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The Rise of Rights-Based Climate Litigation and Germany's Susceptibility to Suit

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THE RISE OF RIGHTS-BASED CLIMATE LITIGATION AND GERMANY'S SUSCEPTIBILITY TO SUIT

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INTRODUCTION

Recent trends in climate activism point to more litigation. Plaintiffs are bringing claims against corporations,[1] regulatory agencies,[2] and governments as a whole[3] to force an energy transition that they see as too slow and insufficient. In particular, recent rulings in several jurisdictions around the world have breathed life into rights-based constitutional claims against national governments for failing to protect their citizens through climate change mitigation and adaptation. Even state actors with relatively "good" climate policies, such as Switzerland, have not escaped suit.[4] As courts give credence

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1.*See, e.g.*, Exxon Mobil Corp. v. Schneiderman, No. 17-CV-2301 (VEC), 2018 WL 1605572 (S.D.N.Y. Mar. 29, 2018) (transferred from N.D. Tex. March 29, 2017); Santa Cruz v. Chevron, Case No. 17CV03243 (Santa Cruz County Superior Court, filed December 20, 2017); Saúl Luciano Lliuya v. RWE AG, Higher Regional Court of Hamm (Nov. 30, 2017), *translated in* https://germanwatch.org/en/download/20812.pdf; Attracta Mooney & Ed Crooks, *New York Sues Big Oil Companies Over Climate Change*, THE FINANCIAL TIMES (Jan. 11, 2018), https://www.ft.com/content/4de8e4fc-f62b-11e7-88f7-5465a6ce1a00 [http://perma.cc/BMX2-3ZHP].

2. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007).

3. *See id.* at 506-7.

4. *See* Jan Burck, Franziska Marten & Christoph Bals, *Climate Change Performance Index: Results 2017*, GERMAN WATCH AND CLIMATE ACTION NETWORK, 12 (2017), https://germanwatch.org/en/download/16484.pdf (indicating Switzerland is the 14th best performer on climate change, but concluding that "No country is doing enough to prevent dangerous climate change."); Verein KlimaSeniorinnen Schweiz v. Schweizerische Bundeskanzlei, Complaint (Swiss

to these novel legal theories – which range from alleged violations of fiduciary duties to violations of the fundamental rights to life and property –the frequency of rights-based climate lawsuits will likely increase.

Among industrialized nations, Germany is an excellent example where no one has yet brought a climate-related constitutional claim against the government, but where a suit seems inevitable. Germany is missing its 2020 emissions reduction target so badly that the new governing coalition that emerged from the 2017 federal election debated abandoning the target altogether.[5] Indeed, despite positioning itself as a leader on climate change, Germany is a favorable target for a rights-based suit due to (1) it backsliding on emissions reduction promises, (2) its liberal access to justice policies for constitutional claims,[6] (3) its affirmative constitutional duty to protect fundamental rights, and (4) an enumerated constitutional state goal to "protect the natural foundations of life" with a "responsibility toward future generations."[7]

Federal Administrative Court, Nov. 25, 2016), *translated in* http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf.

5. For a critique of the latest climate-change related news related to the Grand Coalition agreement, *see* Niklas Höhne*, Germany's New Government Deal Fails the Paris Climate Accord Test*, CLIMATE HOME NEWS (Mar. 12, 2018), http://www.climatechangenews.com/2018/03/12/germanys-new-government-deal-fails-paris-climate-accord-test/. *See also*, Guy Chazan & Tobias Buck, *Carbon Targets on the Table in German Coalition Talks*, THE FINANCIAL TIMES (Jan. 8, 2018), https://www.ft.com/content/d2572cec-f470-11e7-88f7-5465a6ce1a00. Germany had set a goal of reducing its GHG by 40 percent below the 1990 level by 2020. Germany's target is a component of the European Union (EU) Nationally Determined Contribution (NDC) under the Paris Agreement, which pledged to reduce the Union's emissions by 40 percent below 1990 levels by 2030. *See Intended Nationally Determined Contribution of the EU and its Member States*, LATVIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION (Mar. 6, 2015), http://www4.unfccc.int/ndcregistry/PublishedDocuments/European%20 Union%20 First/LV-03-06-EU%20INDC.pdf.

6. *See* Grundgesetz [GG][Basic Law] art. 93(1)(4a) *translated in* https://www.btg-bestellservice.de/pdf/80201000.pdf;
Bundesverfassungsgerichtgeset [BverfGG] [Federal Constitutional Court Act], at §90(1) (Ger.).

7. Grundgesetz [GG] [Basic Law] art. 20(a) *translated in* https://www.btg-bestellservice.de/pdf/80201000.pdf.

This article proceeds in three parts. First, this article addresses the rise of rights-based climate litigation as a tool to force governments to more aggressively respond to climate change. Next, it traces some of the most recent developments in rights-based climate litigation in national courts within the European Union, with particular focus on *Urgenda v. The Netherlands* and *Friends of the Irish Environment v. Ireland, et al.* Finally, this Article explores the availability and evaluates the susceptibility of the Federal Republic of Germany to similar rights-based climate-related claims under the German *Grundgesetz* (G.G.).[8] Germany is widely viewed as a leader on climate change mitigation. However, Germany is not following through with its commitments and it remains a significant GHG emitter, as exemplified by its continued reliance on coal and other fossil fuels. The strong activist psyche of its citizens suggests that a rights-based climate suit is highly likely in the Federal Constitutional Court. To be sure, such a suit faces significant hurdles and success is far from certain. However, there are several constitutional claims to be made.

I. THE RISE OF RIGHTS-BASED CLIMATE LITIGATION

There is scientific and diplomatic consensus about the threats that greenhouse gas (GHG) emissions pose and the levels of reduction needed to avert the worst effects of anthropogenic climate change.[9] In an unprecedented expression of global unity, every nation on the planet[10] (at least until the United States withdraws from the Paris Accord in 2020)[11] has agreed to the principles stated in the Paris Accord, including, "[h]olding the increase in the global average

8. "Basic Law," "*Grundgesetz*," and "Constitution" are used interchangeably in this article.

9. *See, e.g.*, Rajendra K. Pachauri et. al., *Climate Change 2014 Synthesis Report (2014)*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2 (2014), http://www.ipcc.ch/report/ar5/syr/.

10. Syria, the last holdout, joined the Paris Accord in November 2017. Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html [http://perma.cc/5F7K-V8EJ].

11. Although the United States has already expressed its intention to withdraw from Paris, under the terms of the agreement, it is unable to do so until 2020. *See* Paris Agreement, U.N. Framework Convention on Climate Change, art. 28, Dec. 12, 2016, U.N. DOC. FCCC/CP/2015/10/Add.1 Apr. 22, 2016.

temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. . . ."[12] Yet, GHG emissions continue to rise,[13] and the gaps between state action and the Paris Accord's goal highlight the inadequacy of traditional political processes to address this challenge.

The combination of dire forecasts for the planet's climate and the diminishing pathways for mitigation motivate aggrieved parties to bring rights-based claims. In 2017 during the 23rd conference of parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) in Bonn, Germany (COP 23),[14] the UN published troubling conclusions about current emission trends: countries are falling short of their national emission reduction targets, and even if all the parties met their reduction pledges, it would still not be enough to meet the Paris Accord's objective.[15]

Critics of the plodding pace of tangible governmental responses are concluding that political branches of government are simply not up to the task to implement policies that are sufficiently aggressive to avert the worst effects of climate change.[16] This faithlessness in political leaders breeds various forms of protest and direct actions. For example, on the eve of COP 23, several thousand demonstrators occupied one of the largest open pit coal mine in Europe, just 50 km away from the COP 23 venue in Germany.[17] At the end of the

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12. Paris Agreement, U.N. Framework Convention on Climate Change, art. 2(1)(a), Dec. 12, 2016, U.N. DOC. FCCC/CP/2015/10/Add.1 Apr. 22, 2016 [hereinafter, Paris Agreement].

13. Brad Plumer & Nadja Popovich, *CO2 Emissions Were Flat for Three Years. Now They're Rising Again*, N.Y. TIMES (Nov. 13, 2017), https://www.nytimes.com/interactive/2017/11/13/climate/co2-emissions-rising-again.html (citing three scientific journals) [http://perma.cc/2XB3-P46X].

14. Although it took place in Bonn, Germany, COP23 was hosted by Fiji.

15. *The Emissions Gap Report 2017, A UN Environment Synthesis Report*, U.N. ENV'T PROGRAMME (Nov. 2017), https://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf.

16. *See e.g.* Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 COLUM. J. ENVTL. L. 233, 225 (2016) ("There is no realistic prospect that sustainable global controls on greenhouse gas emissions will be adopted in the next decade. Instead, the global community is on track to surpass the one teraton available in the next fifteen to twenty years.").

17. Jonathan Watts, *Germany's Dirty Coalmines Become the Focus for a New Wave of Direct Action*, THE GUARDIAN (Nov. 8, 2017) https://www.theguardian.com/environment/2017/nov/08/germanys-dirty-

conference activists also occupied and disrupted a nearby coal-fired power plant.[18] Participants in these actions hoped to influence policy-makers and focus the world's attention on the fact that Germany, despite its reputation as a leader on addressing climate change, is still reliant on lignite coal, one of the dirtiest fuels.[19]

Speaking at COP 23, California Governor Jerry Brown[20] acknowledged that the unique urgency of climate change will require unconventional responses. Although Governor Brown did not address civil disobedience as a possible response,[21] he did compare the threat of climate challenge to the Second World War, suggesting Congress was ill equipped to do what was necessary for the United States to take sufficient action:

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coalmines-become-the-focus-for-a-new-wave-of-direct-action [http://perma.cc/AMS2-KEEC]. Other examples of direct action include the encampments resisting the Dakota Access Pipeline and shutting down active oil pipelines in the United States, among others. *See* Nia Williams, *Activists Disrupt Key Canada-U.S. Oil Pipelines*, REUTERS (Oct. 11, 2016) https://www.reuters.com/article/us-usa-canada-pipelines/activists-disrupt-key-canada-u-s-oil-pipelines-idUSKCN12B26O [http://perma.cc/4S6S-6YEL]; Hilary Beaumont, *Pipeline Protests Will Likely Heat up in 2018*, VICE NEWS (Dec. 27, 2017) https://news.vice.com/en_ca/article/kznzzx/pipelines-protests-will-likely-heat-up-in-2018 [http://perma.cc/HNQ7-K4DN].

18. The Associated Press, *The Latest: Activists Disrupt German Coal Power Plant*, BUS. INSIDER (Nov. 15, 2017), http://www.businessinsider.de/ap-the-latest-activists-disrupt-german-coal-power-plant-2017-11?r=UK&IR=T [http://perma.cc/L5WA-TEC8].

19. Ende Gelände 2017, *Ende Gelände in the Hambach Opencast Mine* (Nov. 24, 2017), https://www.ende-gelaende.org/en/news/ende-gelande-in-the-hambach-opencast-mine/ [http://perma.cc/QF3P-FN9C]; *see also* B.D. Hong and E.R. Slatick, *Carbon Dioxide Emission Factors for Coal*, ENERGY INFO. ADMIN., DOE/EIA-0121(49/Q1) 1-8 (Aug. 1994), https://www.eia.gov/coal/production/quarterly/co2_article/co2.html.

