EUFJE conference 24-25 October 2022 - Climate law and litigation

Answers to the Questionnaire

Question 1: How has judicial decision-making on climate change issues evolved in your country over the last decade?

Climate change litigation in a broader sense covers all judicial proceedings somehow related to climate protection law issues. Often climate protection is only one argument among many. These judicial proceedings are not a new phenomenon. Recently, however, more specific climate change litigation cases are gaining considerable significance in Germany.

These proceedings are characterized by the plaintiffs not challenging single infrastructure projects but pursuing climate protection itself. Overall, the subject matter of these disputes is the impact of both public and private sector bodies´ actions (and their failure to act) on the global climate. Climate change litigation in this more restrictive sense aims to oblige public bodies as well as private stakeholders to implement climate protection measures.

Looking at the last ten years, the case of the Peruvian farmer Lliuya, who sued the German energy company RWE for damages at the end of November 2015, brought climate protection disputes in the narrower sense into the awareness of the general German public for the first time. The plaintiff claimed that the climate change to which also RWE contributed and the resulting melting of glaciers had caused the water level of Lake Palcacocha in the Peruvian Andes to rise to a dangerous level. This threatens his house situated below the lake near the city of Huaraz. The case is therefore also called the Huaraz case (see more specifically under question 2).

The case before the Berlin Administrative Court (Verwaltungsgericht - VG) from 2018/2019 should be mentioned as the "forerunner" of the subsequent actions targeted at climate protection before the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG). The plaintiffs wanted the Federal Government to be obliged to take additional measures to achieve the self-imposed national climate protection targets as set in the 2020 Climate Protection Program and to comply with obligations to reduce emissions under EU law. The action was dismissed for the lack of standing (see more specifically under question 2 below).

This decision was followed by a "first wave" of a large number of proceedings before the Federal Constitutional Court against the Federal Climate Change Act (Bundes-Klimaschutzgesetz - KSG), which eventually led to the groundbreaking climate decision by the Federal Constitutional Court of 24 March 2021 (see more specifically under question 2 below).

The “second wave” can be described as the constitutional complaints against the climate change acts of the federal states, which the Federal Constitutional Court refused to admit by order of 18 January2022 (see more specifically under questions 2 and 8 below).

Finally, there is a “third wave” initiated after the granting climate decision of the Federal Constitutional Court of 24 March 2021. These proceedings before the Federal Constitutional Court and various Higher Administrative Courts are being conducted or supported by Deutsche Umwelthilfe e.V. (DUH). There is a list of these proceedings on the website of DUH[1], which distinguishes between three categories (see below for more details). Most of the proceedings are still pending.

In the first category (climate disputes against the Federal Government), a “traffic dispute” of September 2020, which is directed against inadequate measures in the transport sector and a cross-sectoral action of 8 March 2021 are mentioned. The applications can be accessed on the internet.

In the second category (climate disputes in the federal states), numerous complaints are listed in the individual federal states; a more detailed list would go beyond the scope of this text.

The third category (climate disputes against companies) deals with disputes against car manufacturers BMW and Mercedes-Benz as well as against the oil and natural gas group Wintershall Dea (see further under question 2 below). Here, too, all statements of claim can be found on the DUH website.

Question 2: Before which type of courts is this type of litigation brought and by which type of plaintiffs?

So far, depending on the objective of legal action, in Germany climate change litigation has been brought before constitutional courts (both on federal and federal state level), administrative courts and civil courts.

a) Constitutional Courts

As the German Federal Constitutional Court may declare legislation unconstitutional, it is seized repeatedly with constitutional complaints against the Federal Climate Change Act (Bundes-Klimaschutzgesetz - KSG). In the case *Neubauer et al. v. Germany*[2] the complainants alleged successfully that Germany's GHG reduction targets set in the KSG were insufficient and

[1] https://www.duh.de/klimaklagen/

[2] Federal Constitutional Court (BVerfG, Bundesverfassungsgericht), Decision of 24 March 2021 – 1 BvR 2656/18 – Rulings of the Federal Constitutional Court (BVerfGE, Entscheidungen des Bundesverfassungsgerichts) 157, 30.

therefore violated their human rights as protected by the Basic Law, Germany's constitution. Subsequently to this decision, the federal legislature amended the KSG. In *Steinmetz et al. v. Germany* (pending) the complainants argue that the KSG's amended GHG emissions reduction paths are still insufficient in light of Germany's constitutional and international legal obligations.

Due to the federal structure of the state, national climate protection targets have to be pursued both on federal and federal state level. For this purpose, federal states have competence to adopt their own regional climate protection laws. In 2021, the Federal Constitutional Court was seized with 11 constitutional complaints against several states, the plaintiffs condemning either the lack or the inadequacy of a climate protection law in the respective federal state as a violation of their fundamental rights as set in the Basic Law. The Court held that federal state legislatures are not subject to a CO_2 emissions budget (unlike the federal legislature) and therefore refused to admit the complaints.[3]

In some federal states, it is possible to file a constitutional complaint with the Federal State Constitutional Court. In these proceedings, the standard of review is limited exclusively to the fundamental rights of the respective federal state constitution. However, these cases are rare, as usually constitutional complaints on federal state level cannot be combined with constitutional complaints on federal level. The details depend on the constitutional law of the respective federal state. For example, in Bavaria it is possible to raise an "actio popularis" to the Federal State Constitutional Court parallel to the constitutional complaint before the Federal Constitutional Court. In the case *Marlene Lemme et al. v. State of Bavaria* the plaintiffs brought a an action against the state of Bavaria for the inadequacy of its adopted climate law (2020 Climate Change Act - BayKlimaG) before the Constitutional Court of Bavaria, arguing that the BayKlimaG violates their fundamental rights as contained in the Bavarian constitution.[4] However, the plaintiffs withdrew their claim after the Federal Constitutional Court had refused to admit their parallel filed constitutional complaints.[5] Consequently, the proceedings before the Constitutional Court of Bavaria were discontinued without a decision on the merits.

