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Environmental justice: Mobilising constitutional opportunity structures to empower and protect vulnerable and marginalised groups

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Abstract: Over recent years national constitutional courts, the European Court of Justice and the European Court of Human Rights have become increasingly engaged with the mobilization of constitutional law and human rights law for the purpose of protecting environmental rights. This working paper explores the extent to which constitutional opportunity structures can be seized to promote environmental and climate justice through legal action, alongside (or instead of) action by political and social movements. The paper also investigates the growing use of human rights law to enable collective and transnational action to advance climate justice. The research objective is to evaluate the potential of national and European courts to promote environmental justice and to secure remedies that go beyond addressing individual harms with a view to promoting environmental and climate justice for all. The paper presents examples from different countries demonstrating how constitutional and human rights law can be used to achieve success in litigation involving environmental harms and makes a series of recommendations for the future use of public law mechanisms by litigants to develop a form of collective action for environmental and climate justice.

Keywords: Climate change; Environmental justice; Constitutional opportunity structures; Human rights; Public law; European law.

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1. Introduction

In recent years, various national constitutional courts around the globe have increasingly engaged with constitutional and human rights law to protect environmental rights and create novel methods to provide environmental justice; especially for groups most at risk. Humanity has witnessed an evolution of scientific knowledge, along with shifts in social and political attitudes and the legal standards for environmental concerns have been similarly evolving. Environmental justice, defined as "the fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies"[1], is an important part of the endeavour to protect the environment and to address the significant problems caused by climate change.

Until today, the emerging efforts of constitution-makers as well as constitutional and human rights lawyers around the world to ensure that constitutions drive and reflect the need for climate and environmental action have not been widely discussed[2] with the focus often falling on private law enforcement mechanisms. More 'creative forms' of litigation as seen in *Neubauer et al. v Germany* (2021)[3] (discussed below) may though become the future method of dealing with environmental concerns in nations with constitutional and human rights mechanisms which lend themselves to a more collective form of action. Consequently, incorporating climate change into constitutions should be viewed as more than merely continuing the prior trends of environmental constitutionalism with more and more countries striving to not only incorporate environmental rights and obligations into national constitutions but also to express climate concerns in "the language of constitutional rights".[4]

This research paper explores the extent to which constitutional opportunity structures can be utilised to promote environmental justice through legal action as well as or alongside the actions of political and social movements. Though the latter are discussed to contextualise the background of the nations discussed, this is not the focus of the paper. Instead, the paper investigates the growing use of constitutional and human rights laws to enable collective and transnational action to advance environmental and climate justice.

An essential component of environmental justice is procedural justice[5], meaning the procedures and mechanisms in place to address environmental outcomes and the "possibilities which individuals and communities have to avoid or ameliorate risk[6]. Thus, the research objective is to evaluate the potential of national and transnational courts to promote environmental justice and to secure remedies that go beyond addressing individual harms with a view to promoting sustainability and climate justice for all. The aim is to ascertain the scope of citizens' rights in public law to achieve environmental justice. Additionally, the study aims to assess the extent to which national constitutions can support environmental justice initiatives and how. The research employs a legal pluralism perspective and considers the interplay between local (cantonal/federal), national, regional (European, South American) and international legal frameworks. The focus lies in understanding how each of the nations considered

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[1] *United States Environmental Protection Agency, 'Environmental Justice' (2023) https://www.epa.gov/environmentaljustice/learn-aboutenvironmental-justice accessed 14 February 2024.*

[2] *Karla Martinez Toral, 'The 11 nations heralding a new dawn of climate constitutionalism' (Grantham Research Institute on Climate Change and the Environment, 2 December 2021) https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawnof-climate-constitutionalism/ accessed 16 February 2024.*

[3] *Neubauer v Germany (2021) 1 BvR 2656/18.*

[4] *ibid.*

[5] *Gordon Walker and Harriet Bulkeley, 'Geographies of Environmental Justice' [2006] 37(5) Geoforum 655; David Schlosberg, 'Theorising Environmental Justice: The expanding sphere of a discourse' [2013] 22(1) Environmental Politics 37; Gordon Mitchell, 'The messy challenge of environmental justice in the UK: evolution, status and prospects' (2019) 273 Natural England https://publications.naturalengland.org.uk/publication/6558423485513728> accessed 10 February 2024.*

[6] *Walker and Bulkeley (n 5) [6].*

below aligns with broader international goals for environmental action, and how there may be potential overlaps or disparities in decision-making at the national, European and international levels.

One angle of the research encompasses the type of litigants involved in environmental and climate action cases. The research posed the question of the use of litigation to protect and/or empower vulnerable/marginalised groups to bring claims which has then resulted in a constitutional change in the countries concerned. The paper discusses multiple marginalised groups (ie people who are negatively affected and structurally disadvantaged in society) for example individuals with disabilities in the UK, elderly women in Switzerland, indigenous people in Colombia, and the protection of young people and future generations in Germany and the Netherlands. This angle also demonstrates a transformation from victim to litigant status within the context of environmental justice. The strategy entails the tactical deployment of legal systems, where individuals engage in lawfare by strategically employing the law as a tool or pioneering innovative methods to leverage legal mechanisms effectively. This can be seen in Colombia, for example, with the indigenous peoples changing presumptions around the legal ownership of property. This approach also involves harnessing a potentially privileged position to instigate change when bringing a case. An illustration of this is seen in the Swiss case, discussed below, whereby women leveraged their societal standing to advocate for reform demonstrating the potential inequalities in achieving environmental justice due to economical and societal advantages.

Criteria for Case Study Selection

This research paper discusses a number of country-specific examples to offer a range of perspectives on environmental justice. Each country chosen for this research paper is unique because of different factors. Firstly, every country occupies a unique geographical location that makes them exposed to different environmental risks. Moreover, the countries take on different geopolitical roles within the international landscape and each operates with a different constitutional and legal system. Access to environmental justice is also greatly dependent on access to education and the availability of NGOs and other pressure groups to exert public pressure and to provide financial power in support of climate litigation.

Types of Climate Change Issues

Across various regions, legal cases have sought to address distinct facets of the climate change crisis. In Switzerland, the focus has been on combating the consequences of rising temperatures and mitigating the impacts of acid rain. Portugal's legal efforts have centred on tackling the alarming prevalence of wildfires and the associated air pollution, including smoke and CO2 emissions. Meanwhile, in Germany and the Netherlands, initiatives have been directed towards the reduction of greenhouse gases to alleviate the environmental burden. In the United Kingdom, the primary objectives also revolve around curbing greenhouse gas emissions and addressing the imminent threat of rising sea levels, particularly pertinent for island communities. In South America, the focus began with awareness of cultural rights and developed in Colombia to using international mechanisms to enforce domestic obligations against deforestation.

Access to Litigation

A comprehensive examination of our cases reveals a notable discrepancy in access to litigation, influenced by factors such as financial resources and time commitments. *Carême v France*[7] for instance, underscores the significance of the need to reside in the country of litigation for the duration of the legal proceedings, highlighting the stringent procedural conditions attached to access to justice. Various examples further illustrate these disparities, such as the impact of UK legal aid cuts and the Aarhus Convention, which regulates costs in environmental claims across Europe. Moreover, while significant

[7] *Carême v France (App. 7189/21).*

financial and political obstacles persist in the Global South, the regional judiciary there has demonstrated remarkable creativity, yielding significant outcomes. For instance, the utilisation of the *tutela*, a constitutional mechanism providing expedited access to justice within a mere ten days, showcases innovative approaches to mitigate barriers to litigation.

Barriers to Justice

Barriers to justice can significantly impede the delivery of fair outcomes. Among these is cost; the Aarhus Convention aims to remove financial barriers to environmental legal challenges and nations such as Switzerland, the UK, the Netherlands and Germany, which are signatories to this Convention, commit to keeping the costs of litigation low to foster greater access to justice. Nevertheless, in practice, despite incurring considerable legal expenses for example in the case of *Verein KlimaSeniorinnen Schweiz*, the European Court of Human Rights sanctioned only €80,000 as permissible costs. Consequently, financial barriers continue to be a critical factor for applicants.

'Creative' Legal Mechanisms and Standing

Article 34 of the European Convention on Human Rights (ECHR) concerning 'victim status' offers an interesting basis for comparison. It enables both associations and individual applicants to bring forth claims. *Verein KlimaSeniorinnen Schweiz* sets a precedent for allowing associations to be involved in legal action but with stringent requirements - they must be legally recognised, pursue legitimate objectives, adhere to their statutory goals, and be genuinely equipped to defend their members' human rights. Individual applicants face a two-part test, needing to demonstrate a significant personal impact by the adverse effects in question and a compelling need for individual protection. This two-part test is essential to the core objective of this report, which seeks to examine the effects of environmental justice on the most vulnerable within society.

Human Rights, the European Convention Provisions and Vulnerability

In *Verein KlimaSeniorinnen Schweiz*[8], various articles of the ECHR are brought into play, illustrating the depth and breadth of human rights considerations. Article 2, concerning the right to life, was not deemed violated in these cases, whereas Article 8, which covers the right to private and family life, was violated, affecting the health, wellbeing, and quality of life of the applicants. Challenges to accessing justice were highlighted under Article 6, as applicants were denied court access on two occasions due to inadequate considerations, effectively leaving them without legal recourse. Article 13 of the Convention was dismissed as inadmissible, suggesting that the parties had access to effective remedies. Furthermore, the litigation in Portugal in the *Duarte* case[9] also relied on Articles 3 and 14, focusing on the severity and discriminatory nature of the impacts, respectively, although the claimants' application was rejected as inadmissible by the Strasbourg court in this case.

