Conference Briefing

BECKER BÜTTNER HELD

A. Overview

I. Introduction to climate litigation

"Climate lawsuits" are a recent phenomenon that has received significant public attention. The chances of success are usually rated as minimal and the procedure is sometimes criticized as staging. The legal situation, shows more promise.

Recent weather trends indicate that natural disasters such as floods, heatwaves, hurricanes and droughts have intensified and become more frequent. A report published by Grantham Research Institute on Climate Change and the Environment at the London School of Economics in 2019 explains the growing trend of climate change related law suits over the past few years. Joana Setzer, co-author of the report explained that "Holding government and businesses to account for failing to combat climate change has become a global phenomenon. People and environmental groups are forcing governments and companies into court for failing to act on climate change, and not just in the United States."

This increase of law suits against fossil fuel companies and governments is directly linked to the research carried out on the Carbon Majors and attribution science. The report states "In cases that seek to establish the liability of greenhouse gas emitters for harm, climate science can be critical to determining whether litigants have standing to sue. Science is an essential part of new litigation cases, substantiating that defendants' actions have caused the plaintiffs harm". These new research methods, especially the Carbon Major's report, give prosecutors the possibility to scientifically substantiate their claims against polluters.

II. Current Climate Cases in Europe

Particularly noteworthy for Europe are the failed attempt at the Austrian Constitutional Court (ÖstVerfGH) to prevent the expansion of Vienna Airport for reasons of emissions, an individual application announced by Greenpeace before the ÖstVerfGH against "climate-damaging provisions", which was also submitted to the appellate court (Den Haag) and there successful Urgenda lawsuit, which led to the ordering of stronger emissions efforts, as well as a nullity and compensation lawsuit ("People's Climate Case") before the CFI (dismissed as inadmissible; appeal was lodged).

In October, the administrative court VG Berlin dismissed a performance action brought by individuals and Greenpeace for compliance with the Federal Government's Climate Action Program 2020 as inadmissible. However, they allowed an appeal "because the question of the individual plaintiffs' right to bring action because

of a breach of fundamental rights protection obligations (...) is of fundamental importance".

2 constitutional complaint from individuals and environmental organizations are pending at the BVerfG. The main complaints are violations of Art. 2 II 1 and Art. 14 I GG. The procedural claim asserted with such complaints is only aimed at a statement (§ 95 I 1 BVerfGG) that the legislature has so far caused an inadequate reduction in greenhouse gas emissions that violates fundamental rights, or, in the case of the legal constitutional complaint, a declaration of incompatibility.

B. People's Climate Case ECJ

I. What is the case about?

1. The plaintiffs

The plaintiffs are families from Europe and outside and the Saami youth association from Sweden. The lives, livelihoods and fundamental rights of plaintiffs are impacted/at risk of being impacted by climate change. The plaintiffs are working in agriculture and tourism in the EU and abroad who are, and will increasingly be adversely affected, in their livelihoods and their physical well-being by climate change effects. They were supported and joined by an associated of indigenous Sammi youth, whose families are equally affected.

One example is a family who engages in beekeeping and as a result of the extreme weather and droughts of the past few years saw a reduction in their production by more than half and were compelled to feed the hives artificially, incurring the extra expenses.

2. The defendants

The European Parliament and the Council.

3. Case before the General Court

The case before the General Court was comprised of the following:

(1) An application for annulment, under article 263 of the Treaty on the Functioning of the European Union ('TFEU'); and

(2) A claim in tortious liability, under article 340 of the TFEU.