To summarise, so far it is primarily the Federal Constitutional Court seized with constitutional complaints, invoking that climate change laws both on federal and federal state level infringe constitutional law. The constitutional complaints aim at the tackled climate change laws being declared unconstitutional and thus the federal or the federal state legislatures being engaged to adjust the regulatory framework.

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[3] BVerfG, Decision of 18 January 2022 – 1 BvR 1565/21 and other.
[4] Bavarian Constitutional Court (BayVerfGH, Bayerischer Verfassungsgerichtshof), Decision of 18 July 2022 – Vf. 41-VII-21 – https://rewis.io/urteile/urteil/du6-18-07-2022-vf-41-vii-21/.
[5] BVerfG, Decision of 18 January 2022 – 1 BvR 1565/21 and other.

Both private individuals and environmental associations filed the first constitutional complaints before the Federal Constitutional Court. However, with the decision of 24 March 2021 – 1 BvR 2656/18 – the Court dismissed the complaints raised by environmental associations, denying that they might be affected by restrictions of freedom comparable to those threatening private individuals. In consequence, only private individuals filed the second wave of constitutional complaints before the Federal Constitutional Court, concerning the constitutionality of several federal state climate change laws. It should also be noted that the majority of these complainants are very young, often even minors, which underlines the aspect of intergenerational justice in climate change litigation.

b) Administrative Courts

Even though in administrative proceedings plaintiffs often refer to climate protection among other arguments, the first specific climate change litigation case was brought before the Berlin Administrative Court (Verwaltungsgericht - VG) only in 2018. Broadly speaking, the plaintiffs wanted the federal government to be obliged to take additional measures in order to accomplish national climate protection targets as set in the 2020 Climate Protection Program. On 31 October 2019 the Berlin Administrative Court dismissed the case, concluding that the plaintiffs did not have standing to bring proceedings and the 2020 target, as a decision of the Federal Cabinet, was not legally binding.[6]

By contrast, the amended Federal Climate Change Act does lately contain legally binding national climate protection targets. In order to achieve these targets, the law now states binding GHG emissions reduction targets for a number of public sectors (energy, industry, transport, construction, agriculture, waste management). In order to improve the sequestration of carbon dioxide from the atmosphere, the Federal Climate Change Act now also strengthens the contribution of the public sector land use, land use change, and forestry. A number of disputes is currently pending before the Berlin-Brandenburg Higher Administrative Court (Oberverwaltungsgericht - OVG), aimed at obliging the Federal Government to implement effective climate protection measures (public enforcement). For each public sector, the plaintiffs want the government to be obliged to establish prognostically sufficient climate protection programs in order to accomplish binding climate protection targets as set in the Federal Climate Change Act.[7]

[6] VG Berlin, Judgment of 31 October 2019 – 10 K 412.18.
[7] OVG Berlin-Brandenburg, case no. 11 A 22/20 and 11 A 22/21 (pending), complaint of 11 September 2020 (affecting the sector transport) available at https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Verkehr/KlimaschutzklageVerkehr_11-09-2020_Final.pdf, complaint dated 8 March 2021 (cross-sectoral) available at https://www.duh.de/fileadmin/user_upload/download/Projektinformation/Klimaschutz/Klimaschutzgesetz/OVGBB_Klimaschutzgesetz_-_Sektor%C3%BCbergreifende_Klage_final.pdf.

Due to the federal structure of the state, there is also a number of disputes currently pending before the higher administrative courts of several federal states in order to oblige the federal state governments to implement effective climate protection measures on federal state level. Precisely, the organization "Environmental Action Germany" (Deutsche Umwelthilfe - DUH) has filed actions against the governments of Baden-Wuerttemberg,[8] Bavaria,[9] Lower Saxony[10] and North Rhine-Westphalia[11] before the respective higher administrative courts. Target of the claims is to oblige the federal state governments to adapt more effective climate protection programs, containing appropriate measures and strategies to reduce GHG emissions, as provided for by the climate change laws on federal state level.

Although higher administrative courts normally act as courts of appeal, there is a special provision[12] in German environmental law granting them jurisdiction over these proceedings as the court of first instance. Plaintiffs in pending proceedings before the administrative courts are, as far as can be seen, solely environmental associations, precisely the organization "Environmental Action Germany". Actions of private individuals will fail to comply with the requirement of legal standing, as neither the Federal Climate Change Act nor climate protection laws in the federrral states contain any subjective rights or actionable legal positions (see also under question below 4).[13] In contrast, environmental associations invoke their standing to bring a representative action (Verbandsklagebefugnis).

c) Civil Courts

Climate change litigation cases before civil courts are directed against private entities, obliging a company either to reduce its GHG emissions or to pay compensation for climate-induced damages (private enforcement). Plaintiffs are private individuals as well as environmental associations, as the following examples show:

