/2019, Amnesty International 2019) <https://www.amnesty.org/en/documents/ior40/1239/2019/en/> accessed 2 April 2023; UNEP, 'Climate Change and Human Rights' (Report, UNEP 2015) <https://www.unep.org/resources/report/climate-change-and-human-rights> accessed 2 April 2023.

50 N Taconet, A Méjean and C Guivarch, 'Influence of climate change impacts and mitigation costs on inequality between countries' (2020) 160 Climatic Change 15; Serhan Cevik and João Tovar Jalles, *For Whom the Bell Tolls: Climate Change and Income Inequality* (IMF 2022); L Chancel et al, *Climate Inequality Report 2023* (World Inequality Lab Study 2023/1) <https://wid.world/wp-content/uploads/2023/01/CBV2023-ClimateInequalityReport-3.pdf> accessed 15 June 2023.

51 Conclusion of Procurator General in *State of the Netherlands* (*Ministry of Economic Affairs and Climate Policy*) *v Stichting Urgenda* [2019], ECLI:NL:PHR:2019:887.

distinction between individual autonomy and the collective and puts pressure on the function of the judiciary, as outlined above.

The *Urgenda* case[52] was initiated based on the unwritten duty of care under Dutch tort law (District Court, 2015). In second and third instance, the Court of Appeal (2018) and the Dutch Supreme Court (2019), however, ruled based on Articles 2 and 8 ECHR. In *Urgenda*, human rights moved to the centre stage of the case as it moved up to the higher instances. In the highest instance, the judges established a duty of care based on human rights norms, considering international commitments of the Dutch State and climate science. In many respects, the move to human rights as the legal grounding of this duty of care has strengthened the replicability of the reasoning and added an important element to climate constitutionalism across Europe.

Human rights were also central to the German case of *Neubauer*, decided by the German Constitutional Court in 2021. However, *Neubauer* differs from *Urgenda* in the role of human rights at least in two important respects: First, the judges in the *Neubauer* case in Germany found a human rights violation but did not conclude that a duty of care was infringed. Second, they could rely on the national incorporation of international climate commitments in the national climate protection act.[53] In other words, they did not have to rely on international (political) commitments but could rely on the temperature goal of 'well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels' confirmed by the German legislature in the legally binding national climate protection act.[54]

In the French case of *Notre Affaire à Tous*, the plaintiffs asked the court, in an action for failure to act, to hold the French State in breach of obligations under the 2015 Paris Agreement.[55] They aimed among other things to establish a statutory duty to act in compliance with the state's own goals for reducing emissions. This duty was based on the French Charter for the Environment, the ECHR, and the general principle of law establishing a right to a preserved climate system. The plaintiffs requested the court to order France first to take proper measures to reduce greenhouse gas emissions in the atmosphere – in due proportion considering global emissions, and taking into account the particular responsibility accepted by developed countries – at a level compatible with the objective to contain the rise of the average temperature of the planet below the threshold of 1.5 °C compared to pre-industrial levels; and second to

52 *Urgenda* [2019] (n 1).

53 *Neubauer* [2021] (n 3).

54 Paragraph 1 on the objective of the law.

55 *Notre Affaire à Tous* [2021] (n 4).

take, at least, all necessary measures to achieve France's targets for reducing greenhouse gas emissions.[56] In final instance, the courts obliged the French State to adopt immediate and concrete climate measures and, importantly, to repair the damage caused by its inaction by the end of 2022.

Equally in France, in *Carême/Grande-Synthe I*, the Conseil d'Etat disallowed the claim of the *mayor* of the municipality of Grande-Synthe to challenge the national government's climate policies. It *allowed the claim of the municipality* together with several other affected municipalities, because of their 'direct and certain' exposure to climate change impacts.[57] However, the legal position of these municipalities was not grounded in human rights. The claim of the mayor of Grande-Synthe, Mr. Carême, was rejected and is now pending before the ECtHR.[58]

The plaintiffs in the Belgian *Klimaatzaak*, decided by the Court of First Instance in Brussels in 2021, took the *Urgenda* case in first instance as their blueprint.[59] Their claim is based both on alleged civil liability of a public authority (Art 1382 of the Belgian Civil Code) and an alleged violation of human rights, namely Articles 2 and 8 ECHR and Articles 6 and 24 International Convention on the Rights of the Child. In addition, the court considered access to justice for alleged violations of national environmental law within the meaning of Article 9(3) Aarhus Convention in the context of its assessment of the admissibility of the case. The Court of First Instance in *Klimaatzaak*, which is currently under appeal, found both civil liability and a violation of the plaintiffs' rights under the ECHR.[60] It explicitly agreed with the Supreme Court in *Urgenda* that the global dimension of the climate emergency could not absolve the Belgian state from its responsibility (rejection of the drop in the ocean argument).[61] Based on explicit separation of powers considerations, the court denied the plaintiffs' request for an injunction ordering the defendants to take the necessary mitigation measures.[62]

By contrast, the Irish Supreme Court invalidated the Government's National Mitigation Plan on narrow legal grounds of *ultra vires* action rather than human rights grounds.[63] In other words, the Irish Climate Case, while

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56 C Cournil, A Le Dylio and P Mougeolle, 'L'Affaire du Siecle: French Climate Litigation between Continuity and Legal Innovations' (2020) 14 CCLR 40.

57 *Grande-Synthe* [2021] (n 4), [3].

58 *Carême v France* (n 13).

59 *VZW Klimaatzaak* [2021] (n 5).

60 Not under the International Convention on the Rights of the Child.

61 *ZW Klimaatzaak* [2021] (n 5), Section 1.2.

62 Ibid, Section 2.3.2.

63 *Friends of the Irish Environment* [2020] (n 2).

successful in imposing climate obligations on the state, did not bolster the potential of human rights as a basis for future climate litigation.[64] This is similar to the courts' position in Plan B. Here, the plaintiffs challenging the legality of building a third runway at Heathrow in *Plan B* arguing their case also based on the ECHR; yet, the courts restricted themselves to the narrow question of the respective powers of the political branches, i.e. whether the executive exercised its powers in line with the legal framework established by the national legislature.[65]

In *Natur og Ungdom v Norway*, environmental groups asked the Oslo District Court, the Court of Appeal and the Supreme Court to declare that Norway's Ministry of Petroleum and Energy violated the Norwegian constitution by issuing oil and gas licenses for deep-sea extraction in the Barents Sea.[66] Their claim was rejected in all three instances, with the Supreme Court upholding the licences in December 2020 and declaring that Articles 2 and 8 ECHR were not violated. The case is hence an 'unsuccessful' example of climate litigation. This comes with low expectations of what it could contribute to climate constitutionalisation. Nonetheless, it contributed, albeit in a limited fashion, to establishing and consolidating legal principles governing the climate emergency, while taking a quite conservative position on other aspects.[67] In terms of consolidation, the Supreme Court confirmed for example that the right to a healthy and natural environment in the Norwegian constitution (Art 112) is 'not merely a declaration of principle, but a provision with a certain legal content.'[68] Under certain circumstances, this provision can directly be invoked in court. The case is now pending before the ECtHR.[69]

Similarly, in the *Klimaseniorinnen* case a group of senior women challenged in 2016 the alleged omissions of the Swiss federal government to adopt a regulatory framework to develop adequate climate protection policy. Their claim was based on Articles 2 and 8, as well as Articles 6 and 13 ECHR. It was rejected by Swiss courts in three instances and is now pending before the ECtHR.[70] The

64 V Adelmant, P Alston and M Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1, 6.

65 *Plan B Earth* [2020] (n 7), [2]; this is in some ways like the narrow approach of the court in the Irish Case.

