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THE INTERTEMPORAL GUARANTEE OF FREEDOM – A CONCEPT FOR INTERNATIONAL HUMAN RIGHTS TO ADDRESS STATES' FAILURE TO COMBAT CLIMATE CHANGE AND ITS THREATS?

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Abstract. This paper analyses, if the Intertemporal Guarantee of Freedom, that was developed by the German Federal Constitutional Court (GFCC), can be used to expand the protection of human rights against the harms of climate change. The case of the Swiss Senior Women shows that there are jurisdictions, where the Intertemporal Guarantee of Freedom could be applied to improve standing and the control standard of states' climate change action. Within international law bodies with jurisdiction over human rights treaties there are distinctive standards of protection against the harms of climate change. A major deficit within the international human rights protection against climate change lies within the focus on the positive obligations and the corresponding wide margin of appreciation granted to the states. The Intertemporal Guarantee of Freedom could provide a protection expansion in this regard, especially in the case of the European Court of Human Rights. It could also enable and legitimise present human rights concerns focused on the future actions of states following their past inaction. One considerable hurdle that is not addressed by it are procedural hurdles like the Plaumann formula applied by the European Court of Justice. The Intertemporal Guarantee of Freedom cannot solve major problems for climate change litigation like procedural hurdles. Yet, it can provide a new approach for complaints to address unambitious mitigation legislation which will lead to future human rights infringements.

INTRODUCTION

In March 2021 the German Federal Constitutional Court (GFCC) developed a new dogmatic approach within constitutional law to approach climate change and its threats, in the form of the Intertemporal Guarantee of Freedom. This leads to the question, if this approach, that it is rooted in national constitutional law can be used to expand the protection of human rights against the harms of climate change elsewhere. In its landmark decision, the court found that the complainants cannot only assert the states duty to protect their rights to life, health and property against cautious legislative restrictions on greenhouse gas emissions but also claim an interference with all of their future freedoms. In order to show its potential, the Intertemporal Guarantee of Freedom will be examined in the context of German constitutional law and applied to other jurisdictions as well as international human rights law in the form of the cases of regional human rights courts and treaty bodies.

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1. THE CONCEPT OF THE INTERTEMPORAL GUARANTEE OF FREEDOM

1.1. The case brought before the court

The case was brought before the GFCC as a constitutional complaint against the failure to adopt suitable measures to tackle climate change, as well as against the Federal Climate Change Act (FCCA). The group of complainants consisted of both children and adolescents not only from Germany but also from Nepal and Bangladesh. Environmental associations who brought claims as 'advocates of nature' were denied standing since the German Basic law (GG) and the constitutional procedural law do not include provisions for an altruistic standing (GFCC 2021, 96-137). The complainants alleged that the state had failed to create a framework sufficient for reducing greenhouse gases (GHG) and that the current reduction goals of the FCCA were not sufficient to stay within an emissions budget, that correlates with the goal to limit the temperature increase to 1,5°C above pre-industrial levels set forth in Article 2 of the Paris Agreement. The complaints were mostly based on the states duty to protect the rights to life, health, property and human dignity. Additionally, a right to an ecological minimum standard of living was claimed. The complaints brought forth were mostly admissible and partially successful even though the court found a differing reasoning. This came as a surprise, because prior claims based on the duty to protect and an ecological minimum standard of living were given minimal chances of success in light of earlier judgements.

1.2. The states' duty to protect

The GFCC did not find a violation of the states' duty to protect the rights to life, health and property. It acknowledged the states' duty to protect its citizens against the risks posed by climate change, while refusing the excuse that one state alone is incapable of stopping climate change and therefore no states' obligations could be singled out by plaintiffs (GFCC 2021, 142, 148 f.). Nevertheless, it was conceded that the global nature of climate change affects the reach of the duty to protect, insofar as the duty to protect obliges the state to engage in international initiatives against climate change. The Constitutional Court derived a responsibility of the state out of Art. 20a GG to take climate action even if there is no international consensus or effort to combat climate change (GFCC 2021, 201).

The states' protection obligation does not only include adaption measures aimed at alleviating the ramifications of climate change within Germany but also actions to limit global warming itself. Restricting the states' actions to adaption measures would be inadequate (GFCC 2021, 149 ff.; similarly, Hoge Raad 2019, 7.5.2). In line with its established case law, the court limits its review to protect the legislator's margin of appreciation by only finding a violation of a duty to protection if no measures at all were taken or if the taken measures are completely inadequate for achieving their goal. Considering that an effort was taken by the state in the shape of the FCCA, the court could not find a violation of the protection duty. Even though the court admits that the current legislation was too unambitious to comply with the goals of the Paris Agreement it still found the rules to be within the legislator's margin of appreciation (GFCC 2021, 162). Concerning the duty to protect citizens property the judgement found that currently no violation of this duty could be found since it deemed it not

likely that in the foreseeable future property within Germany would be endangered by climate change in a way that could not be protected by adaption measures.[2] An assertion that became questionable within weeks after heavy flooding killed 189 people in Germany, left even more homeless and can be attributed to climate change with a high likelihood (Bennhold, 2021; Fountain, 2021).

