CLIMATE CHANGE REACHES THE CONSTITUTIONAL COURTS: The case of the Klimatchutzgesetz judgment of the Bverfg, march 24, 2021

AS ALTERAÇÕES CLIMÁTICAS CHEGAM AOS TRIBUNAIS CONSTITUCIONAIS: O CASO DO ACÓRDÃO KLIMATCHUTZGESETZ DO BVERFG, DE 24 DE MARÇO DE 2021

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ABSTRACT

With the massive normative production of Environmental Law, the intimate relationship between Human Rights and "ecologically balanced environment" has become the main legal substrate for causes in international and national, judicial and administrative courts around the world. A robust environmental jurisprudence was gradually formed from an increased number of disputes with the environment, sometimes as a backdrop, sometimes as the protagonist of lawsuits. Even more recently, with the disturbing matters associated with climate change, the jurisdictional bodies have been summoned to – not without a huge hermeneutical effort – participate in the scenario of overcoming the most challenging crisis of the century. It is from this context of climate litigation that a very specific jurisprudence emerges within the highest constitutional courts in several countries, of which the paradigmatic Judgment "Klimatschutzgesetz", handed down by the German Constitutional Court (BVerfG) on March 24, 2021, is an example, and the central object of this article. The article aims to demonstrate how the case can point to a growing adherence to the subject in the higher courts, albeit through different delineations, and to a strengthening of the relationship between environmental balance (support of life) and the fundamental rights of present and future generations. Methodologically, the descriptive research was predominantly inductive, based on literature review and on the analysis of jurisprudential cases.

Keywords: climate change – climate litigation – constitutional courts – environment – environmental jurisprudence.

RESUMO

Com a vultosa produção normativa do Direito Ambiental, a relação íntima entre Direitos Humanos e "meio ambiente ecologicamente equilibrado" tornou-se o principal substrato jurídico para sindicâncias em tribunais internacionais e nacionais, judiciais e administrativos, ao redor do mundo. Formou-se, paulatinamente, robusta jurisprudência ambiental a partir de um salto no número de litígios tendo o meio ambiente ora como pano de fundo, ora como protagonista de ações judiciais. Ainda mais recentemente, com as inquietantes matérias associadas às alterações climáticas, os órgãos jurisdicionais têm sido convocados para – não sem um enorme esforço hermenêutico – participar do enredo de superação da mais desafiadora crise do século. É desse contexto de litigância climática que emerge uma jurisprudência muito própria no seio das mais altas cortes constitucionais em vários países, da qual é exemplo o paradigmático Acórdão "*Klimatschutzgesetz",* prolatado pelo Tribunal Constitucional alemão (BVerfG) em 24 de março de 2021 e objeto central das reflexões deste artigo. O artigo objetiva demonstrar como o referido caso pode apontar para uma crescente aderência do assunto nos tribunais superiores, ainda que mediante distintos deslindes, e um fortalecimento da relação entre o equilíbrio ambiental (suporte da vida) e os direitos fundamentais das presentes e futuras gerações. Metodologicamente, a pesquisa descritiva foi predominantemente indutiva, alicerçada em técnica bibliográfica e na análise de casos jurisprudenciais.

Palavras-chave: alterações climáticas – jurisprudência ambiental – litigância climática – meio ambiente – tribunais constitucionais.

INTRODUCTION

In 1972, the international community officially awakened to the "ecological era" (KISS, 1994, p. 147). The Stockholm Conference, scheduled since 1968 and held in June 1972, marks the turning point for a new attitude towards resources that were considered eternal gifts and that came to be recognized as scarce and finite. The Club of Rome Report, also released in 1972, warning of the need to abruptly halt industrial, population, extractive and polluting growth, was ignored, but after Stockholm, environmental protection entered the international agenda, triggering a fruitful process of legislative activity, whose subsequent effectiveness, however, does not seem to have accompanied the initial legislative catharsis – the effectiveness deficit, moreover, is the Achilles heel of this legal field (LORENZETTI, 2010, p. 104-106). Despite some specific victories, the situation of the planet's natural resources has deteriorated significantly to the point that, in recent years, and in the context of global warming, we can speak of a more alarming awakening to the climate emergency.

Despite the proliferation of international instruments aimed at stopping global warming, especially since the United Nations Framework Convention on Climate Change (in force since 1993), the results are not encouraging. Since the atmosphere knows no borders, the coordinated action of States to preserve its stability, through the adoption of measures to mitigate greenhouse gas emissions (hereinafter, GHGs), becomes essential for the safeguarding of fundamental rights of their own nationals, but also and more broadly, of the human rights of the world's population. Meanwhile, the States, entities par excellence endowed with legislative and administrative competence to promote public climate policies, are not developing sufficient climate action to save the planet from the announced catastrophe, as can be concluded from reading the UNEP Report on the evolution of the volume of CO2 emissions into the atmosphere in 2020. The model of an ensuring state, to which Giddens alludes, does not seem to have come to fruition in time to avoid, through timely planning, a tipping point (GIDDENS, 2010, p. 24). It is the failure of this dimension of the state's duty of care that brings to light the recent phenomenon of climate litigation.

In this context, a very unique jurisprudence emerges within the highest constitutional courts in several countries, an example of which is the paradigmatic "Klimatchutzgesetz" ruling, delivered by the German Constitutional Court (BVerfG) on March 24, 2021 and a central object of the reflections of the gift. The article aims to demonstrate how the aforementioned case can point to (i) a growing adherence to the matter in higher courts, albeit through different differences, and (ii) a strengthening of the relationship between environmental balance (life support) and fundamental rights of present and future generations. Methodologically, the descriptive research was

predominantly inductive, based on bibliographical techniques and the analysis of jurisprudential cases.

1. THE CLIMATIZATION[1] OF DISPUTES

Paradoxically, climate litigation has taken place within national jurisdictions (judicial and administrative) even though, as a "common interest of Humanity", climate change calls for a strengthening of international jurisdiction. This occurs, to a large extent, because international forums (i) do not have mandatory, much less specialized, jurisdiction to resolve disputes relating to offenses against the integrity or quality of natural environmental components; (ii) access is restricted to States and International Organizations, not recognizing broad and altruistic popular legitimacy for other actors; and (iii) they are confronted with norms that, as a rule, constitute obligations of means and not of results, which makes it difficult to condemn sentences that go beyond calls for cooperation and due diligence in fulfilling commitments.

As a result, several actors have turned to domestic courts to obtain the political responses that are slow to emerge in the face of climate inaction by their own (or other) States, most of which are linked to the commitments established in the Paris Agreement (signed in 2015, in force since November 2016). Climate litigation therefore calls for the participation of the State-Judge in solving the global crisis, removing it from its own inertia, to obtain protection against the improper inertia of the State Legislator, Administrator, or both.

Aware of the urgency of the problem, a group of jurists proclaimed, in 2015, the Oslo Principles on Global Obligations in the Matter of Climate Change[2]. A soft law document, the Oslo Principles recognize the sufficiency of existing normative support, international and internal, to delimit the responsibilities of public and private entities in achieving global mitigation obligations. These Principles contain a statement of utmost importance: the obligation to reduce GHG emissions constitutes a duty of each State vis-à-vis the international community as a whole (cf. §11 of the Preamble), that is, the obligation not to causing harm is not only opposable between neighboring States, but between all States. This is a notable extension of the maxim extracted from the Trail Smelter jurisprudence, already followed by article 48, no. 1, a), of the Draft principles on State

[1]Climatization is a term used in the field of public policies to designate the dispersion of the climate factor across the various domains of government agendas.Cfr. AYKUT; MAERTENS, 2021, p. 502-505.
[2] Available, in several languages, here:https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations

responsibility, which completely reconfigures the classic vision of the figure of international responsibility of State.

The signatories anchor this Charter of Principles on the principles of precaution and common but differentiated responsibilities, highlighting, on the one hand, that obligations to reduce GHGs must be established based on "credible and realistic catastrophic scenarios supported by the analysis of a representative group of climate scientists" and, on the other hand, that such obligations must be modulated according to the capabilities of States. The fundamental operative notion is that of "permissible amount of GHG emissions", calculated annually based on global emission limit data in view of the objective of containing the increase in temperature by a maximum of 2oC above pre-industrial levels accepted under the terms of the Paris Agreement, crossed with the historical level of per capita emissions.

