Climate changes in Courts: different judicial approaches to government actions on cutting greenhouse emissions. Comparing Europe and America through selected cases[1]

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Abstract: The paper seeks to emphasize the different approach of certain national supreme or constitutional courts in the most recent and relevant cases brought to their attention, in order to examine, in each of the jurisdictions under consideration, the role of the judiciary in climate change, the approach to the political nature of the issues and to the standing of the plaintiffs, and the effects of the decisions on climate policies and on future litigation.

Keywords: Climate litigation, political question, greenhouse emissions, standing, courts.

1. Towards an effective cosmopolitan justice?

Back in September 2009, Carol Browner, Director of the White House Office of Energy and Climate Change Policy, claimed that «the courts are starting to take control of climate change»[2]. Likewise, the New York Times of January 27, 2010, reported a statement by a former Bush Administration official suggesting that the «sense of inaction has left a situation in which those intent on reducing gas emissions could try to make the courts a significant battleground». The lemma climate change litigation was then beginning to emerge, along with the rise of numerous actions brought by citizens, NGOs and states, against federal or state governments, oil companies and other actors allegedly responsible for greenhouse gas emissions. When looking at the enormity of the phenomenon today, the words of Professor Hari Osofsky, 2009 appear prefiguring. He argued that courts «have become a critical forum in which the future of greenhouse gas emissions regulation and responsibility are debated»[3]: we have witnessed for over a decade a steady expansion of cases against states and private parties, of civil, administrative, criminal, and constitutional cases, of cases involving

[1] The present paper collects reflections presented at the *XI Conference of the Young Comparativists Committee* of the *American Society of Comparative Law*, held in Boston, October 7-8, 2022.

[2] *Courts "Take Control" of Climate*, insideepa.com (Sept. 23, 2009) in D. Markell and J. B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REP. 10644 (2010).

[3] H.M. Osofsky, *The Continuing Importance of Climate Change Litigation*, Climate Law, vol. 1 no. 1/2010, 3-29; W. C. Burns, H. M. Osofsky (eds.), *Adjudicating Climate Change: State, National, and International Approaches*, Cambridge Univ. Press, 2009.

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damages, pollution bans or lawsuits to impose green policies, brought before international, federal, state and even local courts, which has brought scholars to speak of a climate litigation explosion[4].

Climate change litigation, however, carries with it several questions regarding standing, the judiciary's powers over issues with a strong political impact, as well as the efficacy of the response that the judiciary can give with respect to matters that require an integral, multi-level approach, such as those concerning the measures to curb and mitigate the effects of anthropogenic climate change. This is particularly true for the sort of cases, the number of which has greatly expanded since the success of Urgenda Foundation v. State of the Netherlands[5], which consist of actions brought by citizens and NGOs against governments, held responsible for their slow or unambitious implementation of policies to address climate change.

One cannot, however, fail to recognize the merits of such litigation, which makes climate change tangible and close to the community[6], contributing to a cosmopolitan justice[7], and that serves as an incubator of the movements of the social body that from the bottom are urging legislatures to implement policies aimed at the transition to a sustainable economic model, to the prompt alignment with international commitments and to a transition of the economic-productive system inspired by an integral ecological approach.

Defining climate litigation has long been an exercise tempted by

[4] J. Peel, H. M. Osofsky, *Climate Change Litigation*, Cambridge University Press, 2015, 9. Along with the explosion of climate litigation there has been a growing and continuing scholarly interest in climate litigation, as highlighted by J. Setzer and L.C. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, Wires Climate Change. 2019; e580. The authors observe a steady growth in the number of articles published each successive year, punctuated by spikes in activity related to the issuing of high-profile judgments, such as *Massachusetts v. EPA* (2007) and the Hague District Court's decision in *Urgenda Foundation v. State of the Netherlands* (2015). In a later published article by J. Peel, H. M. Osofsky, *Climate Change Litigation*, Annual Review of Law and Social Science, No. 16/2020, 8.1-8.18, the authors observe, through the same quantitative method used by Setzer and Vanhala, an increase in the output of scholarly articles on climate litigation between 2019 and 2020 more than triple. They do, however, criticize the methodology employed in Setzer and Vanhala's research as «limits the discussion of relevant literature to that self-identifying as being "about" climate litigation, published in outlets that tend to be dominated by English-speaking, Global North scholars». See also L. Rajamani, J. Peel, *The Oxford Handbook of International Environmental Law*, Oxford, 2021; Rayner, S., *How to eat an elephant: a bottom-up approach to climate policy*, Climate Policy, 10(6), 615-21 (2010); W. Kahl, M.P. Weller, *Climate Change Litigation: A Handbook*, C. H. Beck, Munich, 2021; S. Bagni, *La costruzione di un nuovo "eco-sistema giuridico" attraverso i formanti giudiziale e forense*, DPCE Online 2021, Special Issue; S. Baldin, P. Viola, *L'obbligazione climatica nelle aule giudiziarie*, DPCE n. 3/2021, 597 ff; M. Carducci, *La ricerca dei caratteri differenziali della "giustizia climatica"*, DPCE Online n. 2/2020.