The first climate litigation case in this respect was that of Luciano Lliuya, a farmer who lives in Huaraz, Peru. He claims that the German energy supply company RWE, having knowingly contributed to climate change by emitting substantial volumes of GHG, bore responsibility for the melting of mountain glaciers near the town of Huaraz. He requested the court to order RWE to reimburse him for a portion of the costs that he and the Huaraz authorities are expected to incur from setting up flood protections. The Essen Regional Court (Landgericht -

[8] VGH Mannheim, case no. 10 S 3542/21, Deutsche Umwelthilfe (DUH) v. Baden-Württemberg (pending).
[9] Munich Higher Administrative Court (Verwaltungsgerichtshof - VGH), case no. 22 A 21.40024, Deutsche Umwelthilfe (DUH) v. Bayern (pending).
[10] OVG Lüneburg, pending, complaint dated 4 April 2022 available at https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klage_Klimaschutzstrategie_Niedersachsen.pdf.
[11] OVG Münster, case no. 21 D 281/20, Deutsche Umwelthilfe (DUH) v. Nordrhein-Westfalen (pending).
[12] § 7 (2) first sentence of the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz - UmwRG).
[13] OVG Münster, Judgment of 5 November 2021 – 11 D 93/19.AK – para. 133 et seq.

LG) dismissed the action, inter alia denying a legally significant causal contribution of RWE to the glacier melt.[14] The appeal on points of fact and law is now pending before the Hamm Higher Regional Court (Oberlandesgericht - OLG). In 2017, the Court already announced that it finds the claim to be comprehensibly justified in principle.[15] In May 2022, the court held an on-site visit in Peru with several experts, which had already been announced in 2020 and must be postponed several times due to the Covid-19 pandemic.

In fall 2021, the associations Environmental Action Germany and Greenpeace sued the automobile companies BMW, Mercedes-Benz and Volkswagen with the aim of obliging them to reduce the sale of vehicles with internal combustion engines, to achieve certain emission budgets and to stop production of such vehicles by 2030 at the latest. These cases are pending before the Regional Courts of Braunschweig and Detmold (Volkswagen), the Regional Court of Stuttgart (Mercedes-Benz) and the Regional Court of Munich (BMW). A similar dispute, pending before the Regional Court of Kassel, seeks to order the gas and oil exploration company Wintershell Dea to restrict its exploration activities immediately and to completely stop exploring new oil and gas fields by 2025. In these cases, questions of causality and fault must be clarified.

Question 3: What are the opportunities to this type of litigation in your country?

As shown above, climate change litigation throughout the different jurisdictions provides an opportunity to oblige legislatures, public bodies and private stakeholders to implement effective climate protection measures. Regulatory and enforcement deficits of state actors are identified and eliminated. The practical effectiveness of norms of climate protection law is enhanced by enforcing their violation in court.

However, apart from the legal targets of the proceedings, there are also less obvious opportunities and motives. Often, the plaintiffs push the proceedings in a media-effective way and attract public attention. Deficient action on the part of political actors is publicly highlighted and discussed. Climate change litigation initiates political and democratic processes and thereby produces a symbolic effect. Court rulings can have a steering effect on policymakers and accelerate political decision-making. Climate change litigation can also have a direct impact on the development of a private company, as climate disputes are also a reputational issue for the carbon majors. Even unsuccessful climate disputes can therefore be used in political and legal contexts, whereby the significance of the outcome of each single proceedings are put into perspective. Often it is more important how a court justifies a

[14] LG Essen, Judgment of 15 December 2016 – 2 O 285/15 – (not yet final and binding).
[15] OLG Hamm, Decision of 30 November 2017 – I-5 U 15/17.

judgement - even if it dismisses the action. For example, the judgement of the Berlin Administrative Court (Verwaltungsgericht - VG) was celebrated as a great success for the climate protection movement, even though the claim was dismissed. Climate disputes can establish guidelines and have a decisive impact on the debate about climate protection.

Unlike politicians, judges are independent, not bound by legislative terms and not accountable to any voters. Some decisions that are important for climate protection may not be politically opportune. Political as well as state actors may lack the necessary determination to counter climate threats or even breaches of the law. Judicial decision-making is detached from political debate, which offers the possibility of a rational and science-based approach in court proceedings. In addition, court proceedings can have a pacifying effect. For example, an oral hearing can convey the claimant the feeling that that their concerns have been heard by a public body. In court, the individual encounters the state much more directly than it is possible at demonstrations or within political debates. Court proceedings can therefore also contribute to plaintiffs and government bodies entering into a dialogue with each other.

Climate change litigation can also contribute to compensate legal, political and social power imbalances. For example, a single environmental activist may not be willing to take on litigation and cost risks. Climate interests are bundled and strengthened by plaintiffs joining forces, especially involving environmental associations. Having in-depth knowledge of environmental law and necessary financial means, environmental associations are able to pursue their legal interests effectively.

Question 4: What are the challenges to this type of litigation in your country?

In answering this question, we focus on administrative jurisdiction, as we can assess the challenges there from our own experience.

Legal proceedings in the context of climate protection are challenging for the administrative courts in Germany, but also for the plaintiffs - from a procedural and substantive point of view.

Climate-damaging actions on the one hand and climate protection measures on the other hand, will only develop their full effectiveness after a certain time has passed. Mainly affected by climate change are therefore children and young adults as well as future generations. The biggest challenge in proceedings before the administrative courts concerning climate protection is that the action of person seeking protection under German administrative procedural law is in principle only admissible if there is a possibility that its own rights have been violated (legal institution of subjective public-law rights). It follows that the individual must, in principle, not bring oneself to act as the administrator of the interests of the general public or other persons, but must assert a causal effect on its own rights or interests.