1.3. Expansion of the negative dimension of human rights

Even though the duty to protect was not infringed, the court found that fundamental rights were presently violated by the FCCA because the emissions that were allowed by it gave rise to substantial burdens to reduce emissions in later periods, which would lead to disproportional interferences with future freedoms of the complainants (GFCC 2021, 142). The decision to allow certain amounts of CO2 to be emitted until 2030 has an *advance interference-like effect* on the freedoms of the complainants as it inevitably reduces the remaining national budget of GHG emissions that can be emitted in compliance with the goals of the Paris Agreement. The current restrictions of GHG emissions determined by the FCCA concern all forms of freedoms due to the fact that presently nearly all thinkable aspects of human life involve the emission of greenhouse gases and are thus threatened by the restrictions after 2030 that the constitution itself demands in the form of the principle of the protection of the natural foundations of life in Art. 20a GG. By defining the protected behaviour as a right to a freedom use that is inevitably connected with GHG emissions the judgement reverses the common argument of climate protection advocates who typically only invoke the protection duties concerning the right to life, health and property. This allows the judges to expand the *negative dimension of human rights* and not be restricted to the widely accepted limits of the duty to protect.

The court ruled, that the constitutional rights demand the legislator to spread the opportunities associated with freedom *proportionately across generations* and prohibits to offload the greenhouse gas reduction burdens unilaterally onto the future (GFCC 2021, 183). This principle contains the obligation to take climate action and has been specified through the Paris Agreement and the FCCA to include the 1,5°C to 2°C goal (GFCC 2021, 184-185; Saiger, 2021). The judges use this to follow that with the progress of time the remaining GHG budget will decrease and due to the threats of climate change more extensive restrictions of freedoms will become proportional. This endangerment already lies *de jure* within the current insufficient limits to GHG emissions by the FCCA as well as *de facto* within the progression of climate change (GFCC 2021, 185 ff.). The advance interference-like effect the current legislation has on individual freedoms can only be justified if it complies with the constitutional principles of the Basic Law – like the aforementioned principle of the protection of the natural foundations and the duty to protect fundamental rights – and if it is not disproportionate. These limitations to states' interference with fundamental rights are well established by the case law of the GFCC and scholars of constitutional law (GFCC 2021, 189 ff.; on the development of the principle of proportionality Cohen-Eliya, Porat, 2017).

2 These remarks are abbreviated in the translation of the judgement, but can be found in the original German version GFCC 2021, 172.

The FCCA, which contained the Paris goals but whose emission reduction requirements aimed so low that Germany's national GHG budget would most likely be consumed by 2030, was only deemed compliant with Art. 20a GG due to the factual difficulties of calculating GHG budgets which, according to the court, results in an enlargement of the legislators' margin of appreciation (GFCC 2021, 237). Even though it can be argued that the FCCA is inconsistent in it itself, since the climate action instruments put forth by the legislation are not sufficient to reach its own reduction goal of 55 % of GHG emissions compared to 1990, the judgement did not find it unconstitutional because additional legislation could be passed to attain said goal within the margin of appreciation of the legislator (GFCC 2021, 238).

According to the decision, the *principle of proportionality* demands, that one generation must not be allowed to consume large portions of the emissions budget while only bearing a minor share of the efforts to reduce GHG emissions (GFCC 2021, 117, 192). This duty of the legislator to minimise the risk of unreasonable interferences with fundamental rights remains, even if the remaining emissions budget cannot be definitively ascertained. The principle of proportionality generally demanded a proportionate balance between the infringement of individual rights and the purpose the state follows. It is also widely established that different constitutional principles and rights have to be weighed against each other in order to give optimal effectiveness to all concerned rights and principles.[3] The FCCA was deemed unconstitutional by the court as it did not establish a fair balance between the current and the future use of freedoms entailing GHG emissions due to the fact that the emission budgets were only regulated until 2030 and did not contain provisions updating these budgets (GFCC 2021, 257 f.).

2. APPLICATION IN OTHER JURISDICTIONS

Whereas most human rights-based climate litigation efforts focused on the positive obligation of the state,[4] the judgment of the GFCC focused on the negative dimension. In the following passages, the Intertemporal Guarantee of Freedom – as an innovative legal argument – shall be applied to some examples of human rights-based litigation efforts in other countries to examine if this approach could be of success in other jurisdictions. The humanrights-based efforts like the cases for example in Nepal (Shrestha), Pakistan (Leghari), Colombia (Atrato River) and Netherlands (Urgenda, Royal Dutch Shell) will not be elaborated because those litigation efforts were successful.[5]

3 Established as the principle of praktische Konkordanz by Hesse, 1999, 73; further Kommers, 2019, 542 f.

4 For an extensive collection of climate change litigation see the database by the Sabin Institute for Climate Change Law at Columbia Law School: climatecasechart.com/climate-change-litigation/; on the learnings from successful cases of strategic climate litigation Peel/Markley-Tower, 2021.

5 Supreme Court of Nepal, 25/12/2018 . 074-WO-0283; Lahore High Court, 04/04/2015 – 25501/2015 (Leghari); Colombian Constitutional Court 11/10/2016 – T-622/16 (Atrato River); Hoge Raad, 20/12/2019 – 19/00135 (Urgenda); Rechtsbank Den Haag, 26/05/2021 – C/09/571932 (Royal Dutch Shell).

