Climate Litigation, Human Rights & Intergenerational Justice

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Abstract
The progression of climate change has brought the issue of intergenerational justice further into focus. At the same time, there has been a global increase in climate litigation. Activists increasingly use litigation and fundamental and human rights as instruments to enforce their demands for intergenerational justice. This thesis, therefore, focuses on the question of whether climate litigation can transform intergenerational justice from a political norm into a human rights-based, justiciable right.

Previous studies identified a human-rights turn in climate litigation. In addition, other studies revealed that climate activists are increasingly using intergenerational framing. However, the relationship between intergenerational justice and human rights is understudied.

This thesis addresses the existing research gap. Utilizing a mechanism-based account, the legal framing and the legal interpretation of the Neubauer case, decided by the German Federal Constitutional Court are analyzed to show the transformation of intergenerational justice into a matter of human rights. Moreover, climate litigation cases at the ECtHR are analyzed whether they contain references to Neubauer to identify indicators for a precedent-setting effect upon the supranational human rights framework of ECHR. This thesis demonstrates the importance of climate litigation as a policy tool in national and international climate governance.

Word Count: 15708
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1. Introduction

Climate Litigation is on the rise. In its 2022 Climate Change report the Intergovernmental Panel on Climate Change (IPCC) acknowledged this development stating that climate-related litigation “has influenced the outcome and ambition of climate governance” (IPCC, 2022: 46). Climate change is threatening the environment, natural resources, and in consequence, humankind, and the detrimental effects of climate change are not distributed evenly. However, the workings and impact of climate litigation on climate mitigation remain understudied. Climate litigation, that is, a case before judicial and quasi-judicial institutions which involve material issues of climate change science, policy, or law, is a matter of recognition and representation, especially for youth activists. In the face of fundamental threats, the youth and future generations lack representation and institutional power. The voice of the most threatened is not heard, due to the demographics, voting age or future generation yet to be born.

Disappointed and frustrated with the government’s climate mitigation policy, climate activists and NGOs turn to the courts as a last resort to achieve accountability, recognition, and representation which are lacking in the political arena (Skillington, 2019: 96). Activists file complaints against governments for insufficient climate mitigation, especially concerning GHG emissions. Activating the courts offers the activists another tool to achieve their political goals (Barkan, 1980: 945). Activists translate their political beliefs and demands into legal terminology and invoke fundamental or human rights to use institutional power and public authority on their own behalf (Zemans, 1983: 690, 700). Litigation aims to change the perception of the invoked rights (Zemans, 1983: 697) and, so the hopes of activist litigants, could result in a norm transformation process, render their demands into justiciable claims, and thereby increase the level of protection and recognition.

With the Paris Agreement in 2015, a milestone was celebrated, not only for the outcome of the agreed 1.5°C and 2.0°C goal but also for two text passages in the preamble acknowledging the human rights dimension of climate change and the problem of intergenerational justice (Paris Agreement 2015, Preamble, recital 11,13). These passages can be conceived as a success in reframing climate change and may be utilized as an interpretation guide for the agreement. The structure of the Paris Agreement builds on National Determined Contributions (NDCs) and thereby global climate mitigation, although embedded in the Paris Agreement, relies on national legislation to secure the 1.5°C (2.0°C) goal. However, with this development, national climate
litigation concerning NDCs cannot be conceived as a solely domestic issue but rather as a tool and process in the workings of global climate mitigation.

Reframing and placing climate change in the human rights regime, just by transforming intergenerational justice from a political norm to an enforceable human right, activists’ claims will be elevated in an already well-established international framework and thereby, enjoy greater protection without activists needing to fight for an amendment of the current human right regime. The inclusion of intergenerational justice in the human rights framework implies at the same time an inclusion of intergenerational justice in the superior principles of national and international law. Moreover, embedding intergenerational justice in fundamental and human rights entails strengthening enforcement mechanisms (constitutional review and human rights review, domestically and supranationally). Hence, the development of more effective and sustainable policies will be promoted (Limon, 2009: 450).

Climate activists have recognized the power of litigation, and its norm transformational potential and increasingly seek to unleash this power trying to convince the judges to assess intergenerational justice as a matter of human rights. The intergenerational justice framing of climate change has been acknowledged as an effective strategy, but one that is currently understudied (Donger, 2022: 285). For this reason, this research is dedicated to this very phenomenon focusing on the question of whether and to which extent domestic climate litigation, concerning climate protection frameworks and human rights, can transform international norms of climate change mitigation, in particular concerning the politicized question of intergenerational justice. For this reason, the case of Neubauer et al. v. Germany (hereafter: Neubauer), decided by the German Federal Constitutional Court on March 24, 2021, is examined in the context of qualitative content analysis. This thesis also shows that Neubauer although being a case challenging solely the German Climate Protection Act, should be understood as litigation with transnational scope and effects. For this purpose, climate litigation cases at the ECtHR will be examined whether they contain references to the Neubauer case that indicate a precedent-setting effect.

2. Research Question
The thesis is based on the following research question: Whether and to what extent can domestic climate litigation, concerning climate protection frameworks and human rights, transform the international norm of intergenerational justice into a justiciable human right?
In the context of political science, it is common to study norm transformation. However, it is less common to focus on litigation and the extent to which norms are recognized as fundamental or human rights in political institutions. Norm transformation in this case is to be understood in view of (global) constitutionalism. The human rights frame as an important part of the constitutionalist frame in international law operates on separate constitutional levels – national, regional, and international – that interact with each other (Sandholtz, 2021: 442). Human rights-based climate litigation aims to regulate governmental power in the domestic implementation of the Paris Agreement by invoking constitutional rights and freedoms. The research question is supported by the following sub-questions: Can litigation be regarded and serve as a political tool to transform the meaning and scope of human rights in accordance with activists’ claims, to transform political norms into legal norms? To what extent might the national Neubauer case generate a precedent-setting effect at the transnational level?

3. Background on Intergenerational Justice

Before turning to these questions, however, a brief introduction to the broad field of intergenerational justice is outlined in the following.

Entering Anthropocene, that is the geological epoch in which the human species itself constitutes the main agent of detrimental environmental change, imposing the realistic threat of ecological collapse (Skillington, 2019: 1), traditional conceptions of justice have been challenged. Continuing ‘business as usual’ cannot be considered a just mode of living anymore due to its detrimental environmental effects and degradation of ecological living conditions. Future generations depend on the decisions of present generations to ensure equitable living conditions in the future. For this very reason, climate justice activists are striving to establish intertemporal dimensions of well-being and thereby fundamentally shifting perspectives on justice (Skillington, 2019: 8,14). Definitions and accounts of intergenerational justice vary in scope (an overview Zwarthoed, 2018: 80 ff.) and cannot be discussed in their complexity in this research. However, the various accounts on intergenerational justice share a common core. Intergenerational justice can be conceived as “the preservation of favourable conditions for future generations by recognizing that current actions affect future societies’ wellbeing” (Beauregard et al., 2021: 653). Intergenerational justice is a matter of “transgenerational respect for the rights of and the fulfillment of duties vis-à-vis future and past generations” (Meyer, 2012: xi). Some philosophy scholars doubt the possibility of future people having rights
(Meyer, 2012: xii). However, a comprehensive presentation and treatment of these philosophical questions and problems, including the non-identity problem, would go beyond the scope of this research.

Regarding climate change and GHG emissions, intergenerational justice entails elements of distributive justice, that is, the just distribution of emission-generating activities (Meyer, 2012: xviii). The international community acknowledged the detrimental future effects of GHG emissions and passed various international and national frameworks. However, in its 2023 report the IPCC stated that current mitigation frameworks and NDCs “make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C” and identified "gaps between projected emissions from implemented policies and those from NDCs” (IPCC, 2023: 10). Democratic institutions with presentist tendencies and because of their focus on electoral cycles have proven to be insufficient in their governance of climate mitigation due to its long-term scope (Zwarthoed, 2018: 81). Facing this reality, climate activist recognized the insufficiencies of political representation and in accountability and campaign for a clear shift of attention towards intertemporal dimensions of ecological transformation and corresponding duties in the present (Kotzé and Knappe, 2023: 4,5). Activists realized that “justice must be redefined in deeper terms (temporally, spatially and intergenerationally)” (Skillington, 2019: 14) and, therefore, instrumentalize the legal system to establish new interpretations of law matching the urgency of climate change (Skillington, 2019: 14). Institutional interpretation of constitutional and human rights are never exhaustive but constantly developing in line with societal standards of appropriateness (Skillington, 2019: 35). In result, climate litigation utilizing adjusted standards of appropriateness can result in a new interpretation of human rights and, hence, transform intergenerational justice from a norm to an enforceable, justiciable human right.

Global governance practices in environmental policy already resulted in a higher degree of constitutionalism. Since the Stockholm Conference in 1972, broad environmental awareness spread in the global political arena and resulted in the adoption of constitutional, environmental protection provisions in many states (Kotzé, 2016: 11-12). In the German constitution, the Basic Law (Grundgesetz – GG), Art. 20a acknowledges the state’s duty to protect natural living conditions also with regard to future generations. However, this constitutional provision is not designed as a subjective right, but as a so-called state objective provision. Hence,
intergenerational justice had been elevated to the domestic constitutional level, but not to the level of fundamental/ human rights.

4. Relevance for Global Politics
In the following, the relevance of this thesis for Global Politics, especially for global governance of climate change, will be further elaborated.

Climate governance is a topic in which glocalization is specifically significant. Glocalization, that is, “the idea that in globalization local conditions must be considered” (Cambridge Dictionary, 2023). The importance of local conditions and local developments for global climate change mitigation shall be displayed in the following, non-exhaustive examples.