20. Governor Brown headlined the "We Are Still In" faction in Bonn from the United States, which consisted mostly of Democratic politicians seeking to stay engaged on the international level as a positive force despite the Trump Administration's hostility to Paris. *See* WE ARE STILL IN, *COP23: We Showed the World that America is Still In*, https://www.wearestillin.com/cop23.

21. In fact, Governor Brown has shown some hostility toward disruptive protesters. *See* Amy Goodman, *CA Gov. Jerry Brown Tells Indigenous Activists Protesting Fracking He'll Put Them 'In the Ground,'* DEMOCRACY NOW, (Nov. 13, 2017) https://www.democracynow.org/2017/11/13/ca_gov_jerry_brown_tells_indigenous [http://perma.cc/K3ZH-Z8EV].

> Maybe it was December [']41, or maybe it was '42; President Roosevelt said no more private passenger cars. Over. Now we're going to make tanks, and we're going to make liberty ships and we're going to make fighter planes. That was it. Well someday someone is going to have to say no more fossil fuel cars. Period. We gotta [sic] have clean cars. But the way we work, we're not at war, we're just in a catastrophic existential threat that will destroy everything, but we don't get that yet. . . .[22]

Critics say policymakers will not "get" the magnitude of the problem we face until the globe starts experiencing serious, tangible effects from the changing climate.[23] However, by that point substantial effects could be too late to avoid.[24]

Professor Karl Coplan clarified this sentiment in discussing the "cultural cognition challenges for a law-based response to climate change."[25] Coplan explained that natural cognitive biases pose substantial barriers to political consensus and strong corresponding barriers to a legislative response to climate change due to its delayed effects.[26] Legislatures adequately respond to crises that are already under way,[27] but that will not help with the climate crisis. As Coplan notes,

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22. Transcribed from audio recorded by the author.

23. *See e.g.* Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 COLUM. J. ENVTL. L. 233, 245 (2016); U.N. Environment Programme, *The Emissions Gap Report 2017, A UN Environment Synthesis Report* (Nov. 2017), https://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf.

24. Coplan, *supra* note 23.

25. Coplan, *supra* note 23, at 244-46.

26. Coplan, *supra* note 23 (stating "These cognitive biases include: avoidance of cognitive dissonance, availability heuristic, loss aversion, status quo preferences, optimism, confirmation bias, inability to process low-probability events, and framing.") (citing Karl S. Coplan, *Climate Change, Political Truth, and the Marketplace of Ideas*, 2012 UTAH L. REV. 545, 553 (2012)); *see also* GEORGE MARSHALL, DON'T EVEN THINK ABOUT IT: WHY OUR BRAINS ARE WIRED TO IGNORE CLIMATE CHANGE 20 (Bloomsbury 2014).

27. Coplan, *supra* note 23, at 244 (citing post-Depression regulations, civil rights legislation, and environmental regulation after disasters).

> [t]his reactive nature of legislative initiative, unfortunately, suggests that any major legislative response will be deferred until the effects of climate change reach visible, unambiguous, crisis proportions. . . . It is hard to say when such a series of weather catastrophes sufficiently certain to be climate change-related will occur, but by definition they will not occur until catastrophic climate change is already upon us. In such case, it will already be too late. . . .[28]

Copland concluded that at some point, when the effects of climate change are too pronounced to ignore, a total ban on fossil fuels will be the only available response.[29]

How to overcome these cognitive biases and induce the political branches of government to timely mitigate climate change is a key question. Activists are increasingly turning to rights-based litigation and engaging the judicial branch for an answer. Concerned citizens unsatisfied with overtures to their elected representatives or accountability at the ballot box – but who are unprepared to engage in civil disobedience – see the courts as an opportunity to enhance their involvement with this struggle.

An Irish court handed down one of the most recent constitutional rulings of this type, significantly bolstering the credibility of these rights-based claims. The court found "a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large."[30] This ruling followed the extraordinary

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28. Coplan, *supra* note 23, at 244-245 (citing ZYGMUNT J.B. PLATER, ENVIRONMENTAL LAW AND POLICY 465, 524, 679 (Aspen Publishers 4th ed. 2010); Robin Kundis Craig, *"Stationarity is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9 (2010)).

29. *Id*.

30. Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 264 (Nov. 21 2017); *see also* Karen Savage, *Climate Lawsuit Aims to Enforce Ireland's Emissions Targets*, CLIMATE LIABILITY NEWS (Nov. 7, 2017), https://www.climateliabilitynews.org/2017/11/07/climate-lawsuit-ireland-emissions-paris-agreement/ [http://perma.cc/4USK-NPLK]. Earlier the same month New Zealand also weighed in, concluding that developments in a variety of jurisdictions indicate "it may be appropriate for domestic courts to play a role in Government decision making about climate change policy." Case No. CIV 2015-485-919 [2017] NZHC 733, *In re decisions made under the Climate Change*

decisions of *Urgenda Foundation v. The Netherlands,*[31] *Juliana v. United States*,[32] and *Leghari v. Federation of Pakistan*[33] in the Netherlands, the U.S. and Pakistan, respectively. Notably, the *Urgenda* court concluded that "the State has a duty of care to take [climate change] mitigation measures,"[34] and ordered the Dutch government to "limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited . . ." to specified volumes.[35] The rise of rights-based climate litigation is an undeniable trend that is likely to spread.[36]

II. CLIMATE LITIGATION IN EUROPE

Climate change related litigation has reached such a frequency that the United Nations Environment Program (UNEP) released a report in 2017 reviewing its reach.[37] An online database of climate change litigation is updated *monthly* by Columbia Law School and the law firm Arnold & Porter.[38] Citing this database, the UNEP Report states that "[a]s of March 2017 climate change cases had been filed in 24 countries (25 if one counts the European Union), with 654 cases filed in the U.S. and over 230 cases filed in all other countries combined."[39] As of May 1, 2018, this figure had increased to 860 cases in the U.S. and 264 cases in other countries.[40] The UNEP report considers

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Response Act 2002 and public decisions made in relation to the United Nations Framework Convention on Climate Change, Judgment ¶ 133 (Nov. 2, 2017).

31. Zaaknummer Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.

32. Juliana v. United States, 217 F. Supp. 3d 1,224 (D. Or. 2016).

33. Leghari v. Federation of Pakistan, Case No. WP No 25501/2015 (Lahore High Court, Sept. 14, 2015), https://elaw.org/system/files/pk.leghari.091415_0.pdf.

34. *Urgenda* at ¶ 4.83.

35. *Id*. at ¶ 5.1.

36. *See* U.N. Environment Programme, *The Status of Climate Change Litigation: A Global Review* (May 2017), http://wedocs.unep.org/handle/20.500.11822/20767.

37. *Id*.

38. Sabin Center for Climate Change Law, http://climatecasechart.com/about/.

39. U.N. Environment Programme, *supra* note 36, at 10.

40. SABIN CENTER FOR CLIMATE CHANGE LAW, http://climatecasechart.com/about/; s*ee also* U.N. Environment Programme, *supra* note 36, at 10 (totals go beyond rights-based constitutional claims, and include all cases "brought before administrative, judicial and other investigatory bodies that raise issues of law or fact

litigation an "important tool to push policymakers and market participants to develop and implement effective means of climate change mitigation and adaptation. . . ."[41]

Regarding potential constitutional claims, the UNEP report indicates that as of 2012 "there [were] at least 92 countries that [had] granted constitutional status to [the right to a clean or healthy environment], and a total of 177 countries recognize[d] the right" in general.[42] The report counts Germany among these countries.[43] In 2012, "[t]he only remaining holdouts [were] the United States, Canada, Japan, Australia, New Zealand, China, Oman, Afghanistan, Kuwait, Brunei Darussalam, Lebanon, Laos, Myanmar, North Korea, Malaysia, and Cambodia."[44] Since 2012, a Federal District Court in the United States declared there is "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[45] The bottom line is that "[t]oday [a human right to a healthy environment] is widely recognized in international law and endorsed by an overwhelming proportion of countries."[46]

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regarding the science of climate change and climate change mitigation and adaptation efforts."); Paris Agreement, *supra* note 12 (adopting the definition of "climate change litigation" first developed by David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 27 (2012)).

41. U.N. Environment Programme, *supra* note 36, at 8.

42. *Id*. at 32-33 (citing David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T SCI. & POL'Y FOR SUSTAINABLE DEV, July-Aug. 2012, http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html).

43. Boyd, *supra* note 42, at 1 (cited in U.N. Environment Programme, The Status of Climate Change Litigation: A Global Review (May 2017) at 33, n.107).

44. *Id*. (indicating that among these holdouts, "some subnational governments recognize the right to a healthy environment, including six American states, five Canadian provinces or territories, and a growing number of cities.").

45. *Juliana*, 217 F. Supp. 3d at 1,251 (also noting "In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims."). The Ninth Circuit Court of Appeals is currently considering a motion by the federal government to issue a writ of mandamus overturning this ruling.

46. Boyd, *supra* note 42, at 1.

A. The Netherlands

Urgenda Foundation v. The State of the Netherlands is perhaps the most important development for the role of the judiciary in establishing state duties to protect against hazardous climate change for two primary reasons.[47] First, as the UNEP report noted, the ruling is

> pathbreaking in separation of powers jurisprudence because it grounded its instruction to the government to tighten emissions limits on a rights-based analysis rather than through reference to statutory requirements. Subsequent petitions and judicial decisions in Austria, Norway, Switzerland and Sweden . . . have similarly been grounded at least in part on rights-based theories.[48]

Second, *Urgenda* appears to be the first time a court awarded relief ordering a national government to take affirmative steps to reduce the joint volume of national GHG emissions within its borders.[49] Although this decision is under appeal, the Dutch government is moving ahead to implement the order,[50] and cited the case as recently as October 19, 2017 as the basis for its new 2020 emissions reduction target.[51]

The *Urgenda* case followed the Urgenda Foundation's unsuccessful request to the Dutch Prime Minister to "commit and undertake to

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47. Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf; *see also* U.N. Environment Programme, *supra* note 36, at 15.

48. U.N. Environment Programme, *supra* note 36.

49. *Urgenda* at ¶ 5.1 (Ordering "The State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf. . . .").

50. Gov't of the Netherlands, *Cabinet Begins Implementation of Urgenda Ruling but Will File Appeal,* GOV'T OF NETHERLANDS (Sept. 1, 2015), https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal [http://perma.cc/RCB4-J4UV].

51. Gov't of the Netherlands, *More Sustainable Energy than Expected in 2023,* GOV'T OF NETHERLANDS (Oct. 19, 2015), https://www.government.nl/latest/news/2017/10/19/more-sustainable-energy-than-expected-in-2023 [http://perma.cc/6D4A-46HC].

reduce CO[2] emissions in the Netherlands by 40% by 2020, as compared to the emissions in 1990."[52] Notably for the discussion below, this is the precise reduction commitment Germany made, is off target to achieve,[53] and had recently considered abandoning.[54] Urgenda Foundation subsequently brought suit, alleging "systemic responsibility" for the total greenhouse gas emissions in the country and breach of a duty of care "to ensure a reduction of the emission level of the Netherlands in order to prevent dangerous climate change."[55] The Urgenda Foundation relied on, *inter alia*, the European Convention on Human Rights (ECHR),[56] Article 21 of Dutch Constitution,[57] and other international legal principles and conventions.[58] The Urgenda Foundation's environmental mission gave it standing under the Dutch civil code.[59]

Armed with an abundance of scientific documentation on climate change, the court found actualized and foreseeable harms and ordered unambiguous relief.[60] In sum, the court concluded "the Dutch

52. *Urgenda* at ¶ 2.6.

