Review

Climate Constitutionalisation in Europe – After KlimaSeniorinnen and the ICJ's Advisory Opinion

Christina Eckes *

Posted Date: 15 August 2025

doi: 10.20944/preprints202508.1105.v1

Keywords: climate litigation; constitutionalisation; separation of powers; KlimaSeniorinnen; climate mitigation; multi-layered legal landscape; Europe

Review

Climate Constitutionalisation in Europe – After KlimaSeniorinnen and the ICJ's Advisory Opinion

Christina Eckes

University of Amsterdam; c.eckes@uva.nl

Abstract

Several European courts have vested mitigation obligations with a hierarchically higher legal rank than ordinary state action. They construe these obligations from human rights in combination with international commitments and climate science. This phenomenon is here called 'climate constitutionalisation'. In addition, we see an increasing escalation of climate cases to the European Court of Human Rights (ECtHR) and we now have the advisory opinion of the International Court of Justice (ICJ). Climate constitutionalisation in Europe is an incremental process of replication and reiteration. This can only be understood by studying the developing body of national case law in the context European and international law. Studying general emission reduction cases against states in Europe, this paper traces how non-enforceable legal norms, political commitments, and climate science are used to interpret binding and enforceable human rights norms. It reflects on the present and future consequences of the ECtHR's decision in KlimaSeniorinnen and ICJ's Advisory Opinion on climate obligations. The paper argues that Europe's multilayered legal and judicial landscape strengthens climate constitutionalisation and herewith deepens the fault line between the judiciary and the elected institutions. Europe's openness towards international law facilitates this process. It then offers tentative normative justifications for this process.

Keywords: climate litigation; constitutionalisation; separation of powers; KlimaSeniorinnen; climate mitigation; multi-layered legal landscape; Europe

1. Introduction

Judges in Europe[1] have repeatedly relied on international political and legal commitments in combination with climate science in order to give substance to human rights norms. As a result, they have established climate mitigation obligations that enjoy a hierarchically higher legal rank than state climate action, be it legislative or executive. This process is here called 'climate constitutionalisation'.

Climate constitutionalisation through general emission reduction cases against states is more strongly visible in Europe than elsewhere. This is the case for three reasons: first, Europe is a geographical area with a comparatively high number of climate cases in this category;[2] second, a considerable share of these cases has been successful;[3] and three, Europe's multilayered landscape of national law, European Union law, and the European Convention on Human Rights (ECHR), with a comparatively open attitude towards international law facilitates this process.

This paper traces *multilevel climate constitutionalisation* and its *countertendencies in Europe*. It unearths how climate litigation vests international commitments and climate science with *de facto* constitutional effects capable of imposing lawfulness requirements on states. A framework of norms that is – at least at times – able to constrain state actions logically makes a claim to be prevailing, *i.e.*, higher-ranking than ordinary state action. This justifies speaking of 'constitutionalisation'.

It focusses on *strategic* climate litigation (SCL) *in Europe* brought *against states and aiming for general emission reduction (mitigation)*.[4] For simplicity, the abbreviation SCL is here used for this type of cases. SCL so defined is distinct from climate-related litigation predominantly driven by the interests of the litigating party (not strategic), against companies (not states), pertaining to specific sectors or industries (not general), or aiming for adaptation measures or damages (not mitigation).

 doi:10.20944/preprints202508.1105.v1

The paper examines SCL in *European* jurisdictions that all meet in law and practice (more or less) the requirements of liberal democracies, human rights, the rule of law, and separation of powers. The geographical focus allows engaging with Europe's multilayered legal and judicial landscape. The paper shows that the process of creating norms capable of restraining states' (in)action takes place incrementally, non-linear, and triggers countertendencies. The paper also highlights that this process benefits from a high potential for replication because of overlapping legal norms that bind all European states. These norms are EU law, the ECHR and international law, as well as political and legal commitments made by all European states. The universal nature of climate science also supports this process. The paper concludes that the actual and future constitutionalising consequences of the European Court of Human Rights (ECtHR)'s ruling in *KlimaSeniorinnen* and the International Court of Justice (ICJ)'s Advisory Opinion the can hardly be overestimated within Europe.[5]

It adopts a qualitative approach, combining legal doctrinal analysis with constitutional contextual reflections. It is based on an examination of nineteen SCL cases in the public database on *Global Climate Change Litigation*[6] that have been decided in at least one instance on 30 April 2025, ranging from *Urgenda* in 2015 to the *Finnish Climate Case II* in 2025.[7] *Urgenda* (NL), *Neubauer* (DE), *Klimaatzaak* (BE), *KlimaSeniorinnen* (ECtHR) and the ICJ's Advisory Opinion are identified as landmark cases for constitutionalisation and discussed in greater detail, while the other cases are mentioned in support of specific arguments, either in the main text or in the footnotes.

First, this paper gives a nuanced account of climate constitutionalisation in Europe (descriptive contribution). Second, it argues that the interaction between the different legal layers within Europe are particularly suitable to advance climate constitutionalisation (analytical contribution). Third, it reflects on whether, in light of well-documented wide-spread failures of states to take adequate climate mitigation measures,[8] climate constitutionalisation gives us some ambivalent hope that judges may meaningfully contribute to climate decision-making in liberal democracies (normative contribution).

Section two explains how this paper uses the term constitutionalisation, emphasising its incremental nature and countertendencies. **Section three** identifies the central relevance of human rights, international legal norms and political commitments, and climate science in climate constitutionalisation in Europe. **Section four** turns to the ECtHR's landmark case of *KlimaSeniorinnen* and the ICJ's Advisory Opinion as additional legal layers reinforcing this process. **Section five** reflects on replicability of arguments and outcomes, as well as countertendencies. **Section six** offers justifications for climate constitutionalisation. **Section seven** concludes.

2. Constitutionalisation

2.1. Prevailing Legal Yardsticks

The literature departs from different, partially overlapping understandings of 'constitutionalism' and 'constitutionalisation'.[9] This paper uses the term constitutionalisation for two reasons: because it focusses on the *process* rather than the outcome and because its first contribution is descriptive and analytical followed by more limited normative reflections. Constitutionalisation denotes here the 'process by which political actors become regulated' through ordering by means of *legally binding* and *prevailing* norms.[10] It is 'the attempt to subject [via judicial review] all governmental action within a designated field to the structures, processes, principles, and values of a "constitution".'[11] Literature on 'environmental constitutionalism' engages with codified and judicial norms, as well as structural or procedural principles responding to environmental issues.[12] This paper focusses more narrowly on *judicial* norms and *climate mitigation*. '*Climate* constitutionalisation' here refers to a process of establishing and consolidating *prevailing mitigation norms through judicial interpretation* that limit the lawful scope for state action.

This insulation of the objective of climate mitigation from ordinary politics comes with similar challenges as other constitutionalisation, namely that it may appear 'essentially antidemocratic' as it does not rely on majoritarian decision-making and could therefore be seen as 'remov[ing] certain

 doi:10.20944/preprints202508.1105.v1

decisions from the democratic process'.[13] It hence needs to be justified on other than majoritarian grounds. Sam Bookman instructively distinguishes three ways in which judges justify prevailing legal yardsticks that set boundaries on majoritarian decisions of democratically elected institutions: liberal-conservative, technocratic, and transformative justifications.[14] The liberal-conservative justification emphasises that 'environmental matters fall within existing conceptions and traditions of mainstream constitutional theory'.[15] The technocratic justification argues that 'environmental governance requires a high degree of expertise, which is beyond the capacity of electoral majorities'.[16] The transformative justification purports that 'environmental crises require fundamental changes in interrelated social, political, and economic systems, and constitutions can embody the necessary legal and aspirational framework for such transformation'.[17] The three arguments are not mutually exclusive. Throughout this paper, I highlight how courts use these justifications in SCL.

2.2. Incrementalism, Entrenchment, and Countertendencies

The *incremental nature* and *relevance* of legal constitutionalisation becomes apparent in Duncan Kennedy's general remark about one of the 'more powerful conventions of the legal argument', namely, that 'arguments proceed, both within a given case and over a series of cases, from the more general choices to the more particular, arguing and then re-arguing, rather than debating the merits of a point on the continuum versus all the other points on the continuum'.[18] Few legal scholars dispute that legal reasoning is a process of choosing between alternatives. The stakes differ depending on whether one goes down one path or the other. The quote highlights that the process of interpreting and creating norms is prone to unfold in a path-dependent way. This highlights the relevance not only of the outcome of the individual case but also of developing a vocabulary, *i.e.*, a stock of legal concepts. This vocabulary becomes comprehensible beyond the individual case, frames the argumentation of litigants and judges, and may be replicated in future cases.