First, the local dimension of climate litigation is specifically acknowledged in the Paris Agreement with NDCs. Second, the local dimension is reflected in the extent to which climate change affects local livelihoods and the unevenly distributed impacts. Global climate change mitigation being built upon a common core of values and norms has increased in the last decades. This shift can also be understood as a process of constitutionalization, that is, “the process by which institutional arrangements in the non-constitutional global realm have taken on a constitutional quality” (Wiener et al., 2012: 5). However, international cooperation did not lead to the creation of an international accountability mechanism that can be invoked if states fall short of their obligation to protect. Until this day, domestic (constitutional) courts and supranational courts, f.e. the European Court of Human Rights (ECtHR), constitute the only effective means to hold governments accountable for insufficient mitigation efforts.

Furthermore, the united efforts of international climate activists are increasingly canalized in domestic litigation. Nevertheless, domestic climate litigation should not be conceived as a solely domestic issue but as an enforcement mechanism to secure the domestic “fair share” on climate mitigation which in sum with other domestic litigation merges into an international effort to enforce global climate mitigation. The regularly used notion of “fair share” relies upon and refers to the NDCs in the Paris Agreement.

Moreover, by transforming intergenerational justice into an enforceable human rights claim, activists pave the way for a transnational diffusion of that interpretation of human rights. Diffusion, in this case, might be conducted through climate litigation in other jurisdictions
inspired by the precedents abroad or through supranational climate litigation at the ECtHR with the consequence that the transformed understanding of intergenerational justice might be included in other domestic or supranational human rights frameworks. The currently pending case of *KlimaSeniorinnen v Switzerland* at the ECtHR, to be decided in 2023, presents the realistic prospect that such an interpretation could also be adopted at the level of the ECHR.

While the chosen approach of studying litigation is not always at the center of political science, there is still a long tradition of examining legal processes. Political constitutionalism, for example, exactly operates at the juncture of law and politics (Wiener et al., 2012: 2). Global constitutionalism, in its normative account, is conceived as “a legal or moral conceptual framework that guides the interpretation, progressive development or political reform of legal and political practices beyond the state to reflect a commitment to constitutional standards” (Wiener et al., 2012: 7). Principles and norms of constitutionalism are translated into the global frameworks with the goal to compensate for the loss of domestic constitutionalism (Peters, 2009: 405). Hence, global constitutionalism aims to establish and reinforce “constitutionalist principles within the fragmented transnational legal process” (Perera, 2022: 20). Research concerning constitutional and human rights, thus, needs to deal with the Janus-faced character of the law and constitutions. Consequently, this work contains both, elements of legal and political analysis. The author, as a jurist, is well familiar with legal analysis. However, the academic value of the work for the interdisciplinary field of Global Politics arises precisely from the combination of the two fields. Regularly, the field of climate litigation is viewed from either one or the other perspective. Overlaps in the academic discussion of both disciplines have been rather rare. Yet, climate litigation is to be analyzed based on its *telos* both politically and legally. Political analysis is indicated, as activists, due to insufficient democratic representation of their justified concerns, deliberately choose the means of legal action to counter presentist tendencies by having the requirements for climate legislation judicially and bindingly set. Moreover, the process of litigation requires a translation of political demands into legal language and forms. The legal analysis is self-explanatorily necessary as well. However, it is imperative to analyze legal framing and findings in light of policy goals, as those embody the very policy demands being translated. Legal analysis in light of the policy objectives allows one to evaluate the effectiveness of climate action as a policy tool.
5. Literature Review

Previous research on norm dynamics and social movements, climate activism, mobilization, and litigation has addressed a broad spectrum rather than providing a picture of the norm transformation power of climate litigation.

5.1 Norm Dynamics and Social Movements

After the end of the Cold War, International Relations scholars increasingly challenged the Realist frame. Constructivist scholars focusing on the social environment in which states operate argue that state interests and identities are strongly affected by intersubjective engagement in the international arena (Chandler, 2013: 217-218). This focus on the international social context also comes with a different perception of states and highlights the importance of “norms, identity, and culture” (Chandler, 2013: 218). Thus, norms are not a mere structure, but collective understandings of behavior and thereby interacting with states constituting state identities and interests (Checkel, 1998: 327-328). Understanding norms as directional and goal-oriented factors of influence significantly increased the importance of and attention to norms in International Relations.

Research on international norm dynamics and the importance of non-governmental norm entrepreneurs gained great importance in the late 1990s. Norms in political science, and in difference to legal scholarship, are defined “as a standard of appropriate behavior for actors with a given identity” (Finnemore and Sikkink, 1998: 891). As standards of appropriateness, norms cannot easily be measured or identified. Evidence for norm existence can only be indirectly traced (Finnemore and Sikkink, 1998: 892). To better understand and study the dynamics of norm formation and influence, the “Life Cycle” was developed, distinguishing a norm’s life into three different stages: (1) norm emergence, (2) norm cascade, and (3) internalization (Finnemore and Sikkink, 1998: 895). Norm entrepreneurs, such as social movements, are conceived as main actors in the early stage of the “life cycle” calling for attention by framing or reframing issues in order the achieve broader public resonance (Finnemore and Sikkink, 1998: 897). The reframed issue, however, relies on already established standards of appropriateness, either challenging or extending these standards (Finnemore and Sikkink, 1998: 897). For norms to emerge in the second stage of the life cycle, the norm cascade, an institutionalization is necessary to further clarify and define its actual content as well as the consequences of its violation (Finnemore and Sikkink, 1998: 900). During the norm cascade, networks of norm entrepreneurs and international organizations use their agency.
power the pressure governmental and institutional actors to adopt the new standards of appropriateness in treaties and legislation (Finnemore and Sikkink, 1998: 902). The last stage of the life cycle, internalization, is achieved when norms are widely accepted (Finnemore and Sikkink, 1998: 904).

Moreover, scholars acknowledge the increasing importance of activists in the process of transnational norm formation. Activists organized in a network, motivated by principled ideas and values, so-called transnational advocacy networks (TANs), received increasing significance and attention, especially in the fields of human rights and environmentalism (Keck and Sikkink, 2014: 1-2). These networks, framed by principled beliefs, create political spaces in which activists discuss and develop the means and agendas of the activities to change, in a second step, the behavior of state institutional actors (Keck and Sikkink, 2014: 2-3). The main source of power and influence of these networks lies in the exchange of high-quality information (Keck and Sikkink, 2014: 2,8). The particular quality of information depends on the diversity of actors, and, therefore, these networks usually consist of social movements, media, institutional organizations, and members of international and national NGOs (Keck and Sikkink, 2014: 9). TANs’ influence in agenda setting and framing can be well explained using the so-called boomerang pattern. This pattern is usually activated if activists' efforts to hold domestic institutional actors accountable for human rights violations are blocked on the political and judicial level (Keck and Sikkink, 2014: 12). Due to the domestic blockade, activists reach out within the TAN and its alternative channels to activate support. Members of the network apply pressure on institutional actors and within international NGOs and thereby attract attention to the human rights violation with the aim to put pressure on the domestic institutional actors to change the policy (Keck and Sikkink, 2014: 12-13). The boomerang pattern is most effective if it is used on specific policies with a high level of simplicity, meaning that it may be curtailed in its effectiveness by increasing the complexity of the scenario to be addressed (Keck and Sikkink, 2014: 12-13). For this very reason, the boomerang pattern does not provide a suitable frame for the intended analysis. Climate change and its mitigation constitute an extremely complex challenge for humankind and will influence nearly every aspect of living. Furthermore, there is no international consensus yet on whether climate protection and intergeneration justice are acknowledged as categories of human rights.

Moreover, the norm dynamic to be examined in this research does not perfectly match the aforementioned “life cycle” and norm development in TANs. The focus of this research lies on
the question of whether litigation can contribute to the transformation of intergenerational justice from a mere state objective towards a subject of human rights. This process differs from the aforementioned norm dynamics because it examines the norms and their transformation from a different perspective. Climate activists are striving to form intergenerational justice through litigation and try to achieve a transformation not through legislation but through a different interpretation and perception of human rights that include intergenerational justice as an enforceable human right.

5.2 Climate Activism and Social Movements

Research on climate activism was often conducted through the lens of social movement theory. Especially bottom-up social movements and grassroots movements, which are raising their voice for comprehensive climate protection, receive more and more attention in scholarly reviews. Gunningham examined the methods, aims, and development of the Fossil Fuels Divestment movement on the example of 350.org (Gunningham, 2017). This movement due to its grassroots character works rather autonomously and concentrates its efforts mostly on moral framing and symbolic politics utilizing methods of “naming and shaming” and rendering the challenges of climate change in an understandable manner for a broader audience. These methods, he argues, may contribute to the institutionalization of new morals (Gunningham, 2017: 387). Concluding his analysis, Gunningham underlines the importance of bottom-up movements paving the grounds for effective bottom-up measures (Gunningham, 2017: 387).

The research around youth climate activism is often centered around the politicization of intergenerational justice. Examining the claims and narratives of the Global Youth Networks Major Group Children and Youth in the UN (MGCY) the findings of Knappe and Schmidt show that the MGCY calls for a temporal reading of responsibilities and rights (Knappe and Schmidt, 2021). With their qualitative study on climate activists of the group Youth for Climate Cyprus, Theodorou et al. were able to show that activism by young activists is increasingly focusing on the intertemporal and intergenerational character of climate change, identifying a clear link between youth climate activism and intergenerational justice (Theodorou et al., 2023). Correspondingly, Knappe and Renn conclude in their study on the MGCY and Friday for Future that the changed framing of climate change now being conceived as a question of intergenerational justice constitutes a key concept for climate activism (Knappe and Renn, 2022).
Climate activism, specifically the School Strike for Climate protest, was analyzed through the lens of global constitutionalism by Perera (2022). In climate governance, the Paris Agreement constitutes a form of global constitutionalism, Perera argues (2022). The activists intend to close what Perera calls a constitutionalism gap, that is, the weaknesses of legal structures concerning accountability and checks and balances (Perera, 2022: 12-13). The protests aim to emphasize values of global constitutionalism, “such as human rights, democracy, the sovereignty of people, and solidarity, in its quest for climate justice” (Perera, 2022: 22). Hence, because of their aim to reinforce constitutional values the School Strike for Climate protests should be understood as a practice of global constitutionalism. Furthermore, the protests reveal that domestic and global constitutionalism are inextricably intertwined and hence, their promotion is interlinked too (Perera, 2022: 12,21). The movements’ protests translate domestic constitutionalist values into the global constitutionalist framework of the Paris Agreement (Perera, 2022: 21). These findings can be analogously applied to climate litigation as the logical continuation of the School Strike for Climate and other climate activists’ campaigns. Litigation efforts aim in a comparable manner to reinforce constitutionalist values at the implementation of the Paris Agreement, namely enforcing the 1.5°C goal by invoking human rights and the norm of intergenerational justice.