53. *See* Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, *German Climate Policy*, COP23 Fiji, https://www.cop23.de/en/bmub/german-climate-policy/ (last visited Jan. 12, 2018); Michael Bauchmüller, *Deutschland hinkt seinem Klimaziel hinterher*, Süddeutsche Zeitung (Oct. 11, 2017), http://www.sueddeutsche.de/wirtschaft/klimawandel-deutschland-hinkt-seinem-klimaziel-hinterher-1.3702329 (Ger.) (citing a leaked internal ministry paper that predicts Germany's emissions will be 31.7 to 32.5 percent below 1990 levels).

54. *See* Niklas Höhne*, Germany's New Government Deal Fails the Paris Climate Accord Test,* CLIMATE HOME NEWS, (Mar. 12, 2018), http://www.climatechangenews.com/2018/03/12/germanys-new-government-deal-fails-paris-climate-accord-test/ [http://perma.cc/9UK3-JJ6R]; Guy Chazan and Tobias Buck, *Carbon Targets on the Table in German Coalition Talks*, THE FINANCIAL TIMES, (Jan. 8, 2018) https://www.ft.com/content/d2572cec-f470-11e7-88f7-5465a6ce1a00 [http://perma.cc/6R4W-65ZC].

55. *See Urgenda* at ¶ 3.2.

56. *Id*.

57. Dutch Const. ch. 1, art. 21., https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf (stating "[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment").

58. *Urgenda* at ¶ 3.2 (citing the U.N. Climate Change Convention and the TFEU).

59. *Id*. at ¶ 4.6.

60. *Id*. at ¶¶ 2.8-2.69; 4.64 (noting that the threat of climate change "with irreversible and serious consequences for man and the environment" is undisputed,

reduction target is . . . below the standard deemed necessary . . . meaning that in order to prevent dangerous climate change Annex I countries[61] (including the Netherlands) must reduce greenhouse gas emissions by 25-40% by 2020 to realise [sic] the 2°C target."[62] This article does not repeat the scientific evidence of anthropogenic climate change and its risks, which are conclusive by all credible accounts and enjoy international acceptance.[63] Any reasonable court that considers the certainty and dangers of climate change would conclude the same.

Turning to the basis for state liability, the court found that the Netherlands is violating a host of constitutional and international standards. However, the court also found that the Urgenda Foundation did not have a cause of action beyond the domestic civil law for which the court had jurisdiction.[64]

According to the court, "Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the livability of the country and the protection and improvement of the living environment,"[65] but "[t]he manner in which this task should be carried out is covered by the government's own discretionary powers."[66] The court also noted that although the Netherlands is bound by the ECHR, the UN Climate Change Convention, the Kyoto Protocol, and the "no harm" principle,[67] the binding force of these "only involve[]

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and that the parties agree that the State should take precautionary measures for its citizens).

61. *See* U.N. Framework Convention on Climate Change, *List of Annex I Parties to the Convention*, http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php. "Annex I countries" refers to so-called "developed" countries that bear the bulk of responsibility for historic GHG emissions, and for taking the lead on reductions under the UN Framework Convention on Climate Change and the Kyoto Protocol.

62. *Urgenda* at ¶ 4.31.

63. *See e.g.* Intergovernmental Panel on Climate Change, Climate Change 2014 Synthesis Report (2014), http://www.ipcc.ch/report/ar5/syr/; Friedman*, supra* note 10.

64. *See generally Urgenda* at ¶ 4.52.

65. *Id*. at ¶ 4.36.

66. *Id*.

67. "No harm" is a well-accepted duty under customary international law not to cause harm to other states. *See e.g.* Jeremy Suttenberg, *Who Pays? The Consequences of State versus Operator Liability within the Context of Transboundary Environmental Nuclear Damage*, 24 N.Y.U. ENVTL. L. J. 201, 228-243 (2016).

obligations towards other states[, not towards Urgenda]."[68] Indeed, while environmental principles can be derived from the decisions of the European Court of Human Rights,[69] the court stated that "Urgenda itself cannot directly rely on Articles 2 and 8 ECHR."[70] Nevertheless, the court found that these international instruments and principles still hold meaning, "namely in the question . . . whether the State has failed to meet its duty of care toward Urgenda."[71] In other words, all the provisions and international agreements that the court determined do not control still define the contours of the State's "unwritten standard of care" within the Dutch Civil Code.[72] This includes "unlawful hazardous negligence."[73] "This way, these obligations have a 'reflex effect' in national law."[74]

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68. *Urgenda* at ¶ 4.42 ("Urgenda therefore cannot directly rely on [the 'no harm'] principle, the convention and the protocol."). The court also concluded "Urgenda cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Article 2 and 8 ECHR" because it is a legal person, not a "natural person" with physical integrity or personal privacy. *Id*. at ¶ 4.45.

69. *Id*. at ¶ 4.48 (describing the Manual on Human Rights and the Environment, published at the recommendation of the Parliamentary Assembly and by order of the Committee of Ministers of the Council of Europe.).

70. *Id*. at ¶ 4.45.

71. *Id*. at ¶ 4.52.

72. Book 6, Section 162 of the Dutch Civil Code reads: "1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behavior. 3. A tortious act can be attributed to the tortfeasor if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)." Art. 6:162 BW, http://www.dutchcivillaw.com/civilcodebook 066.htm; *see also Urgenda* at ¶ 4.43 (citing national-law open standards and concepts, including social propriety, reasonableness and propriety).

73. *Urgenda* at ¶ 4.53-54 (the jurisprudence on the doctrine of hazardous negligence was developed "to detail the requirement of acting with due care towards society.").

74. *Id*. at ¶¶ 4.43 & 4.52; *see also* Roger Cox, *A Climate Change Litigation Precedent - Urgenda Foundation v. the State of the Netherlands*, CENTER FOR INT'L GOVERNANCE INNOVATION Paper No. 79, 10 (Nov. 4, 2015) ("Hence the court found that the stipulations included in the UNFCCC, the Kyoto Protocol and the no-harm principle of international law need to be taken into account when determining the state's duty of care in relation to climate change.").

Regarding the "right to life" guaranteed by Article 2 of the ECHR, the court in *Urgenda* held that it could impose an affirmative obligation on States to protect from dangerous climate change:

> [I]n some situations Article 2 may also impose on public authorities a duty to take steps to guarantee the right to life when it is threatened by persons or activities not directly connected with the State. . . . In the context of the environment, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.[75]

Unlike in Germany, the Dutch Constitution does not contain an enumerated right to life, *per se*.[76] Therefore, the *Urgenda* court relied in part on jurisprudence of the European Court for Human Rights to establish the state's civil duty to protect. Reliance on rulings from the European Court for Human Rights may not be necessary under the German constitutional structure, although a German litigant could certainly do so.[77]

For relief, the court ordered the Netherlands to "limit the joint volume of Dutch annual [GHG] emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990."[78] The court determined that this is the minimum reduction level that all Annex I countries

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75. *Urgenda* at ¶ 4.49 (The Hague Dist. Ct. Chamber for Comm. Affairs, June 24, 2015) (quoting Manual on Human Rights and the Environment, Council of Europe (2012)). The *Urgenda* court also reviewed the Manual's comments on Article 8 of the ECHR, which guarantees the right to respect for private and family life. *See id*. at ¶ 4.50 ("For an issue to arise under Article 8, the environmental factors must directly and seriously affect private and family life or the home. . . .").

76. Article 11 of the Dutch Constitution guarantees the "right to inviolability of his person. . . ." The German Constitution separately guarantees both the right to life and the inviolability of his person. *Compare* GRUNDGESETZ [GG] [Constitution] art. 2 (F.R.G.) *with* STATUUT NED. [Constitution] art. 11.

77. *Urgenda* at ¶ 4.74. *See e.g.* BverfG, supra note 6, at ¶¶ 82, 86 (The European Convention on Human Rights "must be relied on as an interpretation aid in the interpretation of the fundamental rights and rule-of-law principles of the Basic Law").

78. *Urgenda* at ¶ 5.1. Urgenda had requested an emissions reduction of "40%, or at least 25%, as of the end of 2020. . . ." *Id*. at ¶ 4.104.

combined would need to achieve to keep the atmospheric concentration of CO_2 below a critical level.[79] As discussed further below, Germany's reductions meet the standard *Urgenda* imposed on the Netherlands, showing *Urgenda* may not be directly analogous to a potential suit in Germany. Regardless, the scientific and legal sufficiency of Germany's climate efforts remains a likely question for the courts.

Urgenda was groundbreaking in at least two distinct ways: it incorporated human rights standards into a domestic, civil duty of care related to climate change and granted relief that requires a national government to take specific climate action. *Friends of the Irish Environment v. Ireland, et al.* is similarly groundbreaking for its forceful pronouncement of a fundamental, unenumerated right vis-a-vis climate change mitigation.

B. Ireland

Friends of the Irish Environment v. Ireland, et al. (*FIE Airport Case*) was initially brought as a challenge to an airport expansion. The suit failed to stop the opposed runway, but established a constitutional "right to an environment that is consistent with the human dignity and well-being of citizens at large" in Ireland.[80] Still pending in the Irish High Court is a separate case brought by FIE to challenge the adequacy of the Irish government's actions to avert dangerous climate change (hereafter "*FIE Climate Case*").[81] The litigants hope the *FIE Climate*

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79. *See id*. at ¶¶ 4.29 & 4.31 (relying on, *inter alia*, conclusions of the Intergovernmental Panel on Climate Change, *Climate Change 2007: Fourth Assessment Report* (2007), http://www.ipcc.ch/report/ar4/index.shtml).

80. Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 264 (Nov. 21, 2017).

81. Friends of the Irish Environment CLG v. Government of Ireland, Case No. 2017/793 JR. (Irish High Court, filed Oct. 19, 2017). *See also* Press Release, *Irish Government Taken to Court in Landmark Climate Case*, FRIENDS OF THE IRISH ENV'T, Oct. 23, 2017, http://www.friendsoftheirishenvironment.org/climate-case/17459-irish-government-taken-to-court-in-landmark-climate-case [http://perma.cc/EY3X-GFFM]; Press Release, *Landmark Climate Case against the Irish State Pushed Back to February*, FRIENDS OF THE IRISH ENV'T, Feb. 1, 2018, http://www.friendsoftheirishenvironment.org/climate-case/17492-landmark-climate-case-against-the-irish-state-pushed-back-to-february [http://perma.cc/96NK-8TR7].

Case will follow the trail blazed by *Urgenda* and should be bolstered by the constitutional right recognized in the *Airport Case*.[82]

The *FIE Airport Case* is remarkable for its surprising significance. By all indications, FIE's climate arguments were secondary to other arguments to stop the airport expansion. FIE's primary arguments included those related to EU Directives and an Irish Planning and Development Act, among others.[83] In addition, FIE also claimed that a new runway would increase GHG emissions and quicken climate change. Although FIE's climate claim was not ultimately determinative of the runway question, the court's declaration nevertheless provided a huge victory for environmental activists.