The Role of Lobbying and Multiple Respondent Claims

Lobbying emerges as a significant force in such legal battles, with government representatives, applicants' advocates, and third-party intervenors playing pivotal roles. The involvement of 37 third party written interventions within *Verein KlimaSeniorinnen Schweiz*, *Duarte and Carême* underscored the potential precedential impact of these cases, necessitating their escalation to the Grand Chamber. Moreover, the Portuguese case stood out for implicating 34 other member states of the Convention as participants in human rights violations, highlighting the extensive reach of accountability in environmental and human rights litigation and presenting an additional avenue for escalation even if the applicants' case was rejected as inadmissible.

[8] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, no. 53600/20.*

[9] *Duarte Agostinho and Others v Portugal and 32 Others, no. 39371/20.*

Judicial Processes and Grouping of Cases

The court's strategy to group cases for simultaneous adjudication influences the speed and outcomes of judgments. For instance, a Swiss case heard in February 2024 received a judgment by April 2024, demonstrating the efficiency of this approach.

Higher Judicial Engagement and Global Recognition

Climate change litigation transcends traditional legal boundaries, engaging higher courts and encompassing a broader policy framework. This involves democratic decision-making processes where domestic courts and the European Court of Human Rights collaboratively tackle these multifaceted challenges. Highlighting the global recognition of these issues, the UN has appointed a Special Rapporteur on human rights and the environment, David R. Boyd, signifying the international community's commitment to addressing these pivotal concerns.

Lessons to be learnt from Verein KlimaSeniorinnen Schweiz[10]

The European Court of Human Rights judgment in *Verein KlimaSeniorinnen Schweiz* has established that environmental degradation can lead to severe adverse effects on the enjoyment of human rights guaranteed by the Convention. This conclusion highlights the urgency and necessity of addressing these issues through judicial and legislative means. The responsibility falls not only on the present generation but also affects future generations who will bear the consequences of current failures to effectively combat climate change. In the case of the Swiss judgment, the European Court recognised sufficiently reliable indications that people-caused climate change is real and poses a significant threat to human rights both now and in the future. It was recognised that states are aware of these challenges and have the capacity to enact measures that mitigate these risks, affecting both public and private entities within their jurisdictions. This is particularly critical if the objectives of the Paris Agreement—to limit global warming to 1.5 degrees Celsius above pre-industrial levels—are achieved. It was agreed that states hold ultimate authority over both public and private activities within their territories that result in greenhouse gas emissions, thereby having a causal effect on the rights and well-being of people residing beyond their borders. In *Verein KlimaSeniorinnen Schweiz,*[11] a key finding from the court was the recognition of the standing of the applicant's heir to continue the litigation in place of the original applicant. This can be compared to how the Colombian Supreme Court in its Future Generations decision,[12] discussed below, recognised the Paris agreement as creating legally enforceable obligations for those yet to be born.

Ownership of the Problem

Emissions are inherently a global problem; they are not confined to national borders therefore accountability and ownership of the problem are important to consider. The question of responsibility in addressing the issue of climate change is multifaceted, extending beyond mere legal frameworks to impose accountability. Those advocating for justice hold a crucial role in pushing for accountability, possibly targeting entities with a history of pollution, which includes acknowledging the industrial and colonial legacy of nations like the UK and the Netherlands. Examining this through the lens of the global south and the global north combined underscores the disproportionate impact of climate change on the world's poorest nations. The notion of 'property', as illuminated by the Colombian case, adds complexity to this discussion, prompting reflection on whether states must first assert ownership over territories, both geographically and ideologically, before taking decisive action - a mindset that echoes colonialism. Furthermore, the interconnectedness of environmental issues becomes apparent, emphasising that no nation can address climate change in isolation. The example set by Portugal, where bordering countries' actions directly influence environmental outcomes, underscores the imperative for collaborative efforts in combating climate change.

[10] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, no. 53600/20.*

[11] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, no. 53600/20.*

[12] *Future Generations v. Ministry of the Environment and Others, Corte Suprema de Justicia (CSJ)) [Supreme Court], 5 Apr. 2018, STC STC4360-2018 (No. 11001-22-03-000-2018-00319-01).*

2. Methodology

To address the research aims, this study employs a comparative thematic analysis to investigate how constitutional opportunity structures can be utilised to mobilise climate and environmental action. A qualitative thematic analysis was employed to analyse the constitutional opportunity structures from five different countries. A thematic analysis was chosen for its ability to identify common patterns, themes, relationships and differences within textual data. The data was closely examined to identify common themes, topics, ideas and patterns of meaning that come up repeatedly.

Close analysis was conducted of the following countries: Switzerland, Germany, the Netherlands, the United Kingdom and Colombia. This included a qualitative analysis of primary sources including constitutional documents, statutes and case law. The presentation of the relevant data was conducted in a systematic way to identify commonalities between each country but also the differences. This was supplemented by analysis of secondary academic sources. An initial familiarisation of the data was conducted, which involved identifying common themes via-à-vis systematic process of coding, comparison and refinement. This had a particular focus on the use of litigation, including the types of litigants and how it is being used to protect and empower vulnerable groups. The focus on Switzerland, Germany, the Netherlands and the United Kingdom allowed for a comparison of differing constitutional structures and approaches to environmental issues within Europe. The inclusion of Colombia then allowed for a useful comparison between a vastly different social, political and historical context in a different part of the globe.

It is, of course, essential to recognise that the selection of countries considered in this paper is not representative of the global efforts towards environmental justice. This research does not include an analysis of some of the regions most affected by environmental degradation from climate change, such as states within Africa and Asia. This, along with the exclusion of academic voices from these regions is recognised as a limitation of the research. However, the countries selected were chosen to utilise the personal expertise of the researchers within the scope of the project. Additionally, given the arguably interpretive nature of thematic analysis, it is recognised that there is room for the positionality of the researchers to shape the outcomes and interpretation of themes. To address this, the research tries to ensure reliability and transparency regarding the methodology and how conclusions are reached.

The following section sets out the case studies of each country. To make this analysis clear and consistent, for each country, the following framework for analysis and discussion is used:

- Constitutional Landscape: including the constitutional structure of the state and how it is utilised for environmental action.
- Legal Landscape: including an analysis of key environmental litigation. For each case, particular focus was placed upon the grounds for bringing the case and the types of litigants, both claimants and defendants.
- Political Landscape: including the political framework and institutions of the respective countries.
- Human Rights and Climate Justice: Including how human rights are utilised in the state to pursue environmental claims and the relationship between environmental harm and the violation of human rights.
- Recommendations and Conclusion

The aim of the research is to explore how legal systems can be used to advance environmental justice through three key research questions:

> RQ1: How can climate change litigation employ constitutional and human rights mechanisms to achieve its goal?

RQ2: How can climate change litigation be used to protect and empower vulnerable groups?
RQ3: Which legal tools best enable victims to become active litigants?

3. Case Studies

3.1 Switzerland

Navigating Environmental Justice in Switzerland: **Examining Policy, Constitutional Dynamics, and Legal Precedents through reference to the case of *Verein KlimaSeniorinnen Schweiz and Others v Switzerland (ECtHR)* [2020].**

Introduction: In this investigation into environmental justice in Switzerland, an analysis was conducted to explore the human rights, constitutional and political aspects within the emerging case law. Switzerland's environmental concerns are diverse, ranging from CO2 emissions (addressed by the CO2 Act, June 2021), to biodiversity, energy, agriculture, forestry, water and more. The country actively engages with global environmental policy (most recently COP 26), whilst preserving resources as outlined in its Federal Constitution.

Constitutional Landscape: The Federal Constitution, revised in 1999 and amended in 2019, emphasises environmental governance by enabling citizens to influence constitutional changes. Through referendums occurring four times a year, citizens can directly shape climate policies, as seen in the "For a Switzerland without artificial pesticides" Referendum (June 2021). While lacking specific provisions for environmental rights, the Constitution emphasises sustainable development as well as protection for the natural environment. This framework empowers the Federal Council to propose initiatives to the Federal Assembly, influencing legislation at both national and cantonal/federal levels in a top-down, bottom-up governmental system based on the principle of subsidiarity. Examples of constitutional engagement in combating climate change include the Glacier Initiative 'The Federal Act on Climate Protection Goals, Innovation and Strengthening Energy Security' (September 2022), driven by environmental activists. This initiative sought to embed specific climate goals, like a fossil fuel sales ban by 2050, directly into the Constitution. The Federal Council's endorsement of a long-term climate strategy further illustrates Switzerland's dedication to achieving net-zero greenhouse gas emissions by 2050. The demand by the Swiss People's Party for a national referendum on the Glacier's Bill reflects democratic citizen involvement in shaping environmental policies. Triggered by concerns over melting glaciers, this referendum underscores the significance of public participation in environmental decisionmaking. Campaigners, initially proposing more ambitious measures, eventually supported a government plan committing Switzerland to achieving "net zero" emissions by 2050, allocating over 3 billion Swiss francs ($3.357 billion) for the transition away from fossil fuels.

Legal Landscape: Switzerland possesses a sophisticated legal framework to address environmental goals, utilising its federal legal structure and embracing legal pluralism to align cantonal, national, and international laws. This comprehensive approach involves active collaboration between private and public stakeholders, recognising their pivotal role in shaping effective climate policies. At the core of this legal framework is the Federal Supreme Court (FSC), serving as the ultimate authority in various legal domains and dynamically adapting laws to reflect societal changes. The Court's decisions can be appealed to the European Court of Human Rights, highlighting the interconnectedness of Swiss and European legal frameworks. The Federal Administrative Court (FAC), especially its First Division, specialises in handling appeal proceedings related to environmental issues, underscoring its crucial role in adjudicating disputes and influencing environmental policies.