66 *Nature and Youth* [2020] (n 8).

67 See below Section 5 on the aspects of *Nature and Youth* that confirmed weakened the law's ability to offer answers and opportunities in the face of the global climate emergency.

68 *Nature and Youth* [2020] (n 8), [144].

69 *Greenpeace Nordic and Others v Norway*, no 34068/21. The case has been communicated to Norway with the request for observations. It will hence move to the deliberation stage.

70 *KlimaSeniorinnen* [2020] (n 11).

court considered that the substance of this case is a matter for the political arena and not a violation of human rights. The ECtHR is now asked to,consider the crucial questions of whether the climate emergency (already) violates Convention rights, who is a victim of the climate emergency,[71] causal link between the emissions of a particular state and the harm suffered by the applicants, and what is the 'fair share', which is at the core of any legal challenge to the adequacy of a state's mitigation efforts.

In another 'unsuccessful case', the Finnish climate case (2023), Greenpeace and Finnish Association for Nature Conservation claimed that the governance failure to adopt additional climate measures as they were required to achieve the binding climate targets under the Finnish Climate Act of 2022 constituted a judiciable administrative act.[72] The applicants relied, besides the Aarhus Convention, on Articles 6 and 13 ECHR and, even though the court rejected the appeal, it acknowledged the relevance of these human rights norms for the climate emergency, including when no administrative decision was taken.[73] In other words, the Finnish climate case, while being unsuccessful, contributed by climate constitutionalisation by emphasising the *role of courts* in ensuring that political decision-makers act in accordance with the law and do not obstruct the enjoyment of human rights. This is a climate litigation friendly reading of separation of powers. The Court further established that climate inaction requires an effective remedy. Both in the German *Neubauer* and in the Finnish climate cases, the courts specifically considered (and in the *Neubauer* case protected) the right of future generations.

In six European countries, courts, including highest courts, have established that the climate emergency violates or at least has the potential to violate human rights.[74] In two case, this was rejected.[75] Whenever courts accept to rule on the climate emergency as a potential rights violation they establish and enforce a principled longstanding framework that sets the outer limits in which policymakers may act. This necessarily inserts a longer-term perspective into the political debate, which becomes particularly apparent when right of future generations are protected by the courts.

71 Article 34 ECHR.

72 *Finnish climate case* (n 10). See for the Finnish Climate Act 2022: <https://www.finlex.fi/fi/laki/alkup/2022/20220423>.

73 *Finnish climate case* (n 10), para 58.

74 Actual human rights violation: *Urgenda, Klimaatzaak, Neubauer, Notre Affaire à Tous*; only potentially a human rights violation: *Finnish climate case* (n 10) and Irish case (n 2).

75 *Nature and Youth v Norway* [2020] (n 8) and *KlimaSeniorinnen* [2020] (n 11).

All cases differ as to their specific jurisdictional circumstances, including procedural rules. Yet, all of them are contracting parties to the ECHR and the ECtHR's rulings in the pending climate cases are a crucial moment of opportunity in consolidating or challenging the human rights dimension of the ongoing climate constitutionalisation.

3.2 *Reference to Ratification and Participation in the UNFCCC*

The above outlined relational understanding of separation of powers places emphasis on the constructive interaction between the branches that contributes to justified decision-making and channels disagreement into the decision-making process. In this interaction, courts have a function as both part of the state and independent bodies to offer fora to those whose rights are sufficiently affected for them to be procedurally able to challenge the process or outcome of the decision-making. One core point in the constructive interaction is to ensure that public actors are accountable for their words and actions, not necessarily legally but in any event politically. Climate cases offer a context for pointing out deep running inconsistencies in governments' actions if they repeatedly, and usually internationally pledge climate actions but do not take adequate steps towards such actions. Many cases have brought to light the deep contradictions of governments' (international) political commitments and domestic (legal) actions by reference to the positions that they take under the United Nations Framework Convention on Climate Change (UNFCCC).

The UNFCCC aims to 'stabilize the greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[76] Enhancing the implementation the UNFCCC, the 2015 Paris Agreement sets a long-term temperature goal, aiming at '[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels'.[77] Nationally Determined Contributions (NDCs) form the basis for countries to achieve this objective of the Paris Agreement. The Intergovernmental Panel on Climate Change (IPCC) has published an NDCs Synthesis Report, detailing targets, and policies and measures for mitigation (and adaptation) aimed to achieve the objectives of the Paris Agreement.[78]

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76 Article 2 UNFCCC.

77 Article 2 a) of the 2015 Paris Agreement.

78 UNFCCC, 'Nationally determined contributions under the Paris Agreement', FCCC/PA/CMA/2022/4 (Synthesis Report, UNFCC 2022) <https://unfccc.int/ndc-synthesis-report-2022> accessed 2 April 2023.

The Dutch Supreme Court in *Urgenda* set out the legal framework of the UNFCCC, explains the role of the Conferences of the Parties (COPs) in developing the parties' obligations under the UNFCCC.[79] Importantly, the court explains that while the COPs are the highest political organ they do not necessarily produce binding norms with their decisions. However, the court's reasoning demonstrates that this does not mean that these non-binding commitments and norms cannot deploy legal effects via other norms. The court lists all past COPs and their main relevant stipulations. It also sketches the findings of the two most recent assessment reports of the IPCC that precede the ruling (AR4 in 2007 and AR5 in 2013–14). Equally comprehensive in this respect is the advisory opinion of the Procurator General in *Urgenda*. It traces, as part of the 'recitation of the established facts', the international commitments of all parties to the UNFCCC at the different COPs, but also communications on the Netherlands' negotiation objectives in international climate conferences from the relevant minister to parliament and the national consultation process, leading to the adoption of the national Climate Act, with a reduction target for 2030.[80] The Procurator General explains in detail how he moved from the different political commitments to a legal obligation to reduce GHG emissions.[81] Interesting in this context is also that he makes remarks on the constraints of Dutch procedural law '[f]or the benefit of non-Dutch readers'.[82] He sets out that '[t]he literature […] shows that, when possible, the courts must base specific interpretations of standards of care on objective assumptions' and gives the following examples 'non-binding guidelines and codes of conduct (both of which are 'soft law')' and 'treaty provisions and principles of international law which do not have direct effect'.[83] He concludes that 'in implementing open standards, the national court will take international law into account as much as possible (irrespective of whether or not it has direct effect). This is the concept of reflex effect.'[84] These considerations also indirectly speak to the issue of separation of powers. While the judiciary cannot take political commitments and vest them with legal effect – this would empower it beyond its mandate to interpret the law and establish what is legal and illegal – it must

79 *Urgenda* [2019] (n 1), [5–12].
80 Conclusion of Procurator General in Urgenda [2019] (n 51), section 1.2 et seq, in particular section 1.2(xxvii) and 1.7.
81 Ibid, Sections 2.1.
82 Ibid, sections 1.35.
83 Ibid, Section 2.19.
84 Ibid, Section 2.30.

rely on relevant facts including science and political commitments to establish what open textured legal provisions mean.