5.3 Litigation as a Political Tool
The origins of strategic litigation as a political tool can be found in the United States of America. Under the umbrella term “Legal Mobilization”, scholars discuss political trials by social movements (Barkan, 1980; Zemans, 1983; Cichowski, 2006; 2007; 2013). Complementing protests, activists who lack institutional power, strategically use litigation and thereby public authority (Zemans, 1983: 690). Zemans highlights the reactive nature of the judiciary which relies on individual claims to be activated (1983: 691). Thus, strategic litigation should be conceived as a concrete political demand of individuals operationalized by the use of the law on the individual’s behalf (Zemans, 1983: 694, 700). Legal mobilization is less concerned with the creation of new laws but with a change in the “social perception of the nature of a problem” (Zemans, 1983: 697). Law is “mobilized when a desire or want is translated into a demand as an assertion of one’s rights” (Zemans, 1983: 700). In the struggles for change, courts can be activated as an additional resource to achieve political goals (Barkan, 1980: 945).

An example of the strategic, political usage of litigation can be also found in the so-called “Justice Cascade”. Recurring on the terminology of the norm life cycle and based on the models
of transnational advocacy networks (TANs), scholars studied the usage of litigation, in this case, prosecution, as a political tool (Sikkink and Kim, 2013; Lutz and Sikkink, 2001). A transnational justice network, consisting of activist lawyers and combining the characteristics of advocacy networks and epistemic communities, used domestic prosecution to introduce accountability for human rights violations (Lutz and Sikkink, 2001: 3; Sikkink and Kim, 2013: 270). With human rights prosecution abroad, human rights violators are exposed to the possibility of facing criminal trials abroad if the domestic court system does not provide appropriate individual accountability mechanisms (Lutz and Sikkink, 2001: 30). When prosecution at domestic court had been blocked activists used a boomerang pattern, that is, using prosecution abroad (Sikkink and Kim, 2013: 275; Lutz and Sikkink, 2001: 30). Prosecution at foreign courts, Lutz and Sikkink argue, can be regarded as norm-affirming events (2001: 4). These events impose pressure on domestic governmental structures to enhance human rights protection and to integrate individual accountability mechanisms (Sikkink and Kim, 2013: 280).

The “Justice Cascade” might have enhanced individual accountability for violators of core human rights. However, this process is not comparable with the focus of this research. The “Justice Cascade” through prosecution abroad is built on already existing international treaties on human rights which covered these specific human rights violations, for example, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With respect to climate and intergenerational justice, we lack an international acknowledgment of intergenerational justice as a matter of human rights. Climate litigation itself is about constituting a human rights-based enforceability by changing the interpretation of human rights to also include intergenerational justice in climate change as a matter of human rights.

Building on the legal mobilization scholarship, Cichowski highlights the interpretable nature of rights requiring further elaboration through dialogue and negotiation (Cichowski, 2006: 54). In consequence, strategic litigation with its corresponding discussion can shape the scope and content of the activated rights and thereby complements the legislative and executive work and processes (Cichowski, 2007: 260). Cichowski exemplifies her argument on the transformation potential of litigation referring to a European Court of Justice decision in 1976 (Case 43/75 Defrenne v SABENA) which led to a transformation of Art. 119 EEC Treaty from a provision intended to benefit businesses into a positive, enforceable right for equal pay (Cichowski, 2007:
Consequently, she argues, mobilization can lead to the creation of new rules and procedures (Cichowski, 2007: 250).

Cichowski further examined the importance and possible political impact of mobilization and litigation on the ECtHR and the human rights regime. She argues the processes of mobilization and supranational litigation can result in reforms of rules and procedures governing human rights (Cichowski, 2013). Utilizing the so-called Mobilization-Litigation Framework she shows how the European Human Rights regime can be altered, clarified, or extended by judicial rulemaking. Building on these findings, Gönenç has built a mechanism-based account to examine the norm transformation power of social movements (Gönenç, 2019). Distinguished in three different periods (before the trial, during the trial, and after the trial) she identified four different mechanisms that connect litigation and norm transformation: Legal Framing, Legal Interpretation, Precedent-Setting, and Public Attention (Gönenç, 2019: 44). However, the subject of her analysis was the case of the Sardar Sarovar Dam Project in India, a politically highly contested project, but not climate litigation concerning India’s climate mitigation framework.

5.4 Climate Litigation
Exaining climate litigation in the US in the early 2000s, Gupta’s analysis shows that climate litigation served as a tool to introduce accountability and put pressure on the government to deal with climate change in good faith (2007: 85). More recent research on climate litigation often addressed the question of a human rights turn of climate litigation, that is, whether climate litigation gave rise to human rights-based litigation (Rodríguez Garavito, 2022; Peel and Osofsky, 2018). Peel and Osofsky examined from a legal point of view whether and to which extent human rights-based claims are recognized internationally. Rodríguez Garavito’s analysis is focused on the relationship between human rights, courts, and mobilization arguing that human rights-based climate change litigation (HRCC) is useful to provide a justiciable right to climate action and to deal with the difficulties of causality and temporality in climate change.

The Fossil Fuel Divestment movement also recognized the usefulness of litigation as a tool. Franta analyzed the first litigation case pursued by the Divestment Movement, the case Harvard Climate Justice Coalition et al. v President ad Fellows of Harvard College et al. challenging Harvard’s Corporation Investment in Fossil Fuel companies (Franta, 2017). Although the case was dismissed, Franta as one of the plaintiffs discusses the chances litigation offers as a strategy
to institutionalize moral claims in the existing framework and to introduce liability (Franta, 2017: 405-406). Furthermore, he recognized the possibility of using climate litigation as a tool to enforce (international) climate agreements (Franta, 2017: 407).

Wegener made a similar assessment of the importance and potential impact of climate litigation (Wegener, 2020). He argues, that Paris Agreement due to its reliance on NDCs only offers a limited compliance review while at the same time strengthening the parties’ influence on mitigation. Domestic climate litigation might fill the accountability gap and may provide an additional role for non-institutional actors. He argues the NDC architecture of the Paris Agreement enhanced the potential impact of national climate litigation as a tool to enforce internationally agreed standards (Wegener, 2020: 36). Donger emphasized the importance of the Paris Agreement as the underlying legal basis for human rights-based climate litigation (Donger, 2022: 266).

Setzer and Vanhala’s extensive literature review on climate litigation identified four main themes: (1) the relationship between litigation and governance, (2) how time and scale are feature in climate litigation, (3) the importance of science, and (4) a “human rights turn” (Setzer and Vanhala, 2019). Besides the four main themes, they also identified a gap in the research on climate litigation, that is, the relationship between human rights-based climate litigation and climate justice (Setzer and Vanhala, 2019: 11). Overall, they agree with the assessment of climate litigation as an important tool and predict that climate litigation may develop into a decentralized enforcement mechanism at the national scale (Setzer and Vanhala, 2019: 13). Peel and Lin observed an increasing trend of Global North and Global South partnerships in climate litigation, indicating the emergence of a global climate litigation network (Peel and Lin, 2019: 726).

Especially focusing on youth activism and climate litigation Parker et al. argue that young people are systematically excluded from climate change decision-making and, therefore, to counter this development, youth activists use litigation as a vehicle for disruptive dissent (2022: 70-71). Focused on the legal dimension of this process, they distinguish between three different categories of climate litigation: a) cases on insufficient efforts to reduce carbon emissions and meet climate commitments, b) cases on insufficient efforts to implement mitigation and adoption policies, c) cases on the judicial review of regulatory approvals. Furthermore, Parker et al. argue that youth-focused climate cases can create a public to address the problem of
intergenerational justice and the lack of representation and agency of the youth (Parker et al., 2022: 79, 88).

Although the recent research on climate litigation, especially from a legal perspective, discusses the question of human rights-based claims, little light is shed on the potential norm transformation power of climate litigation itself. Gönenç’s mechanism-based account offers a comprehensive framework to conduct an in-depth analysis of the entire Neubauer litigation process. It was specifically developed to highlight the different roles of the actors in the litigation process. Due to its division into the different mechanisms, it provides a promising structure (1) to identify indicators for a norm transformation process and (2) to investigate the relationship between human rights-based climate litigation and intergenerational justice and thereby, filling the existing research gap.

6. Conceptual Frame of Human Rights and Intergenerational Justice

Before turning to the methodology, it is first necessary to discuss different approaches on how intergenerational justice can be legally addressed and which function human rights can take in this context to provide a conceptual link between human rights and intergenerational justice.

Intergenerational justice can manifest itself in various legal expressions. Slobodian conducted legal analysis on emerging trends in climate litigation and identified three different legal concepts of how a justiciable right of intergenerational equity can be constructed: a) the Public Trust Doctrine, b) the Nondiscrimination Principle, and c) Intergenerational Aspects of Fundamental Rights (Slobodian, 2020: 580). The public trust doctrine, mostly common in the US, poses a duty on the government “to conserve and maintain public natural resources for the benefit of present and future generations” (Slobodian, 2020: 580). In difference to the planetary scope of intergenerational equity, the public trust doctrine is limited to the territory of jurisdictions (Slobodian, 2020: 582). The principle of nondiscrimination focuses on the needs of present and future generations and thereby aims to counterbalance the underrepresentation of young people and future generations in the political arena (Slobodian, 2020: 582). However, the nondiscrimination principle is, according to Slobodian, only rarely used in climate litigation (2020: 583).

