

**Input by Prof. Gerd Winter, University of Bremen**

**answering to questions of the**

**Special Rapporteur on the promotion and protection of human rights
in the context of climate change**

**on**

**“Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice”**

1. Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?

*The German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) in its order of 23 March 2021 found the German Climate Protection Act to violate fundamental rights. In reaction the law was amended by strengthening the emissions reduction target from 55 to 65 %/2030 and reducing the budgets assigned to six emissions sectors. This being a reaction I believe an incorporation would doctrinally not be possible because fundamental rights are higher rank law than ordinary legislation. The yardstick for the assessment of a law cannot be part of the same law.*

1. How to you think climate change legislation should frame a connection to human rights obligations?

*Climate change legislation should simply comply with fundamental rights. If not it is void or to be annulled by court order.*

1. How do you think climate change legislation should engage the concept of loss and damage?

*Liability of a state for damage caused to another state is rather a matter for international treaty and customary law. National law can address four different liability constellations: Liability of a state for damage to persons caused domestically or transnationally, and liability of private persons caused domestically or transnationally. In civil law systems like the German liability of a state is framed as public law and liability of private persons as private law. Both realms are guided by judge made law (state liability – Staatshaftung) or general legislation (such as tort liability – Haftungsrecht). I do not think that new legislation addressing climate effects would be helpful. However, the standing case law on public and private liability needs to be further developed in order to cope with problems posed by climate change, including the complex causality, pro rata concepts, the question of legality of emissions, and the standard of negligence. It appears that this is rather a task of the courts than of the legislator.*

1. Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?

*No, the law must be general.*

**Supporting Climate Change Litigation:**

1. How are human rights considerations being incorporated into climate change litigation?

*An incorporation of human rights considerations into litigation takes place mainly in three cases, namely when applicants allege that climate legislation violates human rights for being unambitious, that public authorities disrespected human right when applying climate legislation, or that private law (e.g. negligence) was to be interpreted in the light of human rights (like it was done in the Dutch Shell case).*

1. Are there issues with making the link between human rights and climate change litigation?

*My focus will be litigation challenging the compatibility of climate legislation with human rights. An evolutive approach is needed to make human rights doctrine applicable in climate change litigation. I will concentrate of two aspects of how to construe the interference of a state with a right, namely the general structure of the right (1) and causality as its major component (2).*

1. *General structure of human rights*

*Interference of a State with fundamental rights can occur in four different ways, captured as follows:*

* *‘interference by state based emissions’ (a)*
* *‘interference by omission’ (b)*
* *‘anticipatory prevention of future interference’ (c)*
* *‘interference by allocation of emission rights’ (d)*

*(a) 'Interference by state based emissions’ only covers emissions from public services such as, for instance, a state run airport or power generation installation.*

*(b) The concept ‘interference by omission’ builds on the fact that the bulk of greenhouse gases (GHG) is emitted from private sources. From this perspective fundamental rights are perceived as positive obligations to protect victims from harmful effects of private emissions.*

*(c) The ‘anticipatory prevention of future interference’ is an unfamiliar concept that was developed by the German Federal Constitutional Court (BVerfG) in its order of 24 March 2021 (BVerfGE 157, 30 para 183). This doctrine relies on fundamental rights as negative obligations. It argues that if emissions are not reduced sufficiently at present, life conditions will emerge in future that will force the state to drastically restrict energy use and thus – justifiably – encroach on fundamental rights. These expected future restrictions have an ‘advance’ legal effect of urging the state to reduce emissions now in order to prevent restrictions in future.*

*This switch from positive to negative obligations is of importance in the German fundamental rights doctrine, since in the jurisprudence of the BVerfG fundamental rights as negative obligations invite rather dense scrutiny of state conduct while fundamental rights as positive obligations implicate a broader margin of discretion of the state. According to the German constitutional court, this is because in the first case one specific measure is under scrutiny, allowing the judge to clearly approve or quash it, while in the second case a multitude of options are possible among which the judge should not make a choice due to the principle of separation of powers.*

*(d) As a fourth approach is ‘interference through allocation of emission rights’. I contend that this construct is a better fit to climate related issues than the other two constructs. It draws on the fact that states have moved from protecting victims of ‘horizontal’ emissions to actively allowing (private) emissions, most visibly if they allocate emission rights to emitters. This new role of states implies that the states take responsibility for these emissions. Allowing emissions generally under a legal regime and in particular allocating emission rights thus constitutes an interference with the victims’ fundamental rights. For instance, in the EU-Emissions Trading System (ETS) the Member States allocate emission allowances to private actors through auctions. Such allowances can be used or, if not used, sold on the market. In a different legal regime, the Irish and the German Climate Protection Acts determine allowable emissions for each major emitting sector. From a more theoretical viewpoint: as the possibility of emissions has become extremely limited, the related budgets must be managed and allocated by states which makes the states responsible for the effects on victims. The state is obliged not only to command emitters to reduce emissions but even more importantly to manage allowances or emissions themselves efficiently.*