The plaintiffs brought two related applications concerning the responsibility of the Union for the GHG emissions contributing to climate change. They contended that the Union had failed and continues to fail to meet its urgent responsibilities to limit the emission of GHGs, in breach of its binding obligations. This breach manifests itself in three legal acts of the EP and Council:

Collectively the GHG Emissions Acts:

- The ETS directive
- The effort-sharing Regulation
- The LULUCF Regulation,

The plaintiffs in the case contended that these legal acts entail failure by the European Union ('EU') to meet urgent responsibilities to limit emission of greenhouse gases ('GHGs') and to avoid harm caused by climate change, and breach of inter alia the following:

(1) The Charter of Fundamental Rights: articles 2 and 3 (the rights to life and physical and mental integrity), articles 15 and 16 (the right to work and the freedom to conduct a business), article 17 (the right to property), articles 20 and 21 (the rights of equal treatment), and article 24 (the rights of the child);

(2) Various treaty obligations, under inter alia the TFEU, the Treaty on European Union and the Paris Agreement 2015; and

(3) Customary international law, including the 'no harm principle' and the 'precautionary principle

The plaintiffs case was that the Union is obliged under higher rank legal norms to avoid harm caused by climate change and associated infringements of fundamental human rights. Given that climate change is already causing damage and that further emissions will add to its dangers, any target set for the reduction of emissions must be based on an assessment of capability, in light of the EU's legal obligations and the grave threat posed by climate change. The GHG Emissions Acts fail to meet this standard and the target set for reducing GHG emissions is grossly inadequate.

The plaintiffs sought the following final relief from the court:

a. **Declare the contested three GHG Emissions Acts void** insofar as they allow the emission between 2021 and 2030 of a quantity of GHG corresponding to 80% of the 1990 emissions in 2021, decreasing to 60% of the 1990 emissions in 2030.

b. **Annul the GHG Emissions Acts** insofar as they provide for a reduction by 2030 of GHG by 40% compared to 1990 levels

c. Order that the contested provisions **remain in force until they are replaced with emissions target levels compliant** with the norms of higher rank law.

d. **Order the defendants to adopt measures** under the three GHG Emissions Acts such as to reduce the level of emissions of greenhouse gases covered by those Acts by at least between 50% and 60% of 1990 levels by 2030.

II. What are the legal challenges arising in the case?

One of the main obstacles faced by the plaintiffs in this case is to prove that they **are individually concerned** by the contested acts, and have the **locus standi** to request the annulment of the acts.

The defendants made a plea of inadmissibility. The essence of the defendants' arguments on admissibility is that the threat of climate change is so pervasive and common to all persons, and caused by such a diversity of activities, that a legal response is unavailable in this Court.

1. The legal arguments of the defendants

- The Council contends that, notwithstanding the immense volume of documentation appended to the application, **the applicants have not shown that any of the contested acts has affected their legal situation**. Indeed, the applicants seek only to show that their factual situation has been, or is likely to be affected.

- The Council also contends that all the contested acts in fact require or enable both the Member States and the Commission to take action to comply with the basic obligations laid down therein or to go beyond such obligations, **so that there is at least some discretion that, in any event, precludes the applicants from being directly concerned**. The Council also points to the fact that all the acts concerned were adopted under Article 192 TFEU and that Article 193 TFEU states that the Member States may take more stringent protective measures than those set out in acts adopted under Article 192 TFEU.

- Next, the Council contends that the part of the application relating to individual concern is confused because the applicants disregard the conditions of eligibility for bringing proceedings. In the Council's view, accepting the

applicants' argument whereby each of them **claims that their fundamental rights have been infringed would render the condition of individual concern entirely meaningless.**

- The Parliament is also of the view that the contested acts **do not directly affect the applicants' legal situation**. In that regard, the Parliament remarks that the contested provisions setting **the target levels of greenhouse gas emissions are not, in themselves, capable of affecting the fundamental rights invoked by the applicants**. According to the Parliament, in order for those rights to be capable of being affected, the greenhouse gas emissions must first take place, via authorisations to emit or via the allocation of emission allowances to economic operators. **However, the legislative package does not 'authorise' any person to emit greenhouse gases**. Indeed, it lays down the minimum requirements with which Member States must comply in order to reduce emissions and, accordingly, combat climate change. The Parliament adds that the legislative package also confers some discretion on the national authorities tasked with its implementation.