FIE persuaded the court that there is scientific, theological/philosophical, and jurisprudential consensus concerning environmental rights. First, the court accepted "a scientific consensus concerning the centrality of (maintaining) the environment to continue human existence."[84] The court then extended this to climate change, finding "no doubt" that it threatens the environment on which continuing human existence relies.[85] Second, the court acknowledged the theological/philosophical consensus on environmental matters, but did not rely on it for its legal analysis.

> What is perhaps most striking . . . [is] the commonality of views that appears to be shared by all of the major religions on matters environmental, as evidenced by the well-known Assisi Declarations of September 1986 in which distinguished leaders and personages from the Buddhist, Christian, Hindu, Islamic and Judaic faiths individually

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82. *See* Press Release, *Irish Government to Appear in Court in Landmark Climate Case,* FRIENDS OF THE IRISH ENV'T, Dec. 10, 2017, http://www.friendsoftheirishenvironment.org/press-releases/17473-irish-government-to-appear-in-court-in-landmark-climate-case [http://perma.cc/E4N8-RKGW] (*Urgenda* "proved that all governments have a legal duty to protect their citizens against climate change by doing their part to lower emissions"); *see also id*. (FIE is "greatly encouraged by the recent declaration by the High Court that citizens have a constitutional right to an environment that is consistent with human dignity and the well-being of citizens at large").

83. *See generally Friends of the Irish Environment CLG v. Fingal County Council*.

84. *Id*. at ¶ 242.

85. *See id*. at ¶ 244 (citing IPCC documentation and expert opinions).

> issued a series of declarations which point to humanity's common destiny as the stewards and trustees of our shared natural environment. Notable too is secular environmental philosophy, whether as fashioned by the Deep Ecology Movement or in its more recent post-naturalistic form. . . .[86]

Although the court made clear that it limited its analysis "solely to accepted legal reasoning,"[87] this dicta provides normative credibility to the court's subsequent legal ruling. No doubt, the vast majority of individuals would identify with one of the groups referenced. Finally, the court found legal support in the Irish constitution and the ECHR, rejecting the state's arguments. In general, the court showed minimal concern with recognizing a previously unrecognized right, which courts have a willingness to do so long as the analysis is sound.[88] The court noted "the certainties of yesterday can very quickly be overtaken by a fresh and very different comprehension of existence."[89] Developments over the past twenty years have led to a "consensus as to the importance of the preservation of the environment," making the time ripe for judicial recognition of the right.[90] The court found it "difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective well-being is concerned is being progressively diminished."[91]

The court similarly dismissed concerns about the environmental right being ill-defined.[92] Despite many open questions about the scope of this right,

> the court does not accept that all such issues require necessarily to be pre-identified (if they can all be identified) and also resolved before the contended-for existing constitutional right can be recognized as existing. Other constitutional rights, such as freedom of speech, and even

86. *Id*. at ¶ 242.
87. *Id*.
88. *See id*. at ¶ 243 (citing McGee v. Attorney General [1974] IR 284 (Ir.)).
89. Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 (Nov. 21, 2017).
90. *Id*. at ¶ 246 (quoting Applicant).
91. *Id*.
92. *See id*. at ¶ 254.

> recognized but unenumerated constitutional rights, such as the right to bodily integrity, present similar complications, with their limits only capable of being defined, demarcated and better understood over time, and yet they are recognised [sic] to exist.[93]

From the court's perspective, there were many fundamental rights which "so-called 'ordinary' citizens, if approached today, would be astonished to learn had ever been the subject of legal controversy or dispute (much the court suspects, as the right contended for . . . is now, or will in the future, be seen)."[94] And while caution is warranted, it is the role of the judiciary to identify unenumerated rights.[95]

Enforceability was no barrier either. "Once concretised [sic] into specific duties and obligations, its enforcement is entirely practicable."[96] Specifics will be "defined and demarcated" over time.[97] "[T]o start down that path of definition and demarcation, one first has to recognise [sic] that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed."[98] The court recognized the unenumerated right under the Irish Constitution with reference to the right to life (Article 40.3), right to work (Articles 50 and/or 45), right to private property (Article 43), and the European Convention on Human Rights.[99] Indeed, the court concluded that "[a] right to an environment that is consistent with the human dignity and well-being of citizens at large

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93. *Id.*

94. *Id.* at ¶ 256.

95. *See* Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 257 (Nov. 21, 2017) ("[I]f the rule of law, in the form contemplated and tolerated by the people, is not to descend to the arbitrary rule of whoever comprises the current representative majority from time to time, then the only agency available to put rights, including unenumerated constitutional rights, between the claims of the executive or legislative and those of so-called 'ordinary' people, is the judicial branch of the tripartite government that the people have established directly.").

96. *Id.* at ¶ 264.

97. *Id.*

98. *Id.*

99. *Id.* at ¶¶ 263 (also citing arts. 40.3.2 & 44.2.6) & 269 (citing Taskin and Ors v. Turkey (ECHR App. No. 46117/99)).

is an essential condition for the fulfillment of all human rights. It is an indispensable existential right that is enjoyed universally."[100]

Courts in the Netherlands, Ireland and other states have signaled to the world that judges are open to finding rights-based state-duties to combat climate-change. Seeing the success of the litigants in those jurisdictions, German environmentalists will likely find the prospect of a similar complaint in the German Constitutional Court too enticing to resist.

III. GERMAN CONSTITUTIONAL CLAIMS

Germany stands among the more aggressive industrialized nations at reducing its GHG emissions. The government has set relatively ambitious reduction targets compared to other nations, but Germany is not expected to meet those targets and recently considered abandoning them.[101] Measured against the actions of other countries, Germany would not be a convincing setting for a rights-based climate change lawsuit. However, measuring Germany's national actions against its own prior targets, or against scientific prescriptions, makes the forum more favorable. A healthy planet would face long, perhaps insurmountable, odds if every nation misses their targets as Germany did. Regardless of the wisdom of a constitutional complaint under the *Grundgesetz*, litigation is likely in light of global trends and the legal regime in Germany that makes it possible.

First, Germany has a relatively liberal access to justice regime for constitutional complaints, which "may be filed by any person alleging that one of his basic rights or one of his rights under [certain articles] has been infringed by public authority."[102] The complaint must merely "specify the right which has allegedly been violated, as well as the *act or omission* of the organ or authority by which the complainant claims his or her rights have been violated."[103] Under the *Grundgesetz*, the Constitutional Court "shall rule" on the interpretation of the Basic Law concerning "the extent of the rights and duties of a supreme federal

100. *Id.* at ¶ 264.
101. *See* Höhne, *supra* note 5.
102. G.G. art. 93(1)(4a); *see also* BVerfGG § 90(1).
103. BVerfGG § 92 (emphasis added).

body. . . ."[104] And under the *Richterliche Hinweispflicht* principle, judges help facilitate the right to be heard[105] by providing opportunities for parties to correct matters that could be grounds for dismissal—increasing the probability of reaching the merits of the claims.[106]

Second, the German principle of *Schutzpflich*, or duty to protect, bolsters the merit of a rights-based climate complaint and the availability of relief. As one scholar explained, *Schutzpflich* "means that the individual whose constitutionally protected interests may be infringed upon by third parties has a claim against the state if the existing laws do not protect him or her sufficiently."[107] Thus, the Constitutional Court could order the legislature to take action if its failure to act violates a right.[108] Specifically, this means that "the legislature loses the power to remain inactive vis-a-vis a manifest danger for a fundamental right. . . . The power lost by the legislature is gained by the Constitutional Court."[109] This regime is markedly different from the United States and bolsters the justiciability of a climate complaint.[110]

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104. G.G. art. 93(1)(1). *See also* BVerfGG § 67 ("The Federal Constitutional Court shall declare in its decision whether the respondent's contested act or omission violates a provision of the Basic Law. The provision is to be specified. In the operative part of the decision the Federal Constitutional Court may at the same time decide on a point of law which is relevant for interpreting the provision of the Basic Law on which the declaration pursuant to the first sentence depends.").

105. G.G. art. 103.1.

106. *See* Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 VAND. J. TRANSNAT'L L. 707 (2015).

107. GEORG NOLTE, EUROPEAN AND US CONSTITUTIONALISM (2005), at 128.

108. *Id*.

109. *Id*. *See also* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 58 (3rd ed. 2012) ("A basic [constitutional] right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the general legal order." (citing Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 261 (1989))).

110. *Compare with* Deshaney v. Winnebago Cty. Dep't of Soc. Services, 489 U.S. 189 (1989) (no obligation of state to act to protect against private individuals, in this case to protect a regularly beaten boy from his father, despite repeated alerts to the county) (discussed in GEORG NOLTE ED., EUROPEAN AND US CONSTITUTIONALISM 153 (Council of Eur. Pub. 2005); s*ee also* KOMMERS &MILLER, *supra* note 109, at 60.

Finally, although in Germany there is "no fundamental right which explicitly guarantees any particular condition of the environment,"[111] scholars recognize the possibility that a court could infer such a right. One could infer the right from "the intentions of the constitutional legislature . . . starting with the hypothesis that these intentions have not always been made clear or, in other words, that it is permissible to take account of changed views about society and thereby promote consistent further development of the existing written provisions."[112] As discussed above, the Irish High Court had no problem adopting this method of interpretation.[113] And there is precedent for the German Constitutional Court to interpret the Basic Law in this way.[114] The inference could happen either through the examination of individual basic rights or deriving the interpretation from the Basic Law as a whole.[115] As one scholar articulated, "[t]he argument has been put forward that the individual positive guarantees in the Basic Law are merely particular manifestations of a comprehensive environmental basic right which stands behind these individual manifestations, as it were, and which these individual guarantees enable us to infer."[116]

A. Grundgesetz Article 20a

Any analysis of an environmental constitutional right in Germany should begin with Article 20a, a manifestly appealing, albeit rather toothless authority for a state-duty to mitigate climate change. Article 20a of the *Grundgesetz* states:

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111. P. Kunig, *German Constitutional Law and the Environment*, 8 ADEL. L. REV. 318, 324 (1983) (cited with approval by KOMMERS & MILLER, *supra* note 109, at ch. 1, n.41).

112. *Id*. at 324.

113. *See* Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶¶ 243-246 (Nov. 21, 2017); *see also* Juliana v. US, 217 F. Supp. 3d 1,224, 1,249 ("The genius of the Constitution is that its text allows 'future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning.'" (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015))).

114. *See e.g.* P. Kunig, *supra* note 111, at 324 (citing inference of the "rule of law" principle, discussed in K Stern, *Das Staatsrecht der Bundesrepublik Deutschland* vol. 1 § 20 IV (1977)).

115. *Id*. at 324, 330.

116. *Id*. at 330.

> [m]indful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with the law and justice, by executive and judicial action, all within the framework of the constitutional order.[117]

Climate change, with its delayed and profound adverse impacts, epitomizes a threat to future generations. At first glance, Article 20a appears to explicitly impose a responsibility on the state to protect the natural environment through "judicial action," implying a cause of action.[118] However, as revealed below, the legislative record shows that preclusion of an individual right was a priority for the majority that passed Article 20a.[119] The framers simply did not want to empower citizens to bring constitutional complaints under Article 20a. But what, if anything, does Article 20a actually prescribe with its striking language? A review of the competing proposals and legislative debate helps answer this question.

1. Legislative History

The constitutional amendment adding Article 20a passed in 1994 after two decades of attempts.[120] To be sure, climate change was not at the forefront of the political psyche when this debate started, but by 1987 at least one legislator already cited the importance of a "globally

117. GRUNDGESETZ, [GG] [BASIC LAW], art. 20a.

118. *Id*.