In the Irish climate case, Ireland's *international commitments* played no role as the case turned on the interpretation of the executive's obligations under the national Climate Action and Low Carbon Development Act of 2015.[85] A similar situation presents itself in the German Constitutional Court's ruling in *Neubauer*. While the case referred four times to the Dutch *Urgenda* case, *e.g.,* when concluding that states cannot avoid responsibility by pointing at the emissions of other states, the construction of the legal obligation was different. The court did not (have to) rely on Germany's international commitments because the national climate protection act had incorporated the temperature goal.[86]

In *Notre Affaire à Tous,*[87] the plaintiffs referred among other things to the UNFCCC and the Paris Agreement, Rio Declaration, Stockholm Declaration and EU law. The Administrative Court of Paris ordered France to take immediate and concrete actions to comply with its emission reduction commitments and repair the damages caused by its climate inaction by 31 December 2022. More specifically, the court calculated that France, even if it lowered its emissions, emitted 62 million extra tons of emissions from 2015–2018. Interestingly, the court required France to subtract the extra emissions in the past, *i.e.*, those exceeding the targets stipulated in national legislation, by further reducing emissions between 2021 and 2022. It also confirmed that all future excess emissions will need to be compensated.

In *Grand-Synthe I*, the Conseil d'Etat argued that the international commitments of the French State may amount to legally enforceable norms, granting the executive another opportunity to justify its actions and lack thereof in light of these international commitments.[88]

In the Belgian *Klimaatzaak,* the Court of First Instance in Brussels, while being relatively concise on the science and impacts of the climate emergency, meticulously traced the international and national political agreements and commitments of the Belgian federal state and the regions.[89] As part of this overview, it emphasized Belgium's failure to meet the agreed reduction targets, including with repeated references to the EU Commission's assessment of that failure. In their appeal of the first instance ruling, the plaintiffs highlighted

85 *Friends of the Irish Environment/Irish case* [2020] (n 2).
86 *Neubauer* [2021] (n 3).
87 *Notre Affaire à Tous* [2021] (n 4).
88 *Grande-Synthe I*.
89 *VZW Klimaatzaak* [2021] (n 5); The hearing of the appeal is in September/October 2023.

that '[n]one of the respondents has disputed that, as Belgium is a party to the UNFCCC and therefore to the COP, it has adopted by consensus the various decisions that this body has taken over the years, from meeting to meeting, from the 2007 COP to the 2015 COP, and that, in so doing, the country and therefore all the respondents were necessarily fully informed of these decisions.'[90] Belgium therefore adhered by consensus to the COP decisions, setting the threshold for dangerous warming at 2°C first, then towards 1.5°C.[91] 'from COP-13 in Bali in 2007 to COP-21 in Paris in 2015, it has been agreed and re-agreed each year that, to avoid dangerous warming understood as 2°C, Annex I countries should reduce their GHG emissions by at least 25–40% by 2020'.[92] The plaintiffs on appeal extensively refer to repeated political commitments within the framework, *e.g.*, Belgium's participation in the Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties, which took the '25 and 40 per cent below 1990 levels by 2020' from 'Box 13.7 of the Working Group III report' as a starting point and indicated that even greater reduction obligation could be possible.[93] They aim to demonstrate the repeated *political commitment* to the COP decisions from COP-13 in Bali in 2007 to COP-21 in Paris in 2015, it has been agreed and re-agreed each year that, to avoid dangerous warming understood as 2°C, Annex I countries should reduce their GHG emissions by at least 25–40% by 2020.[94] They emphasized that '[n]ot only were the respondents aware of the mitigation measures to be taken, but they expressly acknowledged the scientific need for them'[95] and that this is confirmed by a range of national political statements by the regional parliaments and the an executive body (Flemish Council for the Environment and Nature).[96]

In Czech Republic, the Prague Municipal Court ordered in first instance on 15 June 2022 in the case *Klimatická žaloba ČR v. Czech Republic* the state to urgently take climate mitigation measures. It held that the state's failure to take these measures was unlawful, that the plaintiffs' rights were violated and that the state should abstain from further continuing the rights violation. In lack of a national climate act, the legal basis of the obligation was the Paris Agreement and the EU Climate Law setting out the 55% emission reduction

90 Appeal of 17 November 2021 for *VZW Klimaatzaak* (unofficial translation), <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211117_2660_appeal.pdf> accessed 2 April 2023, [38].

91 Ibid, [48].

92 Ibid, [48].

93 Ibid, [45].

94 Ibid, [47]-[48].

95 Ibid, [53].

96 Ibid, [54].

target of the Union (by 2030 as compared to 1990). While pointing out that the goals of the Paris Agreement are not legally binding, it is obvious from these legal instruments that the Czech Republic must contribute to their attainment. The court also rejected the drop in the ocean argument that the state's small contribution to overall emissions did not make a material difference.[97] In the meantime, the first instance judgment has, on appeal, been annulled by the Supreme Administrative Court.[98] The Court discusses separation of powers on several occasions, stressing the need to for judicial restraint, concluding that it is not the right body to assess compliance of concrete policies with the long-term temperature goal, and finally referring the case back to first instance court on the narrow issue of compliance with sectoral legislation.

In *Plan B* in March 2022, the UK Court of Appeal rejected the case arguing that '[t]he fundamental difficulty which the Claimants face is that there is no authority from the [ECtHR] on which they can rely, citing the Paris Agreement as being relevant to the interpretation of the ECHR, Articles 2 and 8'.[99] The claimants build their argument on 'the Paris Agreement temperature limit of 1.5°C as evidence of the international consensus on what must be done to avoid intolerable risks to life and to family life'.[100] The judge specifically mentioned that the reference to the *Urgenda* case, where the Dutch Supreme Court had interpreted the ECHR in the light of the Paris Agreement, was not alone sufficiently convincing as the constitutional context could be very different.[101] In the 2022 Net Zero Strategy case, the legal hook was the Government's duty under the 2008 Climate Act.[102] It is hence a case focused on the limits of executive action under ordinary national law.

The Court of Appeal in *Plan B* argued that the established unlawfulness of the preparation and designation of the relevant policy was based on the narrow ground that the minister had not considered the Paris Agreement. This specific point was reversed by the Supreme Court holding that the Paris Agreement did not constitute 'government policy' within the meaning of the Planning Act.[103]

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97 *Klimatická žaloba ČR v Czech Republic* [2022] No. 14A 101/2021 (Prague Municipal Court).

98 Supreme Administrative Court, *Klimatická žaloba ČR* [2023] (n 9).

99 *Plan B and Others v Prime Minister and Others* [2022] CA-2021-003448 (Court of Appeal) <https://planb.earth/wp-content/uploads/2022/03/CA-Order-and-Judgment.pdf> accessed 2 April 2023.

100 Ibid, [4].

101 Ibid, [5].

102 *Net Zero Strategy Case* [2022] (n 6), [14].

103 *R (on the application of Friends of the Earth and Others) v Heathrow Airport* [2020] UKSC 52, [101]-[112].

By contrast, it emphasized the executive's discretion in deciding whether to consider the Paris Agreement as part of its assessment.