- Regarding individual concern, the Parliament contends that the contested provisions are of a general nature and that they can be applied to any natural or legal person and apply to an indeterminate number of natural and legal persons. It maintains that the applicants have not produced the **slightest evidence to show that the legislative package would alter the rights** that they had acquired prior to the adoption of that package in accordance with the cases giving rise to the judgments of 18 May 1994, Codorniu v Council (C-309/89, EU:C:1994:197), and of 13 March 2008, Commission v Infront WM (C-125/06P, EU:C:2008:159). In addition, the applicants' argument that 'each applicant is affected by climate change … idiosyncratically and is therefore distinguished from all other persons' is fallacious from a logical perspective. It implies that, besides the applicants, each and every person around the world is individually concerned by the legislative package. However, suggesting that all persons are individually concerned by the contested acts is a blatant contradiction of the case-law criterion resulting from the judgment of 15 July 1963, Plaumann v Commission (25/62, EU:C:1963:17), which requires the existence of genuine distinguishing features. Moreover, as regards fundamental rights and effective judicial protection, the Parliament recalls that, according to the case-law, a claim that an act of general application infringes those rules or **those rights is not in itself sufficient to establish that the action brought by an individual is admissible**, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless, as long as that alleged infringement does not

distinguish the applicant individually just as in the case of the addressee. In that context, the Parliament also recalls that the Treaty on the Functioning of the European Union has established, by Articles 263 and 277 thereof, on the one hand, and Article 267 thereof, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the Union.

- Lastly, the Parliament contends that the action is inadmissible because the applicants are **seeking the annulment of provisions that cannot be severed from the remainder of the legislative package**.

2. The legal arguments of the plaintiffs

- The plaintiffs maintain that they are directly concerned by the greenhouse gas emission reduction targets laid down by the legislative package. The legislative package directly affects their legal situation, given that, by **requiring an insufficient reduction in greenhouse gas emissions and thereby allocating and authorising an excessive volume of emissions, it infringes their fundamental rights** as enshrined in the Charter of Fundamental Rights of the European Union, namely the right to life (Article 2), the right to the integrity of the person (Article 3), the rights of the child (Article 24), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17) and the right to equal treatment (Articles 20 and 21).

- The plaintiffs argue that they are also individually concerned. In that regard, they emphasise that they are each claiming an infringement of their individual fundamental rights as listed in paragraph 30 above. The effects of climate change, to which the legislative package contributes, and, accordingly, the **infringement of those rights will be unique to and different for each individual.** According to the plaintiffs, **a farmer affected by drought is in a different situation to a farmer whose land is flooded and made saltier by seawater**. Even within a group of farmers affected by drought, each farmer will experience the effects differently.

3. Findings of the Court

In the present case, it should be observed at the outset that the applicants are claiming an infringement of their fundamental rights. They infer from this that they are individually concerned, given that, although all persons may in principle each enjoy the same right (such as the right to life or the right to work), the effects of climate

change and, by extension, the infringement of fundamental rights is unique to and different for each individual.

Such an argument cannot succeed.

The applicants have not established that the contested provisions of the legislative package **infringed their fundamental rights and distinguished them individually from all other natural or legal persons** concerned by those provisions just as in the case of the addressee.

It is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, **the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application**. As can be seen from the case-law cited in paragraph 48 above, a different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating locus standi for all without the criterion of individual concern within the meaning of the case-law resulting from the judgment of 15 July 1963, Plaumann v Commission (25/62, EU:C:1963:17), being fulfilled.

Accordingly, it must be found that the applicants are not individually concerned by the contested acts for the purposes of the case-law cited in paragraph 45 above. The applicants do not have locus standi and that, accordingly, they may not request annulment in part of the legislative package.

In the light of the foregoing, the plea of inadmissibility raised by the Parliament and the Council must be upheld and the action must accordingly be dismissed as inadmissible in its entirety.

4. Brief commentary on the case

Climate litigation is novel on many different levels, and a legal victory - also with respect to an appeal - is by no means certain. In the European legal system, individuals can only challenge legal acts if they are directly and individually affected by them. This is a serious hurdle, because the European Courts interpret these criteria very narrowly - as seen in the European General Court's Order.

