

MONITOR

SUSTAINABILITY NO. 4/2021

Climate Protection *Made in* Karlsruhe

The Federal Constitutional Court as an International Trendsetter?

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- › The Climate Decision of the German Federal Constitutional Court has received international attention, especially in Latin America.
- › The acknowledgement of standing does not – yet – have any discernible practical benefit for those affected by climate change in the Global South, however.
- › The Court has given an international dimension to the constitutional obligation on the protection of natural foundations of life. In addition, climate protection requirements under Basic Law have acquired an international DNA.
- › The scenario of a future loss of freedom, used by the Karlsruhe Court to substantiate the necessity of longer-term climate protection measures, has become very tangible.
- › The Karlsruhe Court is open to foreign court's jurisdiction on climate protection. However, debates on judicial concepts regarding climate protection in other jurisdictions are still very much in an embryonic stage.
- › With the international focus of its Climate Decision the Court aims to affect issues beyond Germany's borders. To do so, Karlsruhe needs stakeholders both in Germany and abroad to support and further advance the ambitious project of a transnational climate policy guided and controlled by the judiciary.

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The Climate Decision – Judgment with International Dimensions

Courts are increasingly dealing with climate related litigation. Compared with the year 2017, the number of climate change cases has almost doubled – to at least 1550 cases in almost 40 countries¹ *Climate change litigation* is not only a growing, transnational legal market, but is increasingly developing into an independent branch of law.² This development has received renewed impetus from the Climate Decision of the First Senate of Germany’s Federal Constitutional Court³. According to this decision, the state has a constitutional duty to provide an effective climate policy with the objective of climate neutrality. The Federal Climate Change Act of 2019 did not satisfy all the requirements laid down by the Karlsruhe judges, because the legislator had not sufficiently protected future freedom of those affected by climate change. The extent to which the Climate Decision has international appeal, and whether it will be adopted by other countries, will only become clear in the future. There can be no doubt, however, that the First Senate has laid the foundations for cross-border attention – including by the media, as press releases were also published in English and French on the day the decision was announced. There is now a Spanish press release, too.

This article sheds light on the first foreign reactions to the Constitutional Court’s decision on climate change. Then, the decision itself is discussed. Where and how does the First Senate build bridges between German constitutional law and other jurisdictions and international law? What consequences does this have for climate litigants outside Germany? To what extent do arguments used by the Senate to substantiate the constitutional necessity of greater climate protection by the German legislature appeal to foreign courts? It is ultimately a question of whether and to what extent the Karlsruhe model of climate protection also resonates in other states or at the European level. Only then we will be able to see the Federal Constitutional Court’s contributions to cross-border inter-court discussions about climate protection.

Reactions to the Karlsruhe Climate Decision

Victories for climate litigants, especially before the highest courts, have been rare until now. Even a partial success, such as the Constitutional Court’s decision on climate change, is considered a milestone, particularly when a court of international reputation and standing such as the Federal Constitutional Court declares itself the guardian of climate protection. For instance, the Australian edition of the “Guardian” made reference to the “historical” significance of the Karlsruhe demands

for more climate protection (“‘Historic’ German ruling says climate goals not tough enough”). Media in a number of countries have reported about how Germany, as one of the most important industrialised nations, must take provisions to safeguard fundamental freedoms on the orders of the Constitutional Court and thus improve efforts to protect the climate. Above all, the irreversible threat to future freedom of, in some cases, minor plaintiffs, as highlighted by the First Senate, attracted much attention. On the day after the Karlsruhe Climate Decision, the American “New York Times” referred to a “victory for young people” (“German High Court Hands Youth a Victory in Climate Change Fight”). The Singaporean “Strait Times” also focused on the protection of the young generation (“Germany must beef up climate law to protect youth, court rules”).

The Arabic press, however, largely interpreted the ruling as a defeat for Merkel’s government (Al Khaleej: “The German jurisdiction asks Merkel to conduct as policy more ambitious towards the environment”). The French daily “Le Monde”, too, wrote the following headline “Serious setback for Angela Merkel’s Climate Policy” (“En Allemagne, le tribunal constitutionnel inflige un sérieux revers à Angela Merkel sur le climat”). In contrast, the French environmentalist Marie-Anne Cohendet, Professor for Environmental Law at the Sorbonne University, viewed the Karlsruhe Decision as a “very positive signal”. Several legal proceedings regarding “governmental inertia in climate matters” are underway in France as well. French people have long taken to the streets in mass protests to voice their discontent about a new law on climate protection, which is, from their perspective, inadequate. Even more striking was the silence of French politicians on Germany’s obligation to improve climate policy. There were also very few media reports in Eastern European countries like Hungary and Poland, where climate litigation is also pending. The media response is completely different in these countries when the Federal Constitutional Court comments on the relationship between EU Member States and the European Union.