[5] M. Loth, R. Van Gestel, *Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?* Nederlands Juristenblad, n. 37/2015, 2598 ff.

[6] C. Vallejo, *Suing the state for climate change: empirical assessment of court rulings in cases against governments*, Universidad de Los Andes, 2018.

[7] E. Colombo, *The Quest for Cosmopolitan Justice in Climate Matters*, Nordic Environmental Law Journal, 2, 25-39 (2017).

scholars and has generated relevant debate, to the point that it has been said that there are «as many understandings of what counts as 'climate change litigation' as there are authors writing about the phenomenon»[8] . This difficulty is perhaps a reflection of the nature of climate change itself: as Hilson points out[9] the global nature of the problem of excessive greenhouse gas emissions, coupled with the many localized decisions by multiple actors that go toward addressing the issue, comport that «all manner of litigation could conceivably be characterized as related to climate change».

In the present paper have been selected, from the vast array of climate cases, certain relevant high-profile cases placed before the constitutional or supreme courts of Canada, the United States, Norway, and Germany that either see climate change as the central issue raised in court or that, while centered on other issues, have a notable outcome on governments' climate policies and thus climate change mitigation: among the criteria used for the definition, a substantive approach is been taken, thus including cases motivated by concerns over climate change issues and cases with consequences for addressing climate change, «even if the litigation itself is not explicitly framed in terms of climate change»[10] and this is done in order to emphasize how the decisions of the courts can have effects on climate change even in litigation on pure constitutional matters, and how the consideration of the climate crisis and its effects in the reasoning of supreme and constitutional courts can have such different effects in terms of the protection of fundamental rights and climate policies of states.

Thus adopting the definition of climate litigation employed by David Markell and J. B. Ruhl[11], and thus understanding it as «any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts», the present paper seeks to emphasize the different approach of certain national supreme or constitutional courts, in the most recent and relevant cases brought to their attention, precisely in order to examine, in each of the jurisdictions under consideration, the trends of the most sensitive issues involved in climate change litigation, that is, the courts' approach to the standing of the plaintiffs, the politic nature of the issues submitted (and thus the role of the judiciary in the context of climate change) as well as the effects of the decisions on climate policies and on future litigation.

The choice of adopting the aforementioned definition derives from two sets of reasons: (a) while raising relevant issues concerning the causes and impacts of climate change, some of the cases under study arise from

[8] J. Setzer and L.C. Vanhala, *Climate change litigation cit*., 4.

[9] C. Hilson, *Climate change litigation: a social movement perspective*, 2010, Working Paper, University of Reading, ssrn.com/abstract=1680362.

[10] Peel and Hosofsky represent, in the 2015 paper cited above, climate litigation through a series of concentric circles in which, moving outward, the link between climate change and the issues raised or argued in the case becomes less direct. The cases discussed below would lie across the spectrum drawn by the authors. In some cases climate change is the central issue, in others it is a peripheral issue or the consequences of the climate change decision are significant.

[11] D. Markell and J. B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REP., 10644 (2010).

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questions of constitutional law involving the allocation of legislative competence in the federal states, or the regulatory power of government agencies, which is why, by adopting a definition of climate litigation based on the object of the case or the plaintiffs' claims and arguments, very relevant cases would escape analysis; (b) while aware of the centrality of international law in achieving effective and uniform climate targets fit to tackle the current crisis, and while considering the existence of certain cases pending or decided by supra-national courts, the author considers an analysis grounded in domestic litigation developments to be essential, in order to examine the effects of these decisions on national climate policies, which are the decisive element in achieving the global targets for carbon emission reductions under the Paris Agreement.

2. EPA's powers on GHG emissions after West Virginia v. EPA

The trajectory of the Clean Power Plan, from its enactment to the Supreme Court decision in West Virginia v. EPA, traces the history of recent climate policies of presidential administrations.

Certainly, environmental law has always been a subject of debate and, as a result, subject to fluctuations between different presidential administrations[12].