Interpretations by higher instance, regional and international courts, as well as references to constitutional norms have a particularly authoritative value and entrenching effect in this process of carving out paths for legal arguments.[19] These interpretations create norms, which are taken as a point of reference in the judicial processes in lower or national courts. Judges can distinguish their own case from these norms, but they cannot substantively change or simply ignore them. Emphasising the coherent ('path-dependent') development of law based on the entrenching effect of higher or regional courts' decisions draws on a 'liberal-conservative' justification. This justification goes to the heart of traditional judicial reasoning, which usually claims coherence with pre-existing legal norms and in this way draws legitimacy from the legal order as a whole.[20]

However, courts do not only advance but also restrict constitutionalisation. They do so by limiting the scope of higher ranking domestic norms or depriving (international or regional) norms of their effect within the domestic legal order.[21] These are countertendencies of constitutionalisation, often justified by deference to elected institutions or ongoing democratic decision-making. It is a defining characteristic of the judiciary that it may only act when litigants file a case; however, when this is the case judges must say what the law is.[22] While they may decline jurisdiction, doing so also contributes to the understanding of the law. It determines what the law does or does not govern. This explains how litigation necessarily develops the law. Also unsuccessful cases may for example contribute to strengthening the understanding that the climate crisis is justiciable and a human rights matter. Importantly, all cases contribute to a better understanding of the legal opportunity structures and guide litigants in future cases.[23]

So far in Europe, most judges have accepted justiciability of climate issues, so countertendencies are largely limited to specific arguments.[24] However, these arguments also raise the spectre of a scenario in which judges see themselves structurally unable to exercise jurisdiction. This is a scenario in which the polity cannot uphold its constitutional promise even when legally binding norms are violated.

 doi:10.20944/preprints202508.1105.v1

3. Countering Governance Failures with Human Rights, International Law and Science

The governance failures to adequately address the climate crisis are widespread and well-documented.[25] However, one cannot discuss SCL without mentioning that it emerges in reaction to these governance failures. Often, SCL aims to demonstrate how these governance failures violate human rights.[26]

3.1. Human Rights

Imposing limits to (in-)actions of democratically elected institutions based on human rights draws on a liberal-conservative justification. Entrusting the judiciary with this enabling and controlling function presupposes a considerable faith in the functioning of state institutions. Europe's commitment to overlapping and cross-referential national and European human rights instruments is rooted in a shared – albeit increasingly challenged – commitment to liberal democracy. This commitment links democracy inextricably with the rule of law. In this environment, recourse to regional human rights norms enjoys exceptional potential for replicability and entrenchment.

Urgenda, the first ever successful case of SCL, was originally based on the unwritten duty of care under Dutch tort law, in combination with Articles 2 (right to life) and 8 (right to private and family life) ECHR.[27] In second and third instance,[28] the courts based the unwritten duty of care directly on Articles 2 and 8 ECHR. All three instances obliged the state to reduce the overall emissions from its territory by the *substantive minimum* of 25% in 2020. Neither of these human rights provisions directly refers to the climate and *Urgenda* pioneered by interpreting them to entail a prevailing mitigation obligation. Human rights as legal grounds constitutionalised the issue and strengthened potential for replication. The Procurator General even directly explained his reasoning for '[f]or the benefit of non-Dutch readers'.[29] The plaintiffs in the Belgian *Klimaatzaak* took *Urgenda* in first instance as their blueprint and based their claim on civil liability[30] in combination with Articles 2 and 8 ECHR.[31] In first and second instance, the courts established both civil liability and a violation of the plaintiffs' Convention rights. *Klimaatzaak* extensively referenced and literally cited, besides *Urgenda*, also the German Federal Constitutional Court's (GFCC) *Neubauer* decision.[32] It is currently pending in final recourse before the Court of Cassation. Both *Urgenda* and *Klimaatzaak* concerned the rights of all Dutch citizens, rather than only rights of individual plaintiffs.

By contrast, an example of an *individualised rights* claim is the GFCC's decision in *Neubauer.* This case reached the court under the constitutional complaint procedure and, in line with the requirements of that procedure, it dealt with the (alleged) violation of the constitutional rights of 45 *individual persons* from Germany, Bangladesh, and Nepal.[33] However, by relying among other things on a state objective to protect the environment, the GFCC established a general future-oriented, intergenerational duty of care.[34] In other words, even within this individualized procedural setting, the Court took a community perspective, including the perspective of future generations.

A rights-based approach as opposed to other legal grounds formally[35] gives equal emphasis to the rights of all *humans*, including underrepresented and disadvantaged individuals.[36] The climate crisis exacerbates inequalities not only between countries but also within countries, and affects very differently persons of different race, gender, and class.[37] In this light, human rights are one way of empowering *each person* rather than a heterogenous collective. However, besides being ill-suited to protect nature for its own sake, human rights usually require demonstrating an *individualized violation.* Individuals regularly find it difficult to satisfy the procedural requirements of having, for example, to demonstrate 'victim status' or 'individual and direct concern'.[38] These legal requirements are characterized by the distinctiveness of the litigants' harm. This stands in stark contrast to the fact that the climate crisis 'threatens the world's entire population'.[39] Moreover, the strategic aspect of SCL is usually aimed at protecting a collective. This also stands in tension with the individualist human rights framing. Whether such collective claims are possible (as in *Urgenda* and

 doi:10.20944/preprints202508.1105.v1

Klimaatzaak) or whether only individuals can bring cases in their own right (*Neubauer*) depends on the standing requirements in the specific jurisdiction. When courts interpret standing requirements broadly, they usually rely on a transformative justification by emphasising the exceptionality of the climate crisis.[40]

3.2. International (Climate) Law

At the heart of states' international obligations in relation to the climate crisis is the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC pursues the objective to stabilize the greenhouse gas concentrations in the atmosphere. A central instrument is the 2015 Paris Agreement adopted at COP21. Nationally Determined Contributions (NDCs) form the basis for countries to achieve the temperature goal of the Paris Agreement.[41] These are the norms that national courts have so far relied on to impose emission reduction obligations on states. However, the ICJ clarified in its Advisory Opinion of 23 July 2025 that the different sources of international law rather than contradicting each other, inform each other and should be read together.[42] It referred not only to a large number of environmental treaties but also to customary international law and discarded any attempt to see climate-related treaties as *lex specialis*.

In many SCL cases, judges explain in much detail how defendant states ratified and participated in the UNFCCC. They usually emphasise the clarity of the political positions adopted at consecutive COPs and widespread and repeated support expressed for them. *Urgenda* illustrates an approach that several courts took: The Dutch Supreme Court emphasised that the UNFCCC's relevance in two respects: First, the Court relied on the UNFCCC's *legal* principles to interpret Articles 2 and 8 ECHR, *i.e.* the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) and the precautionary principle.[43] Second, the Court emphasised the *political* recognition of the scientific insights of the Intergovernmental Panel on Climate Change (IPCC) in numerous COP decisions to justify the outcome of the case.[44]

Urgenda is an illustrative example of climate constitutionalisation, where political and non-enforceable legal commitments contribute to establishing prevailing obligations when they give meaning to human rights obligations. The Supreme Court and, in even more detail, the Procurator General list the relevant stipulations of all past COPs.[45] They explain that, as highest *political* organs of the UNFCCC, COPs do not produce *binding* norms. This implies that also non-binding commitments and norms may deploy legal effects in combination with binding norms. Similarly, the appeal decision in *Klimaatzaak* bolsters the relevance of international commitments for the legal assessment of state action, including to establish a *substantive minimum threshold*.[46]

One factor that determines whether and how much courts rely *directly* on international political and legal commitments is whether and to what extent national legislation has transposed these commitments. If these commitments are transposed, courts can and do rely on the equivalent national legal obligations. In *Neubauer*, the GFCC also incidentally referred to the UNFCCC framework but did not (have to) rely on international commitments because the Federal Climate Change Act had incorporated the Paris temperature goal.[47]

The stark contrast between international and national political and legal mitigation commitments made collectively and for the future (*e.g.*, Paris Agreement and net zero pledges), on the one hand, and either the lack of or unambitious interim targets and inadequate implementation action is central to SCL. Litigants challenge public failures to adequately protect their rights in light of overwhelming representations and commitments of *the same public authorities* promising such protection. In SCL, states do not deny that they made these representations and commitments but routinely challenge their justiciability. SCL also exposes conflicts between the *objectives* states express in law and politics and the *measures* that they take in law and practice. Judges regularly point out how states fail to justify the latter in light of the former. When doing so judges make a coherence argument (liberal-conservative justification). Regularly, this leads them to establish unlawfulness or even to impose positive duties. Some cases strongly contribute to the constitutionalisation of *international* commitments (*Urgenda*; *Klimaatzaak*).[48] In others, these commitments are not given

 doi:10.20944/preprints202508.1105.v1

prevalence but form part of the legal assessment (*Neubauer*). None of the examined cases denies their (persuasive) relevance.