Political Institutions and Direct Democracy: Switzerland's political system, rooted in direct democracy and the principle of subsidiarity, empowers citizens in legislative decisions through the United Federal Assembly (UFA). Whereas in a representative democracy, citizens elect representatives to make policy decisions on their behalf, in a direct democracy, voters are given the opportunity to

vote on specific issues through referendums, initiatives, or plebiscites. Key political players, including the (GLP) Swiss Green Liberal Party established in 2004 and (GPS) Swiss Green Party established in 1983, are currently represented in seven or more cantons out of 26. Switzerland's proactive stance on environmental challenges is evident in responses to issues like acid rain, fir tree deforestation (Gotthard Road Tunnel, Stick'AIR stickers, Green Tourism Alpmobil), and riparian rights disputes, exemplified by the Sandoz Ag Warehouse case governed by the International Commission for the Protection of the Rhine (ICPR).

Comparatively, the nation's unique geographic and strong economic position (as a financial hub it draws many environmental suits against banks such as *Credit Suisse Climate Activists Trial (Geneva) [2018]* and *Lausanne Action Climate v. Switzerland [2011]*), detached from the EU but an economically influential member of EFTA, adds an intriguing dimension to its international role as a 'small but mighty' player in the global arena. The Federal Department of Foreign Affairs (FDFA) emphasises the interconnectedness of environmental issues, recognising the need for collaborative global efforts to address challenges such as climate change and land degradation that impact human security. Strengthened international cooperation, especially with neighbouring countries (of which Switzerland has five), is crucial for addressing transboundary environmental issues, including acid rain and river pollution (trouble for EU shipping as Rhine River runs dry in Kaub, West Germany). Additionally, the nation's commitment to global collaboration is highlighted through cooperation on foreign environmental policy, facilitated by interdepartmental committees. Switzerland's strategy aligns with international agreements, meeting the terms outlined in the Paris Agreement and presenting a comprehensive plan to achieve net-zero emissions.

Switzerland's distinctive historical background has shaped it into an International Diplomatic Hub. Renowned for its enduring policy of neutrality, particularly in Geneva, the city's status as a focal point for multilateral cooperation attracts a diverse array of international organizations, NGOs, and thinktanks. Specific NGOs, such as the Geneva Environment Network (GEN) and initiatives like Children's Access to Environmental Justice (CRIN), further illustrate the plethora of stakeholders connected to Switzerland's commitment to addressing environmental issues.

Human Rights and Climate Justice: The *Verein KlimaSeniorinnen Schweiz and Others v Switzerland (ECtHR)* [2020] stands as a landmark case offering a unique perspective on the intersection of human rights and climate justice. In this legal challenge, 2,300 senior women contested Swiss Government climate policies, specifically highlighting the threat of heatwaves to their human rights. The senior women, of whom the majority were over 70 years of age, argued that inadequate climate policies violated their rights under Articles 2 and 8 of the European Convention on Human Rights, focusing on the right to life and the right to respect for private and family life. On April 26, 2022, the Chamber of the European Court of Human Rights relinquished jurisdiction in favour of the Grand Chamber of the Court. The case, examined by the ECtHR's Grand Chamber of 17 judges, raised a serious question affecting the interpretation of the Convention (Art 30 ECHR). The outcome of this case, finding in favour of the women, sets a precedent for interpreting the ECHR to protect those most vulnerable to climate change. Considering the global ageing population projected to double to 2.1 billion by 2050, the case underscores the heightened sensitivity of this demographic to the impacts of climate change. The conclusion of this case, along with two others submitted jointly (*Carême v. France [2020]* and *Duarte Agostinho v. Portugal and 31 Others [2020]*), but deemed inadmissible, has been substantial.

The judgment contained a number of key points. Unanimously the court rejected the government's preliminary objections regarding the scope, jurisdiction, and compliance with the six-month time limit. By a vote of 16:1, the court addressed issues related to the victims' status and locus standi of the applicants under Articles 2 and 8, assessing the applicability of these provisions. Also by 16:1, it was held that the applicant associations had locus standi in the present proceedings under Article 8 alone. The government's dismissal under Article 4, citing the unique challenges of climate change and the necessity for generational burden sharing, underscored the appropriateness of allowing legal action by associations in the context of climate change. However, the exclusion of general public interest

complaints under the Convention, known as actio popularis, necessitates that associations must lodge an application on behalf of individuals only under certain conditions, specifically alleging the state's failure to protect lives. Significantly, the case highlighted a critical lacuna in the Swiss state's failure to quantify emissions through a national carbon budget and missing past greenhouse gas emission targets.

Conclusion and Future Recommendations: Switzerland's engagement with environmental justice exemplifies a multifaceted approach, blending legal, constitutional, and political dimensions to address the pressing challenges posed by climate change. The KlimaSeniorinnen case marks a pivotal moment in the intersection of human rights and environmental protection, with implications for future legal precedents and global climate justice efforts. The country's constitutional opportunity structures, including direct democracy, provide useful avenues for citizens to influence climate policies. As Switzerland strives for net-zero emissions by 2050, the integration of legal and political measures is evident. The success of the Glacier Initiative, KlimaSeniorinnen precedent and subsequent strategies signifies a commitment to align national policies with international goals, addressing the global impact of climate change.

3.2 Netherlands

Navigating Environmental Justice in the Netherlands:* examining 'holistic' and 'atomistic' environmental judicial activism and its political consequences through the cases of *Urgenda Foundation v the State of the Netherlands and Milieudefensie and others v Royal Dutch Shell plc.

Introduction: The effects of climate change are felt concretely in the Netherlands. Around 26% of the country lies below sea level, covering densely populated areas with the homes of 9 million people.[13] In the last 30 years, flood defence work only allowed the country to consider 40 centimetres of sea level rise while the IPCC's expectation of 84 centimetres by 2100 poses considerable challenges.[14] In particular, 90 per cent of the city of Rotterdam lies under sea level and, given its economic indispensability as the world's largest seaport outside Asia, is cause for concern.[15] Domestic fossil fuel extraction has also been subject to significant debate, especially since the start of the Russo-Ukrainian conflict - but the Netherlands was forced to halt extraction from Europe's largest gas field because it caused earthquakes in local residential areas.[16]

Constitutional and Legal Landscape: The Netherlands is signatory to the principal international agreements aimed at tackling climate change, such as the 1992 UN Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, and the UN Climate, or 'Paris' Agreement, of 2015.[17] Where the United Kingdom is more 'dualist', the Netherlands has a 'monist' legal system similar to Germany and France. International treaties are considered legally binding and can be enforced in Dutch courts without Parliamentary incorporation. Article 93 of the Constitution provides that: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published. "[18] This gives the Dutch judiciary significant power to venture into what is elsewhere considered 'political' territory, and its judgments

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[13] *Naomi O'Leary, 'When will the Netherlands disappear?' (POLITICO, 16 December 2019) https://www.politico.eu/article/when-willthe-netherlands-disappear-climate-change/ accessed 16 February 2024.*

[14] *Intergovernmental Panel on Climate Change, 'Special Report on the Ocean and Cryosphere in a Changing Climate (SROCC)' (IPCC, 24 September 2019) https://www.ipcc.ch/srocc/chapter/summary-for-policymakers/ accessed 16 February 2024.*

[15] *Michael Kimmelman, 'The Dutch Have Solutions to Rising Seas The World Is Watching' (The New York Times, 15 June 2017) https://www.nytimes.com/interactive/2017/06/15/world/europe/climate-change-rotterdam.html accessed 16 February 2024.*

[16] *Stephanie van den Berg, 'Netherlands to end Groningen gas production by Oct 1' (Reuters, 23 June 2023) https://www.reuters.com/business/energy/netherlands-end-groningen-gas-production-by-oct-1-2023-06-23/ accessed 16 February 2024.*

[17] Government of the Netherlands, 'Dutch vision on global climate action' (Government, 2024) https://www.government.nl/topics/climatechange/dutch-vision-on-global-climate-action accessed 16 February 2024.

[18] *Government of the Netherlands, 'The Constitution of the Kingdom of the Netherlands 2018' (Government, 2018) https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands accessed 16 Feb. 2024.*

have had profound impacts on climate policy.[19] In 2019 the Dutch 'Raad van State' (or Council of State), a judiciary body that can strike down primary legislation if it breaches European or environmental standards, for example, declared a 'nitrogen crisis'[20] due to soil pollution caused by the agricultural sector[21][22][23]. The Government subsequently legislated to halve nitrogen emissions by 2030.