2.1. Switzerland

Switzerland has had its first case of climate litigation with the complaint of the Swiss Senior Women for Climate Protection against the Swiss government (SSC 2020, 145). The association argued that due to the *rising temperatures* caused by climate change, longer periods of hot weather and temperature spikes were to be expected in the coming years in Switzerland. According to scientific studies, women over the age of 75 years would be exposed to a higher risk of mortality during hot summers and would be more seriously affected in their health as the general public. This development affected senior women presently since climate change and the temperature rises were already occurring. The complainants argued that this factual situation would trigger the states' duty to protect the fundamental rights to life (Art. 10 I Swiss Constitution (BV); Art. 2 ECHR) and the right to respect for private and family live under Art. 8 of the European Convention on Human Rights (ECHR) (SSC 2020, 151 f.). The court denied the proposition since it found that the temperatures would not exceed the 2°C goal formulated in the Paris Agreement in the recent future and assumed that temperature rises could be halted before they reach the aforementioned values. Due to this assessment of climate change the court denied a threat to the right to life as well as the right to respect for private and family life (SSC 2020, 154). After the case has been dismissed a complaint was filed against Switzerland at the European Court of Human Rights (ECtHR) in 2021 that is awaiting judgement (Application to the ECtHR 11/26/2020). The judgement itself and the question whether the rising temperatures triggered the states' duty to protect shall not be elaborated here (Bähr/Brunner 2018). What shall be of interest is, if an argument constructed similarly to the Intertemporal Guarantee of Freedom could have been of success.

Instead, the question should be raised if appellants could argue in a similar fashion to the GFCC and focus on the *Intertemporal Guarantee of Freedom*. The basis for the courts' argument in the German case was that the Basic Law contained the protection of the natural foundations of life as a constitutional principle in Art. 20a GG. A similar provision can be found within the Swiss Constitution in the form of Art. 73 BV. This constitutional principle even demands a balanced relation between nature and humanities use of it. This could be used to argue that the current Swiss climate change policy does not give sufficient regard to the future use of freedoms protected especially under Art. 10; 26, 27 BV even though the Swiss Constitution – unlike the German Basic Law – does not contain a general freedom of action. The major advantage of this extension of the negative dimension of human rights is that the complainant does not need to proof a concrete threat to his or her right to life as it was denied by the Swiss court. Instead, the complaining party only needs to argue that the balance of current and future freedoms is disproportionate. This could counter the argument made by the Swiss court that climate change could still be slowed down through suitable measures and prevent a threat to the life (SSC 2020, 153). Even if it is still possible to keep global warming within the 2°C goal, it will not be possible without considerable reduction efforts in nearly all areas of life that will impact the future use of freedom by the citizens (IPCC 2022, C.3; GFCC 2021, 184).

The main obstacle concerning an application of the Intertemporal Guarantee of Freedom and climate change litigation within Switzerland is Art. 190 BV that *limits the constitutional control* of

the Supreme Court by declaring federal laws binding for the court. A *judicial review* of the laws by the legislator is also not guaranteed by Art. 13 ECHR that gives everybody the right to an effective remedy (ECtHR, James v United Kingdom (8793/79), 85.). The Supreme Court did not deem the case unapplicable due to its limits of judicial review – which the previous court in the proceedings had not deemed relevant – but follows the argument of the applicants that the failure to revise the Federal CO2 Act was an informal administrative act (Reich *et al.*, 2022). The court found the case to be unapplicable only because it deemed the appellants not particularly affected. This does not necessarily mean that a later case against insufficient climate litigation in Switzerland will not be considered applicable by the court. Similarly, the court has expanded its judicial review towards acts of the legislator to enable the principle of subsidiarity within the system of the ECHR (SSC 1999, 420; Keller, Weber, 2016, p. 1010; Bähr, Brunner, 2018, p. 204 f.). Based on this expansion of its review, the Swiss Federal Supreme Court could judge on future climate change litigation invoking the Intertemporal Guarantee of Freedom, even if the chances of success seem to be limited, regarding the scientifically supported claim brought forth by the Swiss Senior Women.

2.2. Norway

The first human rights-based climate case in Norway was Greenpeace Nordic v. Ministry of Petroleum and Energy. In this case the petitioners brought an action against ten licences for oil and gas deep-sea extraction in the Barents Sea. The claims were based on Art. 112 of the Norwegian Constitution, which gives everyone the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained, as well as Art. 2 and 8 ECHR and the corresponding Art. 93, 102 of the Norwegian Constitution. The Supreme Court rejected the appeal of Greenpeace Nordic. It found that the emissions of the extractions were too far in the future and thus too uncertain to fall within Art. 2, 8 ECHR (NSC 2020, 168 ff.). Because the national law did not provide further guarantees, the posed question if the Intertemporal Guarantee of Freedom could improve the arguments brought forth under the ECHR shall be analysed further in the following section (D. II.). Due to the rejection of the case the appellants referred the Case to the ECtHR.