119. *See infra* Section III.A.1.

120. *See* DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 12/238 (June 30, 1994) (Ger.), http://dipbt.bundestag.de/doc/btp/12/12238.pdf; *see also* DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8 378 (Apr. 2, 1987) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387 (statement of Dr. Hauff) (debating Drucksache 11/10) ("For several years, the SPD parliamentary group has called for the simple and clear sentence to be included in our constitution . . . this problem was first addressed in a government document - the Federal Environment Agency's Environmental Report - in 1974." (author's translation)). A subsequent amendment added "and animals" to Article 20a in 2002. *See* Kate Nattrass, "Und Die Tiere" Constitutional Protection for Germany's Animals, 10 ANIMAL L. 283 (2004).

stable climate" to future generations as a basis for adding an environmental amendment through Article 20a.[121]

A significant point of disagreement among the political factions considering Article 20a was whether an environmental amendment should provide a "fundamental right," or merely a "state goal" (*Staatziel*), with legislators opining on the functional differences between the two. In the 1980s, the Social Democrats (SPD) advocated for Article 20a to be a simple sentence: "The natural foundations of life are under the special protection of the state."[122] The SPD saw this as a "state goal" and argued it would enshrine nature protection as "a commitment for all state action."[123] From the SPD's perspective, such a state goal would permit the Constitutional Court to intervene "only in a gross neglect or even disregard of the protection of the environment."[124] The SPD "oppose[d] the inclusion of a fundamental right to environmental protection in our Constitution" precisely because it could shift environmental decisions from the legislature to the courts.[125] Debate did not clarify how the SPD believed the Constitutional Court would have jurisdiction where environmental protection is "grossly disregarded," but in SPD's view the court would have a role.[126] To them, "[s]tate goals [such as this proposal] are constitutional norms with legally binding effect, which also give the Constitutional Court more control over public action and, to a greater extent in the future, also against public neglect."[127]

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121. *See e.g.* DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8 379 (Apr. 2, 1987) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387 (statements of Dr. Hauff) (also referencing water quality degradation, smog, solid waste, Chernobyl, and chemical accidents on the Rhine, among other environmental problems) (author's translation).

122. *See* DEUTSCHER BUNDESTAG, DRUCKSACHE 11/10, (Feb. 18, 1987) (Ger.), http://dipbt.bundestag.de/doc/btd/11/000/1100010.pdf (author's translation) (original German: "Die natürlichen Lebensgrundlagen stehen unter dem besonderen Schutz des Staates."); DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8 378 (Apr. 2, 1987) (Ger.) (statements of Dr. Hauff) (debating Drucksache 11/10).

123. DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8 378 (Apr. 2, 1987) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387 (statements of Dr. Hauff) (debating Drucksache 11/10) (author's translation).

124. *Id*. at 379 (statements of Dr. Hauff) (author's translation).

125. *Id*. (statements of Dr. Hauff) (author's translation).

126. *Id*. (author's translation).

127. *Id*. at 380 (statements of Dr. Hauff) (author's translation).

The Free Democrats (FDP), a junior coalition partner from 1969 to 1998 in federal governments headed by both the SPD and Christian Democrats (CDU)[128] at various times, largely agreed with SPD's position.[129] To the FDP, "[a] state goal is a duty to act for the legislature, a normative guideline."[130] With a state goal, environmental protection would receive greater weight in the interpretation of the law and thus "bind all three branches of government," but without a private cause of action.[131]

In 1987, a CDU representative expressed skepticism that any constitutional amendment was necessary at all, but the party ultimately agreed to add nature protection as a state goal:

> No one in this House doubts that the protection and care of natural resources is an essential task of the state. It is just as natural as the duty of the state to provide for internal peace. Both tasks of the state are not explicitly mentioned in our constitution. This has never prevented this coalition from acting in both fields and, in particular, enforcing a host of concrete measures against the further burden on the environment. . . . Nevertheless, ladies and gentlemen, the coalition has decided to include environmental protection as a state goal in the Basic Law. It should not be concealed that this decision has been thoroughly controversial in the coalition. . . .[132]

The CDU representative, Horst Eylmann, also suggested that adding an enumerated state goal would be redundant because of rights guaranteed by other constitutional provisions. Eylmann stated "one can assert that the state objective of environmental protection results indirectly from some norms of the Basic Law. For example, a public duty to protect the citizens from environmental damage and environmental hazards can be derived from the right to life and

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128. For purposes of this article, "Christian Democrats" refer to both the Christian Democratic Union, and its sister party in Bavaria, the Christian Social Union.

129. *See id*. at 383 (statements of Baum). The FDP had supported the inclusion of environmental protection in the Basic Law since 1971.

130. *Id*. (statements of Baum) (author's translation).

131. *Id*.

132. *Id*. at 380-81 (statements of Eylmann) (author's translation).

physical integrity."[133] Although Eylmann meant to undermine the necessity of the amendment in the first place, his statement could also be interpreted as unintentionally supporting an unenumerated right to a healthy environment derived from Article 2 *Grundgesetz*, and other fundamental rights.

As for the Green Party, it believed "the incorporation of environmental protection as a state objective in the Basic Law is not enough. . . . The protection of the environment must be a fundamental right. . . ."[134] The Green Party's concern was that "[t]he SPD's bill offer[ed] no guarantee that the individual can really defend himself in reference to the Basic Law."[135] Like the CDU member, the Green representative also cited Article 2's "right to life," arguing Article 2 already implicates environmental rights, but requires clarification with a new, enumerated fundamental right. The Green Party representative stated:

> [t]he Basic Law and Human Rights . . . also include a fundamental right to an intact environment, Mr. Eylmann. I fully agree with you. However, the SPD writes that the current constitutional law does not guarantee a satisfactory protection of natural resources. Yes, what does Article 2(2) sentence 1 say? Everyone has the right to life and [physical] integrity. . . . This includes the right to clean air, healthy water, non-toxic foods, etc. How else should the physical integrity be guaranteed, ladies and gentlemen?[136]

The Green Party subsequently proposed additions to Articles 2 and 20 G.G., in lieu of a new Article 20a.[137] In so doing, the Greens

133. *Id*. at 381.

134. *Id*. at 382 (statements of Garbe) (author's translation).

135. *Id*.

136. *Id*.

137. DEUTSCHER BUNDESTAG, DRUCKSACHE 11/633, Gesetzentwurf der Fraktion Die Grünen (Aug. 4, 1987) (Ger.), http://dipbt.bundestag.de/doc/btd/11/006/1100663.pdf. The Greens' proposal also included amendments to Articles 14 and 28. The proposal included the following additions (shown in *italics*) (author's translation):

Article 2(2): Every person shall have the right to life and physical integrity, *the preservation of its natural resources and protection against significant damage to its natural environment*.

explained that "[t]hose who want to move forward in terms of environmental policy must give people what they rightfully demand, namely more freedom of action and concrete rights. They must be able to assert the destruction of natural resources as a violation of their personal rights in court."[138] The Bundestag, the German federal parliament, rejected this proposal in September 1990.[139] Had the Green Party succeeded, a constitutional claim on climate change mitigation would be much more straightforward.

In the end, the government adopted compromise language for a "state goal," as it is now enshrined. The Federal Government's official view of the passed amendment once again clarified that it created no individual right or private cause of action, while still envisioning some role for the judiciary.[140]

2. Application of *Grundgesetz* Article 20a

Even if Article 20a does not provide an individual right or cause of action, a rights-based constitutional complaint is still likely to rely on and cite it extensively. The state goal is certainly relevant, although the German Constitutional Court has devoted little time to fleshing out the implications of Article 20a. The Constitutional Court suggested Article 20a "may require taking measures for the protection against threats," including from climate change, but did not indicate how that requirement would be enforced and did not elaborate what constitutes a threat.[141] In an earlier case, the Court had shown deference to the

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Article 20(1): The Federal Republic of Germany is a democratic and social federal state. *The natural environment is the basis of human life and for its own sake is under the special protection of the state. In the case of conflicts between ecological resilience and economic needs, priority must be given to environmental issues if otherwise there is a significant threat of deterioration of the natural environment*.

138. DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/277, 17,966 (Sept. 21, 1990) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11227.pdf#P.17969 (statement of Häfner) (author's translation).

139. *Id*. at 17,974.

140. *See* DEUTSCHER BUNDESTAG, DRUCKSACHE 12/7109, 7-9 (Mar. 17, 1994) (Ger.) ("the wording does not contain any subjective and thus enforceable claims. . . . At the same time, the text outlines the co-responsibility of the jurisprudence and the administration for the protection of natural resources." (author's translation)).

141. *In re* Aviation Tax Act, BVerfG, Judgment of the First Senate, 1BvF 3/11 ¶ 47 (Nov. 5, 2014), http://www.bverfg.de/e/fs20141105_1bvf000311en.html.

government's assessment of the relative impacts of lignite mining and power generation that could conflict with Article 20a.[142]

In most instances, the court cites Article 20a to justify a state action that is in tension with another constitutional right. For example, in a case reviewing regulations of genetically modified organisms (GMO), the court cited Article 20a (among other constitutional provisions) to justify the state's infringement on otherwise protected academic freedoms.[143] In another case, the court cited Article 20a to explain and justify the state's decision to expedite the phase-out of nuclear energy.[144] The court generally handles Article 20's social state principle[145] in a similar manner.[146]

In the climate change context, Article 20a would add value to a rights-based climate complaint for at least two reasons. First, Article 20a may provide interpretive guidance to the Constitutional Court to prioritize stronger environmental protection when interpreting other constitutional or statutory language pertinent to the complaint. As a

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142. Bund für Umwelt und Naturschutz Deutschland Landesverband Nordrhien-Westfalen e.V. v. Federal Administrative Court, BVerfG,, Judgment Spruchkoerper, 1 BvR 3139/08, ¶ 298 (Dec. 17, 2013) ("The assessment of the serious impact on people and the environment that undisputedly follows from mining of lignite and its use for power generation is subject to the execute and legislative branches' political prerogative of assessment, also with regard to the constitutional values of Art. 14 § 1 & Art. 20a GG.").

143. *In re* Act on the Regulation of Genetic Engineering, BVerfG, Judgment of the First Senate, 1 BvF 2/05 ¶ 23 (Nov. 24, 2010), http://www.bverfg.de/e/fs20101124_1bvf000205en.html.

144. *In re* Thirteenth Act Amending the Atomic Energy Act, BVerfG, Judgment of the First Senate, 1 BvR 2821/11 ¶ 283 (Dec. 6, 2016), http://www.bverfg.de/e/rs20161206_1bvr282111en.html. In the Nuclear case, the Court seemed to equate the right to life at Article 2(2) G.G. and Article. 20a G.G: "[T]here are concerns relating to the fundamentally high-value protected interests of the life and health of the people (G.G. art. 2 § 2 sentence 1) and the natural foundations of life (G.G. art. 20a), which the acceleration of the nuclear phase-out contributes to." *Id*. at ¶ 366. As discussed above, Article 2(2) provides a fundamental right, while Article 20a established a state goal - distinct classifications of different legal weight.

145. G.G art. 20 provides certain "constitutional principles," more akin to state goals than fundamental rights, such as the social state principle, which provides "[t]he Federal Republic of Germany is a democratic and social federal state." G.G. art. 20 § 1.