Outside Europe, the Climate Decision attracted particular attention in Latin America – by constitutional judges as well as NGOs with a focus on human rights, environmental and climate protection. Latin America takes a strong interest in the Federal Constitutional Court and its jurisdiction, fostered by in-person discussions between delegations of judges. What is more, the judiciary in Latin American countries has long played a vital role in the fight against environmental degradation, overexploitation, and climate change. For indigenous minorities, who live a secluded life in close proximity to nature, recourse to the courts often provides the last glimmer of hope when it comes to preventing the exploitation and destruction of their habitat.⁴ The Escazú Agreement, the first-ever regional environmental agreement in Latin America, aims to grant more rights to the population in environmental matters⁵. It entered into force on 22 April 2021. Protecting the environment and the rights of those who fight against environmental degradation was thus already a prominent topic in Latin America when the German Constitutional Court stated that politicians must not shift the burdens of climate protection to an uncertain future.

Environmental and human rights organisations are key mediators of the central message from the Karlsruhe Climate Decision that “an overly short-sighted and hence one-dimensional distribution of freedom and reduction of burdens at the detriment of the future [must] be prevented”. It was to these organisations that the First Senate confirmed that climate protection and the protection of human rights need to be considered together and, importantly, “across the generations”. Although the constitutional complaints of environmental associations, addressing the Court as “advocates of nature”, were dismissed as inadmissible, the Karlsruhe Climate Decision is assessed and marketed as a “huge success” by *Bund für Umwelt und Naturschutz Deutschland (BUND)*, which had filed a constitutional complaint in alliance with the German Association for the Promotion of Solar Power. The remaining constitutional complaints were brought by several environmental organisations: from *Deutsche Umwelthilfe*, *Germanwatch*, *Greenpeace* and *Protect the Planet*. *Fridays For Future* are also involved, since Luisa Neubauer, the movement’s prominent German activist, is one of the young people whose complaints achieved partial success. The plaintiffs were represented by lawyers such as Roda Verheyen (Hamburg),

and Remo Klinger (Berlin), who are among the pioneers of *climate change litigation* in Germany and Europe. Both have been “overwhelmed with reactions” to the Karlsruhe Climate Decision, even from abroad.

What makes the way in which Karlsruhe dealt with the topic of climate protection so interesting from an international perspective? What role do international agreements and studies on climate change play for the decision on climate change? To what extent do the Constitutional Court’s legal arguments on climate protection resonate around the world? Below are some observations on this issue.

Legal Standing

Several climate lawsuits have failed due to the courts declaring them inadmissible; the content of litigant’s complaints was then no longer examined. This is what happened in the “*People’s Climate Case*” before the Court of Justice of the European Union (CJEU). Families from Europe, Kenya, and Fiji as well as a youth organisation from Samoa had wanted to force the European legislator to tighten EU climate objectives. The CJEU, however, countered the plaintiffs by arguing that they are not “personally” affected by climate change. The Federal Constitutional Court adopted a broader perspective: “The mere fact that a very large number of people are affected does not mean that the basic rights of individuals are not violated. The First Senate confirmed that plaintiffs from Bangladesh and Nepal have standing. It is “in principle conceivable” that the German state would also be obliged towards them to take action against impairments caused by climate change. This is because the constitutional responsibilities of German authorities do not automatically end at Germany’s border. In this specific case, however, standing was of no benefit to the plaintiffs from the Global South, since, as argued by the judges, it is neither legally nor practically feasible for the German state to take measures in Bangladesh or Nepal to protect the local population from the consequences of climate change. It is likely that German authorities will almost invariably be able to invoke this argument against litigants from abroad. It would therefore seem as though the First Senate has initially given those affected by climate change abroad cold comfort when appealing to the constitutional court on such matters. Judges may have opened the door to global climate lawsuits; however, they have erected a fence directly behind that door, which – still – protects the German state against claims from those affected by climate change abroad.

The Significance of the Paris Climate Agreement and the Intergovernmental Panel on Climate Change (IPCC)