3.3. Normative Effects of Science

Any and all of the international political and legal commitments of the defendant states can only be concretised into mitigation obligations by reference to climate science. The IPCC reports capture the global state of the climate crisis. They constitute the baseline of argument in SCL, often complemented with country-specific studies. Because of their exceptional inclusiveness[49] and political support, IPCC reports are routinely considered 'best available science' by national courts, and now also explicitly the ICJ.[50] By now, they enjoy particular *normative* authority also because of this judicial acknowledgement of their legal relevance. The summaries for policymakers are endorsed line-by-line and the reports are more globally endorsed by states, both by unanimity. On the one hand, this bolsters their democratic support; on the other, it leads to the exclusion of controversial points and gravitates towards the lowest common denominator. Litigants rightly pointed out that the IPCC reports are therefore substantively fairly 'conservative'.[51]

Urgenda and *Klimaatzaak* drew in their reasoning on different IPCC reports.[52] *Neubauer* relied on the assessments of *national* scientific advisory bodies, which are based on IPCC reports.[53] *KlimaSeniorinnen* again heavily relied on the IPCC for establishing the 'facts concerning climate change'[54] and the effects of climate change for the enjoyment of Convention rights in its assessment of Articles 2 and 8 ECHR.[55] For its assessment of the adequacy of Swiss climate actions, however, it relied on expert submissions of the parties.[56] In all of these cases, science forms an essential element in establishing the justification and substance of prevailing mitigation obligations. The strong engagement with expertise evokes the technocratic justification, namely that, in the climate crisis, expert knowledge needs to be placed beyond the reach of political majority decisions.[57]

However, reliance on IPCC reports does not in all cases result in close (or even correct) engagement with the substantive scientific information. IPCC reports simply set out models of different scenarios with different likelihoods (pathways). They do not *cast a normative judgment* on desirability or adequacy in light of the gravity of impacts or legal and political commitments. The Court of Appeal in *Klimaatzaak* for example made the *normative* choice to combine in its assessment the most conservative variables that it found in the IPCC reports, *i.e.*, those that are 'least constraining for the state'.[58] From this basis, it construed *an absolute minimum.* This approach holds the danger that this absolute minimum is vested with the normative judicial endorsement of legal adequateness and justifiability.[59] To be more specific, the Court took as a starting point a probability of 1 out of 2/50% to keep global warming to 1.5°C. This is different from the Dutch Supreme Court in *Urgenda* and the GFCC in *Neubauer*, but also notably *KlimaSeniorinnen*, which all assumed that outcome should be 'likely'/two out of three/67%.[60] It then settled for the lowest level of ambition by accepting the lower end of 55% (rather than 65%) reduction by 2030. Overall, this led in *Klimaatzaak* to an *absolute minimum* that seems difficult to justify. The Swiss Federal Court in *KlimaSeniorinnen* even held that the Paris Agreement 'assumed that there was still time to avert the global temperature rise to keep it [well below 2°C or even 1.5°C (sic!)]'.[61] This is a misconception of what climate science tells us needs to be done to stay below that goal.

What likelihood of an outcome is legally required is a *normative* question, not a scientific one. The Court of Appeal in *Klimaatzaak* is hence wrong when stating that 'best available science confirms that a 50%-scenario is not unreasonable'.[62] Scientific bodies set out pathways with the 1 in 2 likelihood of reaching 1.5°C and sketch how they are feasible and cost effective. They do not make any assessment of *normative reasonableness or desirability.* Accepting the lowest end of possible reduction percentages is a *normative* choice which a court must *justify by reference to normative considerations grounded in law*.[63] In other words, absolute minimum reduction obligations cannot be *normatively* substantiated by arguing that they are *reasonable in light of science.* They must be justified in light of political and legal commitments, principles of international law, and constitutional obligations. By foregrounding science as the single justification, the court marginalised the value-

 doi:10.20944/preprints202508.1105.v1

based disagreements that exist about what we should do to avoid which climate impacts and human rights violations.

Without detailed and reliable science, prevailing legal norms could not be interpreted to entail specific obligations to reduce emission by a substantive minimum (as *Urgenda* and *Klimaatzaak*). Similarly, procedural duties with substantive yardsticks as in *Neubauer* and *KlimaSeniorinnen* (ECtHR) require states to quantify and justify their actions in relation to best available science.

4. Climate Constitutionalisation in Europe

Climate constitutionalisation in Europe is an incremental but also at times erratic non-linear process carried by expressions of legal authority. Courts from different jurisdictions that do not stand in any hierarchical relationship to each other participate in this process. All cases examined in this paper build on each other by referring at least to one prior SCL case (with the exception of *Urgenda* as the first).[64]

4.1. Replicability

In 2019, *Urgenda* established in final instance that the climate crisis is a matter of human rights under the ECHR. In the past 5 years, *Urgenda* has been widely cited by other courts, within and beyond Europe.[65] What we see in the examined case law is a high level of replicability. Human rights arguments are proposed and developed. International legal and political commitments of the defendant states are relied on to argue that they repeatedly *acknowledged* and hence *knew* about the magnitude and urgency of the climate crisis. Climate science is the factual basis to concretise what human rights and international commitments require in terms of emission reductions. All three aspects are prone to exceptional replicability. All European states are Contracting Parties to the ECHR and participate in international climate governance. The heating of the climate concerns each and every person on the planet can scientifically directly be linked to a global carbon budget that represents the cumulative emissions on earth. By reliance on each other's decisions, judges add external authority to all three ways of justifying constitutionalisation: Liberal-conservative arguments based on coherence are bolstered by reference to interpretations of human rights applicable in all European jurisdiction, such as the ECHR. Technocratic or transformative arguments are supported by reference to rulings of other, potentially higher, courts explaining the urgency or the exceptionalism of the crisis.

The replicability of arguments and findings traced in this paper also reaches beyond general emission reduction cases against states. For example, an increasing number of climate cases against companies relies in their reasoning on arguments and findings that were developed in SCL. In the Netherlands, *Milieudefensie v. Royal Dutch Shell* is a case in point.[66] It was built on the success of *Urgenda*, relying on liberal-conservative and transformative arguments. In Germany, *Neubauer* is widely cited in follow up cases, including cases against public authorities and companies.[67] Because of the GFCC's strong hierarchical position in the German legal order its decisions carry exceptional weight for coherence arguments (liberal-conservative). Follow-up cases in Germany routinely apply and further develop arguments from the *Neubauer* decision.[68] An example is the 'budget approach', characterized by its focus on the equality implications of future human rights restrictions caused by mitigation measures that are necessary to stay within Germany's fair share of the shrinking global carbon budget. This point draws inter alia on a technological justification.

Replicability drives climate constitutionalisation, which in turn empowers the judiciary. Reference to other SCL rulings bolsters a court's claim to legitimacy. References to international commitments, science, and cases from other jurisdictions highlight the global nature of the climate crisis and the grievances it causes. They also emphasise judicial decisions as one entry point where the *international* dimension of the climate crises enters into the domestic deliberation about mitigation obligations. Fairness in the context of the global carbon budget can only be argued in relation to others, including those outside one's own jurisdiction. Ultimately, a claim to *fairness* in this respect must stand the test of whether it should at least on principle be reasonably acceptable to those outside

 doi:10.20944/preprints202508.1105.v1

one's own jurisdiction. Because of widespread cross-jurisdictional references one may expect that national courts are aware how their reasoning resonates beyond the boundaries of their jurisdiction. They likely also consider whether their position could be perceived as acceptable if it were generalised and replicated in other jurisdictions.

4.2. Countertendencies in a Multilayered Judicial Context

Countertendencies are also part of climate constitutionalisation. Unsuccessful SCL cases come with low expectations of what they may contribute to climate constitutionalisation and are overall more likely to push back on one of the three examined issues. Examples of unsuccessful cases with countertendencies can be found in *Nature and Youth*, *Plan B*, *Klimatická žaloba* (Supreme Administrative Court, 2023) and the national Swiss case of *KlimaSeniorinnen*, as well as *Greenpeace v Spain*, *A Sud* (IT), the Swedish case *Aurora* and the *Finnish climate cases*.[69]

Swiss courts in the national case of *KlimaSeniorinnen* took the stark and – in Europe – exceptional position that the issue was not justiciable. In *Nature and Youth*, environmental groups claimed that Norway violated the constitution by issuing oil and gas licenses for deep-sea extraction in the Barents Sea.[70] They should take into account (foreseeable) extraterritorial emissions resulting from burning the extracted fossil fuels. The claim was rejected in all three instances. The Norwegian Supreme Court *concluded that Articles 2 and 8 ECHR were not violated.* It stated that 'the net effect of the combustion emissions is complicated and controversial'[71] and that '[t]he authorities' policy was that' GHG emissions were reduced 'by other means than stopping future petroleum production'.[72] Accepting complexity and undefined other means as reasons for executive discretion goes against the trend of requiring concrete justification from public authorities. Nonetheless, the court confirmed that the right to a healthy and natural environment is 'not merely a declaration of principle, but a provision with a certain legal content'.[73] Under certain circumstances, this right may directly be invoked in court.