And moreover, recent history has shown how in the face of weak and climate insensitive environmental regulatory policies, civil society has responded through decisive attempts to reverse this trend in the courts, as well as, following governmental actions aimed at environmental protection and decisive counteraction against the consequences of climate change, part of the economic system that benefits from the current polluter-based system has, likewise, challenged in courts those actions[13]: taking the provisions of the Clean Air Act as example, on one hand there has been an attempt to assert, in response to executive inaction, its duty to intervene to fulfill the purposes of the law, while on the other hand, conversely, there have been attempts to assert, in the face of decisive actions, the excess of discretionary power of the administration as compared to the letter of the law.

It fits perfectly within this discourse the events from which originates the landmark case Massachusetts v. EPA: in the face of EPA's decisions under the Bush administration not to regulate carbon dioxide and other greenhouse gases for climate change purposes under Section 202(a) of the CAA, several states and climate advocacy groups challenged EPA in federal courts, arguing that carbon dioxide should be treated as an air pollutant under the CAA and that the EPA administrator's decision not to regulate carbon dioxide and other greenhouse gases violated the terms of the CAA.

The same pattern can be foreseen in more recent events: if Massachusetts v. EPA arises in the face of an unambitious environmental

[12] R. J. Lazarus, *Reaction, Presidential Combat Against Climate Change*, 126 HARV. L. REV. F., 152 (2013); W. W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B. U. L. REV. 1357, 1376 (2018); D. W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 DUKE ENV'T L. & POL'Y F. 49 (2014).

[13] This trend is well explained in M. Powers, *Juliana v. United States: The next frontier in US Climate mitigation?*, RECIEL, 00, 1 (2018).

policy under the Bush administration, the transition to the Obama administration and the EPA's adoption of the Clean Power Plan gives rise to an immediate reaction of 28 states and hundreds of companies, which challenged the EPA's authority in its regulation of the CPP in the Court of Appeals for the DC Circuit, so that the CPP never goes into effect since it was stayed by the Supreme Court.

In continuity with this dialectics, the replacement of the CPP with the far less ambitious and closer to the needs of the failing coal industry[14] Affordable Energy Rule under the Trump administration resulted in further judicial action before the Court of Appeals for the DC Circuit by 23 states, several cities, and more than 170 other public health groups, who argued that with the ACE rule EPA failed in its duty to reduce emissions and improve public health under the Clean Air Act. As known, the Court of Appeals ruled in favor of the plaintiffs, striking down the ACE just the day before the inauguration of the 46th President, holding that EPA's ACE rulemaking was made arbitrarily and capriciously, with the goal of "slowing down the process of reducing emissions" and that its implementation "is based on a fundamental misinterpretation"[15] of the Clean Air Act.

In a stark opposite approach to the one it adopted in *Massachusetts v. EPA*, in *West Virginia v. EPA* not only did the Court hold that the case from the Court of Appeals for the District of Columbia had to be decided despite EPA's assertion not to enforce the reinstated CPP, but, through the use of the major question doctrine, it restricted EPA's range of authority with respect to the most incisive actions on the transition to cleaner energy sources for existing power plants, without giving any weight to the purposes of the Clean Air Act or the effects of polluting energy productions on climate change.

But, as some scholars have argued even before the ruling, what should be noted is the effect of such a major shift in the Supreme Court's approach to the current administrative-state landscape, and specifically, its effect on environmental law: designation and listing provisions are very common in environmental statutes; such provisions give broad discretion to agencies, such as the EPA, to which the CAA confers the power to classify types of pollutants as harmful to the environment[16]. A significant revival of the non-delegation doctrine thus puts environmental laws at risk, drastically changing the landscape of the administrative state and limiting environmental regulation at the agency level.

Indeed, as some observers have suggested, the Clean Air Act amendments made in the Inflation Reduction Act of august 2022 may have an impact on EPA's role in mitigating climate change risks and transitioning

[14] EPA analysis estimated this rule would increase particulate pollution compared to what was proposed under CPP, potentially leading to 1,500–3,600 more premature deaths per year by 2030 and up to 15,000 more new cases of upper respiratory problems, among other human health impacts. Furthermore, ACE targeted only a reduction of between 0.7% and 1.5% of carbon dioxide emissions from 2005 levels by 2030, compared to the 32% set by the CPP. Cfr. U. Irfan, *EPA analysis of its own new climate proposal: thousands of people will die*, Vox, 21 August 2018.

[15] *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. 2021).

[16] See, for example, beside the Clean Air Act, the Federal Water Pollution Control Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Resource Conservation and Recovery Act.