Similarities exist in this respect to US law ("standing to sue") and to the legal systems in Austria and Poland. A procedure of objective judicial review (objektives Rechtsbeanstandungsverfahren) is alien to the German legal system. Since the aim of actions targeted at climate protection before the administrative courts in the narrow sense is to oblige the state to take certain climate protection measures, the question arises whether the plaintiff has a subjective right to climate protection. The Berlin Administrative Court (Verwaltungsgericht - VG) answered this question in the negative in October 2019 in the first climate action in the narrow sense brought in Germany.[16]

The Federal Climate Change Act that entered into force at the end of 2019 contains a provision according to which this Act does not establish any subjective rights and actionable legal positions. The objective is to cut the ground from under actions directly aimed at complying with the climate protection and mitigation targets as well as the annual emission budgets laid down in this Act. It may be doubted whether this very broad exclusion is compatible with article 9 (3) of the Aarhus Convention and the decision of the Court of Justice of the European Union (CJEU) in the Protect case.[17] In any event, this restrictive provision does not apply to environmental protection organizations following a recent decision of the Federal Administrative Court.[18] In its landmark decision of March 2021, the Federal Constitutional Court did not explicitly decide whether there is a basic right to climate protection.[19] However, it has decided that the individual has a right to protection by the state against irreversible and serios, imminent impairments in the future and that future-oriented defensive protection of basic rights exists. It will be interesting to observe how the German administrative courts react to this concept of intertemporal rights. Overall, it is expected that the number of climate actions (also) before the administrative courts will increase.

Another challenge is the high factual complexity of climate protection proceedings. While in many administrative proceedings only legal questions are to be answered, climate actions are increasingly concerned with questions as to facts. Although important questions about global climate change have now been clarified also with recourse to IPCC reports and climate modelling. However, questions about the causes-effect relationships, for example, are still unclear. Currently, in Germany it lacks concretizing requirements both for the determination of the climate-relevant effects and for their assessment. To date, there are no statutory instruments, administrative regulations, implementing regulations, guidelines, manuals or the like that could be used by the administrative authorities for the practical implementation of

[16] VG Berlin, Judgment of 31 October 2019 - 10 K 412.18 - (see also under question 2 above).
[17] CJEU, Judgment of 20 December 2017 - C-664/15 -.
[18] Federal Administrative Court (Bundesverwaltungsgericht - BVerwG), Judgment of 4 May 2022 - 9 A 7.21 -, provided for publication.
[19] Federal Constitutional Court (Bundesverfassungsgericht - BVerfG), Decision of 24 March 2021 - 1 BvR 2656/18 - Rulings of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 157, 30 (see also under question 2 above).

their obligations to investigate and assess. According to the view of the Federal Administrative Court, this does not mean that the consideration requirement is currently not manageable (operational) and would therefore not apply. However, it poses great challenges to legal practitioners in the application of the law. These challenges are twofold: They not only make it difficult for the executive to identify and take suitable, necessary and appropriate climate protection measures, but also at the same time make it difficult for the courts to legally assess the measures taken.

The German legal system, like a large number of other European legal systems, provides that administrative courts must investigate the facts *ex officio*. In particular, in the case of climate disputes, administrative courts rely on scientific expertise. In Germany, there is no possibility, as in Sweden, of appointing natural scientists as judges who can contribute their expertise when finding the facts and arriving at a judgment. The commissioning of experts by the court, the preparation of expert reports and often a subsequent dispute between different experts can lead to the long duration of proceedings - another challenge that the German administrative courts will have to face in the future when dealing with climate actions. If, despite the administrative court's measures of inquiry, a fact cannot be found to the conviction of the court, this may be borne by the plaintiff. The German legal system does not contain a provision on the burden of proof under which remaining doubts must be considered in favor of climate protection.

In the case of climate actions before administrative courts, it is challenging for plaintiffs that certain specialist laws provide for a ten-week time limit within which the action brought must be substantiated and the facts and evidence must be stated. This applies in particular to proceedings concerning large infrastructure projects, in which questions of climate protection law also regularly arise. Taking account of subsequent declarations or evidence submitted and extending the time limit is only possible under strict conditions. This time limit serves the early specification of the subject matter of the proceedings. This is the only way for the parties as well as the administrative court to diligently deal with the relevant subject matter of the proceedings. The time limit ensures that even complex proceedings concerning large-scale projects remain manageable and thus also serves to expedite the proceedings. It is not excluded that this expedition will also have a positive impact on climate protection. The time limit also applies to infrastructure projects aimed at encountering climate change.

The federal structure of Germany also poses a challenge. State tasks are therefore split into those of the state as a whole (Federal Republic of Germany) and those of the federal states. This federal structure is also inherent to the German legal system; therefore even in the administrative jurisdiction own courts of the federal states exist, which in principle decide on climate actions as courts of first and second instance. The federal structure of the state is also

the reason why a climate change act does not only exist at the federal level; almost all federal states have adopted their own climate change act (see also under question 8 below). This means that climate change acts may be challenged in different courts and it is not excluded that there are divergent decisions in similar situations. The Federal Administrative Court regularly only acts at as a court of third instance. It is also a question of financial resources and time whether a plaintiff pursues his or her aim of legal protection before the Federal Administrative Court after he or she remained unsuccessful in two instances.