Political Institutions: In response to the extensive measures that followed, including the discontinuation of certain environmental permits, a right-wing populist political party called 'BoerBurgerBeweging' or 'BBB' (Farmer-Citizen Movement) was founded in 2019. The protests they inspired, consisting of farmers blocking highways and driving their tractors to the Hague, received international media attention.[23] In a recent shock victory, the party won almost 20 percent of the vote in the 2023 Senate elections.[24] As a result, and perhaps in line with global trends, the climate and environment have become politically polarising subjects.[25]

Human Rights and Climate Justice: Two domestic cases in particular require examination in further detail. Adding to the political turbulence caused by the Council of State's ruling of 2019, the Supreme Court handed down a landmark judgment in *Urgenda Foundation v the State of the Netherlands* [2019].[26] In a statement made the same day, the UN High Commissioner hailed the case as "[providing] a clear path forward for concerned individuals in Europe - and around the world - to undertake climate litigation in order to protect human rights."[27] Urgenda represented 886 individuals in successfully challenging the Dutch Government for failing to meet its 2007 commitment to reduce 1990 emissions by 25 per cent, in order to avoid global warming of more than 2 degrees Celsius. The Supreme Court found that Art. 2 and Art. 8 of the ECHR create a 'positive obligation' for all public and private entities to prevent future violation of these rights by taking concrete measures. The Court gave an unusually wide interpretation of the 'real and immediate risk' required to find a duty of care, since the extent and timing of the impact of climate change is uncertain. Since the Government has knowledge of the 'hazard' but it is not known when it will materialise, the court applied the 'precautionary principle' found in the ECtHR case of *Osman v United Kingdom (UK)* Case No: 87/1997/871/1083 [ECHR]. Controversially, the Court sidestepped issues around standing and causation and did not require the litigants to prove how they were victims of specifically harmful climate policies. In an unprecedented move and contrary to ECHR case law, the Court also interpreted Article 3:305a of the Dutch Civil Code on standing to allow for litigants based abroad and claims on behalf of 'future generations'.[28] The court ultimately found the Government in breach of its obligation to regulate polluting activities,

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[19] *Benoit Mayer, 'Prompting climate change mitigation through litigation' [2023] 72(1) International & Comparative Law Quarterly 233-250.*

[20] *Bart Meijer, 'Dutch farmers' protest party scores big election win, shaking up Senate' (Reuters, 16 March 2023) https://www.reuters.com/world/europe/farmers-protest-party-set-shake-up-dutch-political-landscape-2023-03-15/ accessed 16 Feb'24.*

[21] Raad van State, 'PAS mag niet als toestemmingsbasis voor activiteiten worden gebruikt' (Raad van State (Council of State), 29 May 2019) https://www.raadvanstate.nl/actueel/nieuws/%40115651/pas-mag/ accessed 16 February 2024. Raad van State (Council of State) ECLI:NL:RVS:2019:1603. Raad van State (Council of State) ECLI:NL:RVS:2019:1604.

[22] *Raad van State (Council of State) ECLI:NL:RVS:2019:1604.*

[23] *Bart Meijer, 'Dutch farmers' protest party scores big election win, shaking up Senate' (Reuters, 16 March 2023) https://www.reuters.com/world/europe/farmers-protest-party-set-shake-up-dutch-political-landscape-2023-03-15/ accessed 16 February 2024.*

[24] *Anna Holligan, 'Farmers' protest party win shock Dutch vote victory' (BBC, 16 March 2023) https://www.bbc.co.uk/news/worldeurope-64967513 accessed 16 February 2024.*

[25] *ACLED, 'Political Disorder in Europe: 10 Cases From ACLED's New Expansion' (ACLED, 25 January 2021) https://acleddata.com/2021/01/25/political-disorder-in-europe-10-cases-from-acleds-new-expansion/#1611594626996-fd550a37578b accessed 16 February 2024.*

[26] *Urgenda Foundation v the State of the Netherlands* [2019] ECLI:NL:HR:2019:2007.

[27] *Marjan Minnesma, 'In landmark climate case, Dutch court orders government action on emissions' (NBC News, 20 December 2019) https://www.nbcnews.com/science/environment/landmark-climate-case-dutch-court-orders-government-action-emissions-n1105881 accessed 16 February 2024.*

[28] *Irene Antonopoulos, 'The future of climate policymaking in light of Urgenda Foundation v the Netherlands' [2020] 22(2) Environmental Law Review 119-124.*

provide contingency plans for environmental protection, and ensure procedural rights relating to the freedom of information and right to participate in decision-making.[29][29].

The second case worthy of examination is *Milieudefensie*.[30] Where the *Urgenda* case relates to a Government breach of Convention Rights, *Milieudefensie* is a pivotal case for being the first major climate change ruling against a corporation. The case was heard by the District Court of the Hague, who found that Shell had breached its duty of care in the tort of negligence by failing to reduce emissions resulting from its own activities. It imposed a duty on Shell to reduce its emissions by 45 per cent by 2030, a figure that is based on the IPCC temperature goal of 1.5 degrees Celsius. Shell appealed against the ruling in 2022. The litigants consisted of 7 NGOs and 17,739 individuals, but in contrast to the *Urgenda* case the individual claims were not considered. The climate impact of the activities of Shell were considered to be too fragmented and internationally diverse in comparison with those of the Dutch Government. The controversial element of this case and the primary object of criticism lies in its reliance on 'soft law'.[31] In determining the standard of care and breach thereof, the Court applied the ECHR 'European consensus' doctrine to effectively give legal effect to the UNFCCC and Paris Agreement as matters of 'international fact'. Since these agreements do not have a compliance mechanism, and unlike the Kyoto Protocol were not designed to be universally binding, the District Court has been accused of 'juridification'.[32] Although an important step in holding corporations accountable for their emissions, the effect of *Milieudefensie* is still limited. The judgment only relates to emissions from Shell's own activities, the production of oil, but the emissions from the consumption of oil are 20 times larger.

Conclusion and Future Recommendations: Few courts outside the Netherlands have been able to replicate cases like *Urgenda* and *Milieudefensie*. Not only do few countries allow for the monistic application of international treaties, the Dutch judiciary exercised significant discretion in its interpretation of causation, standing, and 'soft law'. It is virtually impossible to calculate a country or corporation's 'fair share' of global climate responsibilities, let alone measure whether it is complied with.[33] It is also not clear to what extent courts must take cost-efficiency or socioeconomic consequences into account - as a result of the *Urgenda* case alone, the Dutch Government announced it would spend EU 3 billion more on green initiatives.[34] It has been suggested that instead of 'holistic' cases such as *Urgenda* and *Milieudefensie*, which aim to hold a state or corporation to its climate obligations in a general sense, litigants should employ a more 'atomistic' approach.[35] This type of litigation focuses on building more incremental and replicable victories, in a way that is more aligned with the traditional function of the judiciary of applying law rather than creating it. Successful 'atomistic' cases include enforcing the State's duty to adopt and consider a strategy on climate change mitigation, challenging their clarity and internal consistency, and controlling their implementation. All 'atomistic' cases combined would have the effect of creating higher standards for states and corporations to comply with than individual holistic cases.

3.3 United Kingdom

Navigating environmental justice in the UK: **With its unwritten constitution, parliamentary supremacy and influential role of the judiciary in reviewing the powers of state actors.**

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[29] *Andrew Sanger, 'From ambition to obligation: Royal Dutch Shell ordered to reduce CO2 emissions in line with Paris Agreement' [2021] 80(3) Cambridge Law Journal 425-428.*

[30] *Milieudefensie and others v Toray Dutch Shell Plc* ECLI:NL:RBDHA:2021:5339.

[31] *Andrew Sanger, 'From ambition to obligation: Royal Dutch Shell ordered to reduce CO2 emissions in line with Paris Agreement' [2021] 80(3) Cambridge Law Journal 425-428.*

[32] *Andreas Buser, 'National climate litigation and the international rule of law' [2023] 36(3) Leiden Journal of International Law 593615.*

[33] *Benoit Mayer, 'The judicial assessment of states' action on climate change mitigation' [2022] 35(4) Leiden Journal of International Law 801-824.*

[34] *Urgenda, 'CO_2-Reduction Plan: 25% in 2020' (Urgenda, 2024) https://www.urgenda.nl/en/themas/climate-case/dutchimplementation-plan/ accessed 16 February 2024.*

[35] *Benoit Mayer, 'Prompting climate change mitigation through litigation' [2023] 72(1) International & Comparative Law Quarterly 233-250.*

Introduction: The UK is historically a large greenhouse gas (GHG) emitter and among other things, climate change takes the shape of extreme weather events and sea level rise. The UK has an uncodified constitution which lacks explicit environmental protection, which is instead addressed via domestic and international law which can be used alongside constitutional and administrative law structures to bring environmental action. Thus, this section focuses largely on environmental litigation which provides an example of how environmental action can be taken without a written constitution.

Constitutional and Political Landscapes: The UK's uncodified constitution is contained within multiple sources including case law, the royal prerogative, constitutional conventions and statute enacted by parliament. It is also based upon three core constitutional principles: the Rule of Law, Parliamentary Supremacy and the Separation of Powers. Thus, it is flexible and adaptable, allowing for evolution over time through legislative changes and judicial interpretation. The informal Separation of Powers facilitates the utilisation of checks and balances between governmental functions for environmental protection. Checks between the executive and legislature, such as questioning and committees are largely ineffective in practice, as the executive typically holds a built-in legislature majority. Therefore, whilst executive accountability mechanisms built into climate legislation are crucial,[36] such mechanisms, like that in the Climate Change Act (CCA) 2008[37] and established by the Environment Act 2021 are arguably ineffective.[38] Thus constitutionally, checks by the judiciary, mainly judicial review (JR), are crucial for environmental protection. The judiciary can ensure that public bodies operate within their powers and make decisions consistent with environmental law.