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to green production models; however, beyond the seven specific new programs to reduce greenhouse gases and provide funding for states to develop their own plans, and the amendments to the CAA to introduce several gases as air pollutants, the IRA does not grant the EPA the authority to revive the generation-switching approach to power plants taken by the Clean Power Plan, and this is quite understandable, since Congress used a budget reconciliation to pass the law.

3. Judicial deference and the economic model in Norway Supreme Court

It has been said, just as scholars have long reported, that among the critical issues that come to the surface from climate litigation, and particularly in cases in which citizens or NGOs sue the government to have a finding of the illegitimacy of certain public actions on the grounds of being contrary to environmental protection or of the insufficiency of its efforts to contain the climate crisis and guarantee the integrity of the ecosystem, the risk of interference between judicial decision and the political branches' determinations emerges first and foremost.

The issue, which is as long-standing as the rise of the power of judicial review, takes on even greater significance in climate litigation, as environmental issues are inevitably intertwined with those relating to the structure of the economic and productive system, and actions to curb the effects of climate change need planning and deep thinking regarding the costs, burdens and effects of climate policies.

An interesting reflection about the Courts' powers of review with respect to the actions of the political branches can be found in the ruling Greenpeace Nordic Association v Ministry of Petroleum and Energy, commonly known as People v. Artic Oil, in which, on December 22, 2020, the Norwegian Supreme Court rejected the claim put forward by several environmental NGOs that petroleum licenses issued by the Norwegian government violate Article 112(1) of the Norwegian Constitution.

The impact of oil and gas extraction on the Norwegian economy and its contribution to the construction of the welfare state should be premised[17]: Norway is the world's third largest gas exporter, and the 15th largest oil exporter globally[18]. It follows that while having relatively small greenhouse gas emissions from its own territory[19], Norway's emissions from oil exports are 95 percent higher than territorial ones[20].

In 2013 the Norwegian Parliament opened the southeastern Barents

[17] Norwegian Petroleum Directorate and Ministry of Petroleum and Energy, 'The Government's Revenues' Norwegian Petroleum (6 June 2021) <www.norskpetroleum.no/en/economy/governments-revenues> accessed 12 June 2021.

[18] Norwegian Petroleum Directorate and Ministry of Petroleum and Energy, 'Exports of Oil and Gas' (Norwegian Petroleum, 25 March 2021) <www.norskpetroleum.no/en/production-and-exports/exports-of- oil-and-gas/> accessed 12 June 2021.

[19] In 2019, overall emissions amounted to 50.3 mtCO2e, which is 2.3% lower than its emissions in 1990. SSB,'Utslipp til Luft' (2020) <www.ssb.no/klimagassn> accessed 16 February 2021.

[20] *People v Arctic Oil* (n 2) [155].

Sea to oil activity, and in 2016 the Norwegian Ministry of Petroleum and Energy awarded 10 new licenses[21]; against this decision, a coalition of environmental groups, led by Greenpeace Nordic, challenged in court the validity of the oil production licenses issued by the Ministry, arguing that they violate Article 112 of the Norwegian Constitution, which protects the right to a healthy environment, requires that natural resources be managed on the basis of long-term comprehensive considerations that safeguard this right for future generations, and requires the government to take measures to the effect of the provision. After obtaining two unsuccessful judgments in the district court and the court of appeal, the plaintiffs appealed to the Norwegian Supreme Court on February 24, 2020, which decided the case on December 22, 2020.

By a vote of 11 to 15, the court dismissed the challenge, upholding the validity of the licenses. While recognizing the severity of the climate change crisis and establishing a legal duty for the government to take appropriate environmental measures, the Court set a very high threshold for invalidating legislative and other decisions made or passed by Parliament[22].

According to the Court, Article 112 of the Constitution provides guidance to Parliament when it acts as a legislature and for the exercise of discretion in administrative decision-making. Judicial intervention is thus limited to cases where the legislature has been involved but has not taken a position on environmental issues, which, according to the Court, was not the case here, as Parliament has taken several measures to reduce domestic emissions, including a carbon tax and an emissions trading system linked to the EU ETS.

Considering the amount of extraterritorial emissions that Norway produces through oil and gas exports, the Court underestimated this element: «rather than recognizing the long-term effects of extraterritorial GHG emissions on future generations, the Supreme Court used the general delimitation for extraterritoriality: that is, emissions are the responsibility of each state within its jurisdictional scope»[23].

In addition, a deferential approach of the Court with respect to Parliament should be noted: considering de facto Article 112 of the Constitution as a merely procedural constraint, which prohibits judicial review on actions with adverse climate effects as long as parliament has considered the environmental aspects, undermines its own jurisdiction to scrutinize the acts of public authorities and to protect citizens against rights violations.