Chances of success in an appeal to the ECJ according to CAN: The higher and final instance court, i.e. the ECJ has leeway to interpret the law differently and thus initiate further legal development. As the decision of the General Court is only briefly

reasoned and furthermore "invents" a new requirement on standing which is not present in the Treaty, there are definitive grounds for appeal.

This case does highlight a persistent issue in climate litigation: it cannot be correct that if everyone is concerned no one is concerned, and because everyone is to blame no one is responsible. As to responsibility, the Union has since 2009 assumed full responsibility for determining the emissions targets and thus emissions levels of the EU. This must be mirrored in corresponding judicial scrutiny.

C. 2 Prominent Climate Cases ongoing at the BVerfG

I. What are the cases about?

1. Goal of both Law Suits

- The CO_2 budget that Germany is entitled to for compliance with the 1.5 degree limit of 3.465 gigatons would be fully exhausted with the targets set in the Climate Protection Act by 2024, or by 2025 at the latest.

- The aim of the lawsuits is therefore to oblige the federal government and the federal legislature to undertake significantly more ambitious climate protection goals and more effective climate protection measures, which ensure that Germany makes its fair contribution to complying with the Paris Agreement and limiting global warming to 1.5 ° C.

- Specifically, they request that Germany may only cause the maximum amount of greenhouse gas emissions that it is entitled to from the remaining global emissions budget according to the proportion of the population. This requires substantial savings measures immediately. The necessary profound structural changes in all sectors from transport to agriculture can and must be initiated immediately.

- The children and young adults from Germany as well as the people from Bangladesh and Nepal refer to Article 2, Paragraph 2, Clause 1, the fundamental right to life and physical integrity, and Article 14, Paragraph 1 of the Basic Law, the fundamental right to property.

2. Differences

The two lawsuits are directed in the same way against the inadequate climate protection goals and measures of the federal legislature and the federal government. , they are raised by different plaintiffs. The plaintiffs from Bangladesh and Nepal are suing because they **are already suffering** from the consequences of climate change.

The second lawsuit is brought by children and young adults from Germany, whose **future is threatened by climate change.**

3. First reaction of BVerfG

The Federal Constitutional Court has asked the Bundestag, the Bundesrat, the Federal Chancellery, the Federal Ministry of the Interior for Building and Home Affairs, the Federal Ministry of Justice and Consumer Protection and all state governments to comment by 15.9.2020.

The federal government and the federal states have to show which concrete measures they want to take to achieve the 1.5 degree target.

4. Brief commentary on chances of climate cases in Germany

Constitutional complaints related to environmental protection are usually doomed to failure. Unless an obligation to protect has already arisen due to insufficient threat to fundamental rights, it is not possible to conclusively demonstrate a violation of the prohibition of undersize and the individual concern of the complainant. Anthropogenic climate change, however, has empirical peculiarities that distinguish it from other environmental pollution, and which the "climate complaints" could navigate past these material and procedural breaking points.

However, the complainants are still obliged to prove that existing climate protection measures fail to meet the defined requirements (violation of duty to protect and limitation of discretion with regard to the type of measures). If they succeed in this, the Federal Constitutional Court would probably limit itself to the determination of the violation of fundamental rights or the declaration of incompatibility and leave it to the legislature as to how to implement further emission reductions in the most gentle way for the economy and for the fundamental rights of the emitters concerned.

D. The Urgenda Climate Case- Netherlands

I. What is the case about?

1. The plaintiffs

Campaigners in the Netherlands took the government to court for allegedly failing to protect its citizens from climate change. The campaigners were led by Urgenda Foundation, a non-profit foundation in the Netherlands. The class action lawsuit, involved almost 900 citizens, aiming to force the government to cut emissions faster.

2. The defendants

The Dutch government and the Ministry for Infrastructure and Environment.

3. The case before the District Court of the Hague

The campaigners wanted the court to compel the Dutch government to reduce its carbon emissions to **40% below 1990s levels by 2020**. The activists also wanted the court to declare that global warming of more than 2C will lead to a violation of fundamental human rights worldwide.