Yet no matter whether plaintiffs come from inside or outside Germany: the German state must place an international focus on climate protection. The First Senate has elaborated this obligation from the Basic Law article on the protection of natural foundations of life (Art. 20a). Until now, this constitutional objective has led a Cinderella-like existence. That is no longer the case. The First Senate has enshrined a constitutionally binding and judicially verifiable climate change mandate in Article 20a of the Basic Law. This implies a global obligation: “Given that the German legislature alone could not achieve the climate protection outlined under Art. 20a of the Basic Law owing to the global nature of climate change, Article 20a of the Basic Law also calls for “finding solutions at the international level”. The constitutional climate protection requirement therefore has “an ‘international dimension’ from the outset”. Karlsruhe does not accept the objection that Germany’s share of global CO₂ emissions is merely just below two per cent. The judges argue, this makes it even more important for Germany to participate in overall climate protection efforts. The Court uses the Paris Climate Agreement as a benchmark and points out the commitment therein to keep the increase in average earth temperature far below 2 °C above the pre-industrial level, and to limit the increase in temperature to 1.5 °C above the pre-industrial level where possible. The Karlsruhe judges therefore incorporate the Paris climate protection commitments and thus agreements under international law into Art. 20a of the Basic Law. What is more, the

constitutional climate protection mandate, formulated in a way which accommodates international law, is substantiated by the fact that the First Senate consults studies from the *Intergovernmental Panel on Climate Change*. Karlsruhe therefore emphasises the necessity of a climate policy based on science. To put it succinctly: The Court has given an international dimension to the Basic Law article on the protection of natural foundations of life. Moreover, climate protection requirements under Basic Law have acquired an international DNA.

Offsetting Freedom for the Benefit of Future Generations

The Karlsruhe Climate Decision has attracted attention in Germany and abroad due to linking climate protection obligations with the protection of future generations. The Court itself does not use the term “generational justice”, however. The First Senate focuses its innovative considerations on climate protection on the established constitutional promise of freedom. It could scarcely have used a more powerful leverage factor. This also explains the impact of the Climate Decision. Here, a new interpretation is given to protecting freedom: as a state duty “to distribute freedom proportionately across the generations.” Freedom in times of climate change is therefore offset the state needs to organise the use of freedom such that there is an equitable share left over for future generations. Karlsruhe therefore points the way towards a judicial assessment of climate claims, which – as we hear from climate lawyers and international law experts – seems to be unique, at least in Europe. This especially applies to complicated, typically German constitutional dogmatic construction as developed by the First Senate on the “interference-like effect” on civil liberties. Apart from this, the new Karlsruhe understanding of freedom reflects changed life experiences shared by people in many countries. For instance, the Hamburg constitutional and international law expert Sigrid Boysen points out that far-reaching restrictions on freedom have become a defining everyday experience during the Covid-19 pandemic. The scenario of a future loss of freedom, used by the Karlsruhe court to substantiate the necessity of longer-term climate protection measures, has therefore become “very tangible”. Impending “serious and irreversible encroachments” for young generations, an accusation that the Court levels against German climate policy to date, have been the subject of much debate in many countries since the corona pandemic. According to Boysen, the Climate Decision is therefore, a “very contemporary decision”. To put it bluntly: Karlsruhe has put itself at the forefront of *Fridays for Future*.

Climate lawyers obviously want to use the impetus of the Karlsruhe Climate Decision for their ongoing fight against global warming. Portuguese children and young people have issued an Application to the European Court of Human Rights (ECtHR) in Strasbourg against 33 European states, including Germany. German climate lawyers as well as climate protection organisations observing proceedings in Strasbourg are confident that the chances of the young Portuguese before the ECtHR will increase thanks to the Karlsruhe Climate Decision. They are optimistic because the Constitutional Court has affirmed justiciability with respect to climate protection; an area where so many climate protection lawsuits have failed in the past. They also expect a signal effect from the Karlsruhe admonition that the state is obliged to protect future generations against irreversible encroachments due to climate change. If the German Constitutional Court decides in favour of climate protection, this sends the message that problems surrounding global warming are too serious to be tackled by politicians alone. The question is how other courts react to it – whether they distance themselves from Karlsruhe or view the Climate Decision as a source of inspiration for developing their own creative ways of protecting the climate.

Karlsruhe as a Team Player in Judicial Climate Protection?

Using superlatives such as “historic”, or “epochal” to describe the Karlsruhe Climate Decision can easily overshadow the fact that other high courts passed important decisions on problems surrounding climate change before. What role have these cases played in Karlsruhe’s legal findings? How pronounced is Karlsruhe’s commitment to developing its own case law on climate protection in dialogue with other high courts? Below are some observations on this issue.

The first milestone for climate protection by court order in Europe was laid in 2019 by the *Hoge Raad*, the highest court of the Netherlands, in the *Urgenda* proceedings. Pursuant to the European Convention on Human Rights, it was from the right to life and the protection of private and family life that the *Hoge Raad* derived the Dutch government's obligation to reduce national greenhouse gas emissions by 25 percent by late 2020 compared to the base year in 1990.⁶ Although the judges in Karlsruhe took a different approach, they cited *Urgenda* several times.⁷ Decisions on Climate protection from other foreign courts – from the United States, New Zealand and Ireland – are also mentioned in the Karlsruhe Climate Decision.⁸ These rulings are not subject to in-depth analysis, however. The First Senate only used selective lines of argument, for instance to corroborate that the state cannot shirk its responsibilities for climate protection by referring to the greenhouse gas emissions of foreign states.