4. Peace, Order, Good Government and Climate risks in the Supreme Court of Canada

Just as the role of states in climate change policies underpinned the remarks made by the U.S. Supreme Court in Massachusetts v. EPA, in Canada, the

[21] Ministry of Petroleum and Energy, 'Announcement 23rd Licensing Round Awards' Government.no (18 May 2016) <www.regjeringen.no/en/aktuelt/announcement-23rd-licensing-round-awards/id2500936/> accessed 16 February 2021.
[22] C. Voigt, *The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics*, Oxford Journal of Environmental Law, 33, 702 (2021).
[23] *Ibidem.*

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implementation of coordinated actions aimed at achieving an overall lowering of pollutant emissions across all provincial territories has recently raised questions of constitutional law concerning the distribution of competence in environmental matters between the federation and the provinces, which allowed the Supreme Court to reflect on the impact of climate change on Canadian territory and to recognize its nature as an imminent risk, capable of attracting competence in favor of the federal government.

The Reference Re Greenhouse Gas Pollution Pricing Act arises from the implementation, in response to Canada's Paris Agreement commitments, of a national carbon-pricing system, transposed, after prolonged negotiations between the federal and provincial governments, into the Greenhouse Gas Pollution Pricing Act (GGPPA) of 2018.

The GGPPA acts as a federal backstop, that is, if a province or territory already has a sufficiently stringent carbon pricing system in place, the GGPPA does not apply to that province. The law requires the federal government to determine whether a province should be subject to the backstop by taking into account the stringency of the provincial GHG pricing mechanism.

Once the federal government determined the provinces to which the backstop should apply, the governments of Saskatchewan, Ontario and Alberta appealed to their respective provincial appellate courts, challenging the constitutionality of the GGPPA. Only the Alberta Court of Appeals found the law unconstitutional.

The Supreme Court, in a 6-9 decision, held that the GGPPA is constitutional under the national interest branch of the Peace, Order and Good Government Clause (POGG), which holds that Parliament may legislate on matters that would normally fall to the provincial government when the matter becomes of such importance that it concerns the entire country. Of course, much of the ruling is concerned with whether the issue is «of sufficient concern to Canada as a whole» and whether it has a «singleness, distinctiveness and indivisibility» that distinguishes it from matters of solely provincial concern. The court conducted a common-sense inquiry, supported by evidence[24], and concluded that the issue was predominantly international and then extra-provincial, as extra-territorial greenhouse gas emissions have a serious impact at the local level; in addition, the court emphasized the consequences of the provinces' failure to cooperate with respect to the carbon pricing scheme contained in the GGPPA; furthermore, the court found that there was minimal intrusion into provincial powers, given the backstop nature of the legislation.

The judgment strongly emphasizes the risks of climate change from the very beginning, where the Court declares «Climate change is real. It is caused by greenhouse gas emissions resulting from human activity, and it poses a grave threat to humanity's future»[25]. Again, the majority defines climate change as an «existential challenge» and «a threat of the highest order»[26] and emphasizes how «it is part of a family of interconnected

[24] *GGPA Reference n. 3* (142).
[25] *GGPPA Reference n. 3* (2).
[26] *GGPPA Reference n. 3* (167).

problems [...] all of planetary scope and all of which speak to the fact of a global ecological overreaching by humanity».

The court thus abandons climate denialism[27] and redefines the legal doctrine of POGG in relation to the existential threat posed by climate change, balancing it with policy considerations: innovating from previous Canadian federal court decisions on the subject[28], the court, in balancing the risks of climate change against the risk of exercising judicial review over a statutory text which contains policy-laden considerations[29] finds the former to be prevalent: «Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction»,[30]

5. The rise of the intertemporal protection of freedoms in the Klima-Urteil

In a constitutional complaint (*Verfassungsbeschwerde*) directly brought before the Federal Constitutional Court of Germany by young climate activists, the Court strike down part of the Federal Climate Act (*Klimaschutzgesetz*) since the German Parliament has not effectively and stringently enough regulated the post-2030 GHG reduction process, shifting the burden of much more significant GHGs reductions onto future generations, who will have to bear a much greater effort than that required until 2030 to achieve the climate neutrality goals, which the law sets at 2050.