Another illustrative example of a countertendency is *Plan B* in the UK. In this case, the plaintiffs alleged that the national climate policy violated the ECHR/Human Rights Act 1998 by not complying with the Paris Agreement. The courts rejected this claim because of the 'insuperable problem' that the evolving regulatory framework reflects a judgment of the legislature that needs to be respected 'unless it is manifestly without reasonable foundation'.[74] In the UK, while the ECHR and the ECtHR' case law are not directly legally binding under national law, these norms enjoy great relevance before UK courts. In *Plan B*, the Court of Appeal rejected the application for permission to appeal based on the Human Rights Act, arguing that '[t]he fundamental difficulty which the Claimants face is that there is no authority from the [ECtHR] on which they can rely'.[75] *Plan B* also considered and distinguished both *Urgenda* and the *Irish Climate case*.[76]

In *Klimatická žaloba* (Supreme Administrative Court, 2nd instance), *Greenpeace v Spain*, and *A Sud (IT, 1st instance)*, courts relied on EU law to deny justiciability of national climate targets.[77] They emphasised the competences of the EU, the ongoing processes of allocating emissions within the EU, and the potential political damage of ruling on the legality of the national contribution to EU-wide emission reductions. Indirectly, they denied that their respective states had autonomous obligations under international law that may require them to go further than what EU law requires them to do.

National courts are the primary judicial actors to apply human rights. Some have rejected or limited the relevance of human rights claims in relation to the climate crisis. However, (the potential threat of) bringing cases to Strasbourg puts pressure on national institutions, including national courts. It urges them to consider the ECtHR's position, including on the here discussed aspects of scope and applicability of human rights in relation to the climate crisis, the relevance of international law principles to quantify domestic fair share carbon budgets, and science. The next section illustrates the particular opportunities within the multilayered legal and judicial landscape in Europe. The setting does not only allow for replication but also for deliberation and co-creation. Both national courts and the ECtHR are aware of each other's contributions to that deliberative process. It is a space

 doi:10.20944/preprints202508.1105.v1

where political and legal actors with overlapping powers that do not stand in a judicial hierarchy to each other negotiate their authority and deliberate how the climate crisis should be addressed.[78]

For the moment, however, the ECJ does not participate in this process. The climate case demanding greater general emission reductions from the EU was rejected by the EU courts in two instances.[79] To allow SCL cases against the EU, the ECJ would have to change its strict interpretation of the standing requirements in cases brought by individuals. The ECtHR's decision in *KlimaSeniorinnen*, discussed in the next section, puts pressure on the ECJ in that respect.[80]

5. Multilayered Constitutionalisation

5.1. The European Court of Human Rights: KlimaSeniorinnen and beyond

All states in Europe are contracting parties to the ECHR. This highlights the relevance of the interpretation given to the ECHR in *Urgenda*, *Klimaatzaak* and, of course, *KlimaSeniorinnen*. When Convention rights are concretised by the ECtHR, this entrenches an interpretation beyond the reach of national courts and makes legal change more difficult.[81] National courts will have to either give effect to the ECtHR's interpretation or distinguish it. They cannot simply ignore it. At the same time, the Strasbourg judges' knowledge of national SCL may be assumed to have played a role in *KlimaSeniorinnen*. They explicitly agreed with the GFCC in *Neubauer*.[82] *Urgenda* was mentioned several times in the relevant materials but not in the Court's reasoning.[83] This all speaks to the particular replicability of the rights-based argument in the multilayered judicial landscape. In this multilayered landscape, human rights provisions, while they differ in some respects, largely converge.[84]

While the ECHR is binding on 46 Contracting Parties the status and practical relevance of the ECHR in the national legal order differs among the Contracting Parties.[85] Besides their legal effects, ECtHR rulings enjoy across jurisdictions great persuasive authority for *all future SCL in Europe*. By way of illustration, one can contrast Germany as a very dualist legal order and the Netherlands following a (moderate) monist tradition.[86] The GFCC ruled that the ECHR has the same status as ordinary laws taking effect within the framework of the German Constitution.[87] As other international treaties that are binding on Germany, the ECHR hence ranks below the Constitution. Ordinary courts must first observe the Constitution as interpreted by the GFCC. Before the GFCC, the ECHR (only) serves as an 'interpretation aid' in determining the contents of the Constitution.[88] This also explains why the ECHR was not given any attention in the *Neubauer* case. In the Netherlands, by contrast, individuals can rely upon provisions of international treaties even if they are incompatible with the national constitution.[89] The ECHR and decisions of the ECtHR can be directly invoked before national courts. The ECtHR *de facto* functions as the highest human rights court since the Dutch Supreme Court does not have the power of constitutional review. This strong position of the ECHR in the Netherlands is illustrated by *Urgenda*.

However, the precise effects of international articulations of rights norms are not easy to pin down. As has been observed eloquently: Such articulation 'has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society and the press. […] While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits for rights protection.'[90] These benefits rest on a complex combination of binding adjudicatory powers of the ECtHR and the principle of subsidiarity and the margin of appreciation.[91] The former establishes a *prevailing duty to comply* with Convention rights. The latter, by contrast, gives state institutions, including *national courts*, a degree of independence to interpret and give effect to this duty in a 'deliberative engagement'. Ultimately, however, the Convention demands that state institutions make a claim of compliance.[92]

In *KlimaSeniorinnen*, the Grand Chamber of the ECtHR interpreted Article 8 ECHR to entail a positive duty to quantify a fair share carbon budget. It did so after Swiss courts in two instances had rejected claims alleging an omission of the Swiss Government to adopt a regulatory framework of adequate climate policies.[93] The ECtHR's decision in *KlimaSeniorinnen* establishes a *procedural* duty

 doi:10.20944/preprints202508.1105.v1

(to quantify a budget) with a *substantive* yardstick (in light of fairness principles). Because of the composition and institutional role of the Grand Chamber, rulings of the Grand Chamber enjoy particular authority and ensure a higher level of coherence than other decisions of the ECtHR.[94]

The ECtHR's ruling in *KlimaSeniorinnen* drives climate constitutionalisation on all three above-discussed aspects. It recognised, first, that the climate crisis is a human rights issue that can be litigated under the Convention and imposes a positive obligation on states. Second, this obligation to quantify a fair share carbon budget has to be discharged in line with fairness principles of international law. Third, the Court recognised the science that allows quantifying a carbon budget in line with a two out of three/67% likelihood to stay under 1.5°C.

With regard to the first and the second, the ECtHR did not numerically quantify Switzerland's budget or establish the precise methodology for quantification. It did not set out a minimum emission reduction obligation either. However, it confirmed that fairness principles of international law must be taken into account for states to discharge their duty to quantify their share of the carbon budget.[95] The Court carefully avoided to take a position on intricate methodological controversies and allowed states a wide margin of appreciation on methods. At the same time, it made clear that the Contracting Parties had to offer 'effective protection'[96] of Convention rights. In order to do so, they must work out and explain what their 'fair share' carbon budget is, *i.e.*, how should the global carbon budget be divided into national shares in light of fairness principles. Fair share is a concept central to all general emission reduction cases and the relevance of the Strasbourg Court's reasoning and findings on this point can hardly be overestimated for current and future SCL cases in Europe.

The ECtHR has cast the ball back to the domestic institutions of the Contracting Parties. These must now draw up explicit fair share carbon budgets, set up a regulatory frameworks to stay within these budgets and, by doing so, decide how to reconcile numerous short-term and long-term interests. The Court emphasises that this process involves *all three branches of government*, *i.e.*, not only the executive and the legislature but also national courts.[97] The latter demonstrates respect for vertical separation of powers, *i.e.*, the more limited role of the ECtHR as a regional court offering subsidiary protection in combination with a greater role for the national judiciary in the domestic democratic process. As explained above, all domestic institutions must deliberatively engage with *KlimaSeniorinnen* and make a claim of compliance with the obligations to quantify a fair share carbon budget and adopt an effective regulatory framework.

The ECtHR also gave standing rights to the association KlimaSeniorinnen.[98] This is another specific aspect that cast the ball back to national courts and that has already and will continue to have a tremendous impact on SCL before national courts and potentially also the ECJ. Before the ECtHR, the association could represent the interests of affected individuals under Article 8 ECHR, including 'without a specific authority to act'.[99] This broadening of standing before the Strasbourg Court is determinative for pending and future SCL. Judges when interpreting national standing requirements of associations take note of *KlimaSeniorinnen.[100]* National courts have all reasons to avoid being ticked on their fingers in follow up cases in Strasbourg.[101] However, in the same way, *KlimaSeniorinnen* also puts pressure on the ECJ to adjudicate mitigation cases relating to the EU itself rather than waiting for national courts and Strasbourg to tell it what constitutes a rights violation.[102]

Furthermore, in *KlimaSeniorinnen,* the ECtHR directly quoted the paragraph on lack of authoritative case law in *Plan B* and did what it was invited to do: clarify the relevance of the Paris Agreement for the interpretation of the Convention.[103] This should have great influence on the interpretation of Convention rights in the UK in the future. Finally, *KlimaSeniorinnen* may potentially reign in countertendencies in the pending case of *Max Müllner v Austria*.[104] In this case, the ECtHR is for the first time asked to consider the Convention-compliance of an EU Member State that does not have a separate national emission reduction target. Austria derives its target directly from the EU target. Therefore, the Court may likely have to engage with the issue of whether Member States can discharge their obligations by pointing at EU law and the EU decision-making process, as the Czech

 doi:10.20944/preprints202508.1105.v1

Supreme Court held.[105] By extension, this may lead the ECtHR to examine the EU target in light of the Convention obligation to quantify one's fair share carbon budget (*KlimaSeniorinnen*).