Legal Landscape: Whilst some cases are bought against private bodies such as oil companies,[39] claims against public bodies constitute a significant amount of environmental litigation. Litigation has been used to interpret international commitments such as the Paris Agreement 2015, which lacks a multilateral enforcement mechanism. In a case concerning the expansion of Heathrow Airport, the Court found that the Secretary of State should have considered the Paris Agreement, which constituted 'government policy' under s s5(8) of the Planning Act 2008.[40] However, a successful appeal by Heathrow Airport confirmed that the government is not legally bound by Paris Agreement in this case.[41] Regarding other international legislation, s16(2) of the EU (Withdrawal) Act 2018, specifically commits the UK to EU environmental principles and a series of cases were recently bought against DEFRA for inadequate Air Quality Plans under retained EU air quality regulations.[42]

Domestic legislation is one of the main tools for judicial review (JR) claims. Key environmental statutes include the Environment Act 2021 which sets out the UK's main framework of environmental protection for waste, air quality, water, and biodiversity. Additionally, the Climate Change Act (CCA) 2008, contains a Net Zero by 2050 commitment. This long-term duty constrains short-term political cycles and economic incentives, meaning the Act has been regarded as semi-constitutional.[43] This is worth comparing to Germany, where environmental protection is enshrined as a state objective ('Staatsziel'), therefore superseding short term political objectives. *R (Friends of the Earth Limited and others) v Secretary of State for Business, Energy and Industrial Strategy*[44] involved a challenge to government decisions under the CCA 2008 specifically, the duty to prepare proposals enabling carbon budgets to be met and report to parliament detailing policies and time scales.[45] In 2023, a TV presenter and

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[36] *Cathrine Higham et al., 'Accountability mechanisms in climate change framework laws' (Centre for Climate Change Economics and Policy, November 2021) < https://www.lse.ac.uk/granthaminstitute/publication/accountability-mechanisms-in-climate-changeframework-laws/> accessed 10 February 2024.*

[37] *Climate Change Act 2008, ss 12, 16-20, 31-36, 59-62.*

[38] *Joshua Kimlin, Climate Change, the Courts and the Constitution (The Constitution Society, 2022).*

[39] *ClientEarth v Shell Plc [2023] EWHC 1137 (Ch), [2023] 5 WLUK 169.*

[40] *R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52, [2021] 2 All ER 967.*

[41] *Plan B Earth and Others v Secretary of State for Transport [2020] EWCA 214 (Civ), [2020] 2 WLUK 327.*

[42] *ClientEarth v Secretary of State for DEFRA, [2018] EWHC 315 (Admin), [2018] 2 WLUK 458.*

[43] *Thomas Muinzer, 'Is the Climate Change Act 2008 a Constitutional Statute?' (2018), 24(4) European Public Law 733.*

[44] *[2022] EWHC 1841 (Admin), [2023] 1 WLR 225.*

[45] *Climate Change Act 2008, ss13 and 14.*

environmental campaigner filed a high court challenge against the government for abandoning pledges made in its latest carbon budget under the CCA.[46]

Cases also focus on expanding the scope of Environmental Impact Assessments such as for oil pursuits in the North Sea[47] and Surrey.[48] Individuals also bring claims because of their circumstances. In *R (Squire) v Shropshire Council,*[49] the applicant was concerned that the manure from the erection of poultry buildings would cause unacceptable odor and dust. Non-climate legislation is also used strategically. For example, ClientEarth used its shares in Shell Plc to bring a claim against Shell's directors under the Companies Act 2006.[50]

Whilst JR is the most accessible way to bring climate action in the UK, progress remains slow. Environmental cases are often controversial and involve synthesis of complex law, scientific fact, opinion, policy, and judicial administrative discretion.[51] Thus, some remain sceptical about the results it can deliver.[52]

Human Rights and Climate Justice: Increasingly, the ECHR is used in environmental claims. This is key, as declaring decisions or legislation incompatible with the ECHR can be seen as roughly equivalent power to declaring it unconstitutional. This is codified into domestic law via the Human Rights Act (HRA) 1988, which is considered a constitutional statute. In *R (Richards) v Environment Agency*[53] it was argued that failing to take all reasonable steps regarding landfill emissions breached the claimants' Article 2 (right to life) and 8 (right to respect for private and family life) rights, similarly to the Dutch and Swiss cases previously discussed. In this case, the courts also considered the extent to which the ECHR applies to environmental cases, finding that courts are exceeding their role under the HRA 1998 if they prescribe the precise outcomes that government bodies had adhere to. This reflects the reluctance of the judiciary to interfere in environmental policy due to administrative and constitutional constraints.

R (Friends of the Earth Ltd, Mr Kevin Jordan and Mr Doug Paulley) v Secretary of State for DEFRA[54] illustrates the use of both domestic legislation and human rights. It is awaiting JR and believed to be the first case of its kind in the UK. The litigants include an NGO, disability rights activist living in a care home, and campaigner losing their home to coastal erosion. They argue that the government's 'National Adaptation Programme 3' under the CCA 2008 includes only 'vague reduction goals', inconsistent with the statutory language in s58. They also claim breach of the HRA 1998 due to incompatibility with their right to life,[55] home[56] and possessions[57] . Innovatively, they also argue that DEFRA has failed to lawfully assess the unequal impacts of the adaptation plan on protected groups under the Equality Act 2010, in line with their public sector equality duty. This highlights the importance of considering the intersectional impact of environmental issues. One co-claimant suffers from long-term conditions making him particularly susceptible to overheating. The verdict of the Swiss *KlimaSeniorinnen* case is promising here, if the Swiss judgement influences this case, it may obviate the need for it being taken

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[46] *Leigh Day, 'Chris Packham commences legal challenge against UK Government for abandoning green policies' (Leigh Day, 1 December 2023) https://www.leighday.co.uk/news/news/2023-news/chris-packham-commences-legal-challenge-against-uk-government-forabandoning-green-policies/ accessed 31 January 2024.*

[47] *Greenpeace Ltd v The Advocate General (representing the Secretary of State for Business, Energy and Industrial Strategy) and the Oil and Gas Authority* [2021] CSIH 53, [2021] SLT 1303.

[48] *R (Finch) v Surrey County Council* [2022] EWHC 187 (Civ), [2022] 2 WLUK 225.

[49] [2019] EWCA 888 (Civ), [2019] 5 WLUK 424.

[50] *ClientEarth v Shell Plc* [2023] EWHC 1137 (Ch), [2023] 5 WLUK 169.

[51] *Stephen Tromans et al., 'Significant UK Environmental Law Cases 2019-20' (2020) 32 Journal of Environmental Law 323.*

[52] *ClientEarth, 'We're taking the UK Government back to court over its climate plan' (ClientEarth, 25 October 2023) https://www.clientearth.org/latest/news/we-re-taking-the-uk-government-over-its-net-zero-strategy/ accessed 15 December 2023.*

[53] *[2022] EWCA Civ 26, [2022] 1 WLR 2593.*

[54] *[2022] EWHC 1841 (Admin), [2023] 1 WLR 225.*

[55] *ECHR, Article 2.*

[56] *Ibid, Article 8.*

[57] *ibid, Article 1 of the 1st Protocol.*

to the ECHR, speeding up the process. Another example of individuals utilising their unique vulnerabilities is a claim brought on behalf of a child with severe respiratory difficulties.[58]

The discussed cases also represent an issue with access to justice. Most cases are brought by or in conjunction with NGOs, reflecting inaccessibility, high JR costs and significant Legal Aid cuts.[59] However, this is limited by the Aarhus Convention which stipulates that environmental law legal challenges must not be 'prohibitively expensive' and sets a fixed cost cap for bringing environmental breaches cases.[60]

Recommendation and Conclusion: Whilst to date, JR has proven a useful tool to hold the government accountable to statutory environmental commitments, the uncodified and flexible nature of the UK constitution, including parliamentary supremacy, poses a unique opportunity to enshrine environmental protection within it by passing legislation. Calls grow for the introduction of a UK Environmental Rights Bill, establishing a human right to a clean, healthy, and sustainable environment.[61]

Additionally, The Clean Air (Human Rights) Bill, was introduced to Parliament in 2022. It is also known as 'Ella's Law' after a 9-year-old girl, the first person in England to have air pollution named as a cause of death by a coroner. The Bill would require the government to bring air quality up to the minimum World Health Organisation standard, and recognise clean air as a human right.[62] Whilst many remain sceptical about their chance of success, this reflects the growing importance of considering the intersection between environmental and human health. A legislative right to a healthy environment would bring the UKs constitution in line with many other democracies globally.

3.4 Germany

Navigating Environmental Justice in Germany: **An examination of Germany's role in environmental protection through a federal constitutional structure.**

Introduction: Historically, Germany has been strong driver in environmental protection long before other states, particularly in the context of the global north.[63] Since the 1970s, Germany has been pursuing forward-looking environmental policies with some unique institutional and legal features that set a precedent for other countries. Examples include the "Quick Start" governmental programme in September 1970 and the "Environment Programme" in 1971. As described by Weidner, [64] developments in environmental politics from abroad, especially in the United States, greatly influenced the local coalition government in the 1970s. This government eagerly embraced the opportunity to introduce new reforms. Working closely with major business entities and scientific experts, they crafted a comprehensive environmental policy and set of regulations that were quite stringent for that era. Compared to internationally, it can be credited with some notable successes, although these have come at great financial and bureaucratic cost as well[65] which in a comparative context is important to consider as not every country has the means to implement the changes decided.