The unsuccessful Norwegian case of *Natur og Ungdom*, as discussed above, turned on the compliance with the Norwegian Constitution of the national executive's decision to grant petroleum licences.[104] The 'key issue raised [was] the decision's compliance with Article 112 of the Constitution on the right to a healthy environment'.[105] Within this setting reliance on Norway's international commitments to mitigate emissions can be envisaged in order to give meaning to the obligations flowing from the constitutional right to a healthy environment. However, while the appellants argued that Norway must cut its emissions by at least 60% in 2030 and that until 'a detailed legal framework and climate accounts are in place, the authorities cannot commence [fossil fuel exploitation] in new areas', the court concluded '[i]t is unlikely that the courts, when assessing an individual decision, may lay down such specific requirements based on Article 112 of the Constitution'.[106] The Court emphasised that the evaluation must start with the challenged decision instead. When the decision is taken an assessment of the climate effects must be carried out and that 'includes an assessment of the international climate commitments and targets.'[107] Hence, Norway's international commitments were not considered to inform the content of its constitutional obligations but only formed part of the considerations that must be taken into account in the procedure of applying for a license, namely in the plan presented by the licensee (that then requires approval by the executive). The Norwegian case, while weakly acknowledging their procedural relevance for the assessment of climate effects, does not contribute to the constitutionalisation of international mitigation commitments. As a result, it reduces the role of the judiciary to the guardian of procedure, disallowing the judicial stipulation of a particular minimum of climate action.

The different courts dealt quite differently with the legal and political commitments under the UNFCCC. While some drew direct conclusions from the obligations under the Paris Agreements for the mitigation obligation of the defendant state, others rejected such conclusions outright.[108] Several courts used the repeated political commitments confirming the long-term

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104 *Nature and Youth* [2020] (n 8).
105 Ibid, [3].
106 Ibid, [161]-[162].
107 Ibid, [267].
108 Establishing legal obligations: *e.g.*, first instance court in *Klimatická žaloba* (n 96); *Klimaatzaak* (n 5); *Notre Affaire à Tous* (n 4); *Grande-Synthe I* (n 4); rejection: *Plan B* (n 98).

temperature goal and acknowledging the need to avoid 'dangerous climate change', as well as its predicted impacts, as factual basis to interpret the legal obligations under open textured norms, such as human rights.[109]

3.3 *The Normative Effects of IPCC Science*

Judges rely in climate cases heavily on climate science, setting out probabilistic models at a very high level of theoretical agreement. They usually refer to the leading, politically endorsed international expert body: the IPCC. In other words, the IPCC reports are the prevailing source for climate science in court. Their purpose, as stated on the IPCC's website is to 'fulfil two functions: for IPCC member governments they represent the accepted document of record arising from an intergovernmental process; for the research community, they are highly cited scientific documents that synthesize a vast body of evolving knowledge and bring prestige to those involved in writing them.'[110]

The IPCC is the United Nations body for assessing the science related to climate change. Its three working groups (WP) produce reports on the physical science basis (WP I); impacts, adaptation and vulnerability (WP II); and mitigation of climate change (WP III). It is a 'boundary institution'[111] that works on the border of and hence both with scientific and political/policy-making epistemologies, producing translation/transfer work that allows engagement of both communities with the work of the other. It does not only bring together climate science but its findings in form of the Summaries for Policy-Makers (SPM) are also politically agreed and endorsed. Over time, the IPCC has adapted its working procedures considering criticisms, *e.g.*, given more space to dissenting opinions.

The inclusive and unbiased nature of information in IPCC reports exceeds the inclusiveness and impartiality of scientific evidence advanced in most judicial proceedings.[112] As Roda Verheyen, the leading lawyer in the *Neubauer* case, formulated already in 2005 that 'no court of law could possibly deviate from IPCC findings since any expertise put before the court would never be as inclusive as that inherent in the IPCC.'[113] Because of this exceptional inclusiveness

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109 See above all: *Urgenda* [2019] (n 1); different *Nature and Youth* [2020] (n 8).

110 IPCC, *Progress Reports* (IPCC 2021) <https://apps.ipcc.ch/eventmanager/documents/65/040320210332-INF.%208%20-%20Progress%20Report%20IG%20Publications.pdf> accessed 2 April 2023.

111 See G Ganguly, *Towards a transnational law of climate change: transnational litigation at the boundaries of science and law* (LSE PhD Thesis, 2019).

112 See for more details: www.ipcc.ch.

113 R Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Liability* (Brill 2005), 20.

of and the political support for IPCC reports, they should not only be considered a reflection of the 'best available science' but also as enjoying particular *normative* authority.[114] In terms of substance, some plaintiffs in climate cases have rightly pointed out that the IPCC reports are fairly cautious. This flows from the fact that they do not only have the explicit aim to serve policymaking, but that the SPMs is agreed line by line by the climate negotiators of the governments of the contracting parties.

IPCC reports provide judges around the globe with reliable information about the 'best available science'[115] at a given point in time. Extensive reliance on a range of IPCC assessment reports by the judges in *Urgenda* (NL, 2019), *Klimaatzaak* (BE, 2020), *Notre Affaire à Tous* (FR), and *Neubauer* (DE, 2020).

The Dutch Supreme Court in *Urgenda* set out the science in considerable detail. It strongly relied on AR4 of 2007.[116] This is the case because AR4 addresses the reduction target for 2020, while the newer available AR5 focusses on the reduction target for 2030. The court build its decision of what constitutes and absolute minimum of reduction to reach the 'likely' outcome that global warming stays below 2C.[117]

In *Neubauer*, the German Constitutional Court relied on the *national* advisory council's assessment, which is based on IPCC reports.[118] As did the Norwegian Supreme Court in *Natur og Ungdom*, pointing out that the report of the Norwegian Climate Risk Commission on climate risk and the Norwegian economy of 2018 'is primarily a compilation of knowledge provided by the [IPCC] – including [AR5] and [IPCC SR on 1.5C]'.[119]

However, reference to the IPCC does not in all cases result in the same engagement with facts. In the *Klimaatzaak*, for example, the Court of First Instance, in its ruling of 17 June 2021, referred extensively to the IPCC, its establishment, its reports, but less to the scientific information contained in these reports that establishes in detail and with certainty the relations between emissions

114 See C Eckes, 'Strategic Climate Litigation: Legal Consequences of Scientific "Truth"?' (forthcoming).

115 Articles 4(1), 7(5) and 14(1) Paris Agreement 2015.

116 B Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (n 45).

117 Likely means greater than 60%. AR5 concluded that if the concentration GHG emissions is stabilised at around 450 ppm in the year 2100, the chance that the global temperature increase would remain under 2°C is 'likely'; however, 87% of the scenarios included in AR5 are based on assumptions regarding the possible removal of CO_2 from the atmosphere (see Conclusion of Procurator General in Urgenda [2019] (n 51), section 1.2 xiii).

118 German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen – SRU), see *Neubauer* [2021] (n 3), [28], [36], [216]-[247].

119 *Nature and Youth* [2020] (n 8), [50].

and global warming, deducts emission budgets, and expresses probabilities of impacts. This becomes particularly apparent in a comparison between the ruling in first instance and the plaintiff's appeal filed on 17 November 2021. The latter dwells extensively on the science and aims to demonstrate the detailed knowledge of the climate emergency and the political agreement of Belgium to the scientific establishment of the factual situation in the IPCC's procedures and the decisions of the COPs under the UNFCCC. The appellants in *Klimaatzaak* strongly pushed that the court should *confirm the role and relevance of the IPCC*.[120] They emphasized that the IPCC is 'an emanation of the States', which 'recognise the legitimacy' of the 'scientific content' of the IPCC reports, referring specifically to the *SPMs*.[121] They also highlighted that the final report and the SPMs are endorsed by governments.[122] This endorsement of climate science by state actors is another constitutionalisation dynamic that I do not explore further here but that takes place in and of itself and is strengthened when explicated in the authoritative setting of climate litigation.