3. APPLICATION IN INTERNATIONAL LAW

Climate change litigation has not only been a matter of national but also of international law and especially human rights treaty bodies since they provide a legal avenue when national options have been exhausted. A type of climate change action which shall not be addressed in this paper is the question of refugee status due to climate change induced life-threatening living conditions, as a citizen of Kiribati has claimed before the United Nations Human Rights Committee (UNHRC 2020). These cases cannot be sufficiently addressed via the Intertemporal Guarantee of Freedom as it revolves around the current permission to emit GHG gases by the state which will lead to future restrictions of freedoms by the same state. In asylum cases the restrictions within the origin case do not fall within the power of the receiving state. Furthermore, the receiving state is very limited within

its possibilities to determine adaption strategies in other countries (GFCC 2021, 176-178; Donger, 2022). An analysis shall be provided of the cases decided and currently pending at the ECtHR (I.), the European Court of Justice (ECJ) (II.) and the Inter-American Court of Human Rights (IACtHR) (III.).

3.1. European Court of Human Rights

In difference to other Human Rights Treaties the ECHR does not contain a right to a healthy environment. Notwithstanding this lack of a guarantee, the ECtHR has developed the rights to life, health and to respect for private and family life (Art. 2, 8 ECHR) into a protection against climate change (ECtHR, Cordella v. Italy (54414/13), 100; Gross 2021, 13-14; Murcott et al. 2022; Pedersen 2019; Reich *et al.*, 2022). Currently there are multiple cases pending – most notably one against the inadequate action on climate change by 33 member states to the ECHR as well as the aforementioned case by the Swiss Senior Women and the case of Greenpeace Nordic and Others v. Norway.[6]

In its jurisprudence the court has recognised *positive obligations* of the state concerning pollution and regards them similar to the negative obligation not to interfere with human rights in terms of the justification (ECtHR, López Ostra v. Spain (16798/90), 51; ECtHR, Fadeyeva v. Russia (55273/00), 94). One common problem for climate change litigation, especially under the ECHR, is that according to Art. 34 ECHR a present violation has to exist. With cases where the applicants allege insufficient protection against the harms of climate change there often 'only' exists a danger towards a future violation of rights due to climate change, that will most likely not be preventable when it is imminent enough to be claimed before the ECtHR. Additionally, the Court gives the legislator a wide *margin of appreciation* concerning the positive obligations due to the separation of powers (ECtHR, Fadeyeva v. Russia (55273/00), 103, 124; Gross, 2021, p. 17-18; Johann, 2022, p. 5).

These difficulties could be addressed by the *Intertemporal Guarantee of Freedom*. As it was described before, the GFCC constructed this guarantee within the *negative dimension* of human rights. This meant that the court did not grant a similar margin of appreciation as it did concerning the positive obligations of the state (see B. II.). Moreover, the Court defined the protected behaviour very differently from most cases of climate change litigation. It did not focus on the states' duty to prevent GHG emissions, but rather highlighted the future use of freedom that is connected with GHG emissions, hereby forcing the legislator to distribute the possibilities of freedom between current and future use of the present generation (GFCC 2021, 182-192). This lowers the burden of proof for the applicants, since they do not have to prove that they will be threatened in their health or life. This is the argument brought forth by the Union of Swiss Senior Women for Climate Protection who argue that they are exposed to a greater mortality risk due to their age and gender. If the ECtHR argued in a similar manner it could focus on the multitude of rights protected by the Convention and its case

6 Duarte Agostinho and Others v. Portugal and 32 Other States (39371/20) (similar claim in Uricchio and De Conto v. Italy and 32 Other States [14165/21; 14620/21] and Carême v. France (7189/21) where the claimant demands that his case be joined with the aforementioned case); Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others (53600/20); other pending cases include Plan B Earth and Others v. Prime Minister (UK]; Greenpeace Nordic v. Ministry of Petroleum and Energy [Norway] (34068/21).

law to demand its member states to carry out a similar distribution of freedom by enforcing climate change action in present times. Following the Intertemporal Guarantee of Freedom applicants would only have to prove dangers to the exercise of their fundamental rights insofar as those involve GHG emissions. Due to the work of climate change science and the commitment of most states in the Paris Agreement it is significantly easier to argue that these rights are endangered than it is presently being handled by the Court in cases where a threat to live and health is being put forward by the applicants (EctHR, Cordella v. Italy (54414/13), 96-109; *Murcott et al.* 2022). This would increase the chances of climate change litigation before the EctHR not only for cases like Swiss Senior Women for Climate Protection, but especially for younger applicants in the case of Duarte Agostinho and Others and Greenpeace Nordic and Others v. Norway.

For an adaption of this guarantee by the EctHR, the question remains if the court is willing to *reduce the leeway of states* for their legislation on climate change action. Such a recognition of the distribution between the current and the future use of freedom would not constitute a disruption within the rulings of the court. The EctHR has always regarded the convention in a dynamic and evolving manner, keeping up with current challenges as it has done before with climate related applications (EctHR Demir and Baykara v. Turkey (34503/97); Pedersen, 2019, p. 464). Yet, it cannot be disregarded that the ECtHR typically affords a much broader margin of appreciation than most constitutional courts (Pedersen, 2019, p. 367; limiting it to a certain margin of appreciation Eicke, 2021, p. 266-267) which does make it more likely that the Court will adapt the Intertemporal Guarantee of Freedom, even though this paper argues that it can and should do so.