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58 *R (Mathew Richards) v Environment Agency [2022] EWCA 26 (Civ), [2022] 1 WLR 2593.*

59 *The Law Society, 'A decade of cuts: Legal aid in tatters' (The Law Society, 31 March 2023) <https://www.lawsociety.org.uk/contactor-visit-us/press-office/press-releases/a-decade-of-cuts-legal-aid-in-tatters> accessed 7 January 2024.*

60 *Aarhus Convention, Article 9(4).*

61 *Wildlife and Countryside Link, 'The Environmental Rights Bill' (Wildlife and Countryside Link, 2023) https://www.wcl.org.uk/environmentalrightsbill.asp accessed 01 February 2024.*

62 *Gary Fuller "Ella's law' bill seeks to establish right to clean air in UK' (The Guardian, 20 May 2022) https://www.theguardian.com/environment/2022/may/20/ellas-law-bill-right-to-clean-air-uk-pollution-jenny-jones accessed 1 December 2023.*

63 *Helmut Weidner, 'Performance and Characteristics of German Environmental Policy. Overview and Expert Commentaries from 14 Countries' (Wissenschaftszentrum Berlin für Sozialforschung, 1997) https://www.econstor.eu/obitstream/10419/48971/1/231883439.pdf accessed 01 February 2024.*

64 *ibid.*

65 *Weidner, Helmut, and Lutz Mez. 2008. 'German Climate Change Policy: A success story with some flaws'. Journal of Environment & Development 17 (4): 356–78.*

Political Landscape: Although Germany has historically been a strong pursuant of environmental protection, as a highly industrialised country with a large manufacturing sector that accounts for 23 per cent of national output,[66] many parts of Germany are still reliant on coal and other traditional energy sources, and the country's per capita greenhouse gas emissions are consistently above the EU average.[67] This stark contrast to other EU member states lies in the fact that Germany is operating mainly in energy-intensive and polluting sectors (for example the car manufacturing industry with brands such as BMW, Volkswagen, Mercedes-Benz, Opel, and Porsche are based in the country themselves). Furthermore, industry alliances and corporate lobbyists pose a constant obstacle in driving positive change in environmental protection unwilling to make short-term sacrifices for long-term gains.

Despite the highly energy-consuming sector and its strong lobbies, Germany was one of the first countries in the world to undergo domestic changes in favour of environmental and climate policy.[68] This is due to the fact that for several decades, Germany has experienced a well-established and strong Green Party (with the Greens having become a member of the coalition since 2021) and has established numerous governmental departments and agencies to tackle environmental problems across different state levels.[69] Its high-profile and public energy transition (the so-called 'Energiewende') strategy, a reformative and explicit policy shift away from nuclear and fossil-based energy and towards renewable sources won recognition around the world and was initially exceedingly popular in the domestic political discourse.[70] Moreover, a key factor underpinning the energy transition's initial success was the country's federal structure which facilitated cooperation from different public bodies across different layers of government.[71] On top of national legislation, along with other members of the EU, climate policy in Germany is formed to a high degree by decisions made in Brussels, including initiatives such as the EU's 2030 climate and energy framework (which includes binding targets for GHG emissions reductions and renewable energy generation), its emissions trading scheme, procurement regulations and the Green Deal[72] - this is unique to the other countries discussed in this paper since Germany is embedded in a political union that makes them act less autonomously than others.

Constitutional Law: The Federal Republic of Germany is a parliamentary democracy with two chambers of parliament, the Bundestag (elected by the citizens) and the Bundesrat (comprised of representatives of the Länder). Germany is a federal state with a three-tiered system of government: the national level (Bund – Federation), the Länder and a two-tiered system of local government comprising counties (Kreise), cities and municipalities (Städte and Gemeinden). Overall, Germany consists of 16 federal states called the Bundesländer. The Basic Law (Grundgesetz, GG) enacted in 1949 is the Constitution of the Federal Republic of Germany and is a written and codified constitution. Moreover, each federal state itself has their own written and codified constitution, although these are of rather minor practical importance, as federal law takes precedence over state laws (as outlined Article 31, Basic Law), yet poses significance in the comparative nature of this overall study.

The separation of powers in German federalism has a long tradition of decentralised governance and the integrated nature of such means that the legal boundaries that demarcate specific powers to tiers

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[66] *OECD Library, OECD Environmental Performance Reviews: Germany 2023 [2023, OECD Library] https://www.oecdilibrary.org/sites/0cd39b19-en/index.html?itemId=/content/component/0cd39b19-en* [66] *ibid. ch 1.*

[67] *ibid, ch 1.*

[68] *Rie Watanabe and Lutz Mez. "Special Feature on the Kyoto Protocol The Development of Climate Change Policy in Germany" [2004] 5 1 International Review of Environmental Strategies 109.*

[69] *Jänicke, Martin. 2011. 'German Climate Change Policy: Political and economic leadership'. In The European Union as a Leader in International Climate Change Politics, eds. Rüdiger Wurzel and James Connelly, 129–46. Abingdon: Routledge.*

[70] *von Hirschhausen, Christian. 2014. 'The German "Energiewende": An introduction'. Economics of Energy & Environmental Policy 3 (2): 1–12.*

[71] *Peter Eckersley. Power and Capacity in Urban Climate Governance: Germany and England compared. (2018) Oxford: Peter Lang; Weidner, Helmut, and Lutz Mez. 2008. 'German Climate Change Policy: A success story with some flaws'. Journal of Environment & Development 17 (4): 356–78.*

[72] *OECD Library, "OECD Environmental Performance Reviews: Germany 2023" (OECD Library, 2023) https://www.oecdilibrary.org/sites/0cd39b19-en/index.html?itemId=/content/component/0cd39b19-en accessed : 20/03/2024.*

of government are somewhat blurred compared to many other federal countries.[73] Within the postwar constitution (Grundgesetz (GG)), there was no proper allocation of legal responsibilities for climate change or renewable energy to specific tiers of government and protecting the environment was only recognised as a public function in 1994.[74] This constitutional environmental provision was first introduced in Article 20a but the introduction of such a provision had been debated since the 1970 and in accordance with Article 20a, German constitutional law categorises environmental protection as a state objective (Staatsziel), thereby creating an obligation to create or improve the law over time in favour of ecological interests.

Whilst there are some policy areas such as culture and education whereby the Länder have exclusive legislative power, climate policy falls under the so-called concurrent legislation principle, which prevents individual states from introducing new regulations where the federal government has already passed a law or where it conflicts with the federal law itself. Most of the environmental acts are henceforth federal law – often derived from legislation from the European Union. This is especially true for the areas of air pollution control, noise protection, waste management, chemicals, genetic engineering, and nuclear safety. Important areas of Länder law especially include water management, nature conservation and landscape conservation.

Legal Landscape: The Federal Constitution Court (FCC) plays a major role in Germany's system of checks and balances, possessing the jurisdictional power to review the constitutional legality of actions by Germany's legislature, administration, and judiciary. As such, the court also decides upon the compatibility of German legislation with the constitution itself. Germany follows several legal instruments when it comes to climate protection which are discussed below:

International Law: Through the Framework Convention on Climate Change adopted in 1992, the international community agreed at the international legal level to prevent a dangerous anthropogenic (human-caused) disruption of the climate system. In addition, the so-called Kyoto Protocol contains legally binding limitation and reduction obligations regarding greenhouse gases for industrialised countries. The Paris Agreement sets the goal for all parties to the agreement to limit the increase in global temperature to well below 2°C and to make further efforts to keep it below 1.5 °C (Article 2). Moreover, the Federal Climate Change Act's basis is the obligation according to the Paris Agreement under the United Nations Framework Convention on Climate Change. To implement it, the agreement relies primarily on nationally determined contributions to reduce greenhouse gas emissions (Nationally Determined Contributions; NDC).

EU and National Law: At EU level, the long-term climate and energy policy goals are set out in the European Green Deal,[75] which includes the European Climate Pact, the European Climate Law and the EU Strategy for Adaptation to Climate Change. The European Climate Law sets out the goal of reducing net greenhouse gas emissions within the Union by at least 55% compared to 1990 levels by 2030 and reducing emissions to net zero by 2050.[76] At the national level, the Federal Climate Protection Act (KSG), following the amendment of August 18, 2021, sets the long-term climate protection goal of achieving net greenhouse gas neutrality by 2045, as well as reduction targets for greenhouse gas (GHG) emissions formulated for each year up to 2040.[77] Energy consumption reduction targets have thus so

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[73] *Stefan Scheiner, "Interessen der Bundesländer in der deutschen Klimapolitik: Föderale Konfliktverarbeitung in drei Handlungsfeldern." (2013) Schriften zum Föderalismus, vol. 5, eds. Roland Lhotta and Frank Decker. Baden-Baden: Nomos.*

[74] *Erbguth, Wilfried, and Sabine Schlacke. 2014. Umweltrecht, 5th ed. Baden-Baden: Nomos. Fell, Hans-Josef. 2017. The Shift from Feed-in-Tariffs to Tenders is Hindering the Transformation of the Global Energy Supply to Renewable Energies. Berlin: Energy Watch Group Policy Paper. www.energywatchgroup.org/wp-content/uploads/FIT-Tender_Fell_PolicyPaper_EN_final.pdf accessed 20/03/2024.*

[75] *European Commission, "The European Green Deal" (European Commission Strategy and Policy, 2023), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en accessed 12/06/2024.*

[76] *European Commission, "European Climate Law" (European Commission EU Action, 2023), https://climate.ec.europa.eu/euaction/european-climatelaw_en#:~:text=The%20European%20Climate%20Law%20writes,2030%2C%20compared%20to%201990%20levels. accessed 12/06/2024.*

[77] *Bundesregierung, Intergenerational contract for the climate, https://www.bundesregierung.de/bregde/schwerpunkte/klimaschutz/climate-change-act-2021-1936846.*

far been anchored in the National Energy Efficiency Action Plan, the Climate Protection Plan 2050 and the Climate Protection Program 2030. Expansion targets for renewable energies are set out in the Renewable Energy Sources Act.