146. *See* Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1,307, 1,340 (2008).

Bundestag member stated during debate regarding the state goal in Article 20a:

> [e]nvironmental protection receives a higher weight in the interpretation of the laws, in the specification of indefinite legal concepts, in the exercise of discretion . . . [and] is important for the judicial application of law. . . .[147]

In a case of first impression, the Court's analysis of an inferred state duty – either derived from one or more specific fundamental rights, or from the *Grundgesetz* as a whole – will inevitably involve passages subject to competing interpretations. Article 20a suggests that ambiguities should be resolved in favor of increased environmental protection, which could tilt the balance of any ruling. At a minimum, since Article 20a's state goal affects the overall constitutional order, it could play a significant role in the Court's analysis of possible rights derived from the Basic Law as a whole.[148]

Second, even though there are substantial jurisdictional barriers to the Court adjudicating a substantive Article 20a claim alone, other accompanying fundamental rights claims under Articles 1-19 (as discussed below) could bootstrap in an Article 20a claim in its own right. Under Article 93(1)(4a) G.G. and Bundesverfassungsgerichtgesetz ("Federal Constitutional Court Act," or "BverfGG") section 90(1), the Constitutional Court has jurisdiction over alleged state violations of fundamental rights and some other provisions, not including Article 20a.[149] However, "[o]nce a complaint is properly admitted the [C]ourt might perhaps be obliged by virtue of its office to consider the compatibility of the law at issue with other

147. DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8, 383 (Apr. 2, 1987) (Ger.) (statements of Baum) (author's translation).

148. *See* DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 12/238, 20,969 (June 30, 1994) (Ger.) (statement of Finance Minister Dr. Theodor Waigel), http://dipbt.bundestag.de/doc/btp/12/12238.pdf; DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/227, 17,969-70 (Sept. 21, 1990) (Ger.) (statement of Justice Minister Engelhard), http://dipbt.bundestag.de/doc/btp/11/11227.pdf#P.17969; P. Kunig, *supra* note 111, at 325 & 330.

149. *See also* Michael Singer, *The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints*, 31 INT'L COMP. L. Q. 331, 339 (1982).

constitutional provisions."[150] This should also apply to alleged unconstitutional acts or omissions, including those related to climate change mitigation.[151] Thus, with jurisdiction over a complaint regarding the state's violation of Article 2 G.G., for example, the Constitutional Court would be free to rule on a related alleged violation of the state's "responsibility toward future generations" under Article 20a.[152] Put another way, "[a] weak claim which, although formally admissible, might if brought alone be summarily dismissed may still be adequate to support a substantially stronger claim which, if brought alone, would be inadmissible."[153] This is not to say that the jurisdictional limitations of BVerfGG section 90(1) have no meaning, rather the Court enjoys discretion to consider otherwise non-cognizable claims that accompany claims for which its jurisdiction is enumerated. Perhaps in this manner, a rights-based climate suit will prompt the Constitutional Court to elucidate what, if any, duties arise from the mandates of Article 20a. As one scholar wrote, "Article 20a does not entitle individuals to sue the state . . . [but] if the legislature drags its feet in passing needed environmental legislation, the Constitutional Court would probably find ways to remind it of its duty."[154]

Despite its powerful language directing the state to "protect the natural foundations of life" as a "responsibility toward future generations," a constitutional climate change complaint will need more than just Article 20a. As enacted, Article 20a was never intended to provide a cognizable fundamental right. On the other hand, the same is true for Article 21 of the Dutch Constitution, which similarly provides "[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment." Despite the wide latitude given to the Dutch legislature to implement this article, the *Urgenda* court held it "imposes a duty of care on the State relating to the livability of the country and the protection and improvement of

150. *Id*. at 341(quoting BVerfGE 6,376 [385]) (cited with approval by Kommers and Miller at ch. 1, n.41).

151. *See e.g.* BVerfGG § 92.

152. G.G. art. 20a.

153. Singer, *supra* note 149, at 341.

154. Markovits, *supra* note 146, at 1341-42.

the living environment,"[155] and found a way to hold the government liable for its failure to protect.[156] In Germany, once a litigant alleges the violation of a fundamental right and thereby confers jurisdiction on the constitutional complaint, the German Constitutional Court could find a similar "duty of care on the State," derived from G.G. Article 20a.

B. Fundamental Rights

Unlike with constitutional state goals, there is no question that under German law "persons" have a cause of action against the state for violations of fundamental rights, including a failure to protect.[157] The far reaching effects of unmitigated climate change potentially impact a host of fundamental rights. This section focuses on *Grundgesetz* Articles 2, 3 and 14, but creative arguments are also available for claims under less obvious provisions. While a complaint could, for example, argue that heat waves of increased intensity and frequency threaten farmers' families (Article 6) and livelihood (Article 12), these claims are probably more tenuous.[158] In a constitutional complaint, a

155. Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. ¶ 4.36 (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.

156. *See Urgenda* at ¶ 4.36 (The Hague Dist. Ct. Chamber for Comm. Affairs, June 24, 2015); Verein KlimaSeniorinnen Schweiz v. Schweizerische Bundeskanzlei, Complaint (Federal Administrative Court, Nov. 25, 2016) *translated in* http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf (arguing "Although these provisions contain neither specific instructions nor legislative mandates or constitutional rights, they are still a 'legally binding action guideline' and have 'programmatic significance.'" (internal citations omitted)). In Switzerland, the constitution also provides "aims," including "sustainable development," and "the long term preservation of natural resources. . . ." Federal Constitution of the Swiss Confederation, arts. 2(2) and 2(4), *translated in* https://www.admin.ch/opc/en/classified-compilation/19995395/201709240000/101.pdf.

157. G.G. art. 93(1)(4a); BVerfGG § 90(1).

158. *See e.g.*, *Juliana*, 217 F. Supp. 3d at 1,242 (One plaintiff "alleges record-setting temperatures harm the health of the hazelnut orchard on his family farm, an important source of both revenue and food for his and his family"); *id*. at 1,250 ("[Plaintiffs] assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiffs' property, their economic

German litigant is more likely to focus on the rights to life (Article 2), equal protection (Article 3), and property (Article 14).

Each of these rights should be read in the context of and supported by the inviolability of human dignity, enumerated at Article 1 G.G.[159] In the words of scholars Donald Kommers and Russell Miller, the German Bill of Rights "are bound together in an organic unity" with Article 1, which informs "the substance and spirit of the entire [constitution]."[160] Article 1's inseparability is particularly true for Articles 2 and 3.[161] Therefore, a rights-based climate complaint is sure to emphasize that under Article 1 G.G., the state has a duty to protect human dignity, which is threatened by the impacts of climate change. As Kunig argued, Article 1's concomitant right "to lead a life which is essentially self-determined . . . is obviously placed in jeopardy if the individual is deprived of possibilities of development by poor environmental conditions which affect his physical and emotional well-being."[162] In fact, the court in *FIE v. Ireland* framed the very right it recognized as "[a] right to an environment that is consistent with the human dignity and well-being of citizens at large."[163] Beginning to elucidate that right in dictum, the Irish High Court asserted "[i]t is difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective well-being

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livelihood . . . their health, and ultimately their (and their children's) ability to live long, healthy lives.").

159. *See* KOMMERS & MILLER, *supra* note 109, at 355.

160. *Id*. (citing Peter Haberle, "Die Menschenwürde als Grundlage der staatlichen Gemeinschaft," in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (8 vols.), eds. Josef Insenee & Paul Kirchhof 1:815-61 (Heidelberg: C.G. Müller Juristischer Verlag, 1987) (additional citation omitted)).

161. *Id*.; *see also* BERTRAND MATHIEU, THE RIGHT TO LIFE IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE-LAW 12 (2006) ("[t]he right to life, like other rights and perhaps more so than any other right, follows directly from the principle of human dignity").

162. P. Kunig, *supra* note 111, at 330 (further stating, "it has been argued that Art. 1 (1) of the Basic Law points to an (unwritten) defensive right against conduct which damages the environment.") (citing CHR SENING, BEDROHTE ERHOLUNGSLANDSCHAFT. ÜBERLEGUNGEN ZU IHREM RECHTLICHEN *Schutz* 166 (1977); A ROSSNAGEL, GRUNDRECHTE UND KERNKRAFTWERK 42 (1979)).

163. *See* Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 264 (Nov. 21 2017) (calling it "an essential condition for the fulfilment of all human rights").

is concerned is being progressively diminished."[164] A German litigant is sure to echo this sentiment in the context of climate change. As "a rather flexible concept,"[165] the complaint could frame Article 1's human dignity guarantee in manners that elevate each of the other fundamental rights.

1. Right to Life

The right to life in Article 2(2) of the *Grundgesetz* is the most likely enumerated fundamental right on which a climate change constitutional complaint could rest.[166] Article 2 G.G. reads:

> (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
> (2) Every person shall have the *right to life and physical integrity*. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to law.[167]

Urgenda and several opinions of the European Court of Justice have interpreted a similar "right to life" in ECHR Article 2 to encompass protection from various foreseeable environmental harms and natural disasters.[168] Although technically subordinate to the Basic Law, in

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164. *Id*. at ¶ 246.

165. David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 358 (1989).

166. *See, e.g., id*. at 354 ("Article 2(2) has also been the most prolific source of decision recognizing the affirmative duty of the state to protect the individual from harm inflicted by third parties.").

167. G.G. art. 2 (emphasis added).

168. Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. ¶ 4.49 (Chamber for Comm. Affairs June 24, 2015) (under appeal) (quoting Manual on Human Rights and the Environment, Council of Europe (2012)), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf; *see also* L.C.B. v. the United Kingdom, Application no. 23413/94 ¶ 36., Öneryildiz v. Turkey [GC], Application no. 48939/99, Borysiewicz v. Poland, Application no. 71146/01 ¶ 53.; Budayeva and Others v. Russia, Application no. 15339/02.; Murillo Saldias and Others v. Spain, Application no. 76973/01 (all cited in Complaint of Verein KlimaSeniorinnen Schweiz v. Schweizerische Bundeskanzlei (Nov. 2016) (decision pending)); *see generally* BERTRAND MATHIEU,

Germany the ECHR and its interpretation by the European Court of Human Rights "must be relied on as an interpretation aid in the interpretation of the fundamental rights and rule-of-law principles of the Basic Law."[169] Moreover, the "right to life" in Article 40.3 of the Irish Constitution and Article 9 of the Pakistani Constitution have been interpreted to entail environmental rights in their respective jurisdictions.[170] Additional pending complaints also assert the right to climate protection under other "right to life" provisions.[171] Indeed, "[m]any scholars have argued that because clean air, clean water, fertile soil and functioning ecosystems are integral to human survival and well-being, they must be included in the rights to life and health."[172]

It is easy to see how an argument under Article 2(2) G.G. could take shape in Germany. During debate on the environmental amendment to the Basic Law, the Greens emphasized that Article 2 necessarily "includes the right to clean air" and other environmental protections, without which the enumerated rights are compromised.[173] And as Kunig explained in his analysis of Article 2, "[t]he right to life can

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THE RIGHT TO LIFE IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE-LAW 11-14 (2006) (comparing right to life in ECHR and European national constitutions).