The Court employed arguments that were unprecedented compared to previous jurisprudence, to the point that many commentators have spoken of an historic decision[31]: compared to the previous interpretation of the amended Section 20a *Grundgesetz*[32], according to which the provision was a

[27] Climate denialism appears on precedent judgments of federal Courts and in the dissents in the same Reference. On the contrary, as noted by J. Stacey, in *Climate Disruption in Canadian Constitutional Law: Reference Re Greenhouse Gas Pollution Pricing Act*, Oxford Journal of Environmental Law, 00, 13 (2021) the Court embraces a culture of justification, affirming that «public officials must publicly justify their decisions and the court plays an essential role in supervising those decisions».

[28] *Friends of the Earth v. Canada* (Governor in Council) 2008 FC 1183 n. 78 (33).

[29] *Ibidem.*

[30] *GGPPA Reference n. 3* (206).

[31] H.P. Aust, *Klimaschutzaus Karlsruhe. Wasverlangtder Beschluss vom Gesetzgeber?* Verfassungsblog, 5.5.2021.

[32] Section 20a was introduced in the 1994 constitutional reform «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».

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statutory provision of programmatic rank (*Staatszielbestimmung*)[33], the Constitutional Tribunal comes, at the apex of a jurisprudential maturing process[34], to recognize in the Fundamental Law a binding constitutional climate protection mandate incumbent on federal institutions and open to judicial scrutiny.

Relying on the available scientific literature on the subject, the Tribunal interprets this constitutional mandate in the sense that the action of government must inescapably lead to the achievement of climate neutrality through political and legal intervention that starts from the state but extends globally.

Meanwhile, the Tribunal clarifies that, while an effort on the international level is necessary, the state cannot invoke the inaction of other states as justification for its ineffective response, since the responsibilities of the institutions of the Federal Republic of Germany are enshrined in precise domestic constitutional obligations.

The largest innovation in the decision, however, is in the way the Court shapes the violation of the climate protection obligation, which derives from an innovative conception of a constitutionally guaranteed freedom, available not only in the present time, but also in the future. According to the BVerfG, climate change mitigation must be pursued effectively in the present time, since, if it were not, much more intrusive and detrimental measures to the exercise of the rights and freedoms of future generations would be required in the future.

The fundamental rights of the plaintiffs must therefore be protected against unilateral and undue shifting into the future of the constitutionally prescribed duty to reduce greenhouse gases, and the legislature, when enacting regulations aimed at guaranteeing the exercise of certain rights, must take into consideration not only the actual exercise in the present time, but also in the future, since today's behavior defines the conditions under which the same freedoms can be exercised for future generations: this is the new conception of the intertemporal protection of freedoms *(intertemporale Freiheitssicherung)*[35].

The Tribunal also wisely employs foreign judicial precedent, such as the famous Urgenda, the Irish Supreme Court decision in Friends of the Irish Environment v. Ireland of July 31, 2020, as well as the New Zealand Thomson case and the attempt made in Oregon with the Juliana v. United States case. Such use of foreign precedent, including non-European

[33] 1 BvR 310/84, Rn. 35.

[34] In 2007, for the first time, deciding on the constitutionality of the Federal Emissions Trading Act introduced to implement an EU directive implementing the Kyoto Protocol, challenged by the state of Saxony-Anhalt, it stated that Article 20a GG «obliges the legislature to implement in its legislation the mandate contained in Article 20a of the Basic Law and to enact appropriate environmental protection provisions». (1BvF1/05, Rn. 110).

[35] «In any case, it seems possible that the fundamental rights of the *Grundgesetz*, understood as an intertemporal safeguard of liberty, protect against regulations that permit such consumption [of emissions] without sufficient regard for the future liberty that is thereby endangered» (1 BvR 2656/18, Rn. 122).

precedent[36], would be justified with the aim of bolstering the thought that domestic measures to contain GHGs are of essential importance, regardless of the international relevance of the problem and irrespective of the climate policies of other states: the state cannot avoid its climate protection responsibilities by calling into play greenhouse gas emissions produced in other states[37].

Not surprisingly, given the central role of the BVerfG and its relationship to political power, although the court had given the federal legislature until Dec. 31, 2022 to make the necessary changes to rectify the unconstitutional provisions of the *Klimaschutzgesetz*, just over a month after the decision, the *Bundestag* and *Bundesrat* amended the law by increasing the CO2 emission reduction targets by 10 points through 2030 in order to achieve an 88 percent reduction in emissions by 2040 and anticipating the climate neutrality target to 2045.

6. The political impact of judicial deference to the political branches in climate litigation

«Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day, but only Congress, or an agency with express authority from Congress, can adopt a decision of such magnitude and consequence».