As it was mentioned before, another critical question for climate change litigation before the ECtHR involves standing. The court restricts the standing similar to other human rights bodies by prohibiting *actio popularis* (ECtHR, Hafid Ouardiri v. Switzerland (65840/09); ECtHR, Correira de Matos v. Portugal (46502/12), 115). Due to Art. 34 ECHR, the court demands for a case to be admissible that the applicants are *directly affected* by the violation in question. Since all of the pending cases before the ECtHR argue that the state is failing to fulfil the duty to protect their right to life, health and private as well as family life and home the applicants have to provide proof for the imminent threat to these rights, which can be especially burdensome for the right to life. The case with the most imminent threat due to the scientific findings is the Swiss case of the KlimaSeniorinnen. If applicants argued similarly to the Intertemporal Guarantee of Freedom, they would only have to proof an imminent threat towards their freedoms that are associated with GHG emissions. Due to the factual and normative developments concerning the commitments of states in international treaties the victim status of applicants would be easier to prove. Invoking the Intertemporal Guarantee of Freedom would not be hindered by the prohibition of actio popularis, because the applicants would argue that the use of their rights is being affected by the states' failure to adopt effective climate action legislation and the mere fact that a large number of individuals are affected by a law does not reduce the individual victim status (GFCC 2021, 110, 131).

One admissibility problem the Intertemporal Guarantee of Freedom – according to the concept of the GFCC – cannot address is the standing of *extraterritorial applicants*. In the German cases there

were two complainants from Bangladesh and Nepal who claimed an infringement of their rights due to the failure to adopt significant climate action legislation by the German legislator. The court ruled that the complainants did not have a standing as far as the Intertemporal Guarantee of Freedom is concerned because they would not be subject to future limitations of the use of fundamental rights involving GHG emissions since they were neither citizens nor currently living in Germany. They could only invoke the duty to protect their life, health and other fundamental rights due to the effect emissions connected to Germany had on their living situation in their respective countries (GFCC 2021, 101, 132).

If the ECtHR decides to follow the arguments brought forth as the Intertemporal Guarantee of Freedom, climate change legislation on an international level could be immensely improved, enabling more applicants to bring more cases.

3.2. European Court of Justice

Due to the evolution of European environmental law, there is a multitude of decisions by the ECJ and the General Court (GC) on environmental questions related to climate change.[7] The scope of this analysis focuses on those invoking human rights protected under the Charter of Fundamental Rights of the European Union (CFR). One has to bear in mind that the rights guaranteed by the Charter are to be interpreted similarly to the ECHR, insofar as it contains corresponding rights according to Art. 52 (3) CFR. This means that for the scope of the invoked right the principles explained for the ECHR above remain. The CFR binds all bodies of the Union and the Member states when they are implementing Union law, Art. 51 (1) CFR.

For this analysis, there are two cases worth mentioning, namely EU Biomass Plaintiffs v. EU and Carvalho v. European Parliament and Council.[8] In the case of EU Biomass Plaintiffs the applicants instituted proceedings to seek the annulment of the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. They argued, that the inclusion of forest biomass as a source of renewable energy infringes Art. 191 Treaty on the Functioning of the European Union (TFEU) that contains the basis for the EU environmental policies and binds it to combating climate change as well as their fundamental rights from the Charter. The applicants in the case of Carvalho v. European Parliament and Council addressed EU legislation more broadly. The application sought the annulment of Directive (EU) 2018/410 on the enhancing of cost-effective emission reductions and low-carbon investments, Regulation (EU) 2018/842 on binding annual GHG emission reductions until 2030 and Regulation (EU) 2019/841 on the inclusion of GHG emissions and removals from land use in the 2030 climate and energy framework. The European Union's level of ambition was seen as not sufficiently high which would infringe the applicants right to life (Art. 2 CFR) and to the integrity of the person (Art. 3 CFR), the rights of the child (Art. 24), the rights to engage in work and to pursue a freely chosen or accepted occupation (Art. 15 CFR), the freedom to conduct a business and to

7 For an overview see climatecasechart.com/non-us-jurisdiction/eu/.

8 ECJ, EU Biomass Plaintiffs, Judgement 14/01/2021 – C-297/20 P, GC, Order 06/05/2020 – T-141/19; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, GC, Order 08/05/2019 – T-330/18.

property (Art. 16, 17 CFR) as well as the right to equal treatment (Art. 20, 21 CFR). The application offered the court arguments concerning both the negative and the positive rights stipulated in the CFR (Application Carvalho and Others, 24/05/2018, 163).

This argumentation already entailed most of what the GFCC brought forth under the Intertemporal Guarantee of Freedom. The case is built on a broad range of rights that are affected by insufficient GHG reduction legislation. In differentiation from the Intertemporal Guarantee of Freedom, the claim does not entail the prospect of a fair balance of present and future freedoms that the legislator has to provide. Due to this broad argumentation offered – that the court did not reply to – there seems to be minimal chances for improvement by invoking the Intertemporal Guarantee of Freedom. The main hindrance for climate change litigation in front of the ECJ lies within its rules of admissibility.