Another challenge not only German administrative courts have to face is that climate protection activists sometimes have high expectations in such a manner as to expecting the respective court itself to make fundamental decisions on the nature or scope of climate protection measures. It is true that administrative courts are confronted with expectations of the parties in other fields of law, too. However, concerning climate actions, the expectations of parts of society are particularly high in a country with a long-standing climate protection movement. The task of the administrative courts is therefore to respect the principle of separation of powers enshrined in the constitution and the scopes for action of the parliamentary legislature. In essence, the fundamental question arises as to what courts can decide on in the context of climate actions and what is reserved for the legislature (see also under question 6 below).

Question 5: What is the average length of proceedings (including on appeal and cassation)?

The Federal Administrative Court is not in possession of any data on this subject.

Question 6: Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

In the German language, the term 'remedies' is understood as any request established by the current legal system in a particular procedure to challenge an administrative or judicial decision. The various remedies are prescribed by law and are not ordered by the court. We therefore interpret question 6 as to show which decision-making options German courts have in principle.

Due to the principle of separation of powers enshrined in the German constitution, courts are bound by law and justice. This means that, as described in question 3 above, judges are free from political and social constraints in their decision-making, but can only decide within the limits set by the legislature. This is the only way to achieve the objective of "checks and

balances" pursued by the separation of powers. In procedural law, the German legislature has regulated the extent to which the courts are authorized to control state and private action and the options for decisions-making available to the courts for this purpose. Climate actions are not a special type of actions regulated by law, but normal actions with reference to climate protection law. Therefore, in climate protections cases, courts can only have recourse to the decision-making options granted to them under German procedural law but cannot go beyond these means.

So far, the Federal Constitutional Court (Bundesverfassungsgericht - BverfG) has dealt with climate actions only in the context of constitutional complaints (see under question 2 above). In principle, citizens can lodge a constitutional complaint to have acts of the executive, legislative and judiciary reviewed for their conformity with basic rights. As the subject matter of the constitutional complaint, failure of the state to take action is also considered, namely if the public authority was obliged to act. Regardless of whether the constitutional complaint is directed against a judgment, a law or an executive measure, in the case of unconstitutional state action or omission, the Federal Constitutional Court determines a violation of basic rights and sets aside the corresponding judgment, law or act. If a judgment is found incompatible with basic rights, it is possible to refer the dispute back to the court that issued the challenged decision. That court must then decide on the case anew taking into account the findings of the Federal Constitutional Court. If a law is incompatible with the Basic Law or if an executive act is based on such an unconstitutional provision, in principle, the invalidity of the law is pronounced. The decision of the Federal Constitutional Court has legal validity. Once the decision of the Federal Constitutional Court is pronounced, the provision declared invalid is treated as if it has never existed. Something else applies in those exceptional cases in which the invalidity of a norm would impair the constitutional order even more than the violation of basic rights itself. If this is the case, the Federal Constitutional Court declares the norm to be incompatible with the German constitution and at the same time orders that the norm remains applicable for a certain period of time. The Federal Constitutional Court therefore found in the case of Neubauer et al. v. Germany[20] that part of the Federal Climate Change Act was unconstitutional but not invalid. Otherwise, in the event declaring a part of the Act invalid, there would have been no statutory limitation of greenhouse gas emissions at all until the legislature enacted a new Federal Climate Change Act. This would have had an adverse effect on climate protection all the more. Therefore, it was decided that the partially unconstitutional Federal Climate Change Act remains applicable, but that the legislature has to amend the act within a certain time limit determined by the Court.

[20]BVerfG, Decision of 24 March 2021 – 1 BvR 2656/18 – Rulings of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 157, 30 para. 266.

The jurisprudence of the civil court on climate protection has so far been limited to actions concerning claims for damages and the obligation to take action as well as actions for injunctions. In the context of actions concerning the claim for damages, the civil courts decide both whether a right to claim compensation exists and the amount of compensation to be paid. In the case of actions concerning the obligation to take action and actions for injunctions, the civil courts may order the defendants to undertake or omit a particular private-law act requested by the plaintiff. In the aforementioned proceedings initiated by Luciano Lliuya from Peru against RWE[21], the plaintiff is seeking compensation. If the action is successful, the court can also award the claimant an appropriate amount of damages. The aforementioned actions by the environmental associations Greenpeace and Deutsche Umwelthilfe against automotive manufacturers and oil companies[22] described above aim at the court ordering the companies to change their emissions behavior or to refrain from producing natural gas and from flowing oil both directly and indirectly in Germany and abroad by 2025.

Legal protection against official actions or omissions is possible before the administrative courts.

If the plaintiff objects to an administrative measure, the court may annul it if it is unlawful. In the event of a serious breach of law, it is possible for the court to declare the administrative act invalid. Climate disputes in the broader sense are mostly actions for annulment (Anfechtungsklage) against administrative measures in which climate protection plays a role in the administrative decision-making process, for example when weighing the interests concerned. Hence, the implementation of large infrastructure projects can only start once a special formal procedure (planning approval procedure - Planfeststellungsverfahren) has been completed. In the approval decision, the authority must adequately identify, weight and balance the conflicting private and public interests such as climate protection. In the event of an action, the court must inter alia verify whether climate protection concerns have been sufficiently taken into account in the balancing decision. If this is not the case the approval decision will be annulled or declared unlawful and not executable if the deficiencies can be remedied in a supplementary procedure.