Basically, it is about setting more or less precise limits based on the intersection between historical emissions, which reflects the economic capacity of each State, and not future emissions, which reflect the planet's (in)absorption capacity. The setting of such limits must be undertaken by an international control body, operating under the auspices of the Framework Convention on the fight against climate change, one would say, in order to allow transparent monitoring of compliance with reduction obligations of emissions — firstly, by companies —, either by the courts or by social actors. These guidelines are, of course, indicative, given the nature of the document, but they demonstrate that, with political will, determining the quantum of obligation of each State with regard to the reduction of GHGs is perfectly feasible.

It should be noted that the peculiarities of climate disputes denote a consistent "reconfiguration of traditional notions of time and space" (CARVALHO, 2017, p. 337), challenging the traditional logic of measuring causality between a past injury and civil liability. The causality of climate damage is projected not only in time (into the future), reaching dimensions of intertemporality, but also in space. Thus, on the one hand, decisions coming from national climate courts are not materially sealed from the jurisdiction from which they derive, and can directly influence the achievement of supranational goals and policies. A setback to climate justice in a national court is ultimately a setback to global climate justice. On the other hand, such decisions are not compartmentalized in time either, as they have the power to affect fundamental rights of a very wide universe of individuals, present and future.

In a simple cut[3], climate litigation can be classified according to (a) the parties involved and (b) the merit. Regarding the parties, it is necessary to distinguish the active and passive poles. In the active pole, it is generally individuals, stakeholders and subnational entities that provoke the Judiciary with a view to obtaining collective protection, although many still encounter barriers in the admissibility judgment, especially in "jurisdictions that do not have flexible rules of legitimacy" (ADB, 2020, p. 3). On the defendant side, alternatively to legal entities governed by private law, governments (legal entities governed by public law) are the most common defendants. Regarding the merit of the demands, several theorists[4] ventured to create categories based on the mainstream of recent litigation. From these, we chose to divide them into two large groups: i) actions based on violation of rights, whether human or fundamental, nouns or adjectives; ii) actions that seek to condemn States to the obligation to create, specify, adapt or complement domestic policies to assumed international commitments, such as the Paris Agreement. Evidently, the same demand may fit into the intersection of both groups.

i) In the actions of the first group, the violation is alleged of both substantive rights, such as life, physical and mental integrity, privacy, property and economic initiative, and adjective rights, such as access to information and justice , being classified as human or fundamental, depending on the normative support used as a legal basis (e.g. the European Convention on Human Rights, hereinafter ECHR, or the constitutional letters). In this group of actions there is an umbilical relationship between such rights and the formula of the "right to a healthy environment"; hence the assertion that climate litigation permanently dialogues with the phenomenon of the greening of human rights. This is not unique to climate litigation. Cross-fertilization is "in many ways, [just] a logical extension of human rights in environmental protection more generally" (VAN ZEBEN, 2021, p. 3).

ii) In the actions of the second group, the aim is to compel the State to comply with the positive obligations to mitigate and adapt. Typically, these actions are based on invoking omissions, administrative or legislative, in the formulation and implementation of public climate policies, requiring the courts to either control existing acts, but insufficient or inadequate, or condemn the State to fill omissions and gaps. integral. In this second hypothesis, "the possible violation of the

[3] This is an extraordinarily heterogeneous reality which, along with its novelty, makes categorization difficult. For an updated survey of the main climate disputes in the US and the rest of the world, see *Climate Change Litigation Databases* do *Sabin Centre for Climate Change Law*, aqui: http://climatecasechart.com/climate-change-litigation/
[4] Cfr. SETZER; CUNHA; FABRRI, 2019, p. 67-68; ADB, 2020, p. 3; WEDY, 2019, p. 38.

independence of State Powers resulting from the actions and omissions of federal agencies and local authorities regarding the cut in gas emissions is debated" (WEDY, 2019, p. 36). The principle of separation of powers is, therefore, called for in these judgments.

Given this, climate litigation can be conceptualized more broadly or more narrowly. The breadth of the concept increases the sample of disputes that could be classified as climate-related. Van Zeben states that the phenomenon is broadly defined as covering "cases related to mitigation, adaptation or climate science" (VAN ZEBEN, 2021, p. 2), while other authors conceptualize it as any case brought before courts that has the climate change as a central, peripheral or even implicit or collateral theme (ADB, 2020, p. 7). Our approach is based on a restricted perspective of climate litigation, translating the proposed actions with a view to reducing GHG emissions (mitigation measures) and creating resilience (adaptation measures), with or without the Paris Agreement as a backdrop. , but always assuming the fight against global warming as its objective.

Despite already being dispersed across the most varied legal systems, climate litigation clearly has its "top central nodes" located in the Global North, especially in the USA and Europe (SETZER; CUNHA; FABRRI, 2019, p. 64-65), with the source with the largest flow being found in the USA. Since 2007, there have been disputes there with very different results involving climate change, which sometimes reach the Supreme Court.[5] In Massachusetts vs. EPA (2007), the first that involved a public agency as a defendant, the North American Environmental Agency (EPA) was ordered to regulate GHG emissions from motor vehicles, based on the Clean Air Act, given the polluting nature of these gases.

In changing jurisprudence, however, American appeals courts have also handed down verdicts favorable to the Government, as in the case of the Court of Appeals for the Ninth Circuit, which recently judged the case Juliana vs. USA (2020). In it, a group of 21 young people demanded, based on the allegation of violation of fundamental rights of future generations and a "right to a climate system capable of sustaining human life", the condemnation of the US government for climate inaction in controlling emissions of GHGs and, therefore, the obligation to develop and implement a comprehensive plan to reduce them to a level appropriate to meeting national goals. The court rejected the action because it considered that the mission of correcting an existing federal climate policy (although, in the authors' perspective, insufficient) exceeds its competence. This

[5] For a summary of the most paradigmatic cases in the USA, see DÉLTON WINTER DE CARVALHO, KELLY DE SOUZA BARBOSA, "Climate litigation as a jurisdictional strategy for anthropogenic global warming and climate change", in Revista de Direito Internacional, vol. 16, 2019/2, pp. 55ff., 66-68. Available here: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/5949.

double sample clearly highlights the randomness of judgments on climate disputes within the same legal framework, which is evident, for the most part, if we contextualize it in broader universes.

2. FROM THE URGENT CASE TO THE KLIMATCHUTZGESETZ CASE: CLIMATE CHANGE REACHES THE HIGHEST EUROPEAN JUDICIAL INSTANCES

The climate emergency arises from a worsening of the perception of climate risk by the general population. Along with the emergence of social movements challenging the insufficiency or inertia of state action in combating climate change — such as Friday's for future, launched by the young Greta Thunberg, or Extinction Rebellion, in the United Kingdom —, the courts are increasingly called to resolve climate disputes in Europe, sometimes at the highest level of the judicial hierarchy. Within the scope of European supreme courts, the highlight certainly goes to the Urgenda case (2015-2019), because it constituted a resounding victory, but it was not the only time that a Supreme Court confronted the objectives of national policy with international goals (2.1 .). In terms of European constitutional climate justice — that is, before courts with specialized competence to assess the constitutionality of norms — the Klimatchutzgesetz ruling, while not the first by a European constitutional court, is so far the only one to give the case to cause of the climate (2.2.).

2.1. *First we take the Hague...*

The pioneering spirit in the judicial conviction of government entities towards the reduction of GHG emissions must be credited to the Supreme Court of the Netherlands[6], in the case of Urgenda vs. Netherlands (hereinafter Urgenda case)[7]. Among climate litigation, this case undoubtedly constitutes a "lighthouse" (VIEIRA, 2019, p. 637), as it was the first in which (i) "a national court expressly used the principle of common but differentiated responsibilities to interpret the scope of state climate obligations" (FERREIRA, 2016, p. 329), and ii) "a court determined the

[6] It should be noted that this Court is not a constitutional court, since in the Netherlands there is no judicial control of the constitutionality of norms.