169. *BverfG*, Judgment of the Second Senate, 2 BvR 2365/09, ¶ 86-94 (May 4, 2011), http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html. This "serves to give the guarantees of the European Convention on Human Rights as extensive an application in the Federal Republic of Germany as possible. . . ." *Id*. at. ¶ 90. A complete analysis of ECHR jurisprudence vis-à-vis a state duty to protect from climate change is beyond the scope of this Article.

170. *See* Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 263 (Nov. 21, 2017); Leghari v. Republic of Pakistan, Case No. W.P. No. 25501/2015, Order, 5-6 ¶ 7 (Lahore High Court, Sept. 14, 2015), https://elaw.org/system/files/pk.leghari.091415_0.pdf.

171. *See, e.g.*, Verein KlimaSeniorinnen Schweiz v. Schweizerische Bundeskanzlei, Complaint (Federal Administrative Court, Nov. 25, 2016) (citing Article 10 of the Swiss Constitution) *translated in* http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf.

172. David R. Boyd, *The Implicit Constitutional Right to Live in a Healthy Environment*, 20 REV. EUROPEAN COMM'Y & INT'L ENVTL. L. 171, 171 (citation omitted).

173. *See, e.g.*, DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8, 382 (Apr. 2, 198) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387 (statements of Frau Garbe).

become relevant in environmental law if the government avails itself, or permits or tolerates measures which adversely affect the environment and endanger life."[174] This framing has its limitations, to be sure, but a complainant could argue climate change is a unique existential threat to the protected right to life. The complainant could argue that the government is permitting and tolerating an energy consumption system – ranging from lignite mining and coal burning to fossil fuel-based transportation – that endangers life by exacerbating climate change.

A case challenging the German government's consent to the storage of American chemical weapons in Germany, the *Chemical Weapons Case*, helps illuminate how the court would handle a climate change claim under Article 2.[175] In *Chemical Weapons*, the complainants argued, *inter alia*, the state's failure to prevent or adequately regulate the storage of chemical weapons exposed them to unconstitutional risks of bodily harm in the event of accidents or sabotage.[176] They argued this "neglected the protective obligations incumbent on it [the state], arising out of the objective legal content of the basic right to life and inviolability of the person."[177] The court ultimately denied the claim under the particular facts of the case, but did not rule out a different outcome in other cases. The court cited the government's broad powers to assess and evaluate its own compliance with the protective obligations under Article 2, which "can be reviewed by the courts only to a limited extent, depending on the nature of the area at issue, the possibilities of arriving at an adequately certain judgment and the importance of the legal goods at stake."[178]

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174. P. Kunig, *supra* note 111, at 325 (citing J. Schabe, *Krankenversorgung und Verfassungsrecht*, 22 NEUE JURISTISCHE WOCHENSCHRIFT 2,274 (1969)).

175. *In re* Chemical Weapons Storage, BVerfGE 77, 170 2 BvR 624/83, Ruling, Oct. 29, 1987, *translated in* https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=568. Regarding procedural matters, the court found standing despite an uncertainty regarding the location of the chemical weapons in Germany (*id*. at ¶ IV.B.2.b) and determined there were no statute of limitations issues because the complaint was directed at an omission by the public authorities (*id*. at ¶ IV.B.2.b.bb (indicating that the time limits of BVerfGG ¶ 93 do not apply in that situation)).

176. *Id*. at ¶ IV.B.2.b.cc (internal citation omitted).

177. *Id*. at ¶ A.II.3 (citing G.G. art. 2(2)).

178. *Id*. at ¶ IV.B.I.2.b.2.cc (citing BVerfGE 50, 290 [332 f.]).

Despite rejecting the claims, the court in *Chemical Weapons* reaffirmed that a constitutional complaint is an appropriate vehicle for seeking protection under Article 2 G.G.[179] The court noted that:

> [t]he fact that Article 2(2), first sentence, Basic Law does not merely guarantee a subjective right to protection but at the same time constitutes an objective legal value-decision of the constitution applying in all areas of the legal system and establishing constitutional protective obligations has been recognized in a consistent case law on both Senates of the Federal Constitutional Court.[180]

Granted, "[i]t is only in very special circumstances" that the court may restrict the government's freedom of action,[181] but a climate litigant could argue insufficient protection against the profound and certain threats from climate change constitutes a very special circumstance. Faced with substantial evidence, courts in other jurisdictions have overcome similar separation of powers barriers.[182]

The *Chemical Weapons* court also provided a test for future Article 2 constitutional complaints, such as a climate complaint. Any complainant must "conclusively show" that the public authorities have (1) "either not taken protective measures at all," or (2) "that manifestly the regulations and measures adopted are entirely unsuitable or completely inadequate to secure the object of protection."[183] The

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179. *Id*.

180. *Id*. (citing BVerfGE 39, 1 [41 f.]; 46, 160 [164]; 49, 89 [141 f.]; 53, 30 [57]; 56, 54 [73, 78, 80]).

181. *Id*.

182. *See, e.g.*, Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf; Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 ¶ 263 (Nov. 21, 2017); Leghari v. Republic of Pakistan, Case No. W.P. No. 25501/2015, Order, 5-6 ¶ 7 (Lahore High Court, Sept. 14, 2015), https://elaw.org/system/files/pk.leghari.091415_0.pdf.

183. *In re* Chemical Weapons Storage, BVerfGE 77, 170 2 BvR 624/83, Ruling, Oct. 29, 1987, *translated in* https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=568; *see also id*. ("If the complainant wishes to claim that the public authority can meet its protective obligation only by taking a

complainant in *Chemical Weapons* did not meet this burden, but perhaps a climate complainant could, armed with substantial scientific research and publications. Indeed, the *Urgenda* court concluded that the Dutch government's protective measures were inadequate.[184] Similarly, the German government's own assessment establishes that Germany's efforts are inadequate to reduce the country's GHG emissions to the level the government deemed necessary,[185] suggesting the possible success of a climate related constitutional complaint.

Justice Mahrenholz's dissent in *Chemical Weapons* provides even more fodder for a rights-based climate case.[186] The dissent cited a case involving nuclear power plants which indicated "the fundamental right under Article 2(2) Basic Law is infringed not only by actual encroachment on the objects of legal protection therein. . . . Instead, such actual contravention is to be forestalled, so that the fundamental right can enter where precautionary measures against later operating risks are neglected. . . ."[187] Article 2's protection of unborn human life also touches on this concept.[188] Thus, a climate litigant need not wait until dangerous climate change arrives and is undeniable; a complainant may seek to prevent the foreseeable harm before it happens.

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very specific measure, he must also conclusively show this and the nature of the measure to be taken.").

184. *Urgenda* at ¶ 4.84-4.89

185. *See* FEDERAL MINISTRY FOR THE ENVIRONMENT, *Nature Conservation, Building and Nuclear Safety, German Climate Policy*, https://www.cop23.de/en/bmub/german-climate-policy/ (last visited Jan. 12, 2018); Michael Bauchmüller, *Deutschland hinkt seinem Klimaziel hinterher*, SÜDDEUTSCHE ZEITUNG (Oct. 11, 2017) http://www.sueddeutsche.de/wirtschaft/klimawandel-deutschland-hinkt-seinem-klimaziel-hinterher-1.3702329 [http://perma.cc/6VML-ZHX7] (citing a leaked internal ministry paper that predicts Germany's emissions will be 31.7 to 32.5 percent below 1990 levels).

186. *In re* Chemical Weapons Storage, BVerfGE 77, 170 2 BvR 624/83, Ruling, Oct. 29, 1987 (J. Mahrenholz, dissenting); *see also* KOMMERS & MILLER, *supra* note 109, at 399 (referring to the dissent as "eloquent").

187. *In re* Chemical Weapons Storage, BVerfGE 77, 170 2 BvR 624/83, Ruling, Oct. 29, 1987, Dissent at ¶ II.2.a (citing BVerfGE 53, 30 [57]).

188. *See Abortion Cases*, 39 BVerfGE 1 (1975) and 88 BVerfGE 203 (1993) (also relying on Article 1 human dignity).

2. Equal Protection

Article 3(1) G.G. further guarantees that "[a]ll persons shall be equal before the law."[189] On equal protection claims, the court applies an arbitrariness or "rationality" test to unequal treatment,[190] and heightened or "special"[191] scrutiny for acts or omissions affecting other constitutionally protected interests.[192] One Constitutional Court Justice has argued that G.G. Article 20's "social state principle" demands heightened scrutiny of unequal treatment related to social welfare.[193] The environmental state goal in Basic Law Article 20a is viewed similarly to the principle at Article 20, suggesting at least one Justice would open the door to heightened scrutiny of the state's failure to protect future generations from existential threats to the environment, even though it is not an enumerated fundamental right.[194]

The jurisprudence on the tests for heightened scrutiny is somewhat inconsistent,[195] but Professor Somek summarizes a recent test as follows:

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189. G.G. art. 3(1).

190. *See* KOMMERS & MILLER, *supra* note 109, at 421 (citing 1 BVerfGE 14, 52 (1951)).

191. *See e.g. In re* Life Imprisonment, 45 BVerfGE 187 (1977) (Reprinted in part in KOMMERS & MILLER, *supra* note 109, at 364) (applying "special scrutiny under the principle of proportionality"). *See generally* Currie, *supra* note 165.

192. *See* KOMMERS & MILLER, *supra* note 109, at 421 and 422 (quoting 88 BVerfGE 87 (1993)); Currie, *supra* note 165; Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, 314 (1998) ("Some commentators, therefore, have posited the evolution of a two-tiered scheme of general equal protection review which incorporates the proportionality principle on its higher level, triggered by treatments that are suspect because they affect single groups or burden other constitutional rights.").

193. Currie, *supra* note 165, at 369 (citing 36 BVerfGE 237, 248-50 (Rupp-von Brünneck, J., dissenting)).

194. *See e.g.* DEUTSCHER BUNDESTAG, PLENARPROTOKOLL 11/8, 379 (Apr. 2, 1987) (Ger.), http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387 (statement of Dr. Hauff) ("We want environmental protection to be included in our constitution . . . as a state goal. Environmental protection, like the welfare state, must be a commitment to all state action.").

195. *See generally*, Somek, *supra* note 192.

> where groups are treated unequally and in instances where one can expect a negative impact on the exercise of other basic rights, a more searching inquiry is necessary into whether reasons of such a kind and weight that could justify the imposition of unequal legal consequences exist.[196]

Another scholar described the court's analysis as a "search for a reason 'sufficient to justify' the challenged distinction."[197] In many ways the protections of Article 3(1) are similar to those of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[198] The German Constitutional Court has cited U.S. Equal Protection Clause jurisprudence with approval, suggesting it could be persuasive authority, although of no precedential value.[199] Therefore, a German litigant's claims are likely to reflect some of the Equal Protection Clause arguments proffered by the plaintiffs in *Juliana v. United States*, which frames the inequity as between distinct groups of present and future generations.[200] The plaintiffs in *Juliana* argue, *inter alia*, that the United States' fossil fuel production and consumption cause irreversible climate change, consequently denying the youth plaintiffs "the same protection of fundamental rights afforded to prior and present generations of adult citizens."[201] The "acts of Defendants unconstitutionally favor the present, temporary economic benefits of certain citizens, especially corporations, over Plaintiffs' rights to life,

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196. *See id*. at 317 & 320. Professor Somek described one formula as follows: "the German Court first held that this Clause is violated . . . if a group of norm-addressees is treated differently from another group, although the differences between those groups are not of such a kind or such a weight as to justify the unequal treatment." *Id*. at 308 (citing BVerfGE 55, 72 (88)).