The third and probably most popular expression of intergenerational justice can be found in what Slobodian calls the “intergenerational aspects of human rights” (Slobodian, 2020: 583).
This approach is relying on the vague and interpretable nature of human rights to be informed by the principle of intergenerational equity and justice. This way, fundamental rights can achieve an intergenerational protection scope or sustainable development itself could possibly become a human right itself (Slobodian, 2020: 583). In *Leghari v Pakistan*, for example, the Lahore High Court acknowledged that the human rights of the right to life and human dignity are to be interpreted with regard to principles of intergenerational equity and sustainable development (Slobodian, 2020: 584). Slobodian concludes, especially the rights to life and health, and the right to a healthy environment are central to this development (2020: 584). Intergenerational justice, however, requires an appropriate and intertemporal balance of the rights of present and future generations (Slobodian, 2020: 588). Because of these balancing questions, the fundamental rights regime is particularly suitable for dealing with the issue of intergenerational justice, since the balancing of competing fundamental rights is an elementary component of the theory of fundamental rights. In the *Neubauer* case, the litigants chose the third way of intergenerational aspects of human rights to argue their claim.

In the following, the most relevant fundamental rights and provisions, that are, human dignity, the right to life, and the state objective of a healthy environment, will be briefly outlined to provide sufficient background information for the analysis. Starting with human dignity as a constitutional right, the purpose of human dignity is to acknowledge human beings as conscious beings having free will and the freedom to shape one’s life on one’s own behalf (Barak, 2015: 144). In other words, human dignity is denied “if choices are dictated by another person” (Barak, 2015: 145). In the aftermath of World War II and the Holocaust, human dignity has been acknowledged as a fundamental right in various constitutions as well as in the Universal Declaration of Human Rights (UDHR). Human dignity in the UDHR is conveyed in two ways, inherent and achieved dignity (Kittel, 2021: 19-20). In its inherent manifestation, human dignity is unconditionally guaranteed and assigns the same moral value to every individual; in its second manifestation, human dignity is achieved through the granting of the human rights enumerated in the UDHR (Kittel, 2021: 20).

Because of this special status of human dignity in international law, as a fundamental right and intrinsic potential for criticism, it offers immense moral weight without relying on and implying external moral factors and values (Riley, 2016: 276). Establishing and building the principle of intergenerational justice based on human dignity allows for more far-reaching changes due to its special position as a principle of the rule of law that recognizes and establishes the
fundamental state obligations to protect (Riley, 2016: 276). Riley argues the problem of intergenerational justice could be best addressed in the media of universal human rights and human dignity in international law (Riley, 2016: 284, 288).

A human rights frame offers the benefits of higher standards of protection and better possibilities of enforcement (Riley, 2016: 278). Furthermore, he also discusses criticism of the human rights frame, namely the “individualistic” nature of human rights which does not match comprehensive systemic solutions (Riley, 2016: 279). However, these concerns can be defeated when individualistic human rights are combined with environmental law, or when existing human rights are claimed in ways that overcome those very systemic deficits (Riley, 2016: 279). Intergenerational justice rooted in human rights enables the protection of youth and activist interests by providing claims and duties (Riley, 2016: 283). Human dignity in conjunction with human rights provides the necessary constitutional bases and offers distinct benefits for international diffusion of the norm, these are, the universalism of human dignity and human rights as the law of society not just states, a common heritage in human dignity, and “direct constitutionalism” on the basis of human dignity and human rights (Riley, 2016: 285-286). To enable effective enforcement, Riley is pleading for the abandonment of the division of international and domestic human rights frameworks, especially concerning human rights with human dignity relation, such as the right to life and right to health (2016: 287).

In the German Constitution, the Basic Law, human dignity receives a special acknowledgment, and is considered to constitution’s supreme value (Barak, 2015: 146). Human dignity as protected in Article 1 of the Basic Law is absolute and eternal, and cannot be limited due to the proportionality principle (Barak, 2015: 146). Because of this high level of protection, only the utmost situations constitute a violation of human dignity, that is, “where a person is seen as a mere means for the realization of another person’s life” and thus, as a mere object (Objektformel “object formula”) (Barak, 2015: 146). However, human dignity as the supreme principle informs and influences the interpretation of other human rights and thereby increases the level of protection if the core issues related to dignity are touched upon, for example, the economic subsistence minimum (Hong, 2019).

Constitution and human rights underly an ongoing process of interpretation in accordance with their purpose which may be derived from sources outside of the constitution such as culture and basic principles (Barak, 2015: 147). Thus, climate change and the question of the preservation
of appropriate ecological living conditions that still provide the freedom to shape future people’s own life gain constitutional and fundamental rights relevance. For the very same reason, the right to life is of special importance in climate litigation as climate change has massive potential detrimental effects on living conditions. The Basic Law already contains the constitutional obligation of preserving ecological living conditions in Art. 20a of the Basic Law which, however, was not designed as a human right but a state objective. Purposive constitutional interpretation, especially if connected to human dignity, may result in a fundamental shift by either including intergenerational aspects within the interpretation of human rights or changing the legal status of the duty of ecological protection from a state objective to an individually enforceable fundamental right. Human rights-based climate litigation, therefore, contributes to environmental constitutionalism, securing constitutional manners and values in environmental governance.

Because of the overlapping, and largely similar list of human rights at the national, regional, and international levels, a diffusion of such a transformation to the other human rights framework faces less resistance and is, therefore, more likely. This is all the more the case given the interplay of national, regional, and international human rights regimes (Sandholtz, 2021: 442). Hence, understanding and analyzing domestic human rights-based climate litigation, driven by the aim to transform intergenerational justice into a justiciable, subjective right, should be understood as a necessary step toward establishing and supporting intergenerational justice in national, regional, and global human rights frameworks.

7. Methodology
This research explores the question of whether and to what extent domestic climate litigation, concerning climate protection frameworks and human rights, can transform the international norm of intergenerational justice into a justiciable human or fundamental right. For the analysis, Gönenç’s mechanism-based framework is utilized to examine the Neubauer case decided by the German Federal Constitutional Court on 24 March 2021. The Neubauer case is chosen as the subject of research for the following reasons: (1) it has been recently decided, (2) the high reputation of the German Federal Constitutional Court both nationally and internationally, (3) the case’s strong connections to youth climate activism, hence the litigant Luisa Neubauer is one of the leading activists in the German and European Fridays for Future movement, and (4) the case’s explicit references to the intergenerational and intertemporal character of climate change and fundamental rights. Additionally, the Neubauer case contains distinct references to
international cooperation and international law, especially the Paris Agreement, and therefore needs to be regarded as a local process in the global climate change mitigation efforts and frameworks. Moreover, the Neubauer case is the first successful one of its kind in Germany.

Gönenç’s mechanism-based account consists of four different mechanisms: Legal Framing, Legal Interpretation, Precedent-Setting, and Public Attention. The analysis in this research is limited to the first three mechanisms because the post-trial period, especially the media coverage of climate litigation had been the subject of recent research, i.e. in Wonneberger and Vliegenthart’s research of agenda-setting effects of the Dutch climate litigation case of Urgenda (2021). In the following, the methodology for each of the remaining three mechanisms is discussed separately.

7.1 Legal Framing
The mechanism of legal framing is examined using qualitative content analysis. The subject of the analysis is the complaint in the Neubauer case. This document is accessible online in the Sabin's Center Global Climate Litigation database (http://climatcasechart.com) in both original and translated versions. The Sabin’s Center for Climate Change Law founded by the Colombia Law School in New York City offers a peer-reviewed database on global climate litigation.

The complaint is analyzed in its entirety to identify the main claims and framing of the litigants. Setzer and Vanhala’s findings on the four main themes in climate litigation give guidance for the analysis. These are complemented by identified research gap in the relationship between human rights-based climate litigation and climate justice, respectively intergenerational justice. The deductive frame for the analyses consists of the following categories: (1) the relationship between litigation and governance, (2) the time and scale featured in climate litigation, (3) the role of science, (4) international law, and (5) the relationship between human rights and intergenerational climate justice. Furthermore, following the recommendations of Slobodian and Riley, the human rights of human dignity (6) and the right to life (7) are used as independent codes, as well as the obligation of environmental protection (8). During the analysis, the following code is implemented: (9) precedents and (10) causality and evidence.

These codes are organized hierarchically. The connection between human rights and intergenerational justice serves as the overarching code. The codes of human dignity, right to
life, and obligation of environmental protection stand as concrete specifications of the overarching code on the second level. The remaining codes as supporting codes build the third and lowest level of codes.

7.2 Legal Interpretation

The second mechanism of legal interpretation is studied also using qualitative content analysis. The findings concerning the first mechanism of legal framing provide the necessary basis for the analysis. Utilizing these findings, the Neubauer court decision (order) is examined whether and to which extent the German Constitutional Court had been receptive to the litigants framing and arguments. Each of the litigants’ key arguments and framings is examined whether (1) the Court followed or (2) reject the litigants’ key arguments. Using the findings of the legal framing in the original complaint ensures a comprehensive basis for the analysis of the German Federal Constitutional Court’s decision. A high level of reception indicates a strong norm transformation power of the litigants.