5.2. The Advisory Opinion on of the International Court of Justice

The ICJ's groundbreaking advisory opinion on obligations of states in respect of climate change is likely to give SCL and other climate litigation around the world a new momentum. This includes SCL in Europe. The ICJ is the highest authority interpreting states' obligations under international law. National and regional courts must relate their interpretation of what national and regional norms mean in light of international law to the ICJ's interpretation.

The ICJ took the unambiguous position that the right to a healthy environment is a precondition for the enjoyment of other human rights.[106] It first explained in detail how the climate crisis is a human rights issue.[107] It also expressly found support for this in the decisions of regional and national courts.[108] As regards the relevance of international law and policy, the Court traced and confirmed the political and legal consensus on 1.5°C as the long-term temperature goal (while acknowledging that this level of warming already causes significant harms).[109] It also established that international environmental treaties and customary international law and the international climate regime 'inform each other'.[110] Finally, it confirmed the relevance of international fairness principles to establishing what states are obliged to do in terms of climate mitigation.[111] As regards *science*, the ICJ made clear that '[t]he determination of "significant harm to the climate system and other parts of the environment" must take into account the *best available science*. which is to be found in the reports of the IPCC.[112] A core climate obligation of states is to 'prepare, communicate and maintain successive and progressive NDCs' that are capable of achieving 1.5°C.[113] The assessment of whether cumulative mitigation efforts are capable of achieving the long-term temperature goal must necessarily rely on science to establish the link between human emissions and global warming.[114]

The ICJ's Advisory Opinion authoritatively clarifies extensive international obligations in respect of climate change. Already before the delivery of the advisory opinion, these international obligations have, as we saw above, regularly informed the judicial reasoning of national and regional courts in Europe. They construed what domestic and regional human rights require from states by reference to these obligations. With the ICJ unambiguously linking climate obligations to core *international* human rights instruments, national and regional courts are in a very difficult position to explain why corresponding national and regional human rights should be interpreted less stringently. Moreover, the position that Member States of the EU do not have autonomous climate mitigation obligations under international law that may go further than what EU law requires them to do became untenable after the ICJ's advisory opinion.

6. Justifying Constitutionalisation

SCL asks courts to declare unlawful the defendant state's failure to adequately mitigate the climate crisis and/or impose mitigation obligations on the defendant states. Two different types of outcomes in SCL may be distinguished: substantive obligations (*Urgenda*, *Klimaatzaak*) and procedural obligations in light of substantive yardsticks (*Neubauer*, *KlimaSeniorinnen*). In both categories of outcomes, courts place the *objective of mitigating* the climate crisis beyond the reach of day-to-day state actions by the (directly or indirectly) elected, majoritarian institutions, *i.e.*, Parliament and Government. In none of the examined cases, courts determined the *means* of how emissions should be reduced or even the *methods* based on which the domestic fair share should be quantified. Hence, the balancing of (short-term) interests relating to *how* we reduce emissions and the justification of what is fair are left to politics.[115] Hence, in the examined SCL cases, judges leave space to the political (majoritarian) institutions and civil society to deliberate how to mitigate the climate crisis. They only demand that they do so.

We have seen that judges offer at least three types of justifications in favour of constitutionalisation: liberal-conservative, technocratic and transformative.[116] Scholars have also

 doi:10.20944/preprints202508.1105.v1

advanced justifications along these three lines in favour of SCL. They emphasise, for example, how litigation reinforces representation within existing structures,[117] the need for science based decision-making,[118] and that the climate crisis because of its exceptionality requires an urgent break with existing practices.[119]

The strongest justification flows from the realisation expressed by the ICJ, namely that a healthy environment is a prerequisite for the enjoyment of many other human rights. In addition, it is also a prerequisite for democracy itself.[120] If states do not deliver on the most basic goods in the social contract this puts social peace and the functioning of the polity in danger. In *Neubauer*, the GFCC convincingly pointed out that if more stringent mitigation actions are not taken now this leads in the future (after 2030) to unreasonable restrictions of freedoms, including collective political freedoms.[121] In a state of climate emergency, *i.e.*, carbon lockdowns, democratic choices vanish.

In other words, judicial intervention and democratic decision-making cannot be juxtaposed. Declining jurisdiction, denying standing, and ultimately making human rights irrelevant in the climate crisis is neither innocent nor neutral for democracy. In light of increasing impacts, state paralysis reasonably raises doubt whether our democracies are up for this fundamental challenge.[122] Considering alternatives of judicial engagement with SCL quickly leads us to transformative justifications. While courts in SCL have so far engaged with transformative reasons only to a limited extent, growing impacts, closing windows of opportunities, and dwindling carbon budgets are likely to make this line of reasoning become more prevalent in future cases.

Another strong justification is tight together with the nature of the climate crisis as a truly global collective action problem that necessarily requires international cooperation. Any such cooperation is only possible if states remain credible and trustworthy cooperation partners. In other words, cooperation can only work if states do domestically what they commit to internationally. This also becomes apparent in ICJ's advisory opinion emphasising the duty to cooperate.[123] International or regional treaties set binding (quasi-contractual) norms between sovereign states that necessarily entrench what was agreed and by doing so, make cooperation possible.[124] Such treaties cannot be cast aside and hence constrain the politics of the day expressed within the elected institutions. Ensuring that these international norms are (at least to some degree) given effect forms part of being a credible and trustworthy cooperation partner. Whether this is done by the judiciary or by the elected institutions is not the primary concern. This also taps into the liberal-conservative reasoning of coherence in the legal order.

We can however see the fault lines deepening between the judiciary and the political institutions, not only in the national but also in the international context. Courts from many jurisdictions, including the ICJ, bolster with their rulings and opinions the conditions for more litigation. They allow those whose human rights affected by the climate crisis to demand justification for inadequate climate actions. However, also in relation to these fault lines, anyone criticising that judges are overreaching in SCL should consider the alternatives. Some of the 'unsuccessful' SCL cases demonstrate the inability of our constitutional democracies to deal with the existential threat of the climate crisis. If judges deny jurisdiction, while the other branches of government fail to take adequate action, our state institutions *collectively* prove incapable of addressing the climate crisis. If structurally citizens are left without any remedy against irreversible current and future human rights violations this amounts to an institutional, systemic failure of justice. Such a failure of justice cuts even deeper than the failure of states to take adequate action in the first place.

7. Conclusions

SCL in Europe has incrementally, including with countertendencies, established prevailing mitigation norms drawing on human rights, international legal and political commitments, and science. This phenomenon can appropriately be described as climate constitutionalisation. One aspect of constitutionalisation is that SCL is not mushrooming in many unrelated cases but builds a connected web of arguments and references. The multilayered legal landscape of Europe creates a particularly fertile landscape for constitutionalisation. Courts that do not stand in a hierarchical

 doi:10.20944/preprints202508.1105.v1

relationship to each other decide on interrelated or even largely the same issues from the perspective of different jurisdictions. They take binding decisions with respect to the same people and territory. They also refer to each other's rulings and rely on each other's authoritative interpretations.

In addition, SCL benefits for at least four reasons from exceptional replicability: First, the climate crisis is a truly global collective action problem caused by all and affecting the human rights of all (albeit both in very different ways!). These human rights – albeit in slightly different ways – are recognised by all European states, not only under national law but also collectively by signing up to the ECHR and EU law. Second, SCL relies on political and legal commitments of states within the international climate governance framework with nearly universal membership. In addition, the ICJ recently connected these mitigation obligation with universally binding *jus cogens*, which is likely to be picked up in future SCL. Third, climate science is universal in that it traces and explains a global phenomenon. The underlying causal relationships, and resulting impacts, of the climate crisis, even if its impacts affect different regions very differently, are universal. All and every action on the planet is factually connected to these processes. Fourth, so far, none of the defendant states has taken climate action anywhere close to their fair share. This fair share is defined as what adequately mitigating the climate crisis collectively would demand from them in light of fairness principles. Each and every European state is a potential defendant in SCL. These exceptional characteristics of SCL have allowed it to produce in a relatively short timeframe prevailing norms that constrain state action.

Within Europe, a recent leap in climate constitutionalisation is the ECtHR's ruling in *KlimaSeniorinnen.* The Court's reading that the climate crisis as a human rights issue under the Convention powerfully reenforces the position of those domestic courts that see a role for law and courts in this crisis. All ECHR signatories may reasonably expect to be taken to the Strasbourg Court if they remain below the level of climate action demanded by the ECtHR in *KlimaSeniorinnen.* Future decisions in the currently pending cases offer further opportunities to push back on countertendencies. In addition, the ICJ's advisory opinion significantly contributes to the constitutionalising processes in domestic courts. It confirmed – in line with *KlimaSeniorinnen* – what adequate climate action is. National emission reductions expressed in NDCs must comply with international fairness principles and, importantly, be cumulatively capable of keeping global warming below 1.5°C. It is now for domestic courts to give teeth to the obligations outlined by the ECtHR and the ICJ. Litigants will surely ask them to do so.

