Avosetta Questionnaire:

Climate Litigation

Report Germany – Gerd Winter (14.04.21]

Cork, 28-29 May 2021

Although it is never easy, please keep your answers succinct – 2 pages max, excluding the questions.

[1] State of play at national level:

In your particular Member State, have cases been decided by the national courts, and / or are there cases pending before the courts, that aim to deliver better climate protection?

Are there "horizontal" cases between private parties and / or "vertical" ones between private parties and public authorities – or both? If yes, briefly characterise them.

Actions challenging public authorities could be aimed: (1) at high level target setting for greenhouse gas emission (GHG) reduction; or (2) at the taking of more concrete measures reducing emissions (such as emissions limits for automobiles); or (3) at projects causing emissions as a side effect (such as a new runway or highway).

Briefly indicate who are the claimants; what are the standing requirements; what is the objective of the action, and what is the reasoning on the substance of the case.

"Horizontal" cases:

To my knowledge there has only been one case so far: Saúl Lluya v RWE. The plaintiff, a Peruvian farmer and tourist guide, alleges that his home in Huaraz, situated on the floodpath of an Andean lake, is acutely threatened by the potential collapse of two glaciers into the lake that would cause significant flooding as a consequence of global warming. He alleges that RWE, a big German energy supply company, has been a major emitter of greenhouse gases. His claim is – somewhat astonishingly – based on § 1004 Civil Code which (I believe) ressembles nuisance in Common Law. He asks RWE to pay £14,250 for its contribution to global warming. This amount is 0.47% of the estimated repair cost in case of flooding, and this figure corresponds to an estimation that RWE is responsible of 0.47% of global warming emissions from 1751 to 2010. The compensation would be invested in installing a glacial flood outburst early warning system, draining the lake and building new dams or improving existing ones, in order to prevent the risk of flooding in the area. The court of first instance dismissed the action. The appeal court confirmed it would hear the case and consult experts in cooperation with both parties to measure defendant's contribution to the risks of flooding. RWE argues that a single company cannot be held responsible for the consequences of climate change. The case has suffered delay from the pandemic.

"Vertical" cases:

Concerning projects: *The Federal Administrative Court was asked to annul the construction approval of a section surrounding Hamburg of the new highway A 20, inter alia because the EIA did not examine climate effects of the expected traffic. The court held that the approval was subject to the EIA law that was in force before Directive 2014/52/EU was introduced. Although in earlier versions of the EIA Directive climate effects were also to be examined the court said the previous versions only meant the local climate while only the version of 2014 extends this to effects on the general climate. The court grounded this on the newly included recitals 7 and 13 of Directive 2014/52 which provide more detail on the importance of climate change at large. See ECLI:DE: BVerwG:2021:240221U9A8.20.0*

Concerning measures reducing GHG emissions: *I am not aware of such case. Claimants challenging e.g. car emission standards for GHG would not have standing because those standards are considered to aim at the protection of the general public, not individual persons.*

Concerning high level litigation

Cases alleging non-attainment of targets set by law or executive plan

A group of persons filed a complaint at the ***Administrative Court of Berlin*** *arguing that the actual climate protection measures taken by the German government were insufficient to reach the emission reduction target for 2020 set by the German Climate Protection Plan. The action aimed at a declaratory judgment but was held inadmissible because the requirement for declaratory orders of administrative courts that a concrete legal relationship between the parties must exist was not met. The court however took opportunity to express its sympathy with the substantial concern of the claimants about the urgency of better climate protection.*

Cases alleging insufficieny of targets set by law or executive plan

On 24 March 2021 the ***German Federal Constitutional Court*** *(without public hearing and comparatively very expeditiously) decided by order on 4 constitutional complaints (Verfassungsbeschwerden) of 4 groups of claimants, including young people, farmers' families and persons living in Bangladesh and Nepal.*[1] *The standing requirements (personal, direct, and present concern) as well as exhaustion of other remedies are generously accepted, and in particular present concern because of the newly construed advance effect of human rights (see below). The extension of the protective scope of German basic rights to foreign countries is accepted for the admissibility stage but left undecided on the merits.*

In substance the court first applies the traditional concept of obligation of a state to protect in cases of "horizontal" causation from pollution sources to effects. It reconstructs the balancing of concerns and related norms, including the principle established by Art. 20a GG that human life conditions must be preserved, including in the interest of future generations but denies that the principle entails subjective rights. Nevertheless, subjective rights to protection follow from basic rights such as the right to health (Art. 2 (2) (1) GG). The court

[1] BVerfG, Beschluss des Ersten Senats vom 24. März 2021- 1 BvR 2656/18 -, Rn. 1-270, http://www.bverfg.de/e/rs20210324_1bvr265618.html

however accepts that the legislature has a broad margin of discretion in what reduction targets to set and what measures to take concluding that the limits were not overstepped.

As a second step the court develops a rather new concept which it calls advance effect of basic rights ("Vorwirkung" der Grundrechte). In effect the Court declares the German Climate Law unconstitutional due to a lack of a clear reduction pathway in line with the rights of the young generation. The concept can be summarised as follows [in brackets: my explanation]:

First, a broad scope of affected rights is envisaged. Climate change does not only interfere with the right to health but also with social, economic and cultural freedoms. The court does not specify those [but rights to personal development, education, occupation, free movement, property certainly belong to them].