Karlsruhe invokes the “Juliana” ruling from the United States among others⁹. Ultimately, however, the decision of the Ninth Circuit Court of Appeals is diametrically opposed to the Karlsruhe Climate Decision. The lawsuit by American climate activists, again young people, was dismissed, because most of the judges held that solving climate issues is not a matter for the American courts, “even if there is a clear and imminent danger to the American experiment.” Conversely, there are foreign climate decisions that Karlsruhe does not mention, despite parallels with their own line of argument. The Karlsruhe Climate Decision is not the first to adopt the idea of burden-sharing between the generations. In 2018, young Colombians, who had taken a stand against deforestation of the rainforest, successfully filed action before the country's highest civil court. The court agreed with them that the climate needs to be protected with regard to future generations.¹⁰ In Latin America, protection of the environment by the courts has been an important issue for some time. Even more striking is the fact that the First Senate only cited courts from industrialised nations in its Climate Decision.

Overall, it remains to be noted that Karlsruhe is open to climate-related considerations of selected foreign courts. However, the way how the Constitutional Court deals with climate decisions from other jurisdictions leaves space for more in-depth analysis.

Concluding Remarks

With the Climate Decision, the Federal Constitutional Court has reinforced its claim to adapt how the Basic Law is interpreted in line with global challenges. The decision is directly addressed to the German legislature, whereas the Karlsruhe climate protection concept is also important from an international perspective. The Court has woven an international obligation on Germany into the constitutionally binding and judicially verifiable requirement of national climate protection in order to contribute towards protecting the global climate. Scientific findings from the *Intergovernmental Panel on Climate Change* are crucial for its decision. Thus, the First Senate demonstrates a strong commitment to international law.

The key aspect of the Climate Decision – the responsible use of freedom in a way that impacts on future generations must be proportionate from today's perspective is likely to resonate across the world. The First Senate, for its part, acknowledges that courts from other legal systems have already reached decisions on climate protection. However, the judges rarely deal with the arguments of these courts in their Climate Decision. Karlsruhe is positioning itself as a leader on the topic of climate protection in the transnational dialogue with other courts. The First Senate is confident that the international orientation of its Climate Decision will have an impact that transcends national borders. For this to happen, Karlsruhe needs stakeholders both in Germany and abroad to support and further advance the ambitious project of a transnational climate policy guided and controlled by the judiciary.

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- ¹ Global Climate Litigation Report. Status Review 2020 of the Sabin Center of Climate Change Law: <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllwed=y> (last accessed on 13/ 05/2021)
- ² Wolfgang Kahl / Marc-Philippe Weller, Climate Change Litigation, A Handbook, 2021, p. V.
- ³ Federal Constitutional Court, Decision of the First Senate dated 24 March 2021 – 1 BvR 2656/18 –
- ⁴ See Marie-Christine Fuchs and Levon Theisen, Natur als Rechtssubjekt: Kolumbiens Weg als Vorbild für Deutschland?, Analysen & Argumente, Konrad-Adenauer-Stiftung e.V., p. 7 (in press)
- ⁵ Nicole Stopfer, Marie-Christine Fuchs, Georg Dufner, Das Escazú-Abkommen – Licht und Schatten regionaler Umweltpolitik in Lateinamerika (The Escazú Agreement – Light and Shadows of Regional Environmental Policy in Latin America), Country Report Regional Programme Political Participation of Indigenous Peoples in Latin America, Rule of Law Programme Latin America and Regional Programme Energy Security and Climate Change in Latin America, Konrad-Adenauer-Stiftung e.V., April 2021
- ⁶ <https://www.rechtspraak.nl/Bekende-rechtszaken/klimatezaak-urgenda> (last accessed on 16 May 2021)
- ⁷ Federal Constitutional Court, Decision of the First Senate dated 24 March 2021 – 1 BvR 2656/18 –
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recital 121, 155, 161, 203, 218
- ⁸ Federal Constitutional Court, Decision of the First Senate dated 24 March 2021 – 1 BvR 2656/18 –
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recital 203
- ⁹ <https://law.justia.com/cases/federal/appellate-courts/ca9/18-36082/18-36082-2020-01-17.html>
(last accessed on 16 May 2021)
- ¹⁰ See Marie-Christine Fuchs and Levon Theisen, Natur als Rechtssubjekt: Kolumbiens Weg als Vorbild für Deutschland?, Analysen & Arguments, Konrad-Adenauer-Stiftung e.V., p. 4 (in press)

Legal Notice

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