7.3 Precedent-Setting

The third mechanism of precedent-setting is studied using quantitative content analysis. Therefore, climate litigation cases at the ECtHR that are to be decided after or legally pending since the Neubauer decision are analyzed whether they contain references to Neubauer. Relevant cases are selected using the Sabin’s Center Global Climate Change Litigation database. To ensure comprehension of the case selection the categorization of the database is utilized. All cases are accessed from the category: “Global Climate Change Litigation” > “by Jurisdiction” > “European Court of Human Rights” (http://climatecasechart.com/non-us-jurisdiction/european-court-of-human-rights/, last visited May 14, 2023). The subjects of the analysis are official legal documents in the form of complaints, court decisions, and third-party interventions. Coding for the quantitative analysis is based on the identified key arguments in the legal interpretation analysis. The analysis is conducted using NVivo. Given differences in referencing styles of jurisdictions, the word search for references is conducted with the following terms: (1) "Neubauer", (2) "Bundesverfassungsgericht", (3) "German Constitutional Court", (4) "BVerfG" and (5) "1 BvR 288/20" / "1 BvR 2656/18" (case number). Identified references are classified using a coding derived from the substantial arguments in the Constitutional Court’s reasoning: Causality, International Cooperation, Intertemporal Protection of Fundamental Freedoms, Obligation to Protect, Own Share, Standing, and General Reference. This analysis enables a precise assessment of which arguments and parts of the
Neubauer case are the most influential. A high frequency in a specific category indicates a precedent-setting character for the arguments allocated in this very category. The mechanism of precedent-setting indicates a transnational diffusion of the key arguments in the Neubauer case.

8. Analysis
8.1 Legal Framing
Legal framing is of decisive importance. On the one hand, it determines the subject matter of the case on which the court has to decide. The court is bound by this subject matter and cannot go beyond it. On the other hand, legal framing allows the litigants to determine the perspective on the subject matter of the case. It demonstrates to the court a potential interpretive path of which the litigants are convinced to be correct and accurate. In legal framing, complainants translate their principled political beliefs and ideas into legal terminology and link them to specific legal claims and facts. The analysis of the legal framing, thus, will show (1) the concrete subject matter of the claim and (2) the translated principled political beliefs of litigants. A special aspect that must be taken into account in the analysis is the high degree of formalization of constitutional complaints. Unlike political texts or writings, it is not possible to draw any conclusions about the weighting of the content from the order or structure of the complaint. Rather, the structure of constitutional complaints is adapted to the legal examination program and chosen in such a way that it runs parallel to the examination program provided by law and conducted by the courts.

From the very beginning, the litigants highlight the intention behind their claim, which is “securing of the basis of life that are appropriate to human dignity” including the preservation of living conditions for the existence of future generations (Neubauer complaint p.7). The central component of this demand is the fundamental right of human dignity according to Article 1 of the Basic Law. The objective of climate activists adapts to the urgency of the climate change crisis, meaning, it must be taken every, proportionate measure that is possible and necessary to protect ecosystems and future generations. Only in this case, climate protection that complies with basic rights is guaranteed (Neubauer complaint p. 10). In the following, the complainants comprehensively derive a state obligation to protect citizens.
8.1.1 Factual Basis

The derivation begins, according to the usual structure, with the presentation of the facts, which are in the present case, on the one hand, the circumstance of climate change per se and its expected consequences for the environment and people according to scientific findings, and on the other hand, the legislative action taken so far to prevent and counteract these consequences. The complainants state that the current design of the climate protection law is inadequate and thus deprives the complainants’ generation of the opportunity to shape their own future (Neubauer complaint p.10).

“They are already affected by the noticeable effects of climate change in Germany (e.g. extreme weather conditions, heat waves), but cannot protect themselves through their democratic rights, especially not through voting. They feel helplessly exposed to the economic and political "business as usual" and are under considerable stress with regard to their own future.” (Neubauer complaint p.11-12).

In the following, the complainants detailly present and illustrate the factual basis of climate change, building on independent scientific research, calculations, and reports, for example, IPCC reports (Neubauer complaint p. 16ff). Additionally, to legitimize the factual, scientific arguments the complainants refer to the Urgenda case in the Netherlands as a precedent, in which the courts acknowledged the scientific facts as sufficient evidence in climate litigation (Neubauer complaint p.14). Thirdly, they refer to the preparatory documents of the German legislator, in which the scientific basis of climate change is explicitly acknowledged (Neubauer complaint p.13). In detail, they present the dangers and threats imposed by climate change and global warming on the basis of the best scientific knowledge (Neubauer complaint p. 24-42). To introduce scalability, the complainants rely on the CO2 budget as the IPCC introduced and uses it to determine feasible CO2 reduction paths (Neubauer complaint p. 42f). Thereby, the litigants can not only rely on the best scientific knowledge and standard of the IPCC, but they also refer to the IPCC’s models and recommended reductions paths to show that the commitment to the 1,5° C goals can still be achieved. In general, one can observe, in accordance with previous research, that the litigants rely on the best scientific knowledge to legitimize their claim. Precedents and science thus build the factual fundament the case is built upon.
8.1.2 Human Dignity and Intergenerational Justice

The main line of argumentation builds on the fundamental right of human dignity in Article 1(1) of the Basic Law. The argumentation rests on several pillars. First, the complainants recall the telos of human dignity and argue in parallel with the preceding elaborations on human dignity.

"[The guarantee of human dignity] is based on an idea of man, which understands him as a person in freedom of self-determination who is capable to self-responsibly shape his own destiny" (Neubauer complaint p.99).

Thus, human dignity is to be mirror-invertedly perceived as an obligation of the state to secure human living conditions and to take corresponding precautions. Human dignity is violated if humans become mere objects of state action (Neubauer complaint p. 99). The complainants draw a comparison to the case law concerning the economic subsistence minimum, by which the Constitutional Court ruled that falling short of this subsistence minimum not only degrades individuals but also deprives people of the freedom to make their own life choices, which is why this subsistence minimum must be guaranteed constantly deriving of the right of human dignity and the welfare state principle (Neubauer complaint p. 100).

Second, the complainants cite the Urgenda decision, in which the highest court in the Netherlands found a duty to protect the natural foundations of life directly from Article 2 (Right to Life) and Article 8 (Right to respect for private and family life) of the ECHR (Neubauer complaint p. 101). Thirdly, the complainants refer to the state objective provision of Article 20a of the Basic Law for the protection of the natural foundations of life, which is not itself conceived as an enforceable individual right. The complainants utilize this intra-constitutional state objective in a purposive interpretation of human dignity to provide additional reasoning next to the scientific evidence and predictions and the societal debate on climate change. This means the complainants argue the telos of this provision needs to be taken into account when determining the meaning of human dignity. This technique is well-founded in constitutional practice (Barak, 2015: 149 f.) and had been successful in the case of the minimum conditions of economic subsistence, utilizing the welfare principle of Article 20 (1) of the Basic Law.

"Without precaution that safeguards the natural foundations of life in a future-oriented manner, the scope for action that actually exists could become so limited that no real scope for decision-
making remains. Such a situation erodes both spheres of freedom and the foundations of the legitimacy of the state” (Neubauer complaint p.102).

Thereby, the complainants intend to show the comparability of the minimum conditions of economic subsistence and the protection of natural foundations of life arguing that the case law on economic subsistence can be applied analogously while adding a future-oriented obligation towards future generations (Neubauer complaints p.101). Modern states’ duty to protect, hence, needs to be adjusted to match the concrete long-term threats of climate change. Thus, in the complaint one can identify a clear demand to change the temporal dimension of human rights protection. Similarly, the complainants argue for a change in the spatial dimension. Article 20a of the Basic Law, the obligation to protect natural foundations of life, “obliges the Federal Republic of Germany to cooperate internationally to protect the climate or – as the courts in the Netherlands put it – to fulfill ‘its share’ of the necessary climate protection” (Neubauer complaint p. 102). Additionally, the complaints draw a comparison to the German regulations on nuclear energy in which the principle of intergenerational justice had been acknowledged with regard to nuclear waste, arguing that the principle of intergenerational justice needs to be applied similarly in the context of the protection of natural foundations of life (Neubauer complaint p.104).

Consequently, the litigants argue that the right to human dignity in conjunction with the Article 20a of the Basic Law, the objective of protection of natural foundations of life, constitutes a state obligation and enforceable individual “claim to the preservation of ‘foundations of life in accordance with human dignity’, i.e. such natural foundations of life that permit an existence without inhuman deprivation” (Neubauer complaint p.105). Analogously to the minimum of economic subsistence, an “ecological minimum”, also called the “right to a human future”, exists (Neubauer complaint p.105). Human dignity and the protection of the natural basis of life could no longer be separated from each other; rather, joint and future-oriented consideration of both guarantees as “ecological minimum” is imperative.

"Correspondingly, the guarantee of human dignity in conjunction with Article 20a of the Basic Law can also be used to derive a claim to the preservation of ‘foundations of life in accordance with human dignity’, i.e. such natural foundations of life that permit an existence without inhumane deprivation. Partly this minimum is also called ‘ecological minimum’. One can also paraphrase it a ‘right to a humane future’” (Neubauer complaint p.105).
With this argument, the complainants derived an evaluation standard for assessing climate change legislation. The “ecological subsistence minimum” should be regarded as the legal translation of the CO2 budget and tipping points. It enables an evaluation of legislative action on the basis of the most current scientific knowledge and thus forms a dynamic yardstick.

In the Kalkar Decision on Nuclear Energy the Constitution Court stated a limit of residual risks is required as well as “best possible hazard and risk prevention” (Neubauer complaint p. 108). Analogously the litigants argue:

“In the context of climate crisis, the best possible prevention of hazards and risks means no more and less than the legislator is obliged to ensure today that in future – as far as possible – no more greenhouse gases are released, i.e. that GHG emissions are kept as low as possible, taking into account the principle of proportionality” (Neubauer complaint p. 109).