The GC dismissed the action in both cases as inadmissible due to fact that the act was not of *individual concern* to the applicants, which was upheld by the ECJ.[9] This was due to the procedural rule of Art. 263 TFEU which stipulates that natural persons may institute proceedings only if the questionable act is of direct and individual concern to them. The individual concern –as it is defined by the *Plaumann-formula* – is only given 'if the contested act affects the applicants by reason of certain attributes which are peculiar to them or by a reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually in the same way as the addressee of a decision would be' (ECJ, Plaumann (25/62); GC, EU Biomass Plaintiffs, Order 06/05/2020 – T-141/19, 26). The applicants in the Carvalho case argued that their individual concern resulted from the fact that climate change and by extension the following infringement of rights was unique and different for everybody, which was denied by the court (GC, Carvalho and Others, Order 08/05/2019 – T-330/18, 46; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, 44-45). This argument is familiar to the Intertemporal Guarantee of Freedom that focuses on the exercise of fundamental rights in the future, which will be different for every individual. The rejection of the applicants' argument by the court is correct according to its case law based on Plaumann. But it has to be noted that such a narrow definition is not necessarily implied by Art. 263 (4) TFEU which only demands that the applicant proves a direct and individual concern of the act to them. Such a direct and individual concern can exist even if everyone is affected, as it is the case with insufficient climate litigation. The Swiss case highlights this by showing a higher mortality risk for senior women due to temperature rises.

It can be concluded, that within the system of Fundamental Rights Protection under the Law of the European Union, the major problem lies within the narrow definition of admissibility. The Intertemporal Guarantee of Freedom cannot solve this issue.

9 GC, EU Biomass Plaintiffs, Order 06/05/2020 – T-141/19, 25-48; ECJ, EU Biomass Plaintiffs, Judgement 14/01/2021 – C-297/20 P, 28-42; GC, Carvalho and Others, Order 08/05/2019 – T-330/18, 45-47, 54; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, 44-45.

3.3. Inter-American Court of Human Rights

The Inter-American human rights system recognises the right to a healthy environment explicitly in Art. 11 of the San Salvador Protocol. The IACtHR has recognised the importance of this right for human rights protection and constituted an obligation of the state to prevent transboundary damage wherever the state has effective-control (IACtHR, Advisory Opinion OC-23/17, 104). Furthermore, the court obliges the states to regulate, supervise and monitor activities with environmental impact and binds the states to the precautionary principle (IACtHR, Advisory Opinion OC-23/17, 175-180, 242). Due to this broad opinion and the enhancement of human rights-based protection against activities that can cause environmental harm, there is currently no advantage by an application of the Intertemporal Guarantee of Freedom within the Inter-American human rights system. The rulings in the following cases by the IACtHR will have to be critically accompanied to ensure a broad protection against insufficient climate change action by states. Of interest are also the petition of six Haitian children concerning waste disposal in Porte-Au-Prince to the IACtHR (04/02/2021) and the much broader petition by more than a dozen civil society groups who request more climate change action by a number of states through the Commission (11/07/2019).

3.4. United Nations treaty bodies

This last part will focus on the application within the United Nations treaty body system.

3.4.1. United Nations Human Rights Committee and Economic and Social Council

The United Nations Human Rights Committee task is to ensure the conformity of the states' actions bound by the International Covenant on Civil and Political Rights (Art. 40, 41 ICCPR). Similarly, the Economic and Social Council was established to review the conformity of states behaviour with the International Covenant on Economic, Social and Cultural Rights (Art. 16 ICESCR). Both bodies provide an individual complaint procedure under optional protocols. But neither the ICCPR nor the ICESCR contain a specific guarantee of the right to a healthy environment (Atapattu 2019, 22). Art. 6 ICCPR provides the right to life. Art. 11, 12 ICESCR recognise the right to an adequate standard of living as well as the duty of states to improve all aspects of environmental and industrial hygiene. Similarly to the ECHR and the CFR, these rights are put forward by plaintiffs mostly in their positive dimension to demand climate change action by the states (Atapattu, 2019, p. 23). Complaints that have been lodged before the UNHRC include the aforementioned Teitiota case as well as the pending Petition of Torres Strait Islanders where the petitioners claim that the government of Australia's failure to address climate change violates their rights to life, to be free from arbitrary interference with privacy, family and home and their right to culture guaranteed by Art. 6, 17, 27 ICCPR. Since the committee has yet to take a stance on climate change litigation it remains to be seen if there are going to be major deficits in the afforded protection (Atapattu, 2019, p. 39).

The Intertemporal Guarantee of Freedom could be brought forth as an argument under the ICCPR, as well as to enable petitioners to demand climate change action by their states without proving an

imminent threat to their life under Art. 6 ICCPR. As it was shown before, the petitioners could argue that a currently insufficient climate protection strategy will infringe the use of all of their freedoms protected under the covenants in the future. If the Committee and the Council accept such an argument based on the distribution of opportunities of freedoms between present and future use remains to be seen. The wide margin of appreciation granted to the states in the Teitiota case by the Human Rights Committee could point into a different direction (UNHRC 2020, 9.12).

3.4.2. United Nations Committee on the Rights of the Child

Similarly to the previously mentioned covenants, the Convention on the Rights of the Child (CRC) does not contain a specific guarantee of the right to a healthy environment. Yet in its first climate change case Satchi et al. v. Argentina et al. the Committee tasked with guarding the Conventions right found that states have extraterritorial responsibilities for their emissions by adopting the effective control test of the IACtHR. These responsibilities are based on a broad range of rights guaranteed under the CRC like the right to health, the right to water and cultural rights (UNCRC 2021, 9.5-9.7). Notwithstanding this strong basis for climate protection, the case was deemed inadmissible since the complainants had not exhausted the local remedies (UNCRC 2021, 9.20).