In the Finnish climate case, the Court concluded from best available science based on the reports of the IPCC that 'climate change is a question of humanity's fate, which threatens the living conditions of current and future generations on Earth, unless quick and effective measures are taken in terms of maintaining and increasing emission limits and carbon sinks'.[123] The case concerned the inaction of the Finnish government in particular in light of the collapse of the Finnish forest carbon sink and is the first to explicate the relevance of degradation of European forests for assessing a state's duty to take climate action.

Judges' reliance on climate science injects the established scientific basis, which is in principle acknowledged and agreed by all parties, into the public debate. Any debate on decision-making and problem-solving depends on the ability to reach basic agreement on what the problem is and what factors are relevant to that problem. In the case of climate change mitigation, the crux is the scientific consensus that anthropogenic emissions are the cause of the rapid climate change, projected impacts of different temperature levels, the natural science that emissions, once emitted, stay in the atmosphere

120 Appeal for *Klimaatzaak* (n 88), [11]: The IPCC calls itself "the leading international body for assessing climate change". This status is confirmed in that the 195 Member countries take (or at least should take) the IPCC reports as a starting point for their climate policy and that the IPCC reports have a special place in the 1992 UNFCCC.

121 Ibid, [12].

122 Ibid, [14].

123 English translation taken from: K Kulovesi et al, 'Finland's first climate judgment' (n 10).

for hundreds (thousands) of years, and the historical and current emissions of states and citizens (per capita) in Europe. Courts have time and again judicially established these scientific facts, related their reasoning to them, and hence brought the agreed problem and factual basis back into the public debate. The judicial process allows the parties to bring forward their evidence, which is then either formally established or rejected as fact. In the relational understanding of separation of powers, weighing and establishing facts is one way, in which the judiciary contributes to the reasoned exchange that leads to public will-formation.

4 Multi-layered Constitutionalism: Cases in Strasbourg

Nine climate cases aiming for general mitigation by States are currently pending before the ECtHR.[124] Three have been relinquished to the Grand Chamber, *Duarte Agostinho*,[125] *Klimaseniorinnen*,[126] and *Carême/Grande-Synthe*.[127] The relinquishment may, on the one hand, be considered to confirm that a section to which a case is assigned considers that this case raises serious questions of legal interpretation that require a consistent approach of a more authoritative body. On the other hand, the decisions of the Grand Chamber in these cases will enjoy greater judicial authority and hence more strongly contribute to a constitutionalisation of climate norms in Europe. The greater authority derives from the composition of the Grand Chamber, consisting of 17, rather than 7 judges, including the Court's President and Vice-Presidents, the Section Presidents and the national judge, plus other judges selected by drawing of lots.

In addition, several climate related cases before ordinary chambers are likely to contribute to establishing the position of the Strasbourg court on how

124 Three are pending before the Grand Chamber and six have been adjourned pending the Grand Chamber decisions, see here https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7566368-10398533&filename=Status%20of%20climate%20applications%20before%20the%20European%20Court.pdf. The hearings in Klimaseniorinnen and Carême took place on 29 March 2023. Much of KlimaSeniorinnen focusses on the issue of what is a 'fair share' of the carbon budget for each and every case.

125 *Duarte Agostinho v Portugal and 32 other states* (n 14); Application communicated to the defending governments in November 2020 – Relinquishment in favour of the Grand Chamber in June 2022. The hearing is scheduled for 28 September 2023.

126 *KlimaSeniorinnen v Switzerland* (n 12); Application communicated to the Swiss Government in March 2021 – Relinquishment in favour of the Grand Chamber in April 2022.

127 *Carême v France* (n 13); Relinquishment in favour of the Grand Chamber in May 2022.

the rights under the ECHR relate to states' failure to adequately address the climate emergency. One is the Norwegian Youth case discussed above.[128]

Together these cases give the Strasbourg court the opportunity to contribute to the climate-related interpretations of the Convention. They will emerge as a body of case law with exceptional, either direct constitutional or at least strong interpretative weight in all jurisdictions across Europe.[129] They concern the questions of who is a victim of climate change but also very prominently the question of what is the 'fair share' of each state, i.e. how should the global carbon budget be broken down to national carbon budgets.

The relevance and status of the ECHR and decisions of the ECtHR differ tremendously between the 47 signatories. The direct legal effects of the ECtHR's decisions in the pending climate cases consequently also differs. This does not take away their great symbolic and persuasive authority in future litigation.

Germany, in which one of the successful climate cases was decided, is an example of a very dualist legal order. The German Federal Constitutional Court (GFCC) explicitly ruled that the ECHR, as any other binding international law in Germany, has the same status as ordinary laws (*Gesetzesrang*) and takes effect within the framework of the German Constitution.[130] The ECHR hence ranks below the German Constitution, with the consequence that ordinary courts must observe and apply the Convention, while before the GFCC the ECHR (only) serves as an 'interpretation aid' in determining the contents and scope of fundamental rights and fundamental principles protected under the German Constitution.[131] This also explains why the ECHR was not given any attention in the *Neubauer* case.

The Netherlands, as the other extreme, follows a (moderate) monist tradition.[132] Individuals can rely upon provisions of international treaties even if they are incompatible with the national constitution.[133] Decisions of the

128 *Greenpeace Nordic and Others v Norway* (n 69).

129 See for the direct legal weight of the ECHR in a selection of national jurisdictions: C Eckes, 'EU accession to the ECHR: between autonomy and adaption' (2013) 76 *Modern Law Review* 254.

130 GFCC, Decision of 14 October 2004, 2 BvR 1481/04 – (Görgülü; ECHR decision). See more recently: GFCC, Decision of 4 May 2011, 2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2 BvR 1152/10; 2 BvR 571/10 – (Preventive Detention).

131 Eckes, 'EU accession to the ECHR' (n 129).

132 It is considered moderate because international customary law has internal effect but does not take precedence over a conflicting rule of Dutch law (*Nyugat* [1959], HR 6 March 1959, NJ 1962, 2).

133 Except for provisions of international agreements that are not binding on everyone ('een ieder verbindend'), see article 94 of the Dutch Constitution.

ECtHR can be directly invoked before national courts and the ECtHR de facto functions as the highest human rights court of the land since the Dutch Hoge Raad does not have the power of constitutional review. This strong position of the ECHR in the Netherlands is illustrated by *Urgenda*.

In the UK, the European Convention is not itself part of national law and the decisions of the ECtHR are not directly legally binding under UK law. The 1998 Human Rights Act gives domestic legal effect to the ECHR, but it does not oblige Parliament to legislate compatibly or courts to disregard laws that are incompatible with the Convention. Yet, in *Plan B*, the UK Court of Appeal explicitly looked for authoritative case law of the ECtHR supporting the case of the claimants.

Climate litigation seeks to protect the public good of a liveable planet by triggering broad political and socio-economic changes in an area of controversy and tensions about how we should pursue general mitigation objectives and what this means for who carries the costs. In this context, the credibility and social legitimacy of judicial decisions is pertinent to their ability to contribute to this change. To the extent, that court decisions form part of a broader multi-actor trend towards greater reliance on international climate norms and objectives or IPCC reports, they can also benefit for the legitimacy of the individual decision from climate constitutionalisation dynamics in Europe. Cross-references and reliance on each other's reasoning does not only strengthen constitutionalisation in the sense of giving additional authority to the international norms and political commitments/policy goals but also reinforce the authority of the judicial decisions.