[7] On this process, see J. K. DE GRAAF, J. H. HANS, "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change", in Journal of Environmental Law, vol. 27, 2015/3, pp. 517 ff.; MARJAN PEETERS, "Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States", in RECIEL, Vol. 25, 2016/1, pp. 123 ff.; JAAP SPIER, "'The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment", in Netherlands International Law Review, vol. 67, 2020, pp. 319 ss.

target of reducing absolute minimum emissions for a developed State, calling for compliance with a duty of care" (COX, 2016, p. 143). Let us take a moment to analyze its fundamental lines.

In 2015, the Urgenda foundation, together with hundreds of citizens, sued the Judiciary requesting that the Dutch government reverse the decision to reduce the national GHG emission target to 17% (compared to 1990) by the year 2020. authors claimed that the reduction would harm the fulfillment of international commitments, to which the Dutch State was bound and, as a result, the rights to life and privacy, enshrined in arts. 2nd and 8th of the ECHR. The objective of the Urgenda foundation and its co-interested parties was for the Judiciary to recognize and condemn the government to the positive obligation of, respecting the previous goals, fulfilling its duty to protect against the real threat that climate change poses to the human rights of current generations and future ones.

After a first defeat, the State appealed to the second instance and was defeated again. He also tried a last appeal, to the Supreme Court of the Netherlands. In 2019, the Supreme Court confirmed the government's conviction for not developing effective climate action, through "reasonable and appropriate" measures to reduce GHG emissions. The main considerations were that, although climate change is a global phenomenon and reductions do not depend solely on the individual contribution of the Dutch State, this in itself would not exempt it from fulfilling its part. Furthermore, after an extensive theoretical framework, the panel recognized that climate inaction on the part of a public entity involves the violation of personal human rights protected by the ECHR[8], whose protection implies the state's positive obligation to prevent and minimize climate risks.

To set the target of reducing emissions by 25% by 2020 (more ambitious, at the time, than that of the European Union), the Court anchored itself, in an innovative way, on the "principle of common but differentiated responsibilities", according to which the Dutch State must commit to emissions reduction targets corresponding to its share of historical contribution to the climate crisis. In addition, Roy and Woerdman state that the court also uses the precautionary principle to demonstrate that the Dutch State has "the burden of proving the adequacy and effectiveness of [its] climate policy" (ROY; WOERDMAN, 2016, p. 165) , that is, that it has acted to, through compliance with its positive mitigation obligations, contain the threats of the phenomenon.

[8] It should be noted that the Dutch Constitution was, at the time of the presentation of the action by Urgenda (2015), an eminently political text, which did not contain a list of fundamental rights — which is why the appeal to the ECHR played a role of primary protection here. In 2018, the current Constitution came into force, which assigns, in article 21, the task of "to keep the country habitable and to protect and improve the environment" to public entities, and which enshrines the right to reserve private life in the article 10 (curiously, not referring to the right to life but only to the state task of promoting health (article 22)).

Due to the fact that the basis of the action translates into the violation of human rights, the Urgenda foundation invited the court to reflect on the application of the ECHR in line with public climate policies and the UNFCCC. By neglecting its duty of protection, the State would be violating human rights expressly provided for in the Convention, both of current and younger generations, and of future ones. Thus, climate inaction based on unambitious goals for the short term (2020) would represent a real threat of harm to the enjoyment and enjoyment of these rights in the long term. And it is precisely at this stage of the decision that intertemporality reveals itself, exposing the most intense meaning of the principle of intergenerational solidarity.

In the Urgenda decision, the Court's message is quite clear: it will no longer be possible for the current government to pay in installments, with interest, a historical debt that grows due to the lack of control over past and present activities, at the cost of serious restrictions on the human rights of citizens of the future. Climate insolvency should not continue to be passed on to future generations, in the form of deprivation of options in exercising rights. It is immediate and contemporary action, based on science, that will avoid future austere actions. The more ambitious and specific the planning of mitigation goals is in the short term, towards the climate transition, the fewer restrictions on rights will be foreseen in the medium and long term.

However, in the hermeneutic exercise of projecting the conformation of the content of human rights in a scenario of reduced options motivated by the climate crisis, the courts face a difficult challenge in assimilating, through the decision, the intertemporal dimension. In most climate disputes, we are not faced with requests for compensation based on past injuries, since the deleterious effects of the crisis are focused on the future — which gives Leijten reason when he states that "violations of human rights humans involving abstract and future events present a puzzle that is not easy to solve" (LEIJTEN, 2019, p. 113).

This decision was as acclaimed as it was criticized, due to the red line crossed by the Supreme Court regarding the correction of the State's climate policy options. At the appeal stage, the government claimed that the specific determination of a 25% reduction violated the separation of powers, with it being the exclusive responsibility of the political decision-maker to set such an index. In the ruling, the Supreme Court dismissed such allegations somewhat lightly, stating that it was fully entitled to resolve all disputes brought to its attention and adding that the decision was based on its free conviction and did not involve interference with the competence of other powers. We believe, however, that, strictly speaking, the Court was not sufficient with a strict analysis of the State's compliance with the positive obligation to ensure the protection of human rights against the risks of deterioration due to the climate emergency and to implement strategies - emphasize

appropriate mitigation policies; It is crystal clear that the court went further and, reconstructing climate policy objectives, set the percentage at 25%.

It is known that guaranteeing the right to a balanced environment/climate, as well as the human rights associated with it, demands a positive state task of acting, promoting public policies[9]. It turns out that positive obligations, unlike negative ones, do not contain a single and delimited modus operandi for public managers, but a range of choices. The role of the State Judge, in this context, is to control legality and legitimacy, but not the merit or purpose of these options. This control must be exercised with self-restraint, in order to determine: whether the options adopted by the manager (1) exist, (2) whether they are not manifestly inadequate and (3) whether they are not clearly sufficient – in all cases, in accordance with as provided by law.

Among: - recognizing whether or not the government fulfilled its positive obligation arising from the law, condemning it to do so if the omission was verified; and - fulfilling the content of this obligation, there is an abyss that cannot be ignored by the Judiciary. This discussion became more evident in post-Urgenda cases, serving as a guide for analyzing compliance with positive state obligations, in the labyrinth of separation of powers, for other courts[10]. Precisely in this regard, Leijten highlights that the "disjunctive structure" of positive obligations increases the difficulty of jurisdictional control, making it much superior to that faced in terms of controlling negative obligations, in which it is clear what must be done by the manager : refrain from interfering (LEIJTEN, 2019, p. 117). From this perspective, it cannot but be criticized that courts "formulate positive obligations that are excessively precise or demanding, as it is not their task to interfere in the formulation of national policies and budgetary issues" (LEIJTEN, 2019, p. 117).

The climate cases heard by the Supreme Courts of Switzerland and the United Kingdom, also involving an approach to the problem of climate change through fundamental rights, were not equally successful. In Switzerland, the Verein KlimaSeniorinnen Schweiz vs Bundesrat (2017/2020) litigation involved a group of women over the age of 75, who claimed that the GHG

[9] Compliance with this duty of care has already been coordinated with the Dutch courts in a second, inter-private dimension. In a decision from May this year, Shell was condemned in the first instance for conducting a corporate policy contrary to the objectives of reducing emissions by 55% by 2030 (Milieudefensie et al v Royal Dutch Shell plc). This decision, currently under appeal, was considered "a global first" by the pioneering association between oil companies and respect for human rights. See Polly Botsford, A rising tide of climate litigation, July 2021, available here: https://www.ibanet.org/The-rising-tide-of-climate-litigation.