The Intertemporal Guarantee of Freedom could provide an even broader range of affected rights under the CRC because it includes all the freedoms that might be infringed by future stronger mitigation rules. However, the Committee has chosen a similar approach that is based on the foundation that climate change affects human rights in their entirety. One improvement the Intertemporal Guarantee of Freedom could nevertheless provide is its future-oriented design. The new dimension that this dogmatic argument entails is that it protects the claimants against emissions that have not occurred yet, whereas the Committee demanded 'a real detrimental effect' UNCRC 2021, 9.12). This could expand the findings of the Committee towards protecting children against unambitious legislation which will lead to future emissions and accelerate climate change and global temperatures. Such an expansion towards infringement of future freedoms would enable complaints before the threat - for example to life - is imminent.

CONCLUSION

As was shown by the example of the Swiss case, there are some jurisdictions, where the Intertemporal Guarantee of Freedom could be applied within human rights-based climate change litigation to improve standing and the control standard of states' climate change action.

Within international law bodies with jurisdiction over human rights treaties and issues there are distinctive standards of protection against the harms of climate change. Even though only the Inter-American System provides guarantees against climate change or towards a healthy environment all of the fora have found ways to interpret the treaties to entail differing degrees of protection. The courts and committees have used different guarantees like the right to life and health as well as guarantees towards privacy and family life to substantiate their interpretation. A major deficit

within the international human rights protection against climate change lies within the focus on the positive obligations and the corresponding wide margin of appreciation granted to the states. The Intertemporal Guarantee of Freedom could provide a protection expansion in this regard, especially in the case of the ECtHR. It could also enable and legitimise present human rights concerns focused on the future actions of states following their past inaction. Another considerable hurdle that is not addressed by it are procedural hurdles like the Plaumann formula applied by the ECJ. It has to be analysed, if these restrictions are suitable in climate change cases. If the Intertemporal Guarantee of Freedom will be applied in climate action suits by other courts remains to be seen. Since most courts have shown their interest to apply findings of other courts in climate cases there will be judgements discussing the decision of the GFCC in the future.

The Intertemporal Guarantee of Freedom cannot solve major problems for climate change litigation, like procedural hurdles and issues like the judicialization of political questions as well as the counter-majoritarian difficulty. Yet, it can provide a new approach for complaints to address unambitious mitigation legislation which will lead to future human rights infringements.

Character count (without footnotes): 38.780

List of sources

Legal acts

1. International legal acts

1.1. American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22/11/1969;

1.2. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17/11/1988, OAS Treaty Series No. 69;

1.3. Charter of Fundamental Rights of the European Union, 07/12/2000, 2000/C 364/01;

1.4. European Convention on Human Rights, 04/11/1950;

1.5. Paris Agreement, 12/12/2015, entered into force 4/11/2016;

1.6. Directive (EU) 2018/410 of the European Parliament and of the Council of 14/03/2018 amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low-carbon investments, and Decision (EU) 2015/1814, no. 32018L0410 – JEU L 76/3;

1.7. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11/12/2018 on the promotion of the use of energy from renewable sources, no. 32018L2001 – JEU L 328/82;

1.8. Regulation (EU) 2018/841 of the European Parliament and of the Council of 30/05/2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, no. 32018R0841 – JEU L 156/1;

1.9. Regulation (EU) 2018/842 of the European Parliament and of the Council of 30/05/2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitment under the Paris Agreement and amending Regulation (EU) No 525/2013, no. 32018R0842 – JEU L 156/26.

2. National legal acts

2.1. Federal Constitution of the Swiss Confederation, 18/04/1999;

2.2. German Basic Law, 23/05/1949, BGBl;

2.3. German Federal Climate Change Act of 2019, BGBl. 2019 I, 2513;

2.4. Constitution of the Kingdom of Norway, 16/05/1814;

2.5. International Covenant on Civil and Political Rights, 16/12/1966.

Case law

1. International courts

1.1. European Court of Human Rights, James and others v United Kingdom, Judgement 21/02/1986, No 8793/79;

1.2. European Court of Human Rights, López Ostra v. Spain, Judgment 12/09/1994, No. 16798/90;

1.3. European Court of Human Rights, Fadeyeva v. Russia Judgement 09/06/2005, No. 55273/00;

1.4. European Court of Human Rights, Demir and Baykara v. Turkey, Judgement 12/11/2008, No. 34503/97;

1.5. European Court of Human Rights, Hafid Ouardiri v. Switzerland, Judgement 28/06/2011, No. 65840/09;

1.6. European Court of Human Rights, Correira de Matos v. Portugal, Judgement 04/04/2018, No. 46502/12;

1.7. European Court of Human Rights, Cordella and Others v. Italy, Judgement 24/01/2019, No. 54414/13;

1.8. European Court of Justice, EU Biomass Plaintiffs v. European Union, Judgement 14/01/2021 – C-297/20 P;

1.9. European Court of Justice, Plaumann & Co v. Commission of the European Economic Community, Judgement 15/07/1963 – 25/62;

1.10. European Court of Justice, Carvalho and Others v. European Parliament and Council, Judgement 25/03/2021 – C-565/19 P;

1.11. General Court of the European Union, Carvalho and Others v. European Parliament and Council, Order 08/05/2019 – T-330/18;

1.12. General Court of the European Union, EU Biomass Plaintiffs v. European Union, Order 06/05/2020 – T-141/19;

1.13. Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017;