The decisions before the ECtHR play an important role in this respect. Generally, the ECtHR is a well-respected interpreter of the constitutional charter of Europe. Its rulings will have interpretative value of the obligations of all the 47 contracting parties before national courts. The extra-layer of human rights review in Strasbourg, which is generally respected and followed by state institutions in Europe, has direct constitutionalising effects. It shifts the interpretation of what is a human rights violation to an external judicial body, which determines then how the binding obligations under the ECHR should be understood. The ECtHR's reading of the ECHR then guides domestic courts when they rule on future climate cases. It is also a resource for political reasoning, which originates outside the political debate and is for this reason an entrenched point of reference that cannot itself be changed within the domestic legal debate. This shifts powers to the judicial branch, both the externalised judiciary in Strasbourg but also to national courts by giving them additional arguments of internationally binding obligations when confronted with climate cases against the state. At the same time, the applicants

in *Klimaseniorinnen* specifically relied before the ECtHR on the interpretation of the ECHR (Articles 2 and 8) by the Dutch Supreme Court in *Urgenda*. Hence, the reinforcement of authority also goes in the other direction.

Pending and future climate cases before the ECtHR will clarify whether a particular class of persons (*e.g.*, women above 75 years of age) that are statistically more affected by the impacts of climate change (*e.g.*, heatwaves)[134] enjoy victim status within the meaning of Article 34 ECHR. They will clarify whether the applicants have to demonstrate that their rights under the Convention are affected more or differently as compared to other citizens in their position (*e.g.*, because of a particular health condition). The ECtHR, as well as national courts, are also likely to (have to) take positions on what is a 'fair share' of the global carbon budget for each and every country. This may very well be the most far reaching and politically loaded issue underlying climate cases aiming for general emission reduction. It relates to difficult redistributive, i.e. political questions, which the ECtHR is unlikely to address head on. These include: What can an individual state claim in terms of carbon budget? How should this be established? What is the relevance of past emissions in this respect? What is the relevance of per capita calculations?

5 Democratic Decision-Making and the Right to Justification

Climate cases when based on human rights are acts that demand public justification for the alleged violation of these rights by taking inadequate climate action.[135] In a relational understanding of separation of powers, as outlined above, it falls to the judiciary to ensure that the exercise of public powers respects the individual autonomy of all persons by offering them reasons for restricting their human rights and if need be to assert a particular demand for public justification in practice.[136]

The *Urgenda* case highlights this discursive justificatory dimension of the function of the independent judiciary in a state of law.[137] The Supreme Court held that the Dutch State could not lawfully reduce emissions by less than

134 Climate Inequality Report 2023 (n 50).

135 See for a theory of human rights that places the right to justification at the origin of all human rights: R Forst, *Das Recht auf Rechtfertigung – Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp 2014).

136 See section 2.2 above.

137 C Eckes, 'The Urgenda Case is Separation of Powers at Work' in N de Boer, A Nieuwenhuis and JH Reestman (eds), *Liber Amicorum Besselink* (Universiteit van Amsterdam 2021).

25% in 2020 compared to emission levels in 1990 without offering a justification considering the arguments advanced by the plaintiffs based on an extensive presentation of climate science. Throughout the proceedings in three instances, the courts invited the Dutch state time and again invited to justify its failure to develop a climate policy aimed at reducing emissions by 25%. Yet, the Dutch State did not offer such justification.

In the words of the Supreme Court, 'under certain circumstances, the State must properly substantiate that the policy it pursues meets the requirements to be imposed, *i.e.*, that it pursues a policy through which it remains above the lower limit of its fair share.'[138] However, '[t]he State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures, in spite of the above, would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands' share. The State has confined itself to asserting that there "are certainly possibilities" in this context'.[139] On the contrary, '[t]he State acknowledge[d] the fact' that 'any postponement of the reduction of emissions therefore means that emissions in the future will have to be reduce on an increasingly large scale in order to make up for the postponement in terms of both of time and size.' Postponement makes the necessary measures hence 'increasingly far-reaching and costly', as well as 'riskier'.[140]

Similarly, in the Irish climate case, the Supreme Court held that the public needed to be able to hold their government to account.[141] Citizens need to understand whether the government is doing its job (well enough). This is a broad and fundamental democratic argument that carries weight much beyond the narrow legal grounds on which the Irish courts ruled. Surely, the government failed to comply with the specificity requirements of the national climate law, requiring it to draw up a plan to reduce emissions. The justification requirement is substantively linked to the apparent inconsistency that the plan, while stating that Ireland was committed to achieving by 2050 an aggregate reduction in carbon emissions of at least 80 per cent in some sectors and zero net emissions in others (both compared to 1990 levels),[142] first allowed Ireland's emissions first to increase further.[143] The Irish Supreme Court held

138 *Urgenda* [2019] (n 1), para 6.5.
139 Ibid, para 7.4.6.
140 Ibid, paras. 7.4.5 and 7.4.3.
141 *Friends of the Irish Environment* [2020] (n 2), para 46(47).
142 Ibid, para 5(25).
143 Ibid, *inter alia* para 4(3).

that the proposed trajectory was deficient and that the national law required the government to specify how they were going to achieve their reduction target. The courts were not convinced by the government's response that not all the steps to achieve the envisaged reduction could be known already. The Government's plan spoke of 'endeavouring to improve our understanding' and 'further investigation will also be necessary'.[144] Most importantly, the plan alluded to carbon capture and storage (CCS) technologies by stating 'we cannot be sure what future technologies will deliver'.[145] It was in particular the postponement of (political responsibility for) emission reduction (by being insufficiently specific and by allowing in the short-term a further increase in emissions) that the courts did not accept and on which they required further explanation.

In *Grande-Synthe I*, the Conseil d'État (highest French Administrative Court) ruled that the Government had failed to pursue effective climate action. The Court gave the Government nine months (until March 2022) to take the measures necessary for reducing emissions produced on French territory to a level that complies with France's climate targets under the 2015 Paris Agreement.[146] This additional opportunity to take action is also an opportunity to offer justification. It follows the same reasoning as the Irish climate case. The Government's climate action appeared contrary to the requirements of climate science considering France's commitment to pursue the goal of keeping global warming below 1,5° C. The State must explain why this is not the case.

In the UK, *Net Zero Strategy* case, the judges confirmed the focus of the earlier Irish climate case on the lack of concretization, explanation, and quantification of how the government's plans would achieve the emissions targets set out by the legislature. For this reason, the judge found the Government's plan had failed to meet its obligations under Climate Change Act (CCA) 2008. Justice Holgate's judgment ordered the Department for Business, Energy, and Industrial Strategy to prepare and present, by April 2023, a report explaining how the government's policies in the net zero strategy would contribute towards emissions reductions.

Where courts give value to the need for public justification for human rights violations flowing from climate inaction they make an important contribution to democratic will-formation. A robust democratic space requires a forum where contradictory and insincere pledges of politicians to citizens and other

144 Ibid, para 6(43).

145 Ibid.

146 *Grande-Synthe* [2021] (n 4).

states can be exposed and evaluated. If the political branches that are mandated to balance and reconcile the different interests fail to do so and hide behind general assurances while the scientific consensus exposes that climate change structurally endangers the human rights of their citizens courts have a role in allowing citizens to demand justification.