Additionally, the litigants argue the “Untermaßverbot” (translated literally: undersize prohibition) applies as well and, therefore, “the legislator must take appropriate and effective protective measure that are based on a careful investigation of the facts and reasonable assessments” (Neubauer complaint p. 110). The “Untermaßverbot” set boundaries for the legislature's generally existing leeway for assessment and design in order to fulfill its obligation to protect. Instead of concrete substantive requirements for the achievement of objectives, the complainants’ approach only contains the requirement to establish a minimum level for climate protection, the establishment of which is removed from the legislature’s disposition and the legislator’s scope for design is narrow due to the concrete reference to human dignity (Neubauer complaint p.110). Furthermore, the litigants argue because of the sensitive character and the supreme rights concerned the government is also obliged to disclose the determining methods and calculation on the subsistence level (Neubauer complaint p.110-111). Without disclosure of the procedure for determining the subsistence minimum, a comprehensive review of the adequacy of the subsistence minimum cannot be conducted.

In the following, activists address the specific provisions of the Climate Protection Act. In this context, the compensation through the transfer of emission savings and budgets within the EU is also particularly addressed. The complainants argue that this mechanism in both directions,
buying and selling, weakens and undermines the obligations to comply with the “Untermaßverbot” (Neubauer complaint p. 121).

8.1.3 Right to Life and Intergenerational Justice
Intergenerational aspects with respect to the right to life (Article 2 (2) of the Basic Law) are constructed in a similar way. Referring to previous decisions of the constitutional court the complainants point out that the duty to protect also covers environmental risks and thereby the imposed risks due to GHG emissions and the greenhouse effect (Neubauer complaint p. 123). Furthermore, the complainants are already negatively impacted by the effects of climate change, such as heat waves, severe weather, etc.

However, concerning the duty to protect, an already occurred impairment is not relevant in the given case. Rather, in cases in which fundamental legal interests are exposed to a great threat, there is a duty to protect even before the danger materializes, and this duty thus extends to prevention and hazard avoidance. The right to life would therefore have a protective effect directed toward the future.

“Constitutional duties to protect therefore categorically require that legal regulations be designed already today in such a way that the danger of fundamental rights violations remains contained” (Neubauer complaint p. 125).

This protective effect is to be understood intensified by Article 20a of the Basic Law as a long-term, future-oriented obligation of the state. In this respect, the complainants refer to the comments on human dignity and Article 20a of the Basic Law. Analogous to the remarks on human dignity, the “Untermaßverbot” must be respected.

“Consequently, the legislator’s scope for designing and prognosis has been narrowed in such a way that all possible and proportionate reduction potentials must be exploited in order to avoid a deterioration of the climate crisis and to mitigate the possible consequences of climate change for the complainants as low as possible” (Neubauer complaint p.125-126).

8.1.4 Discussion and Concluding Remarks on Legal Framing
The complainants state from the outset that at the heart of the complaint is the issue of intergenerational justice. The individual aspects of intergenerational justice are presented in
detail, starting with insufficient representation and influence of the complainants in the political arena. The substantive, material part of intergenerational justice is presented and explained below on the basis of individual fundamental rights. The complainants make use of already well-established arguments and decisions of the Constitutional Court itself. These are presented in their derivation, in order to establish in a second step, the legal comparibility to the present question of CO2 emissions and climate change.

The weightiest arguments of the complainants can be found in the derivation of an “ecological subsistence level”. The derivation via human dignity on the one hand and the state objective provision concerning the protection of livelihoods, on the other hand, elevates the question of the protection of livelihoods for present and future generations, as a central component of the principle of intergenerational justice, to a human rights issue. Moreover, this combination overcomes the purely individualistic character as a subjective right. The preservation of the ecological subsistence level presents itself not only as an individually enforceable right but also as a binding obligation of the modern state. The complainants already point out at the beginning of their legal statement that modern states have a duty to protect, which results from the contract theory.

In the following, further duties to protect are presented in various forms, for example economical (subsistence level) and ecological (nuclear power). The underlying idea is that it is not the state that determines the extent of its obligation, but rather that the extent of the duty to protect is determined by the severity and scope of the danger. The dangers of climate change, unprecedented in scope and duration, thus demanded a new quality of duty to protect. Due to the global extent of climate change and CO2 emissions, there is, therefore, an obligation for international cooperation as well as an obligation to contribute “its share”, derived from the contract theory. Because of the long-term consequences and irreversibility of changes after tipping points have been crossed, there is already at present an obligation to preserve the livelihood and thus freedoms of future generations and thus to safeguard their subject quality. Both in spatial and temporal terms, the fundamental rights guarantee of human dignity and the right to life are extended by the connection with Article 20a of the Basic Law, the obligation to protect the natural foundations of life, which, according to the complainants, is an expression of the principle of intergenerational justice. The litigants’ argumentation is based on the premise that protection of the natural basis of life can only be achieved if the $1.5^\circ$ C goal will be achieved.
With this line of argument, the complainants present an approach that is suitable for precisely counteracting the presentist deficit in the political sphere by deriving a state obligation that makes it imperative to have a forward-looking orientation that also includes future generations. This approach also respects the legislature's prerogative of assessment.

8.2 Legal Interpretation
In the following, it is examined to what extent the arguments and core demands of the complainants already presented with regard to the question of intergenerational justice have been incorporated into the decision of the court. An argumentation of the court agreeing with the complainants indicates the positive influence of the complainant and thus transformation potential.

8.2.1 Human Dignity and Intergenerational Justice
In contrast to the statements of the complainants, the court is content with a brief reference to human dignity and pursues a different reasoning approach. The court does not attach the question of the fundamental right relevance of intergenerational justice to that of human dignity, but rather to the right to life under Article 2 (1) of the Basic Law. Although it cannot be ruled out a priori that there is also a fundamental right to an ecological subsistence minimum derived from human dignity, this right is in any case not violated in the present case (Neubauer order p. 34-35/ para. 113-114).

The protection of the ecological basis of life is already guaranteed by the right to life and Article 14, the property guarantees of the Basic Law. In addition, there could be an independent obligation to protect derived from human dignity. The prerequisite for this, however, is that although life, physical integrity, and property are sufficiently protected in the sense of the aforementioned obligation, other circumstances relating to human dignity, for example, social and political life, are no longer secure or that adaptation measures are so drastic “that they would no longer allow for meaningful social, cultural and political interaction and participation” (Neubauer order p. 35/para. 114).

The duty to protect derived from human dignity is therefore not aimed at protecting life, and physical integrity, which is already derived from a general right to life, but at core areas of social, cultural, and political life. Thus, the preservation of ecological conditions of existence
essential to fundamental rights may affect human dignity in a broader sense, meaning, human dignity as it is taken up and recorded in the individual freedoms, but it does not necessarily affect human dignity in the narrower sense, that is, the core of human dignity under Article 1 (1) of the Basic Law. Rather, the core area is only impaired if there is a substantial threat to political, social, and cultural life that goes beyond the protection of the individual guarantees of freedom. Such an impairment has not been identified by the court.

8.2.2 Right to Life and Intergenerational Justice

As already explained, the court derives a duty to protect from the right to life and physical integrity. This duty to protect does not exist only upon the occurrence and realization of the danger, but is future-oriented, and exists in particular when, as in the case of climate change, an irreversible negative change in living conditions threatens (Neubauer order p. 42/para. 146). The duty to protect also includes future generations, but only in an objective dimension. A subjective right of future generations does not exist, since they cannot (yet) be bearers of rights (Neubauer order p. 42/para. 146).

The global scope of climate change does not inhibit the existence of the duty to protect but rather affects the substantive requirements of the duty. Protection against global climate change obliges the state to cooperate internationally to combat climate change (Neubauer order p. 43/para. 149).

„Insofar as the duty of protection arising from Art. 2(2) first sentence GG is directed at the risks posed by climate change, it compels the state to engage in internationally oriented activities to tackle climate change at the global level and requires it to promote climate action within the international framework (for example through negotiations, via treaties or in organisations). National measures embedded within this framework then make a contribution towards halting climate“ (Neubauer Order p. 43/para. 149).

In addition, the court affirms that judicial review of an obligation to protect can only take place to a limited extent. Constitutional court review is limited to the question of whether regulations to fulfill the duty to protect have been adopted at all or whether the regulations are completely inadequate (Neubauer order p. 44/para. 152). The legislature has a margin of appreciation and a leeway in design, as to how it fulfills the fundamental but indeterminate duty to protect
In this respect, the court does not recognize any violation of the duty to protect, at least not at present (Neubauer order p. 48/para. 165).

Nor is the regulation completely inadequate with regard to the 1.5°C target. The state’s obligation to protect is not completely congruent with the area of climate protection. The fundamental assumption of the complainants is that a direct standard for the requirement of the scope of the protection obligation can be derived from the 1.5°C target. The court, however, differentiates between climate protection on the one hand and the duty to protect on the other. While the 1.5°C target may be an appropriate and reasonable goal of climate policy, this alone does not mean that exceeding this target within the limits set by the Paris Agreement (well below 2°C) constitutes a violation of the obligation to protect. These differences result not least from the fact that the level of protection cannot be guaranteed exclusively by mitigation but also by adaptation. The state’s duty to protect must therefore be determined on the basis of the inseparable interplay of mitigation and adaptation (Neubauer order p. 47/para. 163-164, 181).

8.2.3 Intertemporal Protection of Fundamental Freedom

Nevertheless, the court states that the current design of the Climate Protection Act (Klimaschutzgesetz - KSG) violates fundamental rights. However, the relevant fundamental right is not the duty to protect, derived from the right to life, but the entirety of the fundamental rights to freedom, as they have been expressed in the constitution. The court thus goes beyond the argumentation of the complainants and chooses a new, independent reasoning approach.

“Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future” (Neubauer order p. 54/para. 183).

“The Basic Law protects all human exercise of freedom through special fundamental rights to freedom, as well as through the general freedom of action enshrined in Art. 2(1) GG as the elementary fundamental right to freedom (foundationally, see BVerfGE 6, 32 <36 ff.; established case-law). Currently, the numerous forms of private, professional and economic activity (see para. 37 above) that still directly or indirectly cause CO2 to be released into the Earth’s atmosphere are also protected” (Neubauer order p. 54/ para. 184).
The court activates fundamental rights to freedom in a new way. The court’s argument is based on the idea that fundamental freedoms are to be protected in an intertemporal manner. In this context, present legislative acts are to be understood as violations of rights to freedom in the future, insofar as these legislative acts themselves imply an impairment of future freedoms. Thus, the current determination of CO2 emission volumes contains an intervention-like advance effect (*eingriffsähnliche Vorwirkung*) in the form that it restricts the exercise of fundamental freedoms that, in the near future, will still be associated with CO2 emissions (Neubauer order p. 54/ para. 184).