1.14. United Nations Committee on the Rights of the Child, Satchi et al. v. Argentina et al., Decision 08/10/2021 – CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, CRC/C/88/D/108/2019;

1.15. United Nations Human Rights Committee, 7/1/2020 – CCPR C/127/D/2728/2016 (Teitiota)

2. National courts

2.1. Federal Constitutional Court of Germany (GFCC/BVerfG), Order of the First Senate of 24th March 2021 – 1 BvR 2656/18, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618;

2.2. Norwegian Supreme Court, Greenpeace Nordic Association v. Ministry of Petroleum and Energy (People v. Arctic Oil), Judgement 22/12/2020, no. 20-051052SIV-HRET; Appeal against Borgarting Court of Appeal's Judgement 23/01/2020;

2.3. Supreme Court of Nepal, Judgement of the 25th of Dezember 2018 - 074-WO-0283, climatecasechart.com/non-us-case/shrestha-v-office-of-the-prime-minister-et-al/;

2.4. Supreme Court of New Zealand, Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment, Judgement 20/07/2015, no. [2015] NZSC 107;

2.5. Swiss Supreme Court (BGE); Judgement of 26th of July 1999 - BGE 125 II 417;

2.6. Swiss Supreme Court (BGE), Judgement of 5th of May 2020 – 1 C_37/2019, BGE 146 I 145.

Special literature

1. *Atapattu, Sumudu*, Environmental Rights and International Human Rights Covenants in: Turner, Stephen J/Shelton, Dinah/Razzaque, Jonah/McIntyre, Owen/May, James R, Environmental Rights, 2019, DOI: 10.1017/9781108612500;

2. *Bähr, Cordelia Christiane/ Brunner, Ursula/ Casper, Kristin/ Lustig Sandra H*, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, Vol. 9 No. 2 September 2018;

3. *Cohen-Eliya, Moshe/ Porat, Iddo*, The Administrative Origins of Constitutional Rights, in: Jackson, Vicki; Tushnet, Mark, Proportionality – New frontiers, New Challenges, 2017;

4. *Donger, Elizabeth*, Lessons on "Adaptation Litigation" from the Global South: What the Law Can, Can't and Might Do to Help Us Cope with Climate Change, Verfassungsblog, 25/03/2022, verfassungsblog.de/lessons-on-adaptation-litigation-from-the-global-south/, DOI: 10.17176/20220326-001236-0;

5. *Eicke, Tim*, Human rights and climate change: what role for the European Court of Human Rights, European Human Rights Law Review 2021, 262 (266-267);

6. *Gross, Thomas*, Climate change and duties to protect with regard to fundamental rights, in: Kahl, Wolfgang/ Weller, Marc Philippe, Climate Change Litigation, 2021;

7. *Hesse, Konrad*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 1999;

8. *Intergovernmental Panel on Climate Change*, Assessment Report 6 Working Group III, Summary for Policy Makers, 2022;

9. *Johann*, *Christian*, Art. 1, in: Karpenstein, Ullrich/Mayer, Franz, EMRK [ECHR], 2022;

10. *Kahl, Wolfgang/Weller, Marc-Philippe,* Part 6: Conclusions, in: Kahl, Wolfgang/ Weller, Marc-Philippe, Climate Change Litigation, 2021;

11. *Keller, Hellen; Weber, Yannick*; Folgen für den Grundrechtsschutz und verfassungsrechtliche Gültigkeit der Selbstbestimmungsinitiative, AJP 8/2016, 1007;

12. *Kommers, Donald P*., German Constitutionalism: A Prolegomenon, German Law Journal 2019, 534.

13. *Murcott, Melanie/Tigre, Maria Antonia/Zimmermann, Nesa*, What the ECtHR Could Learn from Courts in the Global South , Verfassungsblog, 22/03/2022, verfassungsblog.de/what-the-ecthr-could-learn-from-courts-in-the-global-south/, DOI: 10.17176/20220323-001241-0;

14. *Pedersen, Ole W,* European Court of Human Rights and environmental rights, in: May, James/Daly, Erin, Human Rights and the Environment, 2019;

15. *Peel, Jacqueline/Markley-Tower, Rebekkah*, Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases, German Law Journal (2021) 22;

16. *Reich, Johannes/Hausamann, Flora/Boss, Nina Vitoria*, Climate Change Litigation Before the ECtHR, Verfassungsblog 16/05/2022, verfassungsblog.de/climate-change-litigation-before-the-ecthr/;

17. *Saiger, Anna-Julia*, The Constitution Speaks in the Future Tense, Verfassungsblog 29/04/2021, verfassungsblog.de/the-constitution-speaks-in-the-future-tense/, DOI: 10.17176/20210429-221250-0.

Other sources

1. Application Carvalho and Others v. European Parliament and Council, 24/05/2018, climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/;

2. Bennhold, Kathrin, After Deadly Floods, A German Village Rethinks Its Relationship to Nature, New York Times 8/6/2021, nytimes.com/2021/08/06/world/europe/germany-floods-recovery-climate-change-global-warming.html;

3. Fountain, Henry, Climate Change Contributed to Europe's Deadly Floods, Scientists Find, New York Times 8/23/2021, nytimes.com/2021/08/23/climate/germany-floods-climate-change.html.