*(2) Construction of causality*

*Considering that environmental cases brought to courts have largely been concerned with linear causality in neighbourhood constellations there will be a need to develop an approach that addresses the systemic nature of causation in climate cases. The causal chain encompasses the whole cycle from the allocation of emission rights and actual GHG emissions, to (global and local) temperature increase, to changes in the thermohaline system resulting in weather disturbances and finally to damage to the health and environmental conditions of the plaintiffs. I submit that the common criteria, such as ‘direct’, immediate’ etc. used by many courts must be adjusted. Causality as a legal concept must reflect the factual complexity of climate change. Clarity can be achieved if seven dimensions of causality are addressed. They are:*

*(a) Certainty: the causal nexus must be ‘proven’ in factual terms, ruling out abstract statements or hypotheses. Yet, probabilistic research results (dose-response analyses) have and are to be accepted.*

*(b) Individualisation: Applicants must be personally affected. In most legal systems an actio popularis which would allow the representation of other individual or collective interests is not accepted However, the number of applicants should not be a precondition neither of locus standi nor of the substance of fundamental rights.*

*(c) Intensity: According to many legal systems the interference with a right must be severe, ruling out superficial harm. This criterion is certainly also applicable in relation to climate change causality but has in many cases already been proven.*

*(d) Time: The interference with a right has been required to be ‚present‘, or ‚imminent‘, or ‘immediate’. In this respect, an application to interferences that are caused today but have full effect only in the future is legally needed. As shown by IPCC reports this requirement is met, taking also in account that the causation process is irreversible due to the longevity of CO2 in the atmosphere. This was very clearly advocated by the BVerfG (BVerfGE 157, 30 para 37).*

*(e) Specific rights and a general right to the environment ‘as such’: an increasing number of legal orders have adopted a general right to a healthy environment. Such right has also been endorsed by the UN General Assembly. Nevertheless, I have doubts that the courts will construe such right as a right to a defined quality of the environment. As already expressed by the Norvegian Supreme Court in the Barents Sea case they will grant the legislature and government an enormous margin of discretion of determination. I expect more protective content from the human rights protecting more specific values like human health, occupation and property insofar as these depend on a healthy environment. This has often been recognised in environmental law cases such as if clean air was stipulated as condition of a plaintiff’s health. The step that needs to be taken is to bring a life enabling climate into the reach of specific human rights.*

*(f) Domestic and transnational extension:*

*A distinction should be made between attribution of*

* *emissions from the territory of a state impacting on the same*
* *emissions from the territory of a state impacting abroad*
* *emissions from external sources originating in a state (so called scope 3 emissions)*

*Concerning the first situation, attribution to a state of emission effects follows from the general objectives and powers of the state to ensure the well-being of its inhabitants, including to reduce emissions. Such basic attribution then transforms into positive obligations in relation to private emitters, and of negative obligations if the state takes responsibility for private emissions such as by allocating emission rights (see above).*

*Concerning the second situation attribution follows from an interpretation of fundamental rights as protecting all persons that suffer from action or inaction of a state. The BVerfG has accepted this external reach although somewhat limiting the level of protection considering the territoriality principle.*

*Concerning the third situation it is submitted that attribution to the state of origin can be based on the fact that a state allows the export of products (such as cars or gasoline) or authorises investment of national funds abroad (such as through domestic banks or national multinational concerns). It should be noted, though, that the Paris Agreement only address the first and second situation.*

*(g) “Drop in the ocean” or shared contributions: It has often been argued by GHG emitting states that a small contribution to global emissions does not qualify as the cause of the alleged effects. In contrast, many courts including the Dutch Hoge Raad, the Brussels Court of First Instance and the German BVerfG have rejected the argument, but with only weak attempts of doctrinal construction. A conceptual approach is needed for interferences in cases of cumulative effect, given that causality is not only a matter of facts but also a normative concept. The situation is familiar in environmental law. For instance, operators of installations emitting sulphur dioxide have argued that their individual contribution to air pollution is negligible, a so-called de minimis allegation. The German Federal Administrative Court (BVerwG) rejected this plea holding that if there is an overall ‘concept’ of reducing emissions any contribution is of relevance (BVerwG, Order of 17th. February 1984, 7 C 8/82 = BVerwGE 69, 37). It is submitted that this ‘concept requirement’ (Konzeptgebot) is also applicable in climate law. International law requires all states to jointly reduce emissions. This ‘concept’ renders emission reductions of all states a relevant component, including states with relatively small overall shares. Even these small emitters are obliged to reduce emissions. This obligation then shapes the content of the fundamental rights of the state’s citizens. They can stipulate that their state fulfils its obligation, even though this is only a small contribution to the necessary global effort.*