„Against this backdrop, provisions that allow CO2 emissions in the present pose an irreversible legal risk to future freedom because every amount of CO2 that is allowed today irreversibly depletes the remaining budget that was predetermined in accordance with constitutional law, and any exercise of freedom involving CO2 emissions will be subject to more stringent restrictions that will be necessary under constitutional law“ (Neubauer order p. 54-55/para. 186).

The quantifiability of climate protection, in particular the remaining, finite CO2 budget, forms the actual and scientific basis for this legal argumentation. With regard to the finiteness of the CO2 budget, the court emphasizes that development towards CO2 neutrality must take place in "good time", i.e. that the remaining budget is not used up too far too quickly, in order to give technological development sufficient time and thus enable a compatible turnaround (Neubauer order p. 55/ para. 186; p. 73/ para. 248).

“As the finite CO2 budget is increasingly consumed, it is constitutional law itself which makes it all the more urgent to prohibit any further exercise of freedom involving CO2 emissions“ (Neubauer order p. 55/ para. 187).

The importance and thus weighting of the climate protection obligation continues to increase due to the largely irreversible nature of climate change with further temperature increases and further consumption of the CO2 budget (Neubauer order p. 59/ para. 197).
In order to constitutionally justify a restriction of future freedoms, the obligation to protect the natural basis of life under Article 20a of the Basic Law and the constitutional principle of proportionality must be observed.

8.2.3.1 The Obligation to Protect the Natural Foundations of Life

The court first states that the action cannot be derived directly from Article 20a of the Basic Law. Although Article 20a is an enforceable provision, it does not confer any subjective rights. This follows already from the legislative history, in which the design as a subjective right was discussed, but the legislature ultimately decided against a design as a fundamental right (Neubauer order p. 34/ para. 112).

However, the obligation to protect the climate serves as a relevant provision to ensure that climate protection legislation is designed in accordance with the constitution. Consequently, Art. 20a of the Basic Law is to be observed in particular when it comes to the constitutional guarantee of intertemporal freedom (Neubauer order p. 56/ para. 190). The standard for this review is the following:

“The risk to future freedom posed by § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 would therefore be unjustifiable under constitutional law if these provisions violated Art. 20a GG because the climate action required under constitutional law might no longer be achievable post-2030 due to the emission amounts allowed until 2030” (Neubauer order p. 56/para. 190).

Art. 20a of the Basic Law obliges the state to take climate action. Due to the international scope of climate change, the obligation to take climate action is to be understood internationally, that is, the state is obliged to take action on the international level and to promote climate action in treaties (Neubauer order p. 59-60/ para. 200). However, this obligation to cooperate internationally cannot excuse an escape of climate protection domestically if a consensus on climate action had not been reached internationally. Rather, is the government obliged to implement a protection framework independently to convince other states to take climate action. In any case, it must be avoided to create precedents for other states to undermine trust in international agreements (Neubauer order p. 60/ para. 202).
Although no subjective right can be derived from Art. 20a of the Basic Law, it is an enforceable provision that is to be respected by the legislator.

“In Art. 20a GG, environmental protection is elevated to a matter of constitutional significance because the democratic political process is organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term. It is also because future generations - those who will be most affected - naturally have no voice of their own in shaping the current political agenda” (Neubauer order p. 61/ para. 205).

In this way, the legislator implicitly underscores the telos of Article 20a of the Basic Law as a provision of intergenerational justice. This telos must not be undermined by short-time goals (Neubauer order p. 61/para. 205). Yet, Art, 20a of the Basic Law, according to its wording, requires further concretization. The legislator has made precisely such a concretization in Section 1 (3) KSG by adopting the Paris climate targets and specifying the goal of climate neutrality by 2050 (Neubauer order p. 61/para. 204). Hence, the legislator has a considerable prerogative of assessment and judgment concerning the design of the climate protection policy provided that it does not undermine the teleological mandate of the provision (Neubauer order p. 61/ para. 206). After a detailed analysis, the court concludes that the provisions of the KSG, to this date, do not impair the obligation to protect natural conditions of life (Neubauer order p. 73/ para 230).

“The size of the remaining emission budget required for compliance with the temperature limit cannot be currently determined with enough accuracy to enable the budget size stated by the Advisory Council to serve as an exact numerical benchmark for the review by the Federal Constitutional Court. However, the legislator is not entirely free when it comes to using this margin of evaluation. Rather, if there is scientific uncertainty regarding causal relationships of environmental relevance, Art. 20a GG places constraints on the legislator’s decisions – especially those with irreversible consequences for the environment – and imposes a special duty of care on the legislator, including a responsibility for future generations” (Neubauer order p. 68-69/ para. 229).

This, again, highlights the great importance of scientific knowledge, especially the global carbon budget, in climate mitigation and litigation. Uncertainties in the determination of the
carbon budget, however, preclude the application as “an exact numerical benchmark for review by the Federal Constitutional Court” (Neubauer order p. 70/ para. 236).

8.2.3.2 The Principle of Proportionality

However, the court states that “the legislator has violated its duty, arising from the principle of proportionality, to ensure that the reduction of CO2 emissions to the point of climate neutrality that is constitutionally necessary under Art. 20a of the Basic Law is spread out over time in a forward-looking manner that respects fundamental rights” (Neubauer order p. 72/ para. 243).

In this context, the provision and protective function of Article 20a of the Basic Law must also be taken into account. Article 20a of the Basic Law not only regulates the protection of the natural foundations of life, but also the manner in which this goal is to be achieved, that is, the appropriate distribution of burdens across generations (Neubauer order p. 56/ para. 193).

“The objective protection mandate of Art. 20a GG encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence” (Neubauer order p. 56-57/ para. 193).

The remaining CO2 budget would have to be consumed in restraint in order to provide sufficient time for the necessary technical transformation towards more CO2-effective and CO2-neutral solutions and thus mitigate the harshness of Germany's transition to CO2-neutrality and the associated loss of fundamental freedoms (Neubauer order p. 57/ para. 194). The court also concretizes these requirements.

"In view of the advance effect on fundamental rights, this can only be justified if sufficient precautionary measures are taken to ensure that freedom is respected when making the transition to climate neutrality, so that the reduction burdens faced by the complainants from 2031 onwards are alleviated and the associated risks to fundamental rights are contained (1). It is necessary that a development-friendly planning horizon be established (2). In turn, this places specific requirements on the further structuring of the reduction pathway (3).” (Neubauer order p. 72/ para. 244).
Only if the legislator respects these preconditions, constitutional conformity, that is, an intertemporally secured protection of fundamental freedoms, can be guaranteed. In order to ensure intertemporal protection until climate neutrality is achieved, it is of decisive importance that a planning horizon is established which ensures development pressure on the one hand and planning security on the other (Neubauer order p. 74/ para. 249; p. 75/ para. 253).

8.2.4 Discussion and Concluding Remarks on Legal Interpretation

In general, the court follows the argumentation of the complainants, who demand, on the one hand, the recognition of intergenerational justice as a fundamental right issue and, on the other hand, stricter requirements for the reduction path. The legal argumentation, however, differs significantly. In this context, the Federal Constitutional Court attaches great importance to the different functioning of obligations to protect rights and fundamental rights of freedom.

With a view to implementing the duties to protect in ordinary law, constitutional court review is limited to the question of whether the duty to protect has been imposed at all or whether the regulations are completely inadequate. The legislature has leeway in assessing how it fulfills the vague duty to protect derived from fundamental rights. In this respect, the court does not recognize any violation of the duty to protect, at least not at present. However, the court repeatedly emphasizes that both a violation of the duty to protect, derived from the right to life and a violation of the obligation to protect the natural foundations of life under Article 20a of the Basic Law cannot be identified "at present"/"presently". At the same time, it emphasizes that the weight of the obligation to protect the climate increases as climate change progresses.

However, the court conducts an extensive examination of fundamental rights to freedoms. In contrast to the duty to protect, the scope of the review is not restricted but comprehensive. In this context, the legislator must observe in particular Art. 20a of the Basic Law as a binding, enforceable, objective legal provision. The decision has extended Article 20a of the Basic Law in both spatial and temporal terms. Spatially, since the obligation to protect the climate is accompanied by an obligation to cooperate internationally. Temporally, the burdens of climate change must be distributed appropriately between generations. Thus, intergenerational justice is represented in Art. 20a of the Basic Law and the principle of proportionality.

The court's restrained approach with regard to the duty to protect is convincing in two respects. On the one hand, the court thus preserves the separation of powers and underscores the essential
task of the legislature. On the other hand, it is precisely this leeway for design that is also essential for fulfilling the obligation to cooperate internationally, as enshrined in Article 20a of the Basic Law, in order to effectively counter climate change. The design of a regulatory framework for achieving climate neutrality, which is also capable of gaining majority support at the international level, requires the legislature to have some leeway.

On the other hand, in order not to dilute the impending dangers and burdens on the fundamental rights system caused by climate change, the court refers back to the classic fundamental rights dogmatics of freedom rights but integrates intertemporal dimensions. Exercising freedom, today and in the near future, is relevant to emissions. The CO2 budget thus becomes the freedom budget, at least until climate neutrality is achieved. Fundamental freedoms are quantified by means of the CO2 budget. The more freedoms are allowed today, the more drastic the restrictions on future freedoms will be. Thus, CO2 reduction paths acquire a fundamental rights dimension in addition to the scientific, and technical dimensions. The design of the reduction paths is now not only a political and moral decision but also one of fundamental rights. Consequently, the litigants’ demands to understand intergenerational justice as a matter of fundamental and human rights have been successful, even if the actual legal reasoning deviates.