197. Currie, *supra* note 165, at 369.

198. U.S. CONST. AMEND. XIX, ("[No State shall] deny to any person within its jurisdiction the equal protection of the laws."); *see also* Currie, *supra* note 165, at 368.

199. *See, e.g.*, Somek, *supra* note 192, at 287. Professor Somek noted "[i]n the 1980s, the German Court began borrowing from the United States Supreme Court's equal protection jurisprudence. . . ." and concluded, *inter alia*, "the German Court has attempted to apply borrowed constitutional provisions in such a matter that routinely falls short of meeting the German Court's idealized approach to equal protection review." *Id*. at 288 (discussing various standards of equal protection).

200. *Juliana*, 217 F. Supp. 3d 1,224.

201. Complaint, Juliana v. United States, D. Or. Case No. 6:15-cv-01517-TC, Dkt. 7 ¶ 292 (filed Sept. 10, 2015).

liberty, and property."[202] As of this writing, the level of scrutiny applied and whether those claims are successful in the District of Oregon remain to be seen.[203] A recent ruling from the Ninth Circuit Court of Appeals has increased the odds that the court will reach the merits in *Juliana*, reaffirming it as an important case for prospective German complainants to watch.[204]

In Germany, a litigant could argue that the state's failure to protect requires heightened scrutiny because of (1) the weight of the rights being infringed, (2) the weight of the public interest at issue, and (3) the significance of the differences between the affected groups.[205] First, the generational inequity from climate change infringes the state's constitutional "responsibility toward future generations" to "protect the natural foundations of life,"[206] as well as other fundamental rights.[207] Second, the existential threat from climate change and its foreseeable harms are profound matters of public interest with the potential to impact everyone. Finally, the complainant could assert that the reference to "future generations" in the *Grundgesetz* highlights the significance of the difference between generational groups, tilting the balance to heightened scrutiny of the state's acts and omissions that disproportionately affects youth and future Germans.[208] Under heightened scrutiny, the state must justify the generational inequity of its failure to protect.[209] It is difficult to predict whether the Court could find sufficient justification for state action and inaction that disproportionately harms future generations on such a scale as climate change.

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202. *Id*. at ¶ 301.

203. *See Juliana*, 217 F. Supp. 3d at 1,249, n.7.

204. United States v. United States Dist. Court, No. 17-71692, D.C. No. 6:15-cv-01517-TC-AA, 2018 U.S. App. LEXIS 5770 (9th Cir. 2018) (denying federal government's petition for writ of mandamus).

205. *See* Somek, *supra* note 192, at 321 (indicating a German court could put the emphasis on the "significance of the differences between groups," or on "the relative weight of the public interest or the infringement of the right.").

206. G.G. art. 20a.

207. *See infra,* Section II.B.

208. G.G. art. 20a.

209. G.G. art. 3(1).

3. Property Rights

The fundamental right to property is another potential basis for suit.[210] Although subject to limitations, under the Basic Law the state is "obliged affirmatively to preserve and foster" this right.[211] In their extensive reference on German constitutional jurisprudence, Professors Donald Kommers and Russell Miller explain:

> [t]o use the standard formulation, the right to property is an objective constitutional value that the state is obliged affirmatively to preserve and foster. Exactly and precisely what positive duty the state has under this theory has never been laid out in full. But some commentators have suggested that the objective character of Article 14 may require, for example, environmental protection legislation to preserve the value of property, the productive use of which depends on clean water and unspoiled forests.[212]

With foreseeable sea level rise, extreme weather patterns and others, the impact of climate change on property is manifest.[213] Indeed, *Lliuya v. RWE*, a civil case against the energy company RWE for climate-change induced property damage, is moving forward in a German court.[214] That court indicated "even a party who acts lawfully must be liable for property damage caused by him."[215] And in the seminal case

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210. G.G. art. 14.

211. KOMMERS & MILLER, *supra* note 109, at 634.

212. *Id*. (citing P. Kunig, *supra* note 111, at 326-27, and Georg Ress, *The Right to Property under the Constitution of the Federal Republic of Germany* 10 (paper delivered at Notre Dame German-American Constitutional Law Conference, Apr. 1986)).

213. *See e.g.* Christina Ross, Evan Mills & Sean B. Hecht, *Insurance Risk-Management Strategies in the Context of Global Climate Change*, 26 STAN. ENVTL. L. J. 251, 276-282 (2007) ("Climate change has the potential to affect virtually all segments of the property-casualty insurance business, including those covering damages to property, crops, and livestock; business interruptions; supply chain disruptions, or loss of utility service; equipment breakdown arising from extreme temperature events; and data loss from power surges or outages.").

214. Order, Saúl Luciano Lliuya v. RWE AG, Higher Regional Court of Hamm (Nov. 30, 2017), *unofficially translated in* https://germanwatch.org/en/download/20812.pdf.

215. *Id*. at ¶ 2.

Massachusetts v. EPA, the United States Supreme Court focused on climate-change induced impacts to coastal state property as a concrete harm for standing purposes.[216]

A constitutional claim against the state under Article 14 would be more difficult than a civil claim, but has the potential to bolster a German complaint. It is generally understood that the property guarantee of Article 14(1) only permits the state to infringe individual property rights "in accordance with legal requirements, and for public purposes that are more important than the individual property guarantee."[217] Unlike the U.S. Constitution, "[t]he function of Article 14 is not primarily to prevent the taking of property without compensation . . . but rather to secure existing property in the hands of its owners."[218] Although an exception allows expropriation of property "for the public good," it is only "pursuant to a law that determines the nature and extent of compensation." The German Federal Government certainly has not enacted such compensation vis-a-vis climate-change induced property loss and to be constitutional, the court would need to find that climate-change-induced property loss is a "public good" justifying the expropriation, an unlikely conclusion.[219]

Indeed, the German basic right to property "protects the individual against every unjustified infringement of the entire range of protected interests."[220] Considering the affirmative protective obligation for fundamental rights, there is an argument to be made that the state's

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216. Massachusetts v. E.P.A., 549 U.S. 497, 522-23 (2007).

217. Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ. J. INT'L COMP. LAW 389, 407-08 (2007).

218. *Id*. at 416 (quoting *Deichordnung* case, BVerfG 1968, 24 BVerfGE 367 (389) (F.R.G.), *translated in* NORMAN DORSEN, MICHEL ROSENFELD, ANDREAS SAJO & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1162 (2003), also quoted in translation in KOMMERS & MILLER, *supra* note 109, at 633)); *see* KOMMERS & MILLER, *supra* note 109, at 631 ("For the most part, the Federal Constitutional Court has resolved the tension at work in Article 14 to the advantage of the individual liberty interest secured in the article's first paragraph." (citing *Hamburg Flood Case*, 24 BVerfGE 367 (1968))).

219. G.G. art. 14(3); *see* KOMMERS & MILLER, *supra* note 109, at 631 ("In short, Parliament's authority to define the content and limits of the right to property pursuant to Article 14(1)[2] cannot be interpreted to permit legislation that interferes with the essence of the right.").

220. KOMMERS & MILLER, *supra* note 109, at 633 (quoting *Hamburg Flood Case*, 24 BVerfGE 367 ¶ E.III.1.b (1968)).

failure to protect property from foreseeable climate change destruction is a cognizable constitutional claim.[221] However, Article 14 jurisprudence generally involves specific regulations or targeted expropriations that cause property damage or loss. For this reason, a climate change complaint could also attempt to show that specific governmental action, such as permitting lignite mines or coal-fired power plants, causes property loss due to climate change. Showing causation will be challenging, but *Lliuya v. RWE* suggests it is possible with the right expert opinions and evidence.[222]

CONCLUSION

With rights-based climate litigation gaining traction, there is no reason to think litigants in Germany will stay on the sidelines. The odds are that the Federal Constitutional Court will see a rights-based climate complaint in the near future. A German complaint is likely to piggyback on (1) the "duty of care to take [climate change] mitigation measures" in the Netherlands, (2) the recognized "right to an environment that is consistent with the human dignity and well being of citizens at large" in Ireland, and (3) the "right to a climate system capable of sustaining human life" in the United States, among others.

The constitutional structure in Germany and the jurisprudence of the Constitutional Court suggest the Court would recognize a similar right to an environment that maintains life for future generations. The environmental state goal of *Grundgesetz* Article 20a, bolstered by the German fundamental rights to life, equal protection, and property provide a framework on which to base an as of yet unenumerated constitutional right to a life-sustaining environment. On the global stage, it would not be an unprecedented step for the Constitutional Court to link such an environmental right to duties related to climate change mitigation.

Whether a German litigant could succeed in holding the government liable for failing to protect against infringement of this right is another matter. Scientific consensus indicates that the worst foreseeable effects of anthropogenic climate change could infringe such a right by causing droughts and extreme heat waves, increasing the intensity of natural

221. *See* KOMMERS & MILLER, *supra* note 109, at 634.

222. Order, Saúl Luciano Lliuya v. RWE AG, Higher Regional Court of Hamm (Nov. 30, 2017), *translated in* https://germanwatch.org/en/download/20812.pdf.

disasters, and creating conditions for epidemics, to name a few.[223] The scientific evidence for these probable effects opens the door to a legal claim. Yet, even if a court agrees that there is a constitutional right to a certain environmental quality that climate change threatens, the complainant would still need to show that Germany's actions (or lack thereof) are so egregious that it violates that right. After all, climate change is a global problem in a complicated ecological system that Germany cannot solve on its own. Not all courts that have recognized an environmental right have found liability and ordered relief.

Germany has already reduced its emissions by approximately 27.3% compared to its 1990 levels. [224] Therefore, Germany's lack of more aggressive progress is not as egregious as that of the Netherlands, which the Court in *Urgenda* held was so flagrant that the Netherland's had breached its duty of care to its citizens. Indeed, as of 2016, Germany had already achieved the reductions that the *Urgenda* court ordered the Netherlands to take by 2020.[225] This all weighs heavily against the likelihood that the Constitutional Court would find liability for Germany and order relief. However, by the German government's own measure, Germany is not doing enough to reduce its GHG emissions. The German government previously determined that reducing its 2020 emissions to 40% of its 1990 levels was necessary, which could be a standard the Court adopts. Now that it is clear that Germany's current path will not achieve this reduction, a court could grant relief mandating more aggressive action.

Although the likelihood of success on a rights-based climate claim seems slight, ten years ago it would have seemed fanciful. As the pathways for effective climate change mitigation diminish, locking the planet into a destructive trajectory, court involvement is becoming

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223. *See generally, e.g.,* Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (2014), http://www.ipcc.ch/report/ar5/wg2/.

224. *See* Federal Environment Agency (*Umwelt Bundesamt*), *Climate Gas Emissions Rose Again in 2016*, (Jan. 23, 2018), https://www.umweltbundesamt.de/presse/pressemitteilungen/klimagasemissionen-stiegen-im-jahr-2016-erneut-an [http://perma.cc/WB3C-QAAM].

225. *See* Urgenda Found. v. Neth., HA ZA 13-1396 The Hague Dist. Ct. ¶ 5.1 (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf (ordering a 25% reduction below 1990 levels).

increasingly accepted. Someday soon, the German Constitutional Court may have its chance to join the fray.