If an authority refuses to adopt an administrative measure with a certain regulatory effect even though the plaintiff is entitled to it, the plaintiff may bring an action for the issuance of an administrative act (Verpflichtungsklage). Depending on whether the claim exists, the court

[21] Essen Regional Court (Landgericht - LG), Judgment of 15 December 2016 – 2 O 285/15 – (not yet final and bindung); Hamm Higher Regional Court (Oberlandesgericht), Decision of 30 November 2017 – I-5 U 15/17 (see also question 2 above).

[22] Case documents are available at the database Climate Change Laws of the World maintained by the Grantham Research Institute under the names Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW), Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG, Barbara Metz et al. v. Wintershall Dea AG (see also under question 2 above).

may oblige the authority to adopt the requested act or measure or, if the authority must exercise its discretion , to issue a new decision taking into consideration the legal opinion of the court. In such constellations of requests for the issuance of acts or measures, climate actions in the broader sense are only conceivable to a limited extent, since the plaintiff must always have a claim, i.e. a subjective public-law right, which he can assert. Therefore, the problem described in question 4 above arises as to whether the common good objective climate protection also conveys the individual a subjective public-law right. These situations, in which individuals challenge harmful emissions originating from a particular installation, contribute to a small extend to climate protection, for example, when the court obliges the authority to order emission-reducing measures against the operator of that installation. However, this does not directly pursue and achieve the global objective of climate protection and thus the public interest.

Administrative courts may, in the context of actions for performance and injunctions, oblige German authorities to (physically) act or refrain from acting. This was the aim of the climate action in the narrow sense before the Berlin Administrative Court[23] (Verwaltungsgericht - VG) described under question 4 above. With the general action for performance filed there, the plaintiffs requested that the court order the Federal Government to take additional measures to achieve the self-imposed climate change target 2020 and to comply with obligations to reduce emissions under EU law. As stated above, that action was unsuccessful due to the lack of standing on the part of the plaintiffs.

In administrative proceedings for temporary relief (Eilverfahren) the German administrative courts may decide, depending on the situation, whether an administrative measure can be executed (implemented) immediately even though an action has been brought against it which has not yet been decided. This can for example temporarily stop the immediate start of construction of installations— until the judicial proceedings are terminated. There is also the possibility of issuing interim orders in which the court makes concrete provisional orders pending the termination of the judicial proceedings. Judicial temporary relief proceedings are common in the context climate actions in the broad sense, as there is often an individual's interest in preventing irreversible conditions caused by certain installations in order to protect the indivudual's health and property. Temporary relief proceedings in the context of climate actions in the narrow sense have not yet occurred.

Overall, it can be stated that the German legislature grants the German courts various options for decision-making. Each of these possibilities must respect the principle of separation of powers. The courts have the task of reviewing state and private actions but not to take concrete

[23] VG Berlin, Judgment of 31 October 2019 – 10 K 412.18, Family Farmers and Greenpeace Germany v. Germany (see also under question 2 above).

measures on climate protection or to create laws for that purpose. As mentioned above, there is no specific climate action that breaches the principle of separation of powers and gives the court more powers with regard to climate protection issues although this is often assumed by the public. If this were actually intended to improve climate protection, the legislature would have to amend the relevant procedural rules for this purpose and give the German courts more powers. So far, the courts have only the opportunity to identify errors in the implementation of climate protection by private and state actors and thereby ensuring more effective climate protection.

Question 7: Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard?

Enforcement ensures the implementation and thus the effectiveness of judicial decisions. It is enshrined in the constitution as part of the guarantee of effective legal protection in Germany. It is precisely in administrative law that implementation and enforcement of judgments imposing an obligation on public authorities also have a significant rule of law dimension. The administrative courts review whether the executive is complying with the legal limits of its powers. At the same time, the adoption of administrative measures is reserved for the executive. In principle, the courts are not allowed to adopt these measures themselves, but only to determine their erroneousness and to annul them, or to object to their failure to act and oblige the authorities to take action. If the administration does not implement these decisions, this affects the overlapping of the three state powers (Gewaltenverschränkung) among themselves at the sensitive border between the judiciary and the executive.

The Code of Administrative Court Procedure only partially regulates the enforcement of administrative court decisions described here. For the most part, reference is made to the provisions of the Code of Civil Procedure. However, since these rules are designed for disputes between equal private individuals, a transfer to disputes with the public sector is not always possible without problems. It is therefore still partly unclear under what conditions civil law rules can or must be applied and to what extent the few more specific administrative provisions take precedence.

In particular:

Administrative court decisions can only be enforced if they have enforceable contents. They must oblige to a performance, toleration or omission. Therefore, decisions, which merely make a declaration, are not enforceable. Likewise, decisions annulling or declaring a contested administrative act not executable (e.g. the approval of large infrastructure projects) are not

enforceable. The legal effect of the decision then takes immediate effect, without the need for an implementation measure on the part of an authority.

In principle, decisions imposing an obligation are enforceable only if they are incontestable, i.e. final and binding. Therefore, judgments and decisions that have been or still can be challenged by an appeal are, in principle, not enforceable. The most important exception to this principle concerns decisions in temporary relief proceedings, which are by nature immediately enforceable. If the court issues an interim order in temporary relief proceedings, it is enforceable even before it becomes final and binding, because the urgency of the case regularly requires rapid implementation of the decision without waiting for the end of the proceedings through the instances.