6 Conclusions

A growing body of climate cases that is interconnected by references and takes notice of each other emerges. It contributes to exposing and, partially, sanctioning the insincerity with which European governments publicly and solemnly confirm the urgency and necessity of drastic climate actions, while in practice shying away from making the difficult concrete decisions on the ground. They are unwilling or unable to take the necessary decisions on how the numerous, both overlapping and contradicting interests should be reconciled in a sincere effort of taking the drastic climate actions necessary to avoid what they themselves see as 'dangerous climate change'.

Some (partially) unsuccessful cases also contribute to climate constitutionalisation, *e.g.*, by establishing that human rights were violated, that the national constitution gives individuals a right to a healthy environment, or that climate inaction requires an effective remedy. Climate constitutionalisation is like throwing stones into a river to be eventually able to cross to the other side.[147] In other words, climate litigation is not mushrooming in many unrelated cases but builds a connected web of arguments and references. It produces a version of constitutionalisation that relates to the climate-relevance of human rights, mitigation commitments, and climate science. Climate litigation constitutes a shift towards expert law-making in the sense that it, even if partially relating to (symbolic) damages, asks courts to establish legal obligations that have value in the political debate and aim to trigger deep socioeconomic changes for the future. As the catastrophic consequences of the climate emergency are already present and are going to increase, the pressure for more stringent climate laws is growing. For politicians, climate litigation in Europe may feel like being stuck in a repeat game with increasing stakes and decreasing chances. In Germany, another constitutional complaint was filed on 24 January 2022 (*Steinmetz*).[148]

147 See for this image: R Verheyen, *Wir allen habben ein Recht auf Zukunft* (n 23), 107.

148 For more information on the German case see: DUH, 'Climate lawsuit filed: Environmental Action Germany sues German government for ineffective climate protection measures in agriculture and forestry' (*Deutsche Umwelthilfe*, 24 November 2022)

It puts into practice what was predicted in advance, namely that the new climate protection act opens new litigation opportunities.[149]

The additional layer of the ECHR and its interpretation by the ECtHR are substantively highly relevant for the interpretation of human rights in many national jurisdictions. They also have a much wider reach because the 47 signatories to the ECHR have good reasons to take notice of the case law of the ECtHR on an issue that is a truly global action problem, for example when the Court gives meaning to political commitments that all of them have made in slightly different form and shape as they are all parties to the UNFCCC.

This chapter has traced the constitutionalising of mitigation norms emerging from human rights, international political commitments, and climate science. Many successful and some unsuccessful cases in Europe have created a web of legal interpretations, often with mutual references, on which future litigation can stand to push in different ways for climate action.

Litigation as a driver of climate constitutionalisation also has consequences for the powers of the three branches of government and their interaction. This chapter identified these consequences and demonstrated that climate cases strengthen the judiciary's position in the institutional interaction and how this contributes to a constructive exchange and offers an alternative forum, in which the agreed factual basis is publicly established and in which political decision-makers are pressed to offer justification. The judiciary is not only asked to press the other branches for justification of their inaction but also contributes to the development of legal norms in form of principles and interpretations that speak to the climate emergency and that enjoy – at least potentially – a higher rank than ordinary legislative or executive action. This becomes apparent in the authoritative interpretations of the Strasbourg Court of rights under the ECHR.

These judicially interpreted norms constitute the framework in relation to which public and private actors develop their understanding of what is lawful. This concerns both mitigation but also implementation of the politically established and endorsed targets. If law has – at least also – a justificatory function

<https://www.duh.de/presse/pressemitteilungen/pressemitteilung/climate-lawsuit-filed-environmental-action-germany-sues-german-government-for-ineffective-climate-p/> accessed 15 June 2023.

149 A Buser, 'Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German Constitutional Court's Climate Decision' (2021) 22 *German Law Journal* 1409 explains 'how the German legislator, by going beyond what was required by the Court "trapped itself" on an ambitious reduction path, opening opportunities for future constitutional complaints'.

and acts as a moral yardstick, that sets out normative evaluations in a way that can find support by a majority and that benefits from at least some *prima facie* assumption of correctness, these norms also have an influence on the broader understanding of what is legitimate. As more and more states set net zero targets for the future, courts will be less engaged in reviewing the legality of insufficient targets and more engaged in reviewing insufficient implementation of these targets.

Bibliography

Cases

BvR 1152/10; 2 BvR 571/10 – (Preventive Detention).
Carême v France, no. 7189/21 (ECtHR).
Commune de Grande-Synthe v France [2021] no. 427301 (Conseil d'Etat).
Duarte Agostinho and Others v Portugal and 32 Other States, no. 39371/20 (ECtHR).
Efe v. Minister for Justice, Equality and Law Reform [2011] 2 IR 798.
Family Farmers and Greenpeace Germany v Germany [2018] 00271/17/R/SP (Administrative Court Berlin).
*Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney Genera*l [2020] Appeal no. 205/19 (Supreme Court).
GFCC, Decision of 14 October 2004, 2 BvR 1481/04 – (Görgülü; ECHR decision).
GFCC, Decision of 4 May 2011, 2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2.
Greenpeace Nordic and Others v Norway, no. 34068/21 (ECtHR).
Greenpeace Nordic and the Finnish Association for Nature Conservation v Finland [2023] ECLI:FI:KHO:2023:62 (Supreme Administrative Court of Finland).
KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications [2020] 1C_37/2019 (Switzerland Supreme Court).
KlimaSeniorinnen Schweiz et al v Switzerland, no. 53600/20 (ECtHR).
Klimatická žaloba ČR v Czech Republic [2022] No. 14A 101/2021 (Prague Municipal Court).
Klimatická žaloba ČR v Czech Republic [2023] 9 As 116/2022 – 166 (Czech Supreme Court).
Marbury v Madison [1803] 5 U.S. (1 Cranch) 137 (1803) (US Supreme Court).
Nature and Youth Norway and others v Norway [2020] HR-2020-24720P (Supreme Court).
Neubauer and Others v Germany [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court).
Notre Affaire à Tous and Others v France [2021] Nos. 1904967, 1904968, 1904972, 1904976/4-1 (Paris Administrative Court).

Nyugat [1959], HR 6 March 1959, NJ 1962, 2.
Plan B and Others v Prime Minister and Others [2022] CA-2021-003448 (Court of Appeal).
Plan B Earth et al v Secretary of State for Transport [2020] EWCA Civ 214.
R (*on the application of Friends of the Earth and Others*) *v Heathrow Airport* [2020] UKSC 52.
R v Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 1841.
Soubeste and 4 other applications v Austria and 11 other States, no. 31925/22 (ECtHR).
State of the Netherlands (*Ministry of Economic Affairs and Climate Policy*) *v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, Civil Division).
State of the Netherlands v Stichting Urgenda [2018] ECLI:NL:GHDHA:2018:2591 (Court of Appeal).
Stichting Urgenda v State of the Netherlands [2015] ECLI:NL:RBDHA:2015:7196 (District Court).
VZW Klimaatzaak (unofficial translation), Appeal of 17 November 2021, <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211117_2660_appeal.pdf> accessed 2 April 2023.
VZW Klimaatzaak v Kingdom of Belgium & Others [2021] 2015/4585/A (Brussels Court of First Instance).