[10] See, for example, the decision in the case of Greenpeace Netherlands vs State of Netherlands, from 2020. The Organization challenged the fact that the financial aid package granted by the Dutch government to the airline KLM in the context of the pandemic crisis had not been submitted to no environmental conditionality clause, which would violate the duty of care highlighted in the Urgenda case. The decision of the District Court of The Hague rejected the demand, stating, on the one hand, the broad discretion of the Dutch State to manage the pandemic crisis and, on the other hand, the lack of a precise obligation, included in the Paris Agreement, to reduce of international air travel.

emission reduction targets then established by the government were insufficient to maintain temperatures down to 2ºC above pre-industrial levels. Such a lack of protection would imply a threat to fundamental rights enshrined in the Swiss Constitution and the ECHR, namely life and privacy, particularly serious for their age group, which is more vulnerable to heat waves. They were unsuccessful in all instances, with the case being rejected by the Supreme Court in 2020 based on two reasons: the illegitimacy of the applicants (the threat is not sufficiently intense or specific) and the non-justiciability of the dispute (as it concerns political choices). The case has been pending consideration at the European Court of Human Rights since November 2020.

In the United Kingdom, the case Plan B Earth and others v Secretary of State of Transport (2018/2020), was more competitive. The authors intended to call into question the construction of a third runway at Heathrow International Airport because they believed that this expansion was contrary to efforts to contain emissions resulting from the Paris Agreement, in addition to violating British climate policy objectives established in 2008 (namely, the achievement of carbon neutrality in 2050), and of constituting an affront to the Human Rights Act of 1998. The first two judicial instances to analyze the case refused to classify the decision of the Secretary of State for Transport as illegal, understanding that he had acted within his margin of discretion. However, the appeal to the Court of Appeal, decided in February 2020, considered that the British government is bound by the objectives of the Paris Agreement, which should have been taken into consideration when constructing the strategic decision to expand Heathrow. He added that such decision was identically invalid from a formal point of view as it had not been subject to strategic environmental assessment, mandatory (at the time) in light of European Directive 2001/42/EC, and that it should be reformulated. The last appeal, brought by the government to the Supreme Court of the United Kingdom, annulled this ruling and considered the decision to build the third runway as legitimate since, having been adopted in 2018, the standard for measuring its validity was the established objectives in 2008 and not the Paris Agreement, still in the implementation phase — and which had been indirectly considered in the application of the 2008 goals.

In July 2020, it was the turn of the Supreme Court of Ireland to face the phenomenon in its corners, in the case Friends of the Irish Environment (FIE) vs. Ireland[11]. Three years earlier, the non-governmental association FIE had filed a lawsuit against the State, based on the violation of human rights (arts. 2 and 8 of the ECHR) and constitutionally guaranteed rights, such as life and physical integrity, in connection with the "right to a healthy environment". The FIE accused the government of insufficient climate action in drafting the specific guidelines of the National

[11] Available: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.

Mitigation Plan (2017). On appeal, the Supreme Court reversed the decision in favor of the government made in the lower courts, alleging that the insufficient climate action set out in the Plan put at risk those rights protected by the ECHR and the Irish Constitution. In effect, the Court annulled the Plan and ordered the Executive to rework it in a more precise way. The new plan should be clear and detailed enough for any average and interested reader in the country to understand it.

In the ruling, the Court unanimously concluded that: i) the 2017 Plan, which regulated the 2015 Climate Act, should be annulled and replaced by another that demonstrated in a sufficiently specific way how Ireland would meet its reduction targets until reaching carbon neutrality in 2050, although the level of detail could "understandably be less complete" as the time frame increases; ii) the FIE, as a legal entity governed by private law, does not enjoy the subjective rights that it intends to defend, adduced based on the Irish Constitution and the ECHR and, in these terms, lacks the legitimacy to vindicate them in court – however, because it participated in the procedure that led to the adoption of the 2017 Plan, legitimacy must be guaranteed to challenge it in court. Furthermore, the court noted that the claimed "right to a healthy environment is superfluous (if it does not extend beyond the right to life and physical integrity), or excessively vague and imprecise (if it goes beyond these rights)"; therefore, "it cannot be derived from the Constitution" of the country (IRLANDA, 2021, p. 71-73)[12].

Months later, in December 2020, Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy was the first climate case judged by Norway's highest court[13]. The authors claimed that the licenses recently issued by the government for oil exploration in the Barents Sea would violate art. 112 of the country's Constitution ("right to a healthy environment"), as they would boost GHG emissions in violation of national mitigation targets and associated fundamental rights. Although recognizing art.112 as a safeguard for citizens in the face of environmental and climate damage and also extracting from it the state's task of adopting adequate and sufficient protection measures, the Court considered that it was not a subjective right derived from the Constitution, but rather of a

[12] This last statement was not well received by Irish doctrine. Not only because it was considered that the Court missed the opportunity to densify the contours of the "right to a healthy environment" at the heart of the constitutional regime, but also because the Court's position exhibited contempt for the 'right to the environment' when it found that, for a On the other hand, the aforementioned formula would lack any substance of law if isolated from the already established subjective rights and, on the other hand, although coupled with them, it would contain unavoidable imprecision and vagueness (MUINZER, 2021, p. 4).

[13] The Supreme Court of Norway is not a constitutional court in the proper sense given that, in Norway, constitutionality control is disseminated throughout all courts, and can promote the disapplication of rules that they consider to be contrary to the Constitution. Once such decisions are appealed to the Supreme Court, this body can confirm the disapplication but cannot issue declarations of unconstitutionality with general binding force. In other words, there is diffuse but not concentrated oversight of constitutionality.

"substantive limit to government inaction" — a position that Voigt considers a "backward-looking judgment" (VOIGT, 2021, p. 1-2). Hence, he concluded that measures adopted within the framework of climate policy can only be subject to judicial review in restricted situations, that is, when they represent situations of flagrant omission (due to a manifest insufficiency of the protection index).

Based on the existence of other mitigating measures adopted by the Norwegian government, the panel concluded to reject the request, also emphasizing that the uncertainty associated with the level of emissions to be generated by such licenses would weaken the imposition of a total exploration ban. Climate justice may have just lost the battle here, but it may still win the war, as the authors appealed to the European Court of Human Rights, alleging violation of the rights to life and privacy of Norwegian citizens if the maintenance of exploration licenses are maintained. The case is pending.

2.2. ... *then we take Berlin*

Prior to the Klimatchutzgesetz decision, which we will analyze below, the ruling of the Austrian Constitutional Court of September 2020 was taken. The case Greenpeace and others vs Austria involved the compliance of VAT tax exemptions granted to air travel (but not to rail travel).) the Paris Agreement and the State's duty of care in relation to fundamental rights such as life and privacy (protected by the Constitution, the Charter of Fundamental Rights of the European Union and the ECHR). The argument was simple: by exempting air travel from taxation, but not train travel, the Austrian government rewards behavior contrary to the necessary reduction of GHG emissions and discourages environmentally friendly actions. The Constitutional Court dismissed the claim based on the lack of legitimacy of the applicants (Greenpeace and 8,063 rail transport users) to argue the unconstitutionality of the alleged preferential treatment of air transport.

A subsequent decision, by the French Constitutional Council, in August 2021, refused to assess the substance of a request to declare the Loi Climat Résilience unconstitutional, as a preventive measure. The Council detected some formal irregularities in the legislative procedure, which it ordered corrected, but did not comment on the allegations made by the 60 deputies who raised the request, which involve the insufficiency of the GHG emission reduction targets proposed there — 40% by 2030 , compared to 1990 levels, when the European Climate Law, in force since July 2021, sets 55%. The Council based its decision on the fact that the request did not properly

individualize the allegedly unconstitutional rules and stressed that, in any case, "le Conseil constitutionnel ne dispose pas d'un pouvoir général d'injonction à l'égard du législateur"[14].

Judging by these two decisions, European constitutional justice does not seem sensitive to the call of climate justice. The Klimatchutsgesetz case contradicts this conclusion in a blazing way.

3. REFLECTIONS ON THE BVERFG'S KLIMATCHUTZGESETZ JUDGMENT OF MARCH 24, 2021

In March 2021, climate justice had its first victory before a European constitutional court. The German Constitutional Court (Bundesverfassungsgericht, hereinafter BVerfG), one of the most prestigious in the world, was the stage for a case that can now be considered a leading case for climate justice due to several factors, of which we highlight: a robust, well-rounded legal argument in the theory of fundamental rights; a dense technical-scientific texture; and exemplary jurisprudential intertextuality, based on a unique dialogue, both with similar courts (such as the Dutch and Irish Supreme Courts, but also with the United States Court of Appeals for the Ninth Circuit), and with the European Court of Human Rights.