In the case of a decision imposing an obligation on an authority, a specific provision of administrative procedural law lays down that the only means of enforcement of that decision is a penalty payment of up to EUR 10 000, which can be imposed several times if necessary. The court of first instance has jurisdiction, which, however, only acts at the request of the claimant. The authority must first be threatened with the penalty payment for non-compliance within a certain period of time; after the expiry of the time limit the penalty payment can be imposed. The authority that must implement the obligation has to pay the penalty payment. This provision, which severely limits the possibilities of enforcement, favors public authorities over private individuals because the legislature has assumed that the state will normally fulfil its obligations voluntarily.

However, according to the wording of that provision, it is essentially limited to interim orders and decisions imposing the obligation on an authority to adopt an administrative act. It is disputed whether decisions obliging an authority to other performance, be it (physical) acts, tolerations or omissions, must also be enforced according to that provision, or whether it is possible to apply the rules of the Code of Civil Procedure.

This discussion is particularly important because the specific provision of administrative procedural law on penalty payments is hardly efficient. The maximum amount of EUR 10 000 is relatively low for an authority. In addition, the sum does not have to be paid to third parties, but must be paid to the treasury. In practice, money is transferred from one payment office of the public sector to another, but remains within the exchequer and is only redistributed. The penalty has therefore a rather symbolic character and does not affect the politically and legally responsible officials.

A case concerning clean air planning in Munich showed these problems in an exemplary way: The Administrative Court (Verwaltungsgericht - VG) had found that the measures provided for air pollution control by the Free State of Bavaria in Munich were not sufficient to comply with

the prescribed limit value and obliged it to adopt further measures.[24] Because the Free State of Bavaria did not comply with this obligation, the court threatened a penalty payment, which the Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof) considered lawful at last instance.[25] The penalty payment was subsequently imposed several times and also paid, but the federal state government still refused to adopt further measures to control air pollution. Finally, the environmental association, which had successfully sued the Government, requested, in order to effectively implement the judgment, to apply a provision of the Code of Civil Procedure enabling either the fixation of a higher penalty payment of up to EUR 25 000 or to order coercive detention. The Munich Higher Administrative Court considered a higher penalty payment to be unsuitable, but raised the question whether, in a situation in which the executive deliberately disregards the court's decision imposing an obligation, the politically and legally responsible persons may be subjected to coercive detention in order to enforce the decision. Consideration was given to the Bavarian Minister-President, the minister for the environment, the head or deputy head of the authority responsible for clean air planning or the head of department responsible within the authority. According to the Court, such coercive detention would be incompatible with national constitutional law because the relevant civil procedural provision does not satisfy the requirements imposed on a legal basis for measures involving the deprivation of liberty. However, the Court referred the question to the Court of Justice of the European Union (CJEU) whether, in the field of environmental protection, EU law nevertheless allowed or required the application of coercive detention.[26]

In its decision, the CJEU pointed out that an obligation to impose coercive detention on office holders involved in the exercise of public authority may be considered if public bodies do not comply with a judicial decision to enforce EU law. However, due to the severe interference with fundamental rights, this is only possible as *ultima ratio* and only if there is a sufficiently accessible, precise and foreseeable legal basis for the adoption of such a coercive measure in the provisions of national law..[27] However, according to the prevailing opinion among legal scholars in Germany, such a legal basis does not exist, which is why in the end there was no coercive detention and the federal state government's non-compliance with the judicial decisions remained without consequences.

[24] VG Munich, Judgment of 9 October 2012 - M 1 K 12.1046 - Available at VG Munich, Judgment of 09.10.2012 — M 1 K 12.1046 — openJur
[25] Munich Higher Administrative Court (Verwaltungsgerichtshof - VGH), Judgment of 27 February 2017 - 22 C 16.1427 - Available at VGH München, Decision of 27.02.2017-22 C 16.1427 — Bürgerservice (gesetze-bayern.de)
[26] VGH München, Judgment of 9 November 2018 - 22 C 18.1718 - Available at VGH Munich, Decision of 09.11.2018-22 C 18.1718 — Bürgerservice (gesetze-bayern.de)
[27] CJEU, Judgment of 19.12.2019 — C-752/18.

The problem described could also arise in the enforcement of decisions on climate actions, because even in the case of climate protection measures, the state has scope for action, which the court must respect. However, the peculiarity here is that most of the measures must be adopted directly by the legislature due to their far-reaching effects. Therefore, the conflict of competences between the state powers with regard to climate protection law has so far been dealt with mainly between the Federal Constitutional Court and the legislature instead of (at a subordinate level) between the administrative courts and the executive. However, the first proceedings are now pending before the administrative courts in which the plaintiffs seek an obligation of the Federal Government to establish suitable climate protection programs.[28] If the Federal Government were indeed obliged by judgment to take suitable measures, but refused to implement the respective decision, the effectiveness of enforcement in climate protection cases would likewise be put to the proof. If the executive (e.g. for political reasons) is not willing to comply with a judicial obligation to develop or implement climate protection measures, the courts still have no effective means for enforcement.

In the aftermath of the dispute concerning clean air planning in Munich, various suggestions for improvement of enforcement have been discussed: For example, a penalty payment could be imposed directly against the head of the respective authority or the head of government. It could also be paid out to the environmental association that initiated the proceedings or donated to a third organization instead of collecting the penalty in favor of the treasury. Some people also called for the introduction of a legal basis enabling coercive detention while a few people assume that such measures could already be imposed under the current legal situation.