The number of new and pending SCL cases in Europe remains at a high level.[125] For politicians, SCL may feel like being stuck in a repeat game with increasing stakes and decreasing chances. With the adoption of more and more net zero targets, SCL may over time shift from pushing states to adopt emission reduction targets to push them to adopt the necessary plans and concrete mitigation (and adaptation) measures and pay compensation for failing to do so. New litigation strategies emerge and rely on the insights in the discussed cases on what works and what does not. Some cases are bound to contribute to further climate constitutionalisation. If the elected branches continue to fail to agree and adopt adequate climate actions the fault line between them and the judiciary is going to deepen.

Whatever judges do in SCL, their decisions contribute to the development of norms. They also speak to the meaning of law and the role of the judiciary in addressing the climate crisis. Unsuccessful cases also contribute to constitutionalisation, including by escalating the issues to the ECtHR. The emerging norms constitute the framework in relation to which public but also private actors develop their understanding of what actions are lawful or justified.[126] This effect goes beyond the courtroom. Not only because of growing climate impacts but also because of the rising level of climate constitutionalisation, the political and legal salience of climate mitigation (and adaptation) as a human rights issue is likely to further increase. We may expect further interventions by numerous interested and affected parties, including through litigation.

Climate constitutionalisation can also be normatively justified. In light of the wide-spread and well-documented failures of European states to reduce emissions adequately, it remains an ambivalent hope. The repeated signposts and redlines drawn by national and international judges

 doi:10.20944/preprints202508.1105.v1

cannot easily be ignored by state institutions. The judiciary's task to protect the coherence of the legal order lies at the heart of SCL. Political actors time and again confirm in law and politics that the urgency and magnitude of the climate crisis but they do not manage to take the necessary actions in the short-term. They rather aggravate the problem further by pushing these actions into the future. SCL decisions aim to re-establish coherence between diverging legal norms, including the fundamental background norms that protect us from systematic human rights violation. They are important points of reference in the ongoing deliberation of what to do about the exceptional challenge of the climate crisis. Some courts have the constitutional task to ensure that all state institutions live up to their constitutional duties. Arguably, all state institutions must protect the existence and functioning of the polity. This entails averting the 'existential risks' of the climate crisis.[127] Judicial review has an important place in the democratic process of demanding and providing justification. The underlying relations of demanding and giving justification are complex. The litigants in SCL are the prime actors demanding justification from the defendant states. Yet, international law and politics play an important role in the legal reasoning and extend these relations beyond the specific judicial processes and beyond the involved parties, including to other states and third country nationals.

Importantly, constitutionalisation, while it may remove certain aspects from the political debate, does not mark an end point of the these processes. It does not definitely settle emission reduction obligations of states. By way of example: after *Urgenda*, the political debate in the Netherlands continues.[128] A second SCL case, launched by Greenpeace, together with and on behalf of citizens of Bonaire, was admitted to Dutch courts in September 2024.[129] The hearing is scheduled for October 2025. In Germany, *Neubauer* established a constitutional commitment to remain within the national fair share of the global carbon budget. This is the point of reference for all follow-up litigation and the work of the expert bodies advising the German government under the federal climate change act.[130] Several follow up cases challenged inadequate implementation of the federal climate change act and its 2024 amendment.[131] In Switzerland, the implementation of the ECtHR's decision in *KlimaSeniorinnen* is negotiated in the Council of Ministers.[132] In Belgium, Wallonia decided not to appeal *Klimaatzaak*, while Belgium and Flanders appealed to Court of Cassation.[133] In other words, climate constitutionalisation continues and the institutional debates between democratically elected actors and the judiciary on how to mitigate the climate crisis also continue. Climate constitutionalisation sets boundaries but does not bring these debates to an even temporary conclusion.

References

1. 'Europe' denotes the geographical area where national law, European Union law, and the ECHR are applicable in partially overlapping but not identical layers of law. In other words, it covers the EU and its Member States but also as a matter of principle the Contracting Parties to the ECHR, with the disclaimer that any remarks about EU law are not applicable.
2. Comparative data taken from: Higham C, Setzer J and Bradeen E (2022) Challenging government responses to climate change through framework litigation. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change, available at: Challenging-government-responses-to-climate-change-through-framework-litigation-final.pdf, Joana Setzer & Catherine Higham, *Global trends in climate change litigation: 2025 snapshot* (Policy report, LSE 2025), p. 29-30; available at: Global trends in climate change litigation: 2025 snapshot - Grantham Research Institute on climate change and the environment, and Sabin Center's Climate Litigation Database on global litigation: https://climatecasechart.com/non-us-case-category/other/.
3. See the prevalence of European cases in the relevant section on general emission reduction cases against states: Setzer & Higham, ibid, p 29-30: all cases cited by name are from Europe, except the South Korean Youth case. The four example of cases with the greatest legal impact are all from Europe (p.29). Successful: Rechtbank Den Haag [Court of First Instances The Hague], 24 juni 2015, AB 2015/336 (*Urgenda,* First Instance); Hof Den Haag [Court of Appeals The Hague], 9 October 2018, JB 2019/10 (*Urgenda*, Court of

 doi:10.20944/preprints202508.1105.v1

Appeal); *State of the Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (*Urgenda,* Supreme Court); *Supreme Court of Ireland. Friends of the Irish Environment v. Ireland, Appeal No. 205/19*; *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (*Neubauer*); *L'Affaire du Siècle, Tribunal Administratif de Paris, Nos. 1904967, 1904968, 1904972, 1904976/4-1 (Oct. 14, 2021)*; *Conseil d'État [Council of State]. Commune de Grande-Synthe v. France, Case No. 467982*; *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] 2015/4585/A (*Klimaatzaak,* Court of First Instance). Cour d'Appel Bruxelles [Court of Appeals Brussels] (2nd ch.), Nov. 30, 2023, J.L.M.B. 24/045 (Belgium) (*Klimaatzaak*, Court of Appeal); Court of Appeal (England and Wales). *R (Friends of the Earth Ltd) v. Secretary of State for Business, Energy and Industrial Strategy*, Claim Nos. CO/125/2022, CO/163/2022, CO/199/2022 (*Net Zero Strategy*); ECtHR, *KlimaSeniorinnen Schweiz et al. v Switzerland*, no. 53600/20, ruling of 9 April 2024.

4. Also called 'systemic cases' (Lucy Maxwell, Sarah Mead and Dennis van Berkel, 'Standards for adjudicating the next generation of Urgenda-style climate cases' (2022) 13 (42) *Journal for Human Rights and the Environment*) and 'framework cases' (Joana Setzer & Cathrine Higham, *Global trends in climate change litigation: 2022 snapshot* (Policy report, LSE 2023), available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf, accessed 11 July 2024).
5. ECtHR, *KlimaSeniorinnen*, n. 3 ; International Court of Justice (ICJ), Obligations of States in Respect of Climate Change, Advisory Opinion of 23 July 2025 (ICJ, AO).
6. Sabin Center for Climate Change Law, available at: https://climatecasechart.com/non-us-climate-change-litigation/ (accessed on 30 April 2025).
7. See n. 3 for 8 successful cases and Section 4.2 for 12 unsuccessful cases.
8. UNEP, Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again), EGR2023.pdf (https://unep.org); Climate Action Tracker, Analysis for 2022, https://climateactiontracker.org; See also UNEP, Emissions Gap Report 2022, https://www.unep.org/resources/emissions-gap-report-2022.
9. Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism?* (2010); Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014).
10. O'Donoghue, ibid, 16.
11. Dobner and Loughlin, n. 9, 47.
12. Sam Bookman, 'Demystifying Environmental Constitutionalism', *Environmental Law* (2024); James May & Erin Daly, *Global Environmental Constitutionalism* (2014); Louis Kotze, 'The Conceptual Contours of Environmental Constitutionalism' 21 *Widener Law Review* (2015), 187 – all with further references.
13. Stephen Holmes, 'Precommitment and Paradox of Democracy', in Jon Elster & Rune Slagstad (eds.) *Constitutionalism and Democracy* (1988), pp. 196.
14. Bookman, n. 12.
15. ibid., Introduction.
16. ibid.
17. ibid.
18. David Kennedy, 'A Semiotics of Legal Argument' 42 *Syracuse Law Review* (1991), 75-116, at 101.
19. Alon Harel, *The Tension between the National and ECHR Human Rights Adjudication: A Normative Account* 24 *Human Rights Law Review* (2024), 1-11, at 5. On the merit of entrenchment by making law-making procedurally harder (many considerations are transferrable to international courts): Nick Barber, 'Why entrench?' 14(2) *International Journal of Constitutional Law* (2016), 325–350.
20. Christina Eckes, 'A Timid Defence of legal formalism', in Marija Bartl and Jessica Lawrence (eds.), *The Politics of European Legal Research* (2022) 192-207.
21. A prominent example of the latter: US Supreme Court, *Medellín v. Texas*, 552 U.S. 491 (2008).
22. Aileen Kavanagh, *The Collaborative Constitution* (2023), Chapter 3 'The Case for Collaboration'. Art. 13 *Wet AB neergelegde verbod van rechtsweigering* [prohibition to deny justice]. This is also how 'duty' is read in the famous citation: 'It is emphatically the province and duty of the judicial department to say what the law is' form *Marbury v Madison* [1803] 5 U.S. (1 Cranch) 137 (1803).