The process originated from four constitutional complaints, filed by different authors, including: environmental protection associations and German citizens; foreign citizens (Nepalese and Bangladeshis); German youth groups; and groups of young Germans and German citizens living in coastal locations. In their requests, the plaintiffs requested the declaration of unconstitutionality of some rules of the Climate Protection Act, the Klimatchutsgesetz (hereinafter, KSG) of 2019[15].

There were two central allegations: i) the KSG, in its provisions §3(1), §4 (1) third sentence, combined with Annex 2, would be in conflict with the Paris Agreement, when it established a goal of containing the temperature global average at 1.75ºC, proving to be less ambitious than the preferential 1.5ºC (both above pre-industrial levels) established in article 2, no. 1, a) of the Paris Agreement; and ii) although having set the objective of reducing CO2 emissions by 55% by 2030, the KSG legislator unduly delegated to the Executive the prerogative of, by decree, determining the annual reduction rates from then on, until 2050.

[14] It should be noted that, on another front, the Council of State, the highest court of French administrative jurisdiction, ordered the government, in July 2021, to adopt all necessary measures to meet the target of reducing GHG emissions by at least minus 40% by 2030 by March 31, 2022, in response to a lawsuit filed in January 2019 by the municipality of Grande-Synthe, a coastal municipality threatened by rising sea levels.

[15] The first constitutional complaint, from 2018, predates the KSG. The remaining three refer to this Law. Note that this (joint) decision is also identified as Neubauer et al. vs Germany, taking the name of the authors of the last constitutional complaint, presented to the BVerfG in 2020.

As for the first allegation, there was a supposed decrease in the protection of fundamental rights, such as life, physical integrity and property, provided for in arts. 2(2), first sentence, and 14(1), in conjunction with art. 20a, all from the Bonn Basic Law (Grundgesetz, hereinafter GG).

As for the second allegation, there was a lack of respect for the principles of reserve of law and proportionality in the context of the exercise of fundamental rights associated with art. 20a from GG. The authors alleged that the KSG violated the constitutional order by inaccurately determining the decarbonization roadmap between 2030 and 2050, delegating the task of specifying it annually to the Executive. §4(6), first sentence, of the KSG, established that it is up to the "federal government to stipulate annual decreasing emissions 'for further periods after 2030'. Nothing is said about the length of the periods" (ALEMANHA, 2021, p. 70). At this point and unanimously, the Court considered that articles §3(1), second sentence and §4(1), third sentence, in conjunction with Annex 2 of the KSG are incompatible with the GG. It should be noted that these provisions provide the pretext for the authors' second allegation, in the sense that the insufficiency of a specific methodology for setting intermediate reduction targets from 2030 onwards represents a potential threat to fundamental rights and guarantees of present and future generations.

Of the most relevant aspects of the KSG ruling, we highlight four:

i) The affirmation of environmental/climate protection as a task of the State (and not as an object of a fundamental right)

One of the main provisions cited throughout the judgment is art. 20th of GG[16]. The Court noted that this norm directs a state duty to protect the environment and, therefore, the climate, as a natural support for human life ("the climate protection requirement of Art. 20a GG remains decisive") (ALEMANHA, 2021, p . 69), but it does not constitute a subjective right of the plaintiffs. According to Eisentraut, by not expressly recognizing a "right to the environment", the BVerfG retraces the path of its own precedents, maintaining "a discreet profile on the existence of the fundamental right to an ecological subsistence level and the 'right to a human future'. ', which the authors place in dispute" (EISENTRAUT, 2021, p. 2).

[16] In free translation, Article 20a of the GG provides the following: "Taking into account also its responsibility towards future generations, the State will protect the natural supports of life and animals through legislation and, in accordance with the law and justice, through actions of the Executive and Judiciary, all within the scope of the constitutional order" (ALEMANHA, 1949, n.p.).

It should be emphasized that, when considering allegations of potential violations of individualized fundamental rights (such as life, physical integrity, property), the exercise of which strictly depends on guaranteeing the quality of the "natural support of life", the Court recognizes the existence of the possibility of affecting individual legal positions through the degradation of the quality of a meta-individual magnitude. For the BVerfG, it is clear that art. 20a of the GG enshrines constitutional protection for a community value — the environment — which, on the one hand, actually conditions the exercise of fundamental rights and, on the other hand, entrusts the Public Power with a positive task of care. This protection task is comparable to other state tasks of realizing fundamental rights and values; however, in the context of climate emergency and due to the urgency of action, the consideration of the interest of protecting the environment and climate stability takes on greater weight («[...] given that climate change is almost entirely irreversible as things currently stand, any overshoot of the critical temperature for preventing climate change would only be justifiable under strict conditions — such as for the purpose of protecting fundamental rights. Within the balancing process, the obligation to take climate action is agreed by increasing weight as climate change intensifies» , § 197).

ii) The imperative of respect for the principle of separation of powers

Another relevant aspect of the judgment are the considerations made by the BVerfG regarding the principle of separation of powers, which arise in two moments. On a first occasion, when the Court recognizes that there is no unconstitutionality in the legislator's (political) choice to establish, within the range of 1.5ºC-2ºC indicated in the Paris Agreement, an intermediate index of 1.75ºC. In fact, the Karlsruhe Court considers it to be the strict role of the legislator to do so, as long as it complies with internal and international standards. Delimiting what is up to it to assess without running the risk of interfering in the deliberative sphere of another power, the BVerfG rules out that the German government has violated the GG by meeting a containment parameter of 1.75ºC and not 1. 5ºC, compared to 1990 levels.

In this sense, it removes the unconstitutionality defect attributed to this part of the KSG, maintaining that an integrated reading of the GG and the Paris Agreement allows the State to determine, up to the limit of an increase of 2ºC, an increase of up to 1.75ºC, since that the level of 1.5ºC is recommended, but not mandatory. Thus, setting the temperature increase index generated by GHG emissions by Germany at 1.75ºC does not violate international obligations, nor does it lack technical-scientific basis, given that such a value is still considered adequate according to reliable

scientific reports from the German Advisory Council on Environmental Issues (Sachverständigenrat für Umweltfragen).

In a second moment, the principle of separation of powers is invoked again and in an even more explicit way, when the BVerfG, verifying the insufficiency of the KSG's original plan for the post-2030 period, returns the power to the Legislature so that, itself and without delegations, develop a more precise plan. In reality, it is not up to the Court to rule on the plans to be drawn up or the measures to be taken. Its control competence is limited to assessing whether or not the duty of protection was violated and, if the response is positive, determining that this omission be corrected. The exercise of such restricted control powers can only be triggered: i) if no measure has been adopted; ii) if the planned measures, although outlined, are ostensibly inadequate to achieve the stipulated objectives; or iii) if the prescribed measures are flagrantly insufficient. In this sense, the present ruling distances itself from the controversial narrative of the Urgenda decision, as instead of going for a direct setting of targets, it is restricted to, once the existence of mitigation measures has been recorded (55% reduction in GHG emissions) in the period up to 2030, direct an injunction to the legislator to explain the methodology that will govern the setting and implementation of the targets (of the remaining 45% from 2031) until 2050.

In other words, the Court follows "a middle path that, on the one hand, holds the legislator responsible, but on the other hand, does not unduly transform the judge into a political actor" (EISENTRAUT, 2021, p. 1), handing him the power to determine, inter alia, the reduction targets, which remain the responsibility of the Legislature. It is at this moment that another fundamental principle for the outcome of the ruling comes into play: the principle of reserve of law. The argument of violation of the reserve of law is based on the imperative of legislative status regarding fundamental climate policy options, which should not be delegated to the Executive without Parliamentary control. The seriousness of the climate issue, especially due to its impact on the hard core of fundamental rights, prevents the Legislature from delegating to the Executive the function of outlining the essential parameters of the emissions reduction plan.