It has not been common until now that the legislature's expectation that the state will implement administrative court decisions on a voluntary basis has been blatantly disappointed. Apart from clean air planning, similar cases occasionally existed in asylum law and once when an extreme rightwing party requested to use a civic center. However, each of these breaches of the judiciary's sovereign power was a stab at the heart of the rule of law. Actions targeted at climate protection now open up a new playground on which it will once again appear whether the executive is worthy of the trust put in it, or the legislature must tighten strings and provide the courts with more scope for action when it comes to the enforcement of their decisions. This could also be an effective contribution to climate protection. A political will to reform the provision on the enforcement of administrative court decisions and to implement more effective measures is not yet apparent.

[28] Berlin-Brandenburg Higher Administrative Court (Oberverwaltungsgericht - OVG), case no. 11 A 22/20 and 11 A 22/21 (pending) (see also under question 2 above).

Question 8: What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses?

It is difficult to mention the 'most useful norms', as this depends on the respective field of law in which the judge specifically decides. Article 20a of the Basic Law (Grundgesetz - GG), the Federal Climate Change Act (Bundes-Klimaschutzgesetz - KSG) of 12 December 2019, which had to be amended due to a decision of the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG)[29] at the end of August 2021[30] as well as - with restrictions - the climate change acts of the federal states are the central general provisions, from which numerous other specialist provisions result (and will still result in the future).

These norms are briefly presented below.

a) Article 20a of the Basic Law reads as follows:

"Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

The Federal Constitutional Court has ruled that the state's obligation laid down in article 20a GG also includes the obligation to climate protection, including the objective of achieving climate neutrality. However, the Basic Law itself does not contain any more detailed specifications. Rather, further clarification is needed which has been provided by the Federal Climate Change Act.

b) Federal Climate Change Act

The Federal Climate Change Act of 12 December 2019 established the relevant legal framework for national climate policy and clarified the climate protection objective of the Basic Law and defined it in more detail by section 1 third sentence KSG. The temperature threshold referred to in section 1 third sentence KSG (limiting the increase in the global average temperature to well below two degrees Celsius and, if possible, to 1.5 degrees Celsius, above the pre-industrial level) is to be regarded as a constitutionally decisive specification of the climate protection objective of the Basic Law.

The Federal Climate Change Act is a framework law that primarily addresses the legislature and is directed at an overall balance. It sets annual emission targets in the form of maximum emission budgets for each sector (energy, industry, transport, etc.) and specifies the extent to

[29] BVerfG, Decision of 24 March 2021 – 1 BvR 2656/18, 78, 96, 288/20 – Rulings of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 157, 30 et seq. (see also under question 2 above).
[30] First Act amending the Federal Climate Change Act of 18 August 2021.

which emissions in the sectors need to be reduced step by step. Most natural ecosystems can capture carbon dioxide from the atmosphere. In order to improve its role as a carbon storage and sink, the Act now also envisages a strengthening of the contribution to climate protection of the land use, land-use change and forestry sector. However, the Act not only formulates climate protection targets, but also lays the foundation for an instrument of planning and creates a reporting scheme. According to the concept of the Act, it depends on the decision of the legislature how to achieve the climate targets within the time available in the individual sectors.

The only exception is section 13 (1) first sentence KSG, which addresses the 'bodies discharging public duties'', i.e. the authorities, and requires them to 'give due consideration to the purpose of this Act'. Already one decision of the Federal Administrative Court (Bundesverwaltungsgericht - BVerwG) concerns the interpretation of the Act.[31] Subject matter of the dispute was the approval of a motorway section. A nature conservation association had challenged the approval and complained about the lacking consideration of climate protection.

c) Country climate protection laws

Due to the federal structure, almost all German federal states have adopted their own climate change acts. However, these federal state acts are not of less importance than the Federal Climate Change Act. This is because they are formulated in a generally (still) less binding manner. In addition, the federal states do not have any relevant legislative competences in the field of global climate protection.

In January 2022, the Federal Constitutional Court refused to admit constitutional complaints in connection with federal state climate change acts.[32] In part the complainants had objected to the already existing federal state climate change acts and, in part, against the failure of some federal state legislatures to regulate a reduction path for greenhouse gases. As regards the reasoning of the Court, the decision states: The individual federal state legislatures have not been obliged to comply with an at least cursory reviewable amount of overall reductions. However, without such a standard for overall reduction related to the federal state concerned, the emissions permitted or actually occurring in that state up to a certain point in time do not have a legally mediated upstream effect that is equivalent to an interference, since the emissions actually occurring do not contribute to the consumption of a remaining quantity of permitted carbon hydroxide emissions..

[31] BVerwG, Judgment of 26 April 2022 - 9 A 7.21, provided for publication.
[32] BVerfG, Decision of 18 January 2022 - 1 BvR 1565/21 (see also under question 2 above).

As mentioned at the beginning, in addition to the provisions described above, there are many other specialist provisions at federal level, which cannot be listed in detail here. For example, it is now mandatory to take into account the global climate within the environmental impact assessment, there are regulations on greenhouse gas emissions trading and fuel emission allowance trading, housing benefits, energy savings in buildings, tax law, the termination of coal-fired power generation through the decommissioning of coal-fired power plants, etc. In addition, there is the 2022 Immediate Climate Action Program of 23 June 2021, which provides eight billion euros for various sectors (industry, trade, transport, etc.). More than half of the funds are earmarked for the energy-related modernization of buildings.