Human Rights and Climate Justice: A common trail of analysis throughout this paper is climate litigation against public and private bodies but equally who constitutes as a victim to bring a claim to court. For example, the case of *Luciano Lliuya v. RWE AG* (2015)[78] is significant in illustrating how climate change impacts can transcend national borders and how individuals are seeking accountability and liability from entities that contribute to climate change on a global scale. As Crawford points out "Climate change raises significant theoretical and methodological challenges for anthropology. How can a discipline grounded in ethnographic specificity approach a phenomenon that is transforming the entire planet?"[79] In today's order of global capitalism, multinational corporations like RWE AG have the potential to cause significant impact and damage far from their main headquarters. In case of *Luciano Lliuya v RWE AG* (2015), a Peruvian farmer named Luciano Lliuya sued RWE AG, one of the largest carbon emitters in Europe and based in Germany, for its contribution to climate change arguing that RWE's carbon emissions contributed to the melting of glaciers in the Andes, leading to the increased risk of flooding of his property in Peru. The lawsuit sought financial compensation from RWE for a portion of the costs to protect his property from the impacts of climate change. This case underlines that climate change is a global phenomenon with far-reaching consequences whereby claims can be brought to the country of origin despite the plaintiff's residency or nationality – a stark contrast to the case of Grande-Synthe mayor Damien Carême whose claim was dismissed on the basis that the mayor no longer lived in France and therefore could not claim victim status. Holistically, the case thus underscores the concept of climate change accountability and also tackles the already posted question of ownership of a problem. It also raises the question about the responsibility of large corporations and highly greenhouse gas emitting countries for the damages caused by climate change in other parts of the world; here a German-based company's actions causally contribute to a climate-related threat in Peru. The case also highlights the rising costs of adapting to climate change impacts as Lliuya's lawsuit sought financial compensation for the costs of protecting his property from flooding, demonstrating the economic burden that climate change places on vulnerable communities, extending the global neighbourhood concept. This case thereby highlights the firstly disproportionate effect on vulnerable communities and the inequalities of global warming itself. The Hamm Higher Regional Court ruled that climate change with its cross-border effects has brought about a kind of global neighbourly relationship principle, a concept outlined in Germany's national civil code (BGB) Section 1004. Section 1004. Normally applies to neighbourhood disputes around issues of property impairment, yet in this context, the Hamm Higher Regional Court found it to be relevant to this case too. Hence, emission-intensive companies that essentially due to their global operations contribute to the causal effect of climate change related property damage are now found to be liable in their domestic courts.

Furthermore, there are two further infringements of rights highlighted in cases brought to the Constitutional Court in Germany: fundamental rights and the administrative question of climate governance and enforcement – tying in with the Swiss case as the court held that the Swiss domestic courts had not engaged seriously or at all with the action (Art 6§1) and that the women had not been given fair access to the domestic courts. In the latter, there has been a successful recent ruling in *DUH and Bund v Germany* (2023) whereby the Higher Administrative Court (Bundesverwaltungsgericht) Berlin-Brandenburg ruled that the federal government must adopt a so-called immediate action programme (Sofortprogramm) under the Federal Climate Change Act with respect to Section 8, ensuring compliance with the annual emission targets for the building and transportation sector for the years 2024-2030.

Conclusions: Cases such as *Neubauer et al v Germany* (2021) decided in the Federal Constitutional Court focused on infringement of fundamental rights, garnering global interest. Their partially successful

[78] *Lliuya v RWE AG Case (2015) No. 2 O 285/15.*

[79] *Noah Walker-Crawford, 'Climate change in the courtroom: An anthropology of neighborly relations' (2022) Sage Journals https://journals.sagepub.com/doi/10.1177/14634996221138338 accessed 12/06/2024.*

claim essentially resulted in an order by court to amend the piece of legislation as parts of the Climate Protection Act of 2019 were incompatible with fundamental rights. With their constitutional complaints, the complainants primarily claim that the state failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, especially carbon dioxide (CO2) – a legal framework they claim is necessary to limit the increase in the Earth's temperature to 1.5°C, or at least to well below 2°C - in line with the Paris Agreement of 2015. In their constitutional complaints, the complainants − some of whom live in Bangladesh and Nepal − rely primarily on constitutional duties of protection arising from Art. 2(2) first sentence GG and Art. 14(1) GG, as well as on a fundamental right to a future in accordance with human dignity and a fundamental right to an ecological minimum standard of living (ökologisches Existenzminimum), which they derive from Art. 2(1) GG in conjunction with Art. 20a GG and from Art. 2(1) GG in conjunction with Art. 1(1) first sentence GG. With regard to future burdens arising from the obligations to reduce emissions for periods after 2030 – which they describe as an "emergency stop" – the complainants rely on fundamental freedoms more generally.

3.5 Colombia

An Exploration of Environmental Justice in Colombia: Expansion of Rights through Historical and Cultural Influences in the South American Region.

Introduction: The case of Columbia demonstrates an expansion of environmental rights through the advocacy of indigenous people with international and domestic provisions. This has culminated in recognising future generations' rights to a healthy environment to protect natural entities such as the Amazon Rainforest through international obligations.

Political Landscape: South America has been an early battleground for the recognition of environmental rights. Environmental law quickly became an issue of contention due to the indigenous populations' connection to the natural environment and their practices. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,*[80] an indigenous community in Nicaragua requested the Inter American Court of Human Rights (IACtHR) to ensure Nicaragua would fulfill the petition request[81] granted by the Commission's Secretariat to establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community[82] and consequently granting concession for the exploitation of the land occupied. The Inter-America Court of Human Rights recognised that the Awas Tingni had a historical and ancestral possession of the land built through the indigenous communities inhabiting it and was based on a communal system.[83] The fundamental theme of environmental cases within the region is how the community interacts with the land.[84] This case sets a far-reaching precedent affirming indigenous land rights not only for the indigenous communities of Nicaragua but also for indigenous peoples throughout the hemisphere.[85]

The system of remedy in the South American region is also noteworthy. Use of the legal system to institute change, also known as "lawfare" began due to La Violencia in the late 1940's and early 1950's, a period of time in Colombian history after the assassination of a leftist leader Jorge Eliécer Gaitán. The conservative government after the assassination failed to tackle systemic inequalities and the immediate violence, encouraging the left-wing guerrilla movements use of lawfare. The guerrilla movements brought money through the cocaine trade and directly funded struggles against the government.[86]

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[80] *Inter-Am. Ct. H.R. (ser. C) No. 79, 149 (Aug 31, 2001).*

[81] *Petition No. 11,577*

[82] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua Inter-Am. Ct. H.R. (ser. C) No. 79, 149 (Aug 31, 2001) Paragraph 3.*

[83] *ibid n. 42 Page 22.*

[84] *Inter-American Court of Human Rights. (2001) Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua" https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf accessed. 19/02/2024 Page 24.*

[85] *Jennifer A. Amiott, Environment, Equality, and Indigenous Peoples' Land in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v Nicaragua, 32 ENVTL. L. 873, 874 (2002).*

[86] *Eva Irene Tuft "Integrating a Gender Perspective in Conflict Resolution: The Colombian Case", in Skjelskbaek, Inger and Dan Smith(eds), Gender, Peace, and Conflict (2001) London Sage Publications pp139.*

(International) Legal Landscape: The Inter-American System depends on the Organisation of American States (OAS) and its legal framework, the Charter of the Organisation of American States (Charter). Adopted by the OAS in 1969, the American Convention on Human Rights (ACHR) is a binding treaty of 23 civil and political rights[87] that sets out the obligations of signatories to Human Rights. The two supervisory institutions created by the Charter are the Commission and the InterAmerican Court of Human Rights (IACtHR). These two supervisory bodies have been the driving judicial forces throughout the Inter-American region in gross Human Rights violations. The Colombian Parliament ratified the Paris Agreement in 2016.[88]

(Domestic) Legal Landscape: The Columbian courts have a judicial history in innovative approaches. The standing of future generations within international law has been a hot topic, with academics arguing that the future generation cannot enforce their rights because they lack legal standing or *locus standi.*[89] The Colombian Supreme Court created an innovative solution to combat climate change on an intergenerational front. In *Future Generations v. Ministry of the Environment and Others,*[90] the Colombian Supreme Court awarded rights to the Colombian Amazon to prevent deforestation and GHG emissions for future generations, a landmark case in the region. Twenty five youth plaintiffs with the aid of the research and advocacy organization *Dejusticia* argued that the Colombian government did not ensure compliance with the net-zero deforestation target set by the Commission under the Paris Agreement in 2019, threatening the plaintiffs fundamental right to a healthy environment. The Colombian Supreme Court held the international treaty was a "legally binding commitment".[91]

Human Rights and Climate Justice: The biggest influence in the South American region is communal advocacy to gain political rights for historically disenfranchised people. The progressive judgment in *Future Generations*[92] can be seen as a move to "acknowledge the extreme vulnerability of their populations to climate change.[93] It was held that "'inter-generational equality and solidarity, private liability and accountability for climate change, and human dependence on the environment"[94] are topics worth discussion in the highest court. A focus on how communities interact with land could be beneficial to understanding the influence actions used today can have on future generations because these topics have never been discussed in such a manner. Constitutional mechanisms such as the *tutelas*[95] used in *Future Generations*[96] also marks the successful use of the constitutional device[97] when plaintiffs believe that environmental issues are directly affecting their human rights. The *tutela* is a quick constitutional mechanism that has become popular among ordinary citizens and requires only a presentation of the basic facts and how the plaintiff feels their rights have been threatened.[98] The judge

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[87] *Antkowiak T. M, '21. The Americas' in D. Moeckli, S. Shah, S Sivakumaran, and D Harris (ed) International Human Rights Law (4th Edn) (OUP) page 447.*

[88] *WWF, "Colombian Congress passes bill ratifying Paris Agreement" (WWF 2017). https://www.wwf.org.co/?303172/Colombia%2Dratifying%2DParis%2DAgreement#:~:text=Paris%20Climate%20Agreement.-,With%2098%20votes%20for%20and%20none%20against%2C%20after%20the%20fourth,the%20Agreement%20in%20April%202016. accessed 05/03/2024.*