Second, this extended scope of affected rights becomes ever more virulent the more the focus is directed from the present to future decades, when the applicants will be adults. The greenhouse effect will then dramatically jeopardize their life chances, [both because the physical conditions of enjoyment of basic rights are deteriorated and because states need to take ever more restrictive measures aiming at managing the remaining GHG emission opportunities.] The applicants will thus lose or be severely restricted in the exercise of the freedom rights.

Third, those limitations of freedoms in the future is caused by large quantities of GHG emitted at present, which accumulate in the atmosphere thereby increasing the temperature with ensuing harm to human life. Thus, the future interference of rights is caused by (then) past emissions.

Fourth, the state is responsible for such emissions because it allows actors to emit GHG. This permission constitutes an interference with the basic rights [rather than a violation of a duty to protect]. Fundamental rights as an intertemporal safeguard of freedom protect against a unilateral shift of the greenhouse gas reduction burden into the future. In the words of the Court:

> *"The protection of future freedom also requires that the transition to climate neutrality be initiated in good time. In concrete terms, this requires the early formulation of transparent guidelines for the further development of greenhouse gas reduction, which provide orientation for the necessary development and implementation processes and give them a sufficient degree of development pressure and planning certainty."*
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> *"The legislator itself must make the necessary regulations on the size of the total emission quantities permitted for certain periods of time."*

[It should be noted that the ECtHR does not see much doctrinal difference between the two constructions of human rights protection (duty to protect vs interference), while the German Court clearly differentiates between the two, limiting political discretion stricter in the interference scheme as compared with the duty to protect scheme. It appears to me that due to these differences the German Court has denied a breach of the duty to protect but accepted unlawfulness of the interference].

Fifth, the affected human rights are read to have an advance effect on the present time. This is the most innovative component of the new doctrinal construction. In order to avoid the future encroachments, the affected rights demand that emissions must be cut back today, and substantial quantities of allowable GHG emissions must be reserved for future decades. As a corollary effect, such early action provides for the necessary learning time for the transformation of law and society. [It should be noted, however, that the Court did not accept a subjective right of not yet borne generations. To protect them is a not subjectivised objective obligation of the state based on Art. 20a]

[2] Interconnections between developments at national and supranational level:

Where relevant, please connect the national experience to date with developments in climate litigation at the supranational level (e.g. proceedings before the CJEU and the ECtHR).

Carvalho et alii v EP and Council of EU

*An action was brought before the **EU General Court** by 10 families, including young children, whose livelihood have been and will be put at risk by climate change. The pleading goes through the factual climate change effects on the applicants, then argues admissibility on the basis of Art 263 para. 4 TFEU and challenges the incompatibility of the three GHG Emissions Acts with the Charter on Fundamental Rights and the Paris Agreement. It essentially suggests two approaches called "top down" and "bottom up".*

"Top down" argues in terms of a budget approach: A global GHG emissions budget remaining from 2021 within a limit of 2° C temperature increase is calculated on the basis of IPCC findings. 2° is the absolutely upper limit made binding by fundamental rights as read in the light of the Paris agreement. The budget is distributed among states considering various criteria the application suggesting equal per capita. The resulting EU budget – 43 Gt – if spent by linear degression starting with the emissions in 2021 of 3.38 Gt – will be consumed by 2034 which for 2030 means a cut back of 80 %, i.e. much more than the 40% target of the 3 GHG acts. This means the acts are in breach of the budget allowed by fundamental rights and Paris.

In the alternative the bottom up approach is submitted. It means that the EU must apply all means that are technically and economically feasible to reduce emissions. In legal terms that criterion follows from fundamental rights reasoning (justification of interferences if <u>necessary</u> in the public interest) as well as Paris where relative capability to reduce emissions is a prominent principle. When applying that principle it is conceded that the temperature limits may be overstepped. But even capability has not been observed by the EU because the 40 % target was taken out of the political blue rather than be based on sound technical and economical analysis. Had this been done 60% reduction would have appeared to be feasible [a target that the EU is about to finally accept in its Climate Regulation of 2021].

In terms of admissibility both the GC and ECJ insisted in applying the Plaumann test of "individual concern", i.e. requiring uniqueness of concern of the claimants which (we argued) was indeed de facto the case and (in the alternative) should be replaced by a better interpretation such as personal and serious concern. Actio popularis (we argued) could be prevented through procedural means (deadlines, costs, exemplary decisions, etc). National

remedies leading to preliminary rulings were (we argued) not available because national courts would be asked to assess climate policy against national (not EU) fundamental rights, and trying national remedies would be a disproportionate burden, because claimants would have to file actions in 27 states in order to achieve injunctions that sum up to more than 40% for the totality of emissions within the EU.

The CJEU thus dismissed the action on procedural grounds without deciding on the merits (ECJ C-565/19 of 25 march 2021).

Duarte Agostinho et alii v 33 contracting states of the ECHR

6 young Portuguese of 12 – 22 years brought an action against the 27 EU MS plus UK, Russia, Ukraine, Turkey, Norway, Switzerland alleging breach of Arts. 2, 8, 1 1st Prot.and 14 by omission of adequate GHG emission reduction. The Court held the application to be important and urgent (see Art. 41 Rules of the Court) and send questions to the respondents concerning their climate protection measures. The EU Commission was admitted as intervenor, as were 6 NGOs including Climate Action Network (CAN-E) for which I together with Roda Verheyen submitted that the Court may consider to adopt the advance effect concept proposed by the German Fed Const Court this implying that the scope of affected rights should be broadened to include freedom rights.