The imperative of determinability of the law, a corollary of the principle of reserve of law, emerges crystal clear from the reading of the provisions of art. 80 (1) of the GG, a rule that gives the Legislature such responsibility. In effect, the responsibility for specifying the goals for the remaining period could not be transferred to the Executive, nor (and much less) to the Judiciary, which lacks democratic legitimacy to design such goals. It is in the inevitable encounter between the reserve of law and the separation of powers that the BVerfG bases the statement that "even where the legislator is under obligation to take measures to protect a legal interest, it retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design […]" (§152).

iii) The intertemporal dimension of the task of protecting the environment/life support and the dynamic protection of fundamental rights

As we have seen, art. 20a of the GG enshrines a duty to protect the environment as a support for life, human and animal, in an aspect that encompasses the protection of present and future generations and, thus, densifies the principle of intergenerational solidarity in the German constitutional order. However, the device does not provide a similar mechanism for intergenerational protection of fundamental rights. While current generations can seek grounds for protection in the letter of the norm – in conjunction with norms attributing personal and property rights – future generations, because they lack legal personality, do not yet have the same mechanisms associated with the letter of the art. 20a. In other words, in its prospective dimension, this article reinforces the intertemporality of the state's task of protecting the environment, life support, in the present and in the future.

The fight against the climate crisis entails strong changes in contemporary living, consumption and production habits, and requires rapid action. The longer the planning and implementation of mitigation measures are delayed, the more difficult it will become to achieve carbon neutrality in 2050 and greater efforts will be required. Therefore, the State must, as soon as possible (in good time, as early as possible), and not just from 2025 as proposed in the KSG, set reduction targets until 2050. The same is to say that the sooner and The more detailed the decarbonization roadmap is, the more skillful and operational the planning for the period after 2030, and the more agile its implementation, the more safeguarded the essential core of the fundamental rights of current and future generations will be. This anticipation as early as possible is essential, "in order not to have to curtail future freedom suddenly, radically and without replacement" (ALEMANHA, 2021, p. 69).

This assessment of the urgency of action results in a proportionality equation which results in the less ambitious the planning — in terms of precision and anticipation —, the less agility the climate policy response will have and, consequently, the less protection will be guaranteed to fundamental rights for the future. This duty to plan "as soon as possible" is linked to an imperative to safeguard individual and economic freedoms in an equitable way, that is, to distribute opportunities proportionally across generations. The intertemporality that exudes from art. 20a GG, projecting it into the future, obliges the German State to take into account a timeline for the exercise of freedoms, within the framework of which the use of natural resources/the atmosphere must be carried out rationally and in a way that "to leave them for posterity in such a state that subsequent

generations could not only keep them at the price of radical abstinence" (ALEMANHA, 2021, p. 1). Thus, there will be an affront to the principle of proportionality in terms of prohibiting excess whenever the restrictions on fundamental rights imposed by mitigation measures are not established and implemented in a timely manner — that is, as soon as possible —, with a view to equitably planning the forced sacrifices imposed on citizens, present and future. Said another way,

> The BverG understands that the principle of proportionality means an obligation on the legislator to guarantee justice between generations by distributing the burden of interference and/or by proportionally distributing the opportunities for freedom between generations. As the Law failed to distribute freedom opportunities after 2030, the KSG appears to be disproportionate and, therefore, unconstitutional (EISENTRAUT, 2021, p. 3).

In short, the dynamic protection of fundamental rights, which translates into the need for their protection on an intertemporal basis, requires that the general framework of restrictions be drawn up as soon as possible, so that the transition to carbon neutrality is the least radical and the as "freedom-friendly" as possible. This is essential so that current citizens can organize themselves and make choices that are not too drastic, nor too generous, compared to other generations. The sooner such measures are known, the smaller the impact of the transition will be on a single generation. As a result, the BVerfG confirms the insufficiency of the action plan outlined in the KSG to guarantee a safe climate transition to the fundamental rights of present (and young) and future generations, concluding that "the contested provisions violate the freedoms of young claimants, by irreversibly discharging the main burdens of reducing emissions in periods after 2030" (PETERSMANN, 2021, p. 22).

iv) The interstate dimension of the task of environmental/climate protection

The Court certifies, in parallel with the previous considerations, that art. 20a also has a meta-state dimension, moving it from the strict plane of the German order to reach the international scope. It is because it must be seen from a meta-state perspective that the task of climate protection puts pressure on Germany to contribute to the joint result of overcoming the climate crisis, promoting international cooperation and discarding the thesis that it only has a smaller percentage of the overall responsibility for protection. In this sense, the Court emphasizes that "[t]he problem of climate change and the (legal) activities involved in its prevention are genuinely global in nature. No state can stop global warming on its own. Furthermore, emissions from every state contribute to climate change in the same way" (§199). This results in a particularly surprising first conclusion: any citizen, national or foreign, will be able to question the German State for failure to comply with the

duties inherent in art. 20a of the GG (remember that one of the complaints was filed by two non-resident foreigners). However, the panel noted that, in relation to foreign authors in casu, the demand based on violation of their fundamental rights by insufficient mitigation measures does not deserve to prosper, since the principles of territoriality and non-interference in internal matters prevent Germany implements such measures in territories beyond its jurisdiction.

The recognition of the meta-statehood of the task of promoting climate stability based on a provision of the Fundamental Law reveals the justiciability of the determination of article 20a of the GG at the national and international level ("Since the German legislator would not on its own be capable of protecting the climate as required under Art. 20a GG due to the global nature of climate change, Article 20a GG also requires solutions to be sought at the national level», §197), and recognizes that citizens of the world have the legitimacy to demand answers from the German state. By taking this step, the BVerfG recognizes that environmental protection/climate stability is an obligation of States towards the international community as a whole and that the duties of preventing a disruption of the ecosystem balance are invokeable erga omnes.

Since the Opinion of the International Tribunal on the legality of the threat and use of nuclear weapons (1996)[17] that we had not heard such an eloquent statement of the duty to prevent damage to the natural environment of each and every State in relation to the international community as a whole. In that Opinion, the Hague Court emphasized that the environment is not an abstraction but constitutes vital space and provides quality of life and health to human beings, including those who have not yet been born. Therefore, States must ensure that activities carried out in territories under their jurisdiction respect the integrity of the environment of other States and in spaces outside state jurisdiction (§29). The BVerfG went even further, as it not only incorporated this duty into a constitutional imputation rule, reinforcing the intensity of the commitment, but also highlighted its fulfillment from a strict territorial perspective and projected it onto the terrestrial ecosystem as a whole.

v) The indisputable scientific basis for measures to combat climate change

The task of reducing emissions, which results from the duty to ensure, as far as technically possible, climate stability, has its implementation strongly dependent on a technical-scientific narrative. For the BVerfG, this means that the standards intended to plan and implement mitigation and adaptation measures are permeable to mutations resulting from the evolution of scientific

[17] Available: https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

knowledge and may be changed along the way, and such changes must be as completely and precisely substantiated as scientific knowledge allows it, in order to reinforce the legitimacy of the restrictions they will entail (§212).

The Court dedicates Point III (§§31 to 37) of its decision to explain the inevitability of justifying this type of measures. Under the title "Factual foundations of climate protection", the BVerfG describes the phenomenon of global warming and states that, because carbon capture techniques are still very expensive, States must invest in the transition to a low-carbon matrix, gradually renouncing to fossil fuels. At the same time, because the extreme effects of climate phenomena are being felt with increasing severity, the implementation of adaptation measures is also necessary. However, it is in the aspect of mitigation, the renunciation of options used for more than a century and the creation of new energy matrices, that the most significant effort lies, both from an economic and behavioral point of view.

To complicate the task, the impacts to consider are both direct and indirect. In fact, it is not only emissions immediately resulting from the burning of fossil fuels that must be stopped, but also all those associated with manufacturing, transport, use and destruction processes. In an attempt to make its reasoning more explicit, the BVerfG used the example of the textile industry: "Greenhouse gas emissions from global textile production were estimated at around 1.2 gigatonnes in 2015 – almost double the total emissions of international shipping and aviation combined […] . Their lifecycles (production, use, disposal), clothing and footwear account for approximately 8% of global greenhouse gas emissions […]. In order to achieve climate neutrality in our current way of life – including in activities as common and mundane as the construction and utilization of new buildings or the wearing of clothes – fundamental changes and restrictions are needed in patterns of production, consumption and everyday activity" (§37).

