

From the street into the courtrooms: as was the case in Hamburg, young people around the world demonstrated in 2019 for fast and effective climate protection measures. Now they are also taking legal action against the government.



PHOTO: PICTURE ALLIANCE / NIM.GS

CLIMATE-PROTECTING COURTS

TEXT: MICHAELA HUTTERER

Thus far, most industrialized countries have taken only half-hearted measures to limit their CO₂ emissions, and the effects of global warming are becoming increasingly apparent. At the same time, the pressure on governments is growing as climate activists are increasingly taking the matter to court. Researchers at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and the Max Planck Institute for Comparative Public Law and International Law are looking into how jurisprudence and legislation could help to counter climate change.

Hannes Schwerdtner from Uckermark is furious. Furious because the meadows which once fed 400 head of cattle, are being turned into sandy deserts because of violent storm gusts. Furious about the German government's unambitious climate policies and its emergency water laws which prohibit him from drilling new wells. As the farmer testifies at the International Court of Justice in Berlin, he has only been left with 30 cows after having been forced to slaughter the rest. The court has been temporarily relocated because of local flooding.

Though all too believable, what you have just read is (still) a fictional tale taken from "Ecocide", a TV film shown on the German ARD channel last November. In summary, the plot is that 31 southern hemisphere states sued the Federal Republic of Germany in 2034 for damages resulting from insufficient climate protection, whether due to the late phase-out of coal power, the grant of loans worldwide by the state business development KfW bank for the construction of coal-fired power plants, or the support for the domestic car industry through half-hearted measures for CO₂ reduction.

Total science fiction? Not at all. The dystopia presented by author and Director Andres Veiel is based on the latest findings of climate research and legal science. Experts from the Max Planck Institute for Comparative Public Law and International Law in Heidelberg provided the legal background for the script. Scientific facts for a very real future scenario; a script for the time when the Earth's atmosphere will have heated up even more and untold numbers of people will be suffering

the effects. In fact at this point, the scenario is not so far from reality. Whether in Australia, the United States, France, the United Kingdom, Switzerland or Germany, more and more climate protesters are taking their cases to court "We are seeing a dynamic development of climate-related court cases all around the world, with the number of pending cases exploding," reports Tom Sparks, a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. "While no case has yet been brought to the International Court of Justice, it would be possible," explains the expert on international climate and procedural law, who also advised the ARD filmmakers.

The majority of cases are currently presented in national courts. #climate-justice is the buzzword for the legal fight for more climate protection and a fairer distribution of the burdens resulting from global warming and is the legal extension of the Fridays for Future movement, which represents a continuation of protest marches into courtrooms around the world. Cli-

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mate scientists, activists, and lawyers are pooling their knowledge in a global network: whether it is “Lawyers for Future” or environmental lawyers in academia, they rely on the publicity that court cases create, collecting and analyzing legal documents and rulings worldwide. Ecolex is just one of several databases documenting the global battle for climate in the courts.

Climate targets are not directly enforceable

The main argument of activists, victims, and environmental associations who take legal action against the state is that climatic change violates human rights. It threatens the ecological subsistence level of human beings, which is derived from the right to life, to family, but also to housing, and is incorporated in national (constitutional) law, or is at least accepted as a standard, in almost every country.

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“This path is very promising, but there are limits,” legal scholar Sparks observes. Following the adoption of the Paris Agreement in 2015, the 191 signatory states, which include all EU member states and the U.S., are obliged to set and meet certain climate objectives that they set for themselves. “However,” as Sparks explains, “these targets themselves are not directly enforceable.” He goes on to say that it was particularly important for the industrialized nations, as greenhouse gas emitters, not to create any new ground for legal suits under the agreement.

And, as a cursory glance at the database of court verdicts shows, this is precisely why many court cases collapse: at the end of March, the European Court of Justice (ECJ) in Luxembourg rejected the “People’s Climate Case”, a lawsuit filed by ten families from the EU, Kenya and Fiji for stricter climate targets on formal grounds alone. All of the plaintiffs, such as the German Recktenwald family from Langeoog, all work in

tourism or agriculture. They had filed a complaint against the European Parliament and the EU Council because of insufficient climate protection standards. The ECJ did not allow the case to proceed to judgment on the basis that, as in the previous instance, the applicants lacked any basis for the lawsuit. As the judges ruled, climate targets do not create individual rights even if the consequences of climate change – such as droughts or floods – are already having an effect on individual persons or groups. More demanding climate targets such as the reduction of greenhouse gases by 50 to 60 percent compared to 1990 levels by 2030 (rather than the 40 percent currently envisioned) – cannot be established by taking legal action before the ECJ.

The European Court of Human Rights, however, was less restrictive and decided to hear the case put forward by a group of Portuguese young people in a special procedure. The plaintiffs, children and young adults between the ages of nine and 22, are demanding stronger climate protection measures from the 33 states that have signed the Convention for the Protection of Human Rights and Fundamental Freedoms, which includes Germany. Their case is based on the devastating forest fires in the Pedrógão Grande region in 2017, which claimed more than 100 lives. The plaintiffs invoke Articles 2 and 8 of the Convention, which protect the right to life and the right to respect for private and family life. Their accusation is that the inaction of the EU states, but also of Russia and Great Britain, against climate change is partly responsible for the extent of the repeated fires.