[89] *V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone, "International Law and Sustainable Development: Past Achievements and Future Challenges" (1997), p. 27.*

[90] *[2018] Number: 11001-22-03-000-2018-00319-01. STC4360-2018.*

[91] *Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' [2020] 9 1 Transnational Environmental Law 17, p. 30.*

[92] *Future Generations v. Ministry of the Environment and Others, Corte Supreme de Justicia (CSJ) [Supreme Court], 5 Apr. 2018, STC4360-2018 (No. 11001-22-03-000-2018-00319-01).*

[93] *Setzer, J. 'Climate Litigation in the Global South: Constraints and Innovations' [2020] 9 1 Transnational Environmental Law 77 p. 98.*

[94] *Paola Andrea Acosta Alvarado & Daniel Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) Journal of Environmental Law, pp. 522–4.*

[95] *Patrick Delaney, "Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform" (2008) The Equal Rights Review, Volume 1. 50. Page 54.*

[96] *Ibid n 92.*

[97] *Also known as amparo in other member states of the region.*

[98] *Patrick Delaney, "Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform" [2008] 1 The Equal Rights Review 50 54.*

has 10 days to give their ruling.[99] This mechanism can only be used when there is no other domestic constitutional mechanism available to remedy the issue in the interim.[100] This was progressive legal reasoning that showed the steps the judiciary would take to make fundamental constitutional impacts,[101] something not seen as aggressively in the Global North. It allows direct access to higher courts to quickly rectify fundamental rights claims such as the rights given by the ACHR. It established a direct link between the right to a healthy and sustainable environment and the rights of future generations.

Future Generations[102] has been reflected in the 2020 Escazú Agreement as a ground-breaking pact to ensure the enjoyment and protection of a healthy environment[103] with the use of environmental democracy, individuals having a say on what happens to the nature around them, to increase the participation of indigenous communities.[104] The Escazú Agreement stands as a landmark achievement, being the first-ever international treaty in Latin America and the Caribbean focused solely on environmental issues. It sets a global precedent by uniquely incorporating provisions aimed at protecting the rights of environmental activists.[105]

Conclusion and Recommendations: Similarities in the use of younger generations and generations that are yet to be born as litigations that can be seen in comparison the Dutch and Colombian cases to the older generations used in the Swiss case. Each court recognised the harm that came from ignoring environmental obligations but the remedy to the harm may not be as tangible as others. The Colombian and Dutch cases use of future generations as litigants to see the efforts of their litigation while the Swiss litigants would theoretically lack any benefit due to their age. This can be seen in contrast to *DUH and Bund v Germany* (2023) where immediate action by the government needed to take place allowing litigants to see a direct remedy. Remedy in environmental litigation has becomes more of an abstract concept in the UK while the Colombian Supreme Court, like the German case, held that remedy needs to be immediate.

The Paris agreement was a pivotal piece of international legislation for the Columbian Supreme Court and can be seen used in other jurisdictions differently. The Dutch courts in *Urgenda*[106] use the Paris Agreement as a means of requiring transparency in the government's actions.[107] The UK Supreme Court held that the Paris Agreement did not require the UK government to comply. The Colombian Supreme Court differed in that it held the government liable for compliance with this Agreement though it was created on the international setting.

The use of international agreements within the domestic legal landscape for the benefit of marginalized individuals has shown to be productive legal reasoning because individuals that do not have a voice can take centre stage. If we can expand this further and tackle environmental concerns on a broader scale

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99 *Constitution of Colombia, Article 29, Article 86.*

100 *Ibid; Article 86.*

101 *Joana Setzer, "Climate Litigation in the Global South: Constraints and Innovations" [2020] 9 1 Transnational Environmental Law 77 98.*

102 *Supra n 92.*

103 *United Nations. "UN experts hail landmark environmental treaty in Lation America and the Caribbean" (20 November 2020) https://www.ohchr.org/en/press-releases/2020/11/un-experts-hail-landmark-environmental-treaty-latin-america-and-caribbean accessed: 14/02/2024.*

104 *Dominico Giannino, "The Escazu Agreement: environmental democracy and human rights." (2019) Taking Humanties. https://talkinghumanities.blogs.sas.ac.uk/2019/07/30/the-escazu-agreement-environmental-democracy-and-human-rights/ accessed 10/02/2024.*

105 *United Nations, "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean" (United Nations, 2018). https://web.archive.org/web/20210206165311/https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf accessed 20/03/2024.*

106 *Urgenda Foundation v. State of the Netherlands [2015] HAZA C/09/00456689.*

107 *Ibid p 31.*

first to trickle down into the small communities, there might be better results as seen in Colombia and the protection of the Amazon.

4. Findings

Through the case studies, the key theme that emerges is the differing strategies of environmental litigation, particularly the different types of litigants and vulnerable groups at the heart of the cases. These groups include NGOs and people bringing class actions, urban populations, future generations, natural entities, and elderly people.

4.1 NGOs and Class Actions

Due to the increasing cost of litigation, NGOs play a key role in enabling and funding environmental litigation. They can take on cases that individuals lack the resources or political momentum for. In *R (Friends of the Earth Ltd, Kevin Jordan & Doug Paulley) v Secretary of State for DEFRA* [2023], the first UK case of its kind, Friends of the Earth are assisting a disability rights campaigner and someone losing their home to erosion. They will challenge the National Adaptation Programme under the Human Rights Act 1998[108] and the Equality Act 2010.

4.2 Future Generations

Legal hurdles such as standing, and causation restrict the use of litigation to prevent harm that has not happened yet, even if it is certain and imminent. In *Neubauer et al. v Germany* [2020], *Future Generations v. Ministry of the Environment and Others* [2018] and *Urgenda Foundation v Netherlands* [2019], the respective Supreme Courts found that states owe an equitable duty to guarantee fundamental freedoms of future generations. This gives legal status to the UN Framework Convention on Climate Change Art. 3(1) and creatively opens the door to more preventative litigation.

4.3 Natural Entities

To expand the scope of environmental protection, several countries progressively recognise the legal rights of natural entities. In *Future Generations v. Ministry of the Environment and Others* [2018], the Supreme Court accorded rights to the Colombian Amazon to prevent deforestation and GHG emissions. Latin American indigenous communities are the driving force behind eco-centric litigation. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [2001] acknowledged their communal land rights despite the absence of legal title.

4.4 Elderly People

The global population aged 65+ will double to 2.1bn by 2050 and is more vulnerable to climate impact. In *Verein KlimaSeniorinnen Schweiz and Others v Switzerland (ECtHR)* [2020], the association of 2,300 older women, in a historic victory, successfully challenged the Swiss Government's inadequate climate policies before the European Court of Human Rights. These litigants are particularly susceptible to frequent and intense heatwaves and climate change threatens their right to private life. Such successful litigation allows senior populations to leave a positive legacy for their descendants and future generations.

5. Recommendations

Overall, this research highlights the importance of recognising the identities of the people affected by environmental issues and those bringing environmental action. It is often the communities and individuals most affected by environmental injustices who do not have their identities recognised and may struggle to participate in procedural justice. However, this research has also shown that these

[108] *Human Rights Act 1998.*

same groups may have some of the most powerful voices when it comes to bringing environmental claims. In light of this, the recommendations drawn from this research are as follows:

> R1: Access to justice is a priority since climate litigation is prohibitively expensive, complicated and time-consuming. The '*tutela/amparo*' mechanisms used in South America provide a positive and quick alternative.
>
> R2: Articles 2 and 8 of the European Convention on Human Rights should be raised and interpreted to include the right to a clean, healthy and sustainable environment.
>
> R3: Constitutional, regional and international courts should apply flexible rules around standing and causation to allow for litigation to prevent imminent harm, whether it be through the vehicle of 'future generations', 'elderly populations', or other vulnerable groups.
>
> R4: Legislators and policy-makers should move from an anthropocentric to an eco-centric approach. Measuring the climate crisis purely in human harm does not capture its entirety.
>
> R5: Global collaboration is required amongst constitutional and international courts to acknowledge that vulnerable groups are not separated by borders and emissions cannot be 'out-sourced' to poorer or neighbouring jurisdictions.

6. Conclusions

Since the 1970s, the concept of environmental constitutionalism, which involves embedding environmental rights and responsibilities within national constitutions, has gained significant traction. This evolution has been closely intertwined with the expansion of substantive environmental provisions, particularly rights during processes of constitution-making. These developments were underpinned by the prevailing model of constitutional democracy in the post-Cold War era.[109]

This research has shown that there is a growing willingness across the globe to develop the use of constitutional opportunity structures to promote climate justice at national, regional, and international levels. There is a creativity in the strategies employed by lawyers, litigants and climate activists moving beyond traditional political and social mechanisms to advocate for change, to a more targeted approach drawing upon legislative and constitutional provisions as well as judicial interpretation of key constitutional concepts in order to secure legal victories.

Inevitably legal victories do not take place in a vacuum, and it is important to acknowledge the contextual picture with social and media interest in climate justice and climate action at an unprecedented level. This research shows, however, that climate justice engages multiple populations, generations, groups, and individuals. It is a global concern that cuts across borders and national divisions.

Of course, constitutionalism as a concept has to accommodate different cultures that place emphasis on other (sometimes competing) values. Accordingly, constitutional climate clauses need to be defended according to ethical values that arise from local contexts alongside universal standards, thereby accommodating the unique contexts of different countries and their continents alongside the global need to pursue climate justice to secure the earth's future.

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[109] *David R Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment (University of British Columbia Press 2012).*

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