 doi:10.20944/preprints202508.1105.v1

23. Roda Verheyen, *Wir alle haben ein Recht auf Zukunft* (2023), 13; Christina Eckes, 'Governance failures in court: how litigation constitutionalises norms on climate change mitigation' in Armin Steinbach & Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Transnational Governance Failures and Policy Responses* (2024);.
24. See by contrast: Juliana v US, at: Juliana v. United States - Climate Change Litigation.
25. Climate Action Tracker, and UNEP, Emissions Gap Reports 2022 & 2023, n. 8.
26. See also beyond Europe: Cesar Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation', 114 *American Journal of International Law* (2020), 40-4; Jon May & Erin Daly, 'Global climate constitutionalism and justice in the courts' in: Jordi Jaria-Manzano & Susana Borrás (eds.), *Research Handbook on Global Climate Constitutionalism* (2019), 235-45. For an approach also concentrating on codified law: Navraj Singh Ghaleigh et al., 'The Complexities of Comparative Climate Constitutionalism', 34 *Journal of Environmental Law* (2022), 517-28; see fundamentally: Louis Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (2016).
27. *Urgenda*, District Court, n. 3. Chantal Mak discusses *Urgenda* as a politically sensitive case in civil courts, *inter alia* through a lens of constitutionalisation: Chantal Mak, 'Giving voice: a public sphere theory of European private law adjudication' *European Law Open* (2023), 697–723.
28. *Urgenda*, Court of Appeal and Supreme Court, n. 3.
29. Conclusion of Procurator General in *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019], ECLI:NL:PHR:2019:887, sections 1.35.
30. Article 1382 Belgian Civil Code.
31. *Klimaatzaak*, n. 3.
32. *Klimaatzaak*, Court of Appeal, ibid, para. 234.
33. The constitutional complaints of two associations were dismissed as inapplicable.
34. Article 20a German Constitution; GFCC, *Neubauer*, n. 3, 144 et seq.
35. Critical voices challenge the very medium of individual rights: Christoph Menke, *Kritik der Rechte* (2018).
36. Amnesty International, *After UN Climate Action Summit, Urgent Action Needed by All States to Avoid Human Rights Violations on Massive Scale* (Public statement, Index number IOR 40/1239/2019, Amnesty International 2019), available at: www.amnesty.org/en/documents/ior40/1239/2019/en/ accessed on 31 July 2025; UNEP (UN Environment Programme), *Climate Change and Human Rights* (Report, UNEP 2015), available at: www.unep.org/resources/report/climate-change-and-human-rights accessed on 31 July 2025.
37. Nicolas Taconet et al., 'Influence of climate change impacts and mitigation costs on inequality between countries' 160(1) *Climatic Change* (2020), 15-34; S. Cevik & J. Tovar Jalles, *For Whom the Bell Tolls: Climate Change and Income Inequality* (IMF, 2022); Daniel Lindvall, (2024). *Climate change and the endurance of democracy*, Chapter 6, https://doi.org/10.4324/9781003465874; World Inequality Lab, Climate Inequality Report 2023, Fair Taxes for a Sustainable Future in the Global South, available at: CBV2023-ClimateInequalityReport-3.pdf (wid.world) accessed on 20 October 2024.
38. See for 'victim status' within the meaning of Article 34 ECHR: ECtHR, *KlimaSeniorinnen*, n. 3, 478-488 and 507-520; See for direct and individual concern within the meaning of Article 263(4) TFEU: Case T-330/18 *Carvalho and Others v EP and Council* EU:T:2019:324, 33 et seq; upheld on appeal by Case C-565/19 *Carvalho v EP and Council* EU:C:2021:252, para 76-7. See similarly: Case T-141/19 *Peter Sabo v EP and Council* ECLI:EU:T:2020:179; C-297/20 P *Sabo and Others v EP and Council* ECLI:EU:C:2021:24.
39. Conclusion of Procurator General in *Urgenda*, n. 29.
40. *Neubauer*, n. 3 but also below in Section 5.1 *KlimaSeniorinnen*, see also Eckes, C. (2025). "It's the democracy, stupid!" in defence of KlimaSeniorinnen. *ERA Forum*. https://doi.org/10.1007/s12027-025-00828-w.
41. See for a synthesis of 166 NDCs representing 193 Parties: UNFCCC, *Nationally determined contributions under the Paris Agreement*, FCCC/PA/CMA/2022/4 (Synthesis Report, UNFCC 2022), available at: https://unfccc.int/ndc-synthesis-report-2022 (accessed 20 October 2024).
42. ICJ, AO, n. 5, para 410; see also below Section 5.2.
43. Recitals and Art 3(1) UNFCCC (CBDR-RC) and Article 3(3) UNFCCC (precautionary principle), see *Urgenda*, n. 4, 5.7.3.
44. *Urgenda*, n. 2, 7.2.2 and 7.2.3.

 doi:10.20944/preprints202508.1105.v1

45. Supreme Court, *Urgenda,* n. 2, 5-12. Conclusion of Procurator General in *Urgenda*, n. 29, section 1.2 et seq, in particular section 1.2(xxvii), 1.7, 2.19, and 2.30.
46. *Klimaatzaak*, Court of Appeal, n. 3, 8-68.
47. *Neubauer,* n. 3.
48. *L'Affaire du Siècle* and *Grande Synthe I*, n. 3.
49. For a very critical voice on the inclusiveness and legitimacy of the IPCC: Tejal Kanitkar, Akhil Mythri & T. Jayaraman, *Equity assessment of global mitigation pathways in the IPCC Sixth Assessment Report*, CLIMATE POLICY (2024).
50. Within the meaning of Articles 4(1), 7(5) and 14(1) Paris Agreement 2015. See ICJ, AO, n. 5, para 278.
51. *Klimaatzaak*, Court of Appeal, n. 3, 17.
52. As did *L'Affaire du Siècle*, n. 3.
53. German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen – SRU), see *Neubauer,* n. 2, 28, 36, 216-47.
54. ECtHR, *KlimaSeniorinnen*, n. 3, 64-120.
55. ECtHR, *KlimaSeniorinnen*, n. 3, 431-33.
56. ECtHR, *KlimaSeniorinnen*, n. 3, 558 et seq.
57. See Bookman, n. 12.
58. *Klimaatzaak*, Court of Appeal, n. 3, 192.
59. See also: Yann Robiou du Pont & Malte Meinshausen, 'Warming assessment of the bottom-up Paris Agreement emissions pledges', *Nature Communications* (2018), at p. 4810.
60. However, *Urgenda*, n. 3, and *Neubauer*, n. 3, reason in relation to 2°C and 1.75°C (the temperature in relation to which the national advisory body calculated the remaining budget), respectively. While this is for partially historically explicable reasons, the substantive obligations in these rulings are hence also intrinsically incompatible with 1.5°C.
61. Bundesgericht, *KlimaSeniorinnen Schweiz et al. v Federal Department of the Environment, Transport, Energy and Communications* [2020] 1C_37/2019, para 5.3.
62. *Klimaatzaak*, Court of Appeal, n. 3, 195 – translated by the author.
63. Similar issues are raised by grandfathering, overshoot, and negative emissions, which are inherent in all climate models but the degree of their use needs to be normatively justified.
64. Many other cases in Europe also refer to the here discussed cases, *e.g.*, the *Irish Climate Case*, n. 3; *Net Zero Strategy*, n. 3.
65. See, e.g., for a case outside of Europe: *Thomson v. Minister for Climate Change Issues, High Court of New Zealand Wellington Registry* (2017); *Mathur v. Ontario, Superior Court of Justice of Ontario* (2020); *Lawyers for Climate Action NZ Incorporated v The Climate Change Commission, High Court of New Zealand* (2022); *Daniel Billy et al v. Australia, UN Human Rights Committee* (2022).
66. Milieudefensie et al. v. Royal Dutch Shell, available at: https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (accessed 20 October 2024).
67. DHU cases in Berlin-Brandenburg; Barbara Metz et al. v. Wintershall Dea AG; Kaiser et al. v. Volkswagen AG; Deutsche Umwelthilfe v. Bayerische Motoren Werke AG (BMW) and Deutsche Umwelthilfe v. Mercedes-Benz AG https://www.ngfs.net/sites/default/files/medias/documents/ngfs_report-on-climate-related-litigation-recent-trends-and-developments.pdf (accessed 20 October 2024).
68. See the complaint by Greenpeace and Germanwatch, available at: https://www.greenpeace.de/publikationen/Verfassungsbeschwerde_final_0.pdf (accessed 20 October 2024).
69. *Nature and Youth Norway and others v Norway* [2020] HR-2020-24720P (*Nature and Youth*); High Court of Justice (Administrative Court). *Plan B Earth v. Prime Minister*, Case No. CO/1587/2021 (*Plan B*); Supreme Administrative Court of the Czech Republic. *Klimatická Žaloba ČR and Others v. the Czech Republic*, Case No. 9 As 116/2022–166; Bundesgericht, *KlimaSeniorinnen*, n. 61; Supreme Court of Spain, *Greenpeace v. Spain*, Case No. 002/0000162/2021; Civil Court of Macerata, Italy, *A Sud v. Italy*, Case No. 39415; Nacka District Court, *Aurora* and Others v. Sweden, Case No. 7177-23; Supreme Administrative Court of Finland [Korkein hallinto-oikeus]. *KHO:2023:62*; ECLI:FI:KHO:2023:62 (*Finnish Climate Case I*); Supreme Administrative

 doi:10.20944/preprints202508.1105.v1

Court of Finland [Korkein hallinto-oikeus]. *KHO:2025:2*; ECLI:FI:KHO:2025:2 (*Finnish Climate Case II*). See also: ECtHR, *Carème v. France*, Application No. 7189/21 and *Duarte Agostinho*, Application No. 39371/20.