The fact that the judges allowed the lawsuit to proceed to judgment is a novelty for legal experts: plaintiffs usually have to go through national courts before they are allowed to bring a claim before the European Court of Human Rights. The Strasbourg judges made an exception in this case. What’s more, they bundled the lawsuits against the 33 governments into a single procedure and emphasized the importance, urgency and priority of

Fictional trial: in the TV film “Ecocide”, the International Court of Justice hears a case brought by countries in the Global South against Germany in the year 2034. The states are claiming damages because the German government has done too little to combat climate change.



SUMMARY

Lawsuits for more climate protection have been successfully filed in national courts. The judges based their decisions on fundamental and human rights.

In March, the European Court of Human Rights allowed a climate lawsuit against 33 European states.

An obligation to protect the climate can also be derived from international law: the no-harm rule prohibits a country from taking any actions that harm another country.





PHOTO: 2020 MATTHIAS FLEISCHER / ZERO ONE FILM

the process. The respondents now have a rather short deadline until mid-July 2021 to respond. If the Strasbourg judges were to rule in favor of the young people, it would be an important victory in the fight for climate protection by court order.

Climate plaintiffs are mainly drawing support, above all, from the Netherlands and the breakthrough decision from December 2019 – called “Urgenda”. “It is the blueprint for many lawsuits around the world,” as Alessandra Donati, a senior research fellow at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg explains.

The Dutch Urgenda foundation (from Urgent Agenda) had already sued the Dutch government in 2013 for stronger climate protection on behalf of 900 Dutch citizens. The foundation invoked international, EU and national law and called for the govern-

ment to do significantly more by the end of 2020 in order to keep to the Paris climate objectives. The government thought it was in line with the rules offering a reduction of greenhouse gas emissions by 20 percent below 1990 levels. Too little, the District Court of The Hague decided, and ordered the government to limit emissions to at least 25 per cent by 2020. The High Council, the highest court in the Netherlands, upheld that decision. The judges also referred to the European Convention on Human Rights: by setting insufficient climate protection standards, the state violated its duty to protect citizens from the dangers of climate change, which follows from Articles 2 and 8 of the ECHR.

The decision is something of a sensation for legal experts. “For the first time, a court has established a duty of action on the part of the state to comply with climate objectives and condemned it for inadequate implementation,” as

environmental law expert Donati explains. “States have a duty of care to their citizens to provide a healthy environment and protect them from harm.” Whether this danger affects individuals or the entire population is just as irrelevant as the question as to how imminent the danger already has to be. As Donati, a former solicitor, explains: “Urgenda” establishes the state’s liability for any foreseeable danger to its citizens.

Judges in France came to a similar ruling in February in the case “L’affaire du siècle”. In its ruling, the Paris Administrative Court found ecological damage in connection with climate change and held the French state liable. The case was brought by environmental and social associations, which are now preparing a lawsuit for damages. In Germany, too, pressure on the legislator is mounting. In an unexpected but impressive verdict this April, the Federal Constitutional Court (Bundesverfassungsgericht) as



ruled in favor of 44 complainants led by Fridays for Future activist Lisa Neubauer, declaring that the provisions of the Federal Climate Change Act of 2019 (Bundes-Klimaschutzgesetz – KSG) governing national climate targets and the annual emission amounts allowed until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards. The law stipulates that Germany should become climate-neutral by 2050, in line with the Paris Agreement, and sets specific reduction targets until 2030 yet fails to make any specifications for the period between 2031 and 2050. For the judges, this is an inadmissible interference with the civil rights of young people and future generations. If CO₂ emissions do not decrease by a considerable degree by 2030, the rele-

vant restrictions will have to be tightened if the climate targets are still to be achieved. Because almost all areas of human life are still linked to the emission of greenhouse gases, the court reasons that many freedoms will have to be restricted from 2031 onwards.

The judges are demanding a real, long-term climate strategy for future generations as set out in Article 20a of the German Basic Law (Grundgesetz) which states that: “Pursuant to its responsibility to future generations, the state shall protect the natural foundations of life and animals.” It remains to be seen whether the new climate protection legislation that the federal government enacted rather swiftly following the court ruling in mid-May will meet the judges’ demands. It envisages a

65% reduction in greenhouse gas emissions by 2030 (rather than 55% in relation to 1990) and aims for climate neutrality by 2045 (rather than 2050). The Netherlands, France, Germany – what good is a patchwork of national decisions? Does global warming not require global action and global legislation? “I see two ways to mitigate the effects of global warming,” says Alessandra Donati: “Legislation and litigation. Climate related lawsuits are only one part of it. More important are meaningful climate laws themselves.” In the course of a research project, she is looking into how the proposals outlined in the EU’s Green Deal, the purpose of which is to mandate tougher targets for the EU, could be implemented to tackle environmental, economic, and legal climate risks in accordance with EU law.