Urgenda set out the facts of climate change and explained why emissions need to be radically reduced to avert catastrophic harm. It provided the grounds upon which it claims the Dutch state is legally obliged to take action to reduce Dutch greenhouse gas emissions.

In its defence, the State acknowledged all of the facts of climate change, including the potentially devastating consequences if no action is taken. The State implicitly acknowledged that it is not doing its share to avoid dangerous climate change. However, the State **rejected the notion that it can be legally obliged to act**. In short, the State argued that there is **no legal obligation** on the basis of which it is legally bound to reduce greenhouse gas emissions. Furthermore, the State argued that whether and to what extent emissions should be reduced is a **political question in which the courts should not intervene.**

The District Court of The Hague issued its judgment on the 24 June 2015, ordering the Dutch State to lower its emission by at least 25% before 2020 compared to 1990 levels.

The Dutch government decided to appeal the judgment. It made this decision even though it is taking steps to meet the target set by the Court. The Hague Court of Appeal decided to uphold the 2015 court decision. The appeal court judges ruled that the severity and scope of the climate crisis demanded greenhouse gas reductions of at least 25% by 2020 – measured against 1990 levels – higher than the 17% drop planned by Mark Rutte's liberal administration.

On 8 January 2019, the State filed its grounds of appeal to the Supreme Court.

4. The case before the Supreme Court

Despite its initial announcement to file the appeal because of its disagreement with the Court of Appeal's approach to the question of 'separation of powers', the State challenged a wide range of findings that were made by the Court of Appeal. This includes the finding that the State has a human rights-based obligation to reduce emissions and the necessity to reduce Dutch emissions by at least 25% by 2020 compared to 1990 level in order to prevent global warming from exceeding 2°C.

On 13 September 2019, two chief advisors to the Supreme Court, the Procurator General and Advocate General, published an Advisory Opinion. The Advisory Opinion assesses every argument that has been put forward by the State and concluded than none of them are persuasive. They therefore concluded that the judgment of the Court of Appeal should be upheld.

The final judgment of the Supreme Court: On 20 December 2019 the Supreme Court, the highest country states that the Dutch government must reduce emissions immediately in line with its human rights obligation.

II. What are the legal challenges arising in the case?

a. Issue of locus standi in the Netherlands

Unlike the People's climate case, the issue of locus standi was not a hurdle for the plaintiffs in this case. The following provisions are set out in Dutch law:

Article 3:303 of the Dutch Civil Code (hereafter DCC) determines that a (legal) person can file a complaint before a civil court only when that person has sufficient individual and personal interest in that claim.

Article 3:305a DCC contains an exception to that rule. On the basis of that provision, a legal entity such as a **foundation or association** can also file a complaint when it is aimed at protection of a **general interest**, or the **collective interests** of other persons, insofar as that interest is formulated as one of the constitutional purposes of that legal entity. Such an organisation will only be given standing in its complaint after it has made sufficient attempts to reach its demands in a constructive dialogue with the target of its complaint.

In relation to the standing of the Urgenda Foundation, insofar as it is not acting as legal representative of all other plaintiffs, it is clear that its claim aims to protect an issue of public interest that lies at the core of its constitutional purpose, that is, to

protect the interests of current and future generations in order that the ecosystems and the liveability of the planet are not severely put at risk by planetary heating and climate change caused by humans. The Urgenda Foundation and all other plaintiffs that are legally represented by it (jointly referred to as 'Urgenda c.s.') want to preserve the planet as a sustainable place for future generations to live.

b. Other issues that arose in this case

Separation of powers

The Dutch government attempted to argue that the court cannot intervene and force the government to extend their emission targets as this is a political matter. As per the separation of powers, the court cannot preside over matters that fall under the executive branch.

The Court of Appeal based its ruling on the State's legal duty to ensure the protection of the life and family life of citizens, also in the long term. This legal duty is enshrined in the European Convention of Human Rights (ECHR).

The Court disagreed with the State that courts have no right to take decisions in this area. The Court has to apply directly effective provisions of treaties to which the Netherlands is party. These provisions form part of the Dutch legal order and even take precedence over deviating Dutch laws.