This example, which involves consumer goods accessible to the general population, clearly demonstrates the challenges of adaptation, production processes and mentalities, which will have to be faced. In other words, the example illustrates well the difficult but urgent choices that political decision-makers face and the level of interference in fundamental rights that is at stake.

If it is true that it is up to climate policy to decide whether and to what extent the concentration of CO2 in the atmosphere should be limited, it is certain that it is up to (Climate) Science to provide credible models for projecting global warming under conditions of life of human beings on the planet. It will be from the intersection between scientific information on the limits of survival in the face of certain degrees of increase and the political decision on the capacity to reconvert the energy matrix of States in time to avoid irreversible damage that the methodology for achieving carbon neutrality in 2050 and containment of the increase in CO2 in the atmosphere to a

maximum of 2ºC above pre-industrial levels. The German Advisory Council on Environmental Issues (Sachverständigenrat für Umweltfragen) considered that there is a 67% probability that the German State will be able to set the increase at 1.75 0C, and therefore the BVerfG validated the sufficiency of the index set by the legislator.

Ultimately, this decision must be read for what it is, but also for what it represents. The KSG ruling sends a warning to the legislator that, if clearly insufficient or inadequate measures drawn up by it in the future to protect fundamental rights in the face of climate risks occur, they may once again be subjected to constitutionality control by the Court, when provoked. Paradigmatic in every way, the KSG ruling reaffirms the maxim that there will always be a judge in Berlin, but now also ensuring that no law or lack thereof puts at risk the constitutionally guaranteed rights of current or future generations, if potentially threatened by insufficient or delayed climate action.

The warning was clear: the BVerfG submitted the declaration of unconstitutionality of the KSG rules to a resolutive term — December 31, 2022 — in order not to create a legal void (an option that the Court usually uses)[18]. The German Legislature immediately prepared to comply with the determinations of the decision, going further and approving the first amendment to the KSG, months later, in June 2021. With the amendment promoted, the legislator added a new section, detailing targets for reducing specific emissions for each of the years between 2031 and 2040, aligning them with the new requirements arising from the EU and daring to bring forward the country's carbon neutrality target for 2045 (FRENZ, 2021, p. 585). However, this change may not be the last, as likely updates and revisions may occur until 2050.

Following this change to the KSG, there have been replies to the BVerfG ruling and the correction of the law. Indeed, its repercussions were felt immediately: from June to September 2021, seven constitutional complaints were filed with the BVergG by groups of young people from the Länder of Bayern, Brandenburg, Sachsen-Anhalt, Sachsen, Saarland, Hesse and Nordheim - Westfalen, alleging a lack of protection of fundamental rights in these states, due to the incompatibility of state laws with the reformulated KSG (Bayern) and the absence of state climate laws (all other states). And certainly other courts, national and international, constitutional and ordinary, will seek arguments in this ruling to strengthen their decisions in claims presented to them[19].

[18]Mendes teaches that the Court can recognize that the "situation is 'still constitutional' or is not 'yet unconstitutional' and links this decision with the 'appeal to the legislator' [Appellentscheidung] so that, within a certain period, it can proceed to correct this situation" (MENDES, 1993, p. 14).

[19] Consider, for example, the request for an advisory opinion that Vanuatu intends to take to the International Court of Justice, so that it can rule on the relationship between climate inaction by States that do not comply with the Paris Agreement and the defense of fundamental rights, of its citizens and of all those who, in other States, find themselves in a situation of extreme vulnerability in the face of rising ocean levels. It should be noted that this is

4. FINAL CONSIDERATIONS: A STARE DECISIS FOR CLIMATE DISPUTES?

Having arrived here, it is worth highlighting, regarding the judgments analyzed, some conclusive points, namely:

i) the arrival of climate disputes at the highest courts in Europe, especially the constitutional ones, demonstrates the tendency for the issue to spread to lower courts, with judges and local courts having to progressively deal with this "new development"";

ii) such disputes often break the harsh formal barriers through the greening of Human Rights and the association of the "right to a healthy environment" with fundamental rights provided for in the different constitutional acquis;

iii) it is through the alleged violation of substantive rights of current and future generations that the courts have come face to face with the dimension of intertemporality, managing to embody the essentially ethical principle of intergenerational solidarity;

iv) once the barriers of admissibility have been overcome, the courts do not offer particular resistance to fitting the climate issue into the legal field and framing it within their respective constitutional regimes, especially when related to the state task of guaranteeing balanced life support It's healthy;

v) in most of the judgments, the Courts are reluctant to densify the formula of the "right to the environment", interpreting it sometimes as life support, sometimes as a substantive limit to state inaction, in the sense of protecting its citizens in the face of risks climatic;

vi) recurring themes are: (a) meta-statehood; (b) intertemporality; (c) common but differentiated responsibility; (d) separation of powers; (e) dialogue with Climate Science;

not an unprecedented initiative, since, in 2011, Palau and the Marshall Islands, two other island nations, moved internally at the UNGA to provoke the submission of a request for an advisory opinion to the Court, in identical terms — except for the non-existence, at the time, of the Paris Agreement. The attempt was not successful, mainly because it emerged at the time of the preliminary negotiations that would lead to the signing of the Paris Agreement. About this, cf. UN, 2011, n.p.

vii) particularly with regard to the KSG ruling, the BVerfG, based on a robust argumentative construction of the theory of fundamental rights, supports the imperative of their dynamic protection, the possibility of constraining public entities to fulfill their positive obligations to protect "as soon as possible ", in order not to frustrate the exercise of these same fundamental rights in the future. However, it emphasizes that it is the democratically elected legislator, namely the parliamentary legislator, who is responsible for the timely and concrete determination of such measures, with careful consideration of their proportionality in the distribution of efforts between generations, safeguarding the needs of the present and not compromising intolerably the range of choices of future.

Judgments such as those analyzed in this article should serve as a stimulus to the Public Power to act in time and to the satisfaction of the climate emergency, mitigating, adapting and restructuring an entire development model as soon as possible, in order to avoid harming the fundamental rights of the most young among us and the youngest of the youngest. In this sense, the BVerG itself warns of the unconstitutionality of any stipulation for a posteriori restriction of fundamental rights of future generations, at the expense of omitting the positive task of restricting emissions a priori (FRENZ, 2021, p. 584). Even faced with the challenges that are so deeply rooted in technology and science, the courts cannot, by raising formal questions, remain indifferent when asked to consider these disputes.

There is still a long way to go for jurisprudence in a field in which the scientific state is also constantly updated. The Judiciary, in climate litigation, respecting its constitutional attribution, cannot reserve the right to be the last to make a mistake. This is your burden, but also your opportunity: to risk building a stare decisis.

As we noted, the repercussions of the KSG decision were soon felt (i) in Germany: Parliament amended the Climate Law "on the rise" and several constitutional complaints arose before the BVerfG, highlighting the need to conform state laws with the maxim of ruling: establish GHG reduction targets in accordance with International Law and European Union Law, fulfilling the mandate of article 20a of the GG, as soon as possible. The effectiveness of this ruling — and of the arguments presented — cannot, however, be lightly extrapolated to other orders in the European or global space.

Constitutional courts such as the (ii) Austrian and (iii) French did not accept the case with the same enthusiasm, taking refuge in formal issues, the same having happened in (iv) Switzerland and (v) Norway. And if we hypothesize the possibility of a similar decision occurring in States without the democratic and judicial robustness of the German State, such a scenario will become more remote[20].

If we focus on the European Union's dispute, perhaps the answer may be different, since, in view of the European Climate Law and the target set therein, member states that do not introduce these targets (or higher targets) into their internal frameworks — or that, in doing so, they do not accompany them with a sufficient set of measures; or even, who adopt contradictory measures with this objective — will subject themselves, initially, to persecution by the European Commission and, in a second step, to condemnation for non-compliance by the Court of Justice of the European Union. On the other hand, if we turn to the European Court of Human Rights, where several requests for conviction from States parties to the ECHR are currently pending for alleged violations of rights such as life, physical integrity and the reservation of private life due to inaction or insufficient climate action, the outcome may not prove to be so auspicious, given the reluctance, already expressed by the Strasbourg Court on several occasions, to recognize legitimacy to authors who, even if invoking direct virtual affectation of their legal spheres by the effects of global warming, cannot characterize it as exclusive[21] (AMADO GOMES, 2019, p. 1597).