For the right to a climate that benefits all humans: Mariana (9), Cláudia (22), Martim (18), and Catarina (20), together with two other Portuguese youths, successfully filed a complaint with the European Court of Human Rights.



PHOTO: GLAN

Experts are waiting with bated breath to see what legal imperatives will be brought to bear in the struggle against global warming in the future. What is required is a global will to act, which is predicated on a shared set of goals within the global community. “Since Paris,” Sparks observes, “the process of agreeing on more profound measures has stalled – often due to the resistance of the emitting countries.” He and Donati are cautiously optimistic about the outcome from the virtual Earth Day Summit in April, at which the U.S., the host country, in particular, forged ahead under its new administration.

No country should harm another

Whether or not the international community truly takes climate protection seriously will be seen later this year. More aggressive climate protection targets could be established at the climate summit in Glasgow. But what happens if they are not set? Can one argue the case for a duty to take action? Tom Sparks is looking into this question and is considering the extent to which countries may even be obliged to take action based on international law. An obligation to reach agreement may even be derivable from international law, for example through the no-harm rule, which prohibits a country from taking measures whose effects are to the disadvantage of another country. An international duty to protect the climate would appear to be the solution in view of rising sea levels, fire and storm damage, and increasing droughts.

In the meantime, the only hope is for climate protection to be fast-tracked by a court ruling. Above all, hopes are resting on the International Court of Justice in The Hague (ICJ), which can tackle all the relevant legal issues as long as the parties accept its jurisdiction. “Inter-state claims can have a far greater effect on solving the climate problem because, unlike proceedings based primarily on human rights violations, they usually have more than just a national impact,” says Sparks.

PHOTO: PATRICIA DE MELO MOREIRA/APP VIA GETTY IMAGES



Deadly fire: in 2017, forest fires claimed the lives of more than 100 people in the Pedrógão Grande region of Portugal. It was this disaster that caused young Portuguese to file a lawsuit in favor of climate protection.

Unlike in the TV movie, it is not clear whether any of the countries in the southern hemisphere are currently preparing a lawsuit against Germany or other industrialized nations. One can also set about finding out what the supreme judges of the world think about the objectives and climate efforts of the global community in a different way. “It would be possible to raise a request in the UN General Assembly

next year to oblige judges to provide a legal opinion on some of the specific legal questions,” says Sparks. “An advisory opinion from the International Court of Justice has enormous significance as it provides an authoritative statement on the rights and obligations of states.” National courts would benefit from this in their decision-making. So, the ICJ judges could become the supreme climate defenders.



Danger from the well: in some areas of India, groundwater is naturally contaminated with arsenic. An information campaign is intended to educate villagers about the risks. This includes asking about the health of all family members.

84 Max Planck researchers cooperate with partners in more than 120 countries. Here they write about their personal experiences and impressions. Shambhavi Priyam of the Max Planck Institute for Research on Collective Goods is coordinating an information campaign in northeast India in order to protect people from arsenic-contaminated well water. She reports on culinary delights, the slow wheels of the Indian bureaucracy, and celebrating her birthday in the midst of a pandemic.

For many of use, the word ‘arsenic’ conjures up images of old murder mysteries. But hardly anyone in Germany knows that millions of people in India and Bangladesh suffer from chronic arsenic poisoning – and that tens of thousands of people die from it every year. Highly toxic arsenic compounds occur naturally in the groundwater in some areas of northeast India. Many wells are contaminated with it. The

problem is that you can’t see, taste, or smell the arsenic in the water. And because it doesn’t make you sick right away, many people don’t even realize that they are damaging their health every day. They use the well water for drinking, cooking, and irrigation. In the process, they suffer from chronic poisoning over the years. Typical symptoms are painful, itchy calluses on the palms of the hands and soles of the feet as well as dark spots on the skin. It sometimes takes years – or even decades – for nervous diseases or cancer to develop.

We want to figure out the best way to make people aware of the invisible danger and persuade them to change their habits. The study involves 150 villages from the Bihar region in northeastern India. The people here either farm or earn their living as migrant workers. Many cannot read or write and have limited access to medical care. In order to educate them about the arsenic problem, we have made a film in cooperation with the

local government. Film work was completely new territory for me. But it was a lot of fun.

The footage provides information about the invisible danger and shows the inhabitants of the region how to obtain safe water. One method is to boil water collected from ponds and rivers. But there is an even easier way: well water is left to stand overnight so that the arsenic can settle to the bottom. The water at the top of the vessel can safely be used. A small change in behavior can thus have a huge effect – I want to spread this message to as many people as possible! To do this, I work together with local helpers. They go to the villages, measure the arsenic levels in the wells, interview people about their habits and health status, and show them the film. In order to reach people, it is important that all contributors speak the local language and know the local conditions. I was born in Patna, the capital of Bihar, and spent the first 10 years of my life here. An interim assessment