These words of Chief Justice Roberts in West Virginia v. EPA can condense the majority's indifferent approach with respect to the climate issue, to the necessity of a transition to green sources of energy production, and thus with respect to the effects of a restriction on the EPA's regulatory powers under the clean air act on the level of emissions targets needed to mitigate the consequences of anthropogenic climate change.

This approach is quite the opposite of the approach SCOTUS took in 2007 in Massachusetts v. EPA, where, in order to determine the scope of the EPA's powers in limiting carbon dioxide emissions, the Court gave due consideration to the effects of GHGs with respect to the air quality and ecosystem protection purposes that the CAA gives to the EPA: in West Virginia, instead, the Court held that administrative action cannot restrict beyond a certain extent considered "ordinary" economic freedom without an authorization as specific as possible from Congress, regardless of the ecosystem integrity effects of the exercise of those economic freedoms. Such effects had, moreover, been pointed out by several *amici curiae* intervening in the judgment, including the Brief of climate scientists as *amici curiae* in support of respondents, according to which: «it is still possible to mitigate the human and economic costs of climate change—as particularly relevant here, if greenhouse gas emissions from existing power plants and other

[36] K. Gelinsky, M.-C. Fuchs, *Bitte noch mehr: Rechtsprechungsdialog im Karlsruher Klimabeschluss*, in *Verfassungsblog*, 26.5.2021, cit. in A. De Petris, *Protezione del clima e dimensione intertemporale dei diritti fondamentali: Karlsruhe for Future*, CERIDAP, 4/2021, 145.

[37] 1 BvR 2656/18, Rn. 203.

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sources can be reduced. But such mitigation will require significant coordination at the federal level. And this Court has recognized that EPA is the nation's "primary regulator of greenhouse gas emissions," the entity with "the scientific, economic, and technological resources [necessary to] cop[e] with issues of this order."[38]Because the D.C. Circuit's ruling below recognizes EPA's obligation to develop the rules necessary to reduce greenhouse emissions, we respectfully submit that the decision should be affirmed».

In the cases reviewed up above, a very different approach from this one is that taken by the Supreme Court of Canada, which instead, as noted above, scrutinized the power of the federal government to invoke authority under the POGG clause in light of the severity of the threat of climate change on Canadian territory and the need to regulate GHGs emissions in a more uniform way: not dissimilarly, and also by employing the precedent resulting from Massachusetts v. EPA, SCOTUS could, looking to the purposes of the Clean Air Act, have held legitimate, under section 111d of the CAA, the actions aimed at technology shifting in the power plants taken by the EPA.

The two cases, the SCC's Reference on GGPPA and SCOTUS's West Virginia, although being only indirectly related to climate change, have instead a major impact on the environmental policies of their respective countries: the different approach of the two courts has in one case paved the way for the implementation of the Canadian carbon pricing system to achieve emission reduction targets and more generally extended the powers of the federation in all actions necessary for a coordinated mitigation of the effects of climate change, while in the U.S. case the Supreme Court approach has greatly weakened the EPA's action in reducing greenhouse gas emissions from the existing power plants fueled by polluting sources[39].

A different approach can also be detected by comparing the two European rulings, that of the *Bundesverfassungsgericht* and that of the Supreme Court of Norway. While clarifying the difference of the two lawsuits, the former being a constitutional complaint directed to the Federal Constitutional Tribunal for the judicial review of the Federal Climate Act, for the violation of the fundamental rights of future generations, and the latter being instead a more circumscribed action that arose for the invalidation of the oil licenses issued in 2016 for the Barents Sea, it must be pointed out how both are based on constitutional provisions introduced to protect the environment and that the focus of the arguments in both decisions was to determine the effect of these constitutional provisions with respect to the legislature's authority. With respect to this aspect, it is evident how the BVerfG's approach was far more decisive and innovative, whereas the Court strongly pushed the intertemporal protection of freedoms,

[38] *American Electric Power*, 564 U.S. at 428.

[39] A. Howe, *Supreme Court curtails EPA's authority to fight climate change*, SCOTUSblog (Jun. 30, 2022), www.scotusblog.com/2022/06/supreme-court-curtails-epas-authority-to-fight-climate-change; P. Parenteau, *The inflation Reduction Act doesen't get around the Supreme Court's climate ruling in West Virginia v. EPA, but it does strengthen EPA's future abilities*, *The conversation* (Aug. 24, 2022), theconversation.com/the-inflation-reduction-act-doesnt-get-around-the-supreme-courts-climate-ruling-in-west-virginia-v-epa-but-it-does-strengthen-epas-future-abilities-189279.

scrutinizing in detail the effects on the climate of the legislature's intervention, and finding them inadequate with respect to the duty imposed on it by Section 20a of the Fundamental Law.