Ultimately, the emblematic KSG decision constitutes a milestone of utmost importance for strengthening the argumentative body of climate litigants. In addition to contributing to the sedimentation of jurisprudence, decisions like this open the doors to a new public perception of climate change. However, decisions such as the BVerfG also constitute proof that the courts should not replace the democratically elected legislator in intrinsically political and vital decision-making processes regarding the climate.

Undoubtedly, the courts are important forums for amplification, control and construction of an argumentative rhetoric that is fundamental for strengthening a theoretical framework that allows the fight against the climate crisis to be firmly anchored, from a legal perspective, but they are not – and should not be – the builders of the regulatory framework that will take us to carbon neutrality

[20] Think, for example, of the historic ruling of the Supreme Court of Colombia, of April 5, 2018, on the Amazon, which contains injunctions to the State and municipalities to halt deforestation in Colombian territory, which, after a year , remained unfulfilled — cfr. https://www.dejusticia.org/gobierno-esta-incumpliendo-las-ordenes-de-la-corte-suprema-sobre-la-proteccion-de-la-amazonia-colombiana//.

[21] Cfr. AMADO GOMES, Carla. Direito ao respeito pelo ambiente não associado à protecção do domicílio. *In: Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais*, II, org. de Paulo Pinto de Albuquerque, Lisboa: Universidade Católica Editora, 2019, pp. 1597 ss., 1610-1614.

in 2050. The BVerfG stressed that today's climate inaction will echo for eternity; It is up to States to respond promptly to the challenge of acting as soon as possible, in a conscious and ambitious way. “Our planet is talking to us: we must listen. And we must act”[22].

REFERENCES

ADB. **Climate Change, coming soon to a Court near you**: Climate Litigation in Asia and the Pacific and Beyond**.** Manila: ADB, 2020.

ALEMANHA. **Basic Law for the Federal Republic of Germany**. Disponível em: < https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0116>. Acesso em 17 de out. 2021.

ALEMANHA. **Order of the First Senate of 24 March 2021**. Disponível em: <http://www.bverfg.de/e/rs20210324_1bvr265618en.html>. Acesso em 17 de out. 2021.

AMADO GOMES, Carla. Direito ao respeito pelo ambiente não associado à protecção do domicílio. *In:* **Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais**, II, org. de Paulo Pinto de Albuquerque, Lisboa: Universidade Católica Editora, 2019, pp. 1597 ss., 1610-1614.

AYKUT, Stefan C.; MAERTENS, Lucile. The climatization of global politics: introduction to the special issue. **International Politics**, v. 58, n. 4, p. 501-518, 2021.

BOTSFORD, Polly. **A rising tide of climate litigation**. Disponível aqui: https://www.ibanet.org/The-rising-tide-of-climate-litigation. Acesso em out. 2021.

CARVALHO, Délton Winter de; DE SOUZA BARBOSA, Kelly. Litigância climática como estratégia jurisdicional ao aquecimento global antropogênico e mudanças climáticas. **Revista de Direito Internacional**, v. 16, n. 2, 2019.

COX, Roger. A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands. **Journal of Energy & Natural Resources Law**, v. 34, n. 2, p. 143-163, 2016.

DE GRAAF, J. K.; HANS, J. H. “The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change”, *in* ***Journal of Environmental Law***, vol. 27, 2015/3, pp. 517 ss.

EISENTRAUT, Nikolas. **Der Klimaschutz-Beschluss des BVerfG–eine erste Einschätzung**. JuWissBlog, 2021.

[22] Trecho do discurso de António Guterres, Secretário-Geral da ONU, na abertura da COP 26, em Glasgow, em 1 de Novembro de 2021.

FERRAJOLI, Luigi. Constitución y jurisdicción. **Revista Oficial del Poder Judicial.** Órgano de Investigación de la Corte Suprema de Justicia de la República del Perú, v. 6, n. 6/7, p. 339-356, 2010.

FERREIRA, Patrícia Galvão. 'Common but differentiated responsibilities' in the National Courts: Lessons from Urgenda v. The Netherlands. **Transnational Environmental Law**, v. 5, n. 2, p. 329-351, 2016.

FRENZ, Walter. **Das novellierte Klimaschutzgesetz**. Natur und Recht, v. 43, n. 9, p. 583-588, 2021.

GIDDENS, Anthony. **A política da mudança climática**. Rio de Janeiro: Zahar, 2010.

GORMLEY JR, William T. Regulatory issue networks in a federal system. **Polity**, v. 18, n. 4, p. 595-620, 1986.

IRLANDA. **Friends of the Irish Environment (FIE) v. Ireland**. Disponível em: < http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf>. Acesso em 17 de out. 2021.

KISS, Alexander. Direito Internacional do Ambiente. In: **Direito do Ambiente**, INA, 1994.

LEIJTEN, Ingrid. Human rights v. Insufficient climate action: The Urgenda case. **Netherlands Quarterly of Human Rights**, v. 37, n. 2, p. 112-118, 2019.

LORENZETTI, Ricardo Luis. **Teoria geral do direito ambiental**. Editora RT, 2010.

MARJAN, Peeters. *Urgenda Foundation and 886 Individuals v. The State of the Netherlands*: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States", *in* ***RECIEL***, Vol. 25, 2016/1, pp. 123 ss.

MENDES, Gilmar Ferreira. Controle de constitucionalidade na Alemanha. **Revista de Direito Administrativo**, v. 193, p. 13-32, 1993.

MUINZER, Thomas. **Climate Case Ireland: The Good News and the Bad**. Disponível em: <https://www.abdn.ac.uk/law/blog/climate-case-ireland-the-good-news-and-the-bad/>. Acesso em 17 de out. 2021.

ONU. **Palau seeks UN World Court opinion on damage caused by greenhouse gases.** Disponível em: <https://news.un.org/en/story/2011/09/388202>. Acesso em 17 de out. 2021.

PETERSMANN, Ernst-Ulrich. The UN sustainable development agenda and rule of law: how to limit global governance failures and geopolitical rivalries. **European University Institute**, EUI LAW, 2021.

ROY, Suryapratim; WOERDMAN, Edwin. Situating Urgenda v the Netherlands within comparative climate change litigation. **Journal of Energy & Natural Resources Law**, v. 34, n. 2, p. 165-189, 2016.

SETZER, Joana; CUNHA, Kamyla; FABRRI, A. B. Panorama da Litigância Climática no Brasil e no Mundo. In: SETZER, J. et al. **Litigância Climática: novas fronteiras para o Direito Ambiental no Brasil.** São Paulo: Thomson Reuters Brasil, 2019.

SPIER, Jaap. "The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's *Urgenda* Judgment", *in* ***Netherlands International Law Review****,* vol. 67, 2020, pp. 319 ss.

TIGNINI, Mara; BRÉTHAUT, Christian. The role of international case law in implementing the obligation not to cause significant harm. **International Environmental Agreements: Politics, Law and Economics**, v. 20, p. 631-648, 2020

VAN ZEBEN, Josephine AW. **The Role of the EU Charter on Fundamental Rights in Climate Litigation**. SSRN 3930716, 2021.

VIEIRA, Julien, L'emergence de l'activisme climatique et l'accès au juge. **Revue Française de Droit Administratif,** 2019

VOIGT, Christina. The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics. **Journal of Environmental Law**, 2021.

WEDY, Gabriel. **Litígios Climáticos de acordo com o Direito Brasileiro, Norte-Americano e Alemão**. Salvador: Editora JusPodivm, 2019.

BOTSFORD, Polly. **A rising tide of climate litigation**. Disponível aqui: https://www.ibanet.org/The-rising-tide-of-climate-litigation. Acesso em out. 2021.

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