Literature

Adelmant V, P Alston and M Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1.
Al Jazeera English, 'The Case for the Climate: Forcing systems change in court | earthrise' (26 April 2023) <https://www.youtube.com/watch?v=MJXpO0oZwpc> accessed 15 June 2023.
Amnesty International, 'After UN Climate Action Summit, Urgent Action Needed by All States to Avoid Human Rights Violations on Massive Scale' (Public statement, Index number IOR 40/1239/2019, Amnesty International 2019) <https://www.amnesty.org/en/documents/ior40/1239/2019/en/> accessed 2 April 2023.
Besselink L, 'The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives: Hoge Raad (Netherlands Supreme Court) 20 December 2019, Urgenda v The State of the Netherlands' (2022) 18 European Constitutional Law Review 155.
Buser A, 'Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity– The German Constitutional Court's Climate Decision' (2021) 22 *German Law Journal* 1409.
Cevik S and J Tovar Jalles, *For Whom the Bell Tolls: Climate Change and Income Inequality* (IMF 2022).

Chancel L et al, *Climate Inequality Report 2023* (World Inequality Lab Study 2023/1) <https://wid.world/wp-content/uploads/2023/01/CBV2023-ClimateInequalityReport-3.pdf> accessed 15 June 2023.

Cournil C, A Le Dylio and Mougeolle, 'L'Affaire du Siecle: French Climate Litigation between Continuity and Legal Innovations' (2020) 14 CCLR 40.

Darian-Smith E, *Global Burning: Rising Anti-Democracy and the Climate Crisis* (Stanford University Press 2022).

Dover S, 'Sustainability: Demands on Policy' (1997) 16 Journal of Public Policy 303.

DUH, 'Climate lawsuit filed: Environmental Action Germany sues German government for ineffective climate protection measures in agriculture and forestry' (*Deutsche Umwelthilfe*, 24 November 2022) <https://www.duh.de/presse/pressemitteilungen/pressemitteilung/climate-lawsuit-filed-environmental-action-germany-sues-german-government-for-ineffective-climate-p/> accessed 15 June 2023.

Eckes C, 'EU accession to the ECHR: between autonomy and adaption' (2013) 76 *Modern Law Review* 254.

Eckes C, 'Strategic Climate Litigation: Legal Consequences of Scientific "Truth"?' (forthcoming).

Eckes C, 'The Urgenda Case is Separation of Powers at Work' in N de Boer, A Nieuwenhuis and JH Reestman (eds), *Liber Amicorum Besselink* (Universiteit van Amsterdam 2021).

Eckes C, J Nedevska and J Setzer, 'Climate litigation and separation of powers' in M Wewerinke-Singh and S Mead (eds), *Judicial Handbook on Climate Litigation, lawyers and legal scholars* (project of IUCN's World Commission on Environmental Law (WCEL) Climate Change Law Specialist Group (CCLSG)), 2023.

Fiorino D, *Can Democracy Handle Climate Change?* (Polity Press 2018).

Fischer F, 'Ecological Crisis and Climate Change: From States of Emergency to 'Fortress World'?' in F Fischer (ed), *Climate Crisis and the Democratic Prospect: Participatory Governance in Sustainable Communities* (Oxford University Press 2017).

Forst R, *Das Recht auf Rechtfertigung – Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp 2014).

Ganguly G, 'Judicial transnationalization' in V Heyvaert and LA Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar 2020).

Ganguly G, J Setzer and V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841.

Ganguly G, *Towards a transnational law of climate change: transnational litigation at the boundaries of science and law* (LSE PhD Thesis, 2019).

Ghaleigh NS, J Setzer and A Welikala, 'The Complexities of Comparative Climate Constitutionalism' (2022) 34 Journal of Environmental Law 517.

Gloppen S and C Vallejo, 'The climate crisis: litigation and economic, social and cultural rights' in J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020).

Habermas J, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (MIT Press 1996).

IPCC, *Global Warming of 1.5°C* (IPCC 2019) <https://www.ipcc.ch/sr15/download/> accessed 15 June 2023.

IPCC, *Progress Reports* (IPCC 2021) <https://apps.ipcc.ch/eventmanager/documents/65/040320210332-INF.%208%20-%20Progress%20Report%20IG%20Publications.pdf> accessed 2 April 2023.

Jaria-Manzano J and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019).

Kennedy D, 'A Semiotics of Legal Argument' (1991) 42 Syracuse Law Review 75.

Knox O, 'The Daily 202: The Alarming Climate Report Is Also a Huge Politics Story' (*Washington Post* 10 August 2021) <https://www.washingtonpost.com/politics/2021/08/10/daily-202-alarming-climate-report-is-also-huge-politics-story/> accessed 15 June 2023.

Kotzé L, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

Kulovesi K et al, 'Finland's first climate judgment: Putting the government on notice' (*CCEEL*, 12 June 2023) <https://sites.uef.fi/cceel/finlands-first-climate-judgment-putting-the-government-on-notice> accessed 15 June 2023.

May JR and E Daly, 'Global climate constitutionalism and justice in the courts' in J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019).

May JR and E Daly, *Environmental Constitutionalism* (Cambridge University Press 2015).

Mayer B, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' (2021) 115 American Journal of International Law 409.

Mayer B, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2022) 20 Journal of Environmental Law 1.

Möllers C, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013).

Peel J and H Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21.

Rodríguez-Garavito C, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 American Journal of International Law 40.

Rodríguez-Garavito C, *International Human Rights and Climate Governance: The 'Rights Turn' in Climate Litigation* (Unpublished manuscript).

Shearman D and JW Smith, *The Climate Challenge and the Failure of Democracy* (Praeger 2007).

Taconet N, A Méjean and C Guivarch, 'Influence of climate change impacts and mitigation costs on inequality between countries' (2020) 160 Climatic Change 15.

Tzanakopoulos A, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loy. L.A. Int'l & Comp. L. Rev 33.

UNEP, 'Climate Change and Human Rights' (Report, UNEP 2015) <https://www.unep.org/resources/report/climate-change-and-human-rights> accessed 2 April 2023.

UNESCO, 'UNESCO 'World in 2023' Survey Report highlights youth concerns over climate change and biodiversity loss' (*UNESCO*, 31 March 2021) <https://en.unesco.org/news/unesco-world-2030-survey-report-highlights-youth-concerns-over-climate-change-and-biodiversity> accessed 15 June 2023.

UNFCCC, 'Nationally determined contributions under the Paris Agreement', FCCC/PA/CMA/2022/4 (Synthesis Report, UNFCC 2022) <https://unfccc.int/ndc-synthesis-report-2022> accessed 2 April 2023.

Vanhalla L, 'Legal opportunity structures and the legal mobilization by the environmental movement in the UK' (2012) 46 Law & Society Review 523.

Verheyen R, *Climate Change Damage and International Law: Prevention Duties and State Liability* (Brill 2005).

Verheyen R, *Wir alle haben ein Recht auf Zukunft* (DTV Verlag 2023).

Vile MJC, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967).

Waldron J, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 441.

Wewerinke-Singh M and S Mead (eds), *Judicial Handbook on Climate Litigation, lawyers and legal scholars* (project of IUCN's World Commission on Environmental Law (WCEL) Climate Change Law Specialist Group (CCLSG), 2023).

World Health Organisation, 'Health and climate change' (*WHO News Room*, 5 December 2018) <https://www.who.int/news-room/facts-in-pictures/detail/health-and-climate-change> accessed 15 June 2023.

Zielonka J, *The Lost Future and How to Reclaim It* (Yale University Press 2023).