Instead, the Norwegian Supreme Court, adopting a formal-procedural interpretation of Article 112 of the Constitution, maintained a deferential attitude to the legislature: the Court has effectively lowered the environmental duty to taking any measure expressed in Article 112(3), without any regard to the effectiveness or adequacy of that measure[40].

Furthermore, the Court deemed not to address the long-standing issue of extra-territorial emissions, adopting a reductionist, nation-centric view of the climate issues, according to which emissions are the responsibility of each state within their jurisdictional scope[41]. Conversely, the German court arrives at much deeper reflections: while considering the need for effective measures to mitigate the risks of climate change to be taken at the international level, it considers the existence of a state duty, arising primarily from constitutional norms, from which government cannot be relieved because of the inaction of other international partners. Moreover, this vision comes, though not expressly mentioned by the BVerfG, from Massachusetts v. EPA, where SCOTUS argued, in the face of EPA's assertion that regulation of new vehicle emissions in the U.S. could not mitigate global climate change because of rising emissions from other countries, that a reduction in domestic emissions would slow the pace of global emissions growth, regardless of whatever happens elsewhere[42].

So far it has been noted how different approaches of the courts to climate issues brought to their attention can have very different effects on the achievement of national and global climate goals. In addition to cases expressly brought by citizens to the courts to declare states' obligations, it was also seen that even cases purportedly resolving issues of constitutional law relating to the separation of powers and the distribution of powers between states and the federation can have a significant impact on national climate policies.

By the mere occurrence of such potential impact on policy issues, a stringent approach to the political question would suggest that courts should decline jurisdiction or adopt an argumentative approach that is as restrictive as possible.

This has been the approach of the Supreme Court of Norway, as well as, in some respects, the U.S. Supreme Court when it considered using the major question doctrine in West Virginia v. EPA. Quite the contrary, the Canadian Court and the BVerfG have taken a more interventionist approach.

Can, however, be said that the Norwegian and U.S. approaches are devoid of policy effects and that, conversely, such effects should be recognized only in the German and Canadian ruling? Looking closely at the decision in People v. Artic Oil, some effects on the political level exists and they consist in the maintenance of the legitimacy of the oil licenses issued in 2016 and of all further licenses that will be issued in the future, since the Court has refrained from exercising a review of the adequacy of the

[40] C. Voigt, *The First Climate Judgment* cit., 707.
[41] *People v Arctic Oil* (n. 2) 56-58.
[42] *Massachusetts v. Environmental Protection Agency*, (549 U.S. 497).

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legislature's choices with respect to the issuance of licenses. This decision thus carries with it effects that can be summarized in the maintenance of the *status quo* with respect to the economic-productive system; indeed, it is still the economic system sought by the legislature, which issued the licenses, and yet it should be noted how the absence of a scrutiny of reasonability with respect to the constitutional parameter of the choices of Parliament ends up contributing to the perpetuation of said system.

Similarly, the mild approach of the U.S. Supreme Court in West Virginia, when it held that EPA actions directed toward a generation switch in existing power plants entailed an economic policy assessment that must be reserved for express delegation to the administration by the legislature, has the effect of preserving the current structure of the energy industry, which would instead be economically undermined by actions aimed at upgrading production to higher standards.

This rationale can also be seen in the origins of the case that gave rise to the Canadian Reference, if it is true that the provinces that sought the intervention of the provincial courts at first and of the Supreme Court then, are characterized by higher oil production and therefore higher output of greenhouse gases. The judgment of the German Federal Constitutional Court, beyond having to be read in light of the pre-eminent position that the BverfG has over time gained in the constitutional system and in its relations with the legislature (to whom it usually sends strong warnings), must also be considered with respect to the emission reduction policy already put in place by the legislature: the Court found the efforts of parliament inadequate with respect to the duty of rights protection incumbent on the legislature, in the context of a climate policy already set by the political decision maker and strongly avant-garde.

To conclude then, looking at the impact of the decisions considered with respect to the climate policies of the states, it cannot simply be said that the judges who showed a more deferential approach to legislature were respectful of the highly political nature of the issues related to mitigating the effects of climate change and their economic implications. On the contrary, even the decisions of the most deferential judges have relevant political effects, and they mostly consist of the preservation of the existing economic model, and this happens for reasons that are often very much related to the economic structure of that country: it is not a coincidence that both of the judgments with a more restrictive approach come from countries with economic systems still strongly tied to the coal industry and oil exports.

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