8.3 Precedent-Setting
In total 12 climate litigation cases at the ECtHR could be identified. In five cases, the original applications and third-party intervention documents are available at the Sabin’s Center Global Climate Change Litigation database (last accessed May 14, 2023).

<table>
<thead>
<tr>
<th>Case</th>
<th>Documents available</th>
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<tbody>
<tr>
<td>Carême v. France</td>
<td>No</td>
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<tr>
<td>De Conto v. Italy and 32 other States</td>
<td>No</td>
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<tr>
<td>Duarte Agostinho and Others v. Portugal and 32 Other State</td>
<td>Yes</td>
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<tr>
<td>Engels and Others v. Germany</td>
<td>No</td>
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<tr>
<td>Greenpeace Nordic and Others v. Norway</td>
<td>Yes</td>
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<tr>
<td>Humane Being v. the United Kingdom</td>
<td>No</td>
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<tr>
<td>KlimaSeniorinnen v Switzerland</td>
<td>Yes</td>
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<tr>
<td>Mülner v. Austria</td>
<td>Yes</td>
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<tr>
<td>Plan B.Earth and Others v United Kingdom</td>
<td>Yes</td>
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All of the aforementioned cases, except for Plan B.Earth and Others v United Kingdom and Humane Being v. the United Kingdom (both dismissed), are currently pending. In the following, the results of the analysis of the available documents are presented for each case separately.

8.3.1 KlimaSeniorinnen v Switzerland

The KlimaSeniorinnen v Switzerland case, also one of the more popular cases, contains the highest frequency of references to the Neubauer case. In the KlimaSeniorinnen v Switzerland case, the litigants claim that Switzerland's inadequate climate change legislation violates the right to life and health under Art. 2 and the right to respect for private and family life under Art. 8 of the ECHR. They use the Neubauer case as a precedent to support their arguments at various points.

Firstly, eight of the identified references referred to the Neubauer case in a general manner, briefly presenting the outcome. Secondly, the Neubauer order is used to argue for a standing of the litigants underlining the future impairment of rights and the potentially irreversible motion of climate change (f.e. Petitioner’s reply p. 23; Third-Party Intervention by E. Brems of the Human Rights Centre of Ghent University p. 7). Furthermore, it cites the Constitutional Court's reasoning stating that there is a direct causality between anthropogenic climate change and CO2 emissions. (f.e. Petitioner’s reply p. 47). To concretize the scope of action, the litigants invoke the reasoning concerning the state’s duty to international cooperation and to fulfill its own share of emission reductions regardless of whether other states fulfill their share (f.e. Petitioner’s reply p. 47-48). Consequently, the state's obligation to protect derived from the right to life is also invoked (f.e. Observations on the facts, admissibility and the merits by Klimaseniorinnen p. 52; Third-Party Intervention by E. Brems of the Human Rights Centre of Ghent University p. 5).

The largest portion of the references relates to the core of the Constitutional Court's decision, namely the disproportionate distribution of reduction burdens between generations (f.e.
Observations on the facts, admissibility and the merits by Klimaseniorinnen p. 57, 58; Petitioner’s reply p. 24; Third-Party Intervention submitted by the Sabin Center for Climate Change Law p. 10). References that address the unbalanced distribution of reduction burdens and future restrictions on fundamental freedoms are categorized under the "Intergenerational Protection of Fundamental Freedoms”.

Figure 1: References to the Neubauer case in KlimaSeniorinnen v Switzerland

8.3.2 Duarte Agostinho and Others v. Portugal and 32 Other States

In the Duarte Agostinho and Others v. Portugal and 32 Other States, the litigants argue the member states of the European Council, Norway, Russia, Switzerland, Turkey, Ukraine, and the United Kingdom violated human rights due to insufficient climate mitigation action. In the official case documents, 12 references to the Neubauer case are identified. Besides general references, the intertemporal protection of fundamental freedoms constitutes the most relevant category referred to. Especially the Amicus Brief by Climate Action Network Europe contains a detailed reference and presentation of the Constitutional Court’s reasoning concerning the intertemporal protection of fundamental freedoms (p. 8 ff.). Additionally, the Amicus Brief by Climate Action Network Europe included the official press release on the Neubauer case in the Appendix. Overall, all identified references to intertemporal freedom assurance derive from Third-Party Interventions (Amicus Brief by UN Special Rapporteurs p. 4; Amicus Brief by the European Commissioner for Human Rights p. 7; Amicus Brief by the European Commissioner for Human Rights p. 5; Amicus Brief by Climate Action Network Europe p. 8 ff). Furthermore, a reference concerning international cooperation (Amicus Brief by the European Commissioner
for Human Rights p. 6) and the obligation to protect (Amicus Brief by CIEL, Greenpeace, and Union of Concerned Scientists p. 8) is identified.

Figure 2: References to the Neubauer case in Duarte Agostinho and Others v. Portugal and 32 Other States

8.3.3 Greenpeace Nordic and Others v. Norway

The Greenpeace Nordic and Others v. Norway case differs in its subject from the aforementioned cases. Instead of challenging the entire climate mitigation framework and policy, the litigants claim that the currently issued licenses for oil and gases exploitation in the Artic beyond 2035 are violating the litigants’ rights to life (Art. 2 ECHR) and to respect for private and family life (Art. 8 ECHR).

Again, the most represented category is intertemporal protection of fundamental freedoms (f.e. Written observations in application no. 34068~21 from European Network of National Human Rights Institutions p. 5, 10; Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on human rights and the environment and Marcos A. Orellana, UN Special Rapporteur on toxics and human rights p. 5-6) followed by general reference to the Neubauer case. Furthermore, the litigations refer to the Constitutional Court’s reasoning identifying a direct causal link between climate change and GHG emissions (f.e. Norwegian state’s response p. 32, 40). With regard to the distribution of the other references, see Figure 3.
8.3.4 Plan B.Earth and Others v. United Kingdom and Müllner v. Austria

In both cases no references to the Neubauer could be identified.

8.3.5 Overview and Concluding Remarks

The analysis of the ECtHR climate lawsuits shows that the Neubauer case is gaining importance at the supranational level. Of the 5 cases in which documents were publicly available, references to the Neubauer case are identified in 3 cases. The references are not limited to a general reference to the outcome of the Neubauer case. Rather, the key points of the decision, in particular the remarks on the intertemporal protection of fundamental freedoms, are taken up and used to support the supranational claims. This indicates precedent-setting, at least on the litigants' side. However, it should be emphasized at this point that all of the analyzed cases containing references are still pending, meaning that the decisions of the ECtHR are still awaited. The extent to which the Neubauer case will have a precedent-setting effect at the supranational level depends largely on the decisions of the ECtHR and thus remains to be seen. For an overview of all identified references, see Figure 4 below.
9. Conclusion

This thesis showed that climate activists in Germany have changed the reading of human rights with their climate litigation Neubauer. In their case, the litigants demand that intergenerational justice must be taken into account when interpreting fundamental rights. The question of climate protection, they argue, must necessarily include a question of fundamental rights. The state has an obligation to take appropriate action as of today to preserve the natural foundations of life. The protection of an ecological subsistence level was not merely a state objective, but rather a compelling, enforceable obligation of the state to protect derived from human dignity, the right to life, and the constitutional obligation to protect the climate in Article 20a of the Basic Law.

Although the Constitutional Court only partially followed this line of argument, it expressly clarified that effective climate protection legislation and the achievement of climate neutrality in good time is a matter of human rights. On the one hand, in its decision, the Constitutional Court remained cautious with regard to the duty to protect, emphasizing, in particular, the legislature's leeway for assessment and design. It stated that the legislator had not exceeded its leeway, at least at present. On the other hand, and apart from the argumentation of the complainants, the Constitutional Court applied a comprehensive examination of the fundamental rights of freedom, which it, crucially, extended to include an intertemporal dimension. Climate protection policy must contain a sustainable, long-term reduction path to climate neutrality in order to enable technological and social progress so that the necessary
transition to climate neutrality can take place as gently as possible. Unloading large reduction burdens onto future generations without creating such a reduction path would represent an unconstitutional restriction of future fundamental rights to freedom. These unconstitutional restrictions of future freedoms are also inherent in the climate protection legislation, which consumes large parts of the finite CO2 budget until 2030 and thus shifts disproportionate reduction burdens into the future. In doing so, the court also draws on Article 20a of the Basic Law, the climate protection provision, which it sees as an expression of intergenerational justice. The observance of Article 20a of the Basic Law is enforceable, even if it only has an objective legal effect and does not convey a subjective right. Thus, the litigants’ demand for consideration of intergenerational justice in the design of climate protection policies in conformity with fundamental rights has been implemented. At the national level, intergenerational issues of climate protection have been elevated to the level of fundamental rights.

This work has further shown that German interpretation has found its way into supranational climate litigation at the ECtHR. The references identified indicate that the Neubauer case has a radiating effect up to the international level. In the proceedings before the ECtHR, particular reference is made to the remarks on the intertemporal protection of fundamental freedoms as well as the remarks on the obligation to protect. As of this writing, the ECtHR's judgments are still pending. The first judgments are expected in the course of 2023. These rulings will show to what extent the national case of Neubauer also leads to a transformation of the political norm of intergenerational justice into a human rights issue on the level of the ECHR.

In conclusion, in the Neubauer case, litigation has proven to be an effective tool. It has led to a revaluation and transformation of the political norm of intergenerational justice, which now found its way into the dogmatics of fundamental rights on the national level, and thus strengthened the possibilities of legal enforcement. This is a merit of the activist litigants, but also a merit of the Constitutional Court itself. In this way, the litigants experienced the very representation they lack at the political level and achieved a reform that did not pass the test of electoral politics.
Bibliography


Case Law Index