70. *Nature and Youth*, ibid. See also: Petra Minnerop & Ida Rostgaard, 'In Search of a Fair Share: Article 112 Norwegian Constitution, International Law, and an Emerging Inter-Jurisdictional Judicial Discourse in Climate Litigation', 44 *Fordham Int'l LJ* (2021), 847-920.
71. *Nature and Youth,* n. 69, 234.
72. Ibid, para. 243.
73. Ibid, 144.
74. *Plan B*, n. 69, 48-50 & 77.
75. *Plan B*, n. 69, 5.
76. *Plan B*, n. 69, 55-6.
77. Eckes, C. (2024). Strategic Climate Litigation before National Courts: Can European Union Law be used as a Shield? *German Law Journal*, *25*(6), 1022-1042.https://doi.org/10.1017/glj.2024.54.
78. See for inspiration: Cristina Lafont, Democracy without shortcuts: A participatory conception of deliberative democracy (2019).
79. GC and ECJ, *Carvalho*, n. 38. See also: Winter, G. (2023) 'Plaumann withering: Standing before the EU General Court underway from distinctive to substantial concern', *European Journal of Legal Studies*, 15(1), 85–123.
80. Christina Eckes, 'KlimaSeniorinnen requires the EU to set a 2040 target of at least 90 % reduction domestically', *European Law Blog*, 2025, available at: KlimaSeniorinnen requires the EU to set a 2040 target of at least 90 % reduction domestically · European Law Blog.
81. Nick Barber, n. 19.
82. ECtHR, *KlimaSeniorinnen*, n. 3, para. 571.
83. ECtHR, *KlimaSeniorinnen*, n. 3, e.g., at 164 (report of the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change) and 245-6 (public rapporteur to the Conseil d'État in the Grande Synthe II), 260-1 (submission of the Netherlands).
84. Christina Eckes, 'Mutual Trust and the Future of Fundamental Rights Protection in the EU's Compound Legal Order', in Nehal Bhuta (ed.), *Human Rights in Transition* (2024).
85. See for the direct legal weight of the ECHR in a selection of national jurisdictions: Christina Eckes, 'EU accession to the ECHR: between autonomy and adaption', 76 *Modern Law Review* (2023), 254-85.
86. It is considered moderate because international customary law has internal effect but does not take precedence over a conflicting rule of Dutch law (*Nyugat* [1959], HR 6 March 1959, NJ 1962, 2)
87. GFCC, Decision of 14 Oct. 2004, 2 BvR 1481/04 – (Görgülü; ECHR decision). See more recently: GFCC, Decision of 4 May 2011, 2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2 BvR 1152/10; 2 BvR 571/10 – (Preventive Detention).
88. Christina Eckes, *EU accession to the ECHR*, n. 85.
89. Except for provisions of international agreements that are not binding on everyone ('*eenieder verbindend*'), see article 94 of the Dutch Constitution.
90. See Douglass Cassel, 'Does International Human Rights Law Make a Difference', 2 *Chicago Journal of International Law* (2001), 121.
91. George Letsas, *Two Concepts of the Margin of Appreciation* 26 Oxford Journal of Legal Studies (2006), at 705, see also 722 (the principle of subsidiarity as 'a *chronological* or *procedural* domestic control over international control').
92. Alon Harel, n. 19, 7-8.
93. ECtHR, *KlimaSeniorinnen*, n. 3; Bundesgericht, *KlimaSeniorinnen*, n. 61.
94. Rules of the Court, edition of 23 June 2023, Rule 24 – Composition of the Grand Chamber andRule 72 – Relinquishment of Jurisdiction in favour of the Grand Chamber, available at: https://www.echr.coe.int/documents/d/echr/rules_court_eng.
95. ECtHR, *KlimaSeniorinnen*, n. 3, para. 571 'requires the States to act on the basis of equity and in accordance with their own respective capabilities'.
96. ECtHR, *KlimaSeniorinnen*, n. 3, 519.

 doi:10.20944/preprints202508.1105.v1

97. ECtHR, *KlimaSeniorinnen*, n. 3, 449, 550.
98. *KlimaSeniorinnen* was decisive for the Swedish court's interpretation of standing in *Aurora*, n. 68.
99. ECtHR, *KlimaSeniorinnen*, n. 3, 498-503; quote at 476.
100. *Aurora*, n. 69.
101. Eckes, C., Kammeringer, C., & Coenders, A. (2025). Democratie en vertegenwoordiging van het algemeen belang. *Nederlands Juristenblad (NJB)*.
102. Eckes, 2040 target, n. 80.
103. ECtHR, *KlimaSeniorinnen*, n. 3, 268 ('overview of domestic case law concerning climate change').
104. ECtHR, *Müllner v. Austria* App no. 18859/21 (ECtHR, 1 July 2024). At least ten additional climate cases are pending before the ECtHR.
105. See on the latter point: Eckes, *Shield*, n. 77.
106. ICJ, AO, n. 5, para 389 and 393.
107. Ibid, 372-86.
108. Ibid, para 385.
109. Ibid, 224 and 189.
110. Ibid, 404 and 309-315.
111. Ibid, 240 and 247.
112. Ibid, para 278 emphasis added.
113. Ibid, para 457 (3)(A)(f).
114. Ibid, para 72.
115. See ECtHR, *KlimaSeniorinnen*, n. 3, 421.
116. See above all Bookman, n. 12.
117. Kathrina Kuh, 'The Legitimacy of Judicial Climate Engagement' *Ecology Law Quarterly* (2019), 731-764.
118. See with regard to environmental adjudication: Katalyn Sulyok, *Science and Judicial Reasoning* (2020).
119. Stephen Dover, 'Sustainability: Demands on Policy' 16 *Journal of Public Policy* (1997), 303-18.
120. Daniel Lindvall, (2024). *Climate change and the endurance of democracy.*
121. *Neubauer*, n. 3, 246.
122. Daniel Fiorino, *Can Democracy Handle Climate Change?* (2018); Jason Brennan, *Against Democracy* (2016); David Shearman, Joseph Wayne Smith, *The Climate Change Challenge and the Failure of Democracy* (2007).
123. ICJ, AO, n. 5, para 227.
124. Eyal Benvenisti and Alon Harel, 'Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity' (2017) 15(1) International Journal of Constitutional Law 36.
125. Joana Setzer & Catherine Higham, *Global trends in climate change litigation: 2025 snapshot* (Policy report, LSE 2025), available at: Global trends in climate change litigation: 2025 snapshot - Grantham Research Institute on climate change and the environment.
126. See Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion', 56 *American Political Science Review*, 853, 855.
127. ECtHR, *KlimaSeniorinnen*, n. 3, 421.
128. See e.g., parliamentary question and answers of the cabinet relating to *KlimaSeniorinnen*, available at: https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2024Z12035&did=2024D34379 (accessed 20 October 2024).
129. https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2024:14834 (accessed 20 October 2024).
130. https://expertenrat-klima.de/en/publikationen/ (accessed 20 October 2024).
131. See the complaint by Greenpeace and Germanwatch, n. 117, as well as the background paper of the complaint by the Solarenergie-Fördervereins Deutschland e.V. (SFV) and Bund für Umwelt und Naturschutz Deutschland e.V. (BUND), available at: https://www.bund.net/fileadmin/user_upload_bund/publikationen/klimawandel/klimaschutz-menschenrecht-klima-verfassungsbeschwerde-bund-sfv.pdf (accessed 20 October 2024).

 doi:10.20944/preprints202508.1105.v1

132. The Court referred the implementation to the Council of Ministers: ECtHR, *KlimaSeniorinnen*, n. 3, 657. See for the process: Committee of Ministers, '1521st Meeting (DH), 4–6 March 2025, H46-30 Verein KlimaSeniorinnen Schweiz and Others v Switzerland (Application No 53600/20)' (Council of Europe, 6 March 2025).
133. See: https://cadmus.eui.eu/bitstream/handle/1814/77257/Verf_From_Urgenda_2023.pdf (accessed 31 July 2025).