*The de minimis argument also raises a question of legal logic. Legal rules must be shaped to be generally applicable. If any and all small polluters are to be exempted from the generalised concept of responsibility, the legal rule itself is put into question – which would in turn challenge the fundamental principles of law.*

1. What do you think are the major barriers to initiating climate change litigation?

*Rules on standing of applicants.*

1. Are the barriers different in different parts of the world? What are they?

*According to German law applicants’ standing before administrative courts requires that the contested administrative action has violated a subjective right of the applicant. Such rights are derived from norms that aim at the protection not only of the general public but also of individuals (so-called protective norm or Schutznorm). This is a narrow concept as compared with more open concepts of other countries that simply require that a personal interest may be negatively affected. The two approaches have over time somewhat converged because under the influence of the ECJ German courts have had to construe Schutznormen more broadly. Concerning constitutional complaints the BVerfG has sometimes opened its doors even mor widely. Much more narrow is however standing of individuals before the EU General Court. According to the so-called Plaumann formula applicants must be distinctively concerned. This leads to the paradoxical result that the more catastrophical and thus wide spread a damage is the less legal protection is provided.*

1. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

*In general yes. There is however a lack of understanding concerning the so-called budget approach which allows to determine the share of a state in the emissions that are still possible if certain warming limits shall not be exceeded.*

1. How could this be improved?

By in-depth study of the budget approach. It proceeds in 2 steps:

*First, the global emissions budget is calculated for an assumed ceiling of the average temperature increase. It can be calculated for a present year or a past year, in latter case with deduction of the de facto emissions since that date.*

*Second, the budget is allocated to states according to criteria either of equity or of feasibility. Equity means, for instance, that the criterion ‘per capita’ of states’ populations is applied, either related to a present or a past date. The result is called fair share. Feasibility means that states are required to reduce emissions as is socially, technically and economically possible. The result can be called feasible share. For developed states this usually means that the fair share results in much smaller budgets than the feasibility share. Some commentators argue that the gap shall be made good by financial transfers form developed to developing states.*

*In terms of human rights the budget approach can be incorporated as follows:*

* *Fair share can help to define the threshold above which an interference is considered to be given.*
* *Feasible share can help to find out whether the interference can be justified because of necessary and overriding public interests.*
1. Are there particular issues with getting access to the courts?

See above no 8.

**Advancement of the principle of intergenerational justice**

1. What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?

*The BVerfG as accepted that human rights also protect future generations, but only those persons who are already born at present, not those who will be born. The reason is that individual rights presuppose that the right holder already exists. By contrast, there is an ‘objective’ obligation of the state to protect also generations born in future, based on Art. 20a of the Constitution which obliges the state to preserve the natural conditions of life at present and for future generations.*

1. How would you best define intergenerational justice in the context of climate change and human rights?

*In a narrow sense of the budget approach intergenerational justice means that portions of the allowable GHG emissions budget shall be saved for future generations. The urge to save today at the same time incentivises present generations to find ways of stepping out of fossil energy. In a wider sense intergenerational justice means that not only the climate but also biodiversity, water, the soil, etc, in sum the entire biosphere shall not be destroyed for short term goals of present generations but be preserved for the future.*

1. Has the concept of intergenerational justice been incorporated into climate change litigation?

*Yes, by setting targets for the reduction of GHG emissions and a bundle of measures, but insufficiently so.*

1. What options are available for enshrining the principle of intergenerational justice in international law?

*There are treaties protecting the air, water, the soil, biodiversity, the climate, etc. but what would be needed is a comprehensive international covenant that thinks in terms of the overall biosphere. The biosphere is on the brink of expelling human beings. This should be the starting observation for a humble concept of the role of human beings in these systemic interdependencies.*

1. How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?

*The least states can do is to establish a constitutional ‘objective’ obligation of both the state and the citizens to protect future generations. I have however doubts if this should also be framed as individual right because the right holder is not yet existing.*

1. Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?

*Examples are well known court cases such as Juliana Kelsey, Urgenda, Carvalho, Duarte Agostinho in which young persons acted as applicants.*

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