No legal obligation to act

The State implicitly acknowledged that it is not doing its share to avoid dangerous climate change. However, the State rejected the notion that it can be legally obliged to act. In short, the State argued that there is no legal obligation on the basis of which it is legally bound to reduce greenhouse gas emissions.

This was rejected by all three courts, concluding that the t Dutch government must act immediately in line with its human rights obligation and that the severity and scope of the climate crisis demanded greenhouse gas reductions of at least 25% by 2020.

E. Climate Law

EREF Position on Climate Law Proposal:

The proposal **lacks clear enforceability regarding national measures**. It remains unclear how the Member State obligation in Art. 4 (2) relate to the NECPs referred to in Art. 6 (1) of the proposal. Once the NECPs are accepted by the COM, they should become mandatory, subject to infringement procedures and potential penalties. **The wording of Art. 5 (3) for the assessment of EU progress and measures clearly points to enforceability. The same should be adopted for Art. 6 regarding the assessment of national measures which currently only lay out the preliminary proceedings of an infringement procedure.**

F. Panel Members Activities in those Cases

1. Peter Barnett, ClientEarth's Singapore Office

Senior Lawyer, SEES Asia Programmes Coordination Lead

2 Cases he picked for his speech for world environment day 2020 in June:

https://www.etoncollege.com/news-and-diary/school-news/world-environment-day-2020-using-the-law-to-fight-climate-change/

- The first, in the Torres Strait Islands, concerns islanders whose rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) may have been affected by climate change.

- The second case, which ClientEarth has already won, was ClientEarth vs Enea, in which the charity successfully proved that the planned construction of a coal-fired power plant in Ostrołęka did not account for the financial risks of such an endeavour.

2. Jinmei Liu, Friends of Nature

- Chinese Cases, for example regarding chemical pollution or eating cats and dogs http://www.fon.org.cn/index.php?option=com_k2&view=item&id=12954:the-changzhou-soil-pollution-case-is-far-from-over&Itemid=251

- The chinese system for environmental public interest lawsuits doesn't allow cases against government actions. The CBCGDF therefore suggests "establishing a system for social organisations to bring administrative public interest lawsuits".

3. Xiang Liu, CLAPV

- Chinese Pollution Cases

The Center for Legal Assistance to Pollution Victims or CLAPV (Chinese: 污染受害者法律帮助中心) at the China University of Political Science and Law is a legal-aid office, training center, and one of the most effective environmental groups in China.

4. Anna McIntosh, Ecojustice Canada

- Anna is a graduate of McGill University and has also worked or interned at the Environmental Jurists Association in Taipei and UN Environment in Geneva.

- No case overlap, overview of Canadian cases here https://ecojustice.ca/cases/?fwp_issue_areas=climate

5. Shengzhi Wang, Sunshine Lawfirm

- environmental and RE project development attorney at Sunshine Law Firm (counsel, but not listed on the website)

- One significantly unique part of Sunshine is our Environmental, Resources and Energy Research Center (the "ERE Center"), which meets the growing demand for legal research in the transformation of energy and environmental issues and services. The ERE Center has launched research projects on frontline issues of importance to sustainable development, energy policy, energy and environmental strategy and climate change in China. The ERE Center has built close cooperative relations with domestic and international universities, research institutes and consulting firms to better serve our clients. The ERE Center also provides legislative consultation to government bodies, and assists energy companies in forming growth strategies.

6. Ivan Vargas-Roncancio, Law PhD Candidate at McGill University

- His dissertation asks how forests become legal agents through indigenous, scientific, and legal practices; how human and other-than-human beings such as Amazonian plants co-produce protocols for forest governance, and finally how a law that comes from the territory challenges concepts of justice, agency, and value in times of socio-ecological transitions.

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7. Asghar Leghari, Partner at Leghari & Darguar

- No search results for law firm name, maybe some mix up
- Pakistani High Profile case: Farmer named Asghar Leghari challenged government for failure to carry out the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030).

Brüssel, 18. April 2021