

Polluters in the Dock: Fighting Climate Change in Court

An interview with Hannah Neumann

March 31, 2020

More and more people understand that climate change has a serious impact on human rights. And while political measures to protect the climate are slow, citizens take their governments or polluting companies to court to speed things up and hold them accountable. We spoke with German Green MEP Hannah Neumann about the concept of climate justice, the prospects of climate litigation in the EU, and what Greens in the European Parliament can do to push for change.

Green European Journal: The number of climate-related litigations against the policies of EU governments is growing. What have they shown us so far?

Hannah Neumann: The climate emergency is making life and even survival hard for increasing numbers of people around the globe. Yet political decisions on effective counter-measures remain painfully slow. This is one of the reasons why increasingly people turn to the courts rather than governments to claim their rights.

In Europe, the most important ruling was the case of [the State of the Netherlands vs. Urgenda Foundation](#), in which a Dutch NGO filed a lawsuit against the government to urge it to reduce greenhouse gas emissions. The importance of this case for future climate change litigation cannot be overstated. The Supreme Court in the Netherlands set out precise benchmarks for the Dutch government in its ruling. What's more, the court held the government responsible for not taking sufficient measures to prevent climate change.

From a human rights perspective, the court found a link between the reduction of emissions and the right to life, as well as the right to respect for private and family life. The case's success shows that climate litigation is a powerful tool to bridge slow political progress.

How can you make sure that states comply?

States' compliance with human rights obligations is a major challenge in the international human rights regime. The best-drafted texts with strong human rights clauses can still be ignored. We see this phenomenon in the context of the European Court of Human Rights, where some countries repeatedly fail to implement judgments. Having a regime that facilitates access to legal remedies for victims is key and so is providing robust built-in mechanisms that allow for the implementation of judgments and sanctions if necessary. Put differently, the price for non-compliance must be high enough for companies and states to comply.

What is the experience so far in cases against the fossil fuel industry? Are the legal and reputational risks to these companies high enough?

We have known for years that burning fossil fuels is not a sustainable practice, and that it is responsible for a large percentage of emissions. However, the vast financial resources that multinationals possess allow them to fight off any potential damage to their business or reputation. ExxonMobil, one of the world's biggest oil and gas companies, has known for decades about the devastating effects of human-caused climate change but chose to

conceal this information, thereby not only denying our right to accurate information but also misleading its investors.

This revelation led to a wave of legal challenges. ExxonMobil won one of its first cases, ^[1] but numerous others are in the pipeline. Just in January 2020, six French NGOs launched a legal action against Total, claiming that the company has not done enough to tackle climate change. Whether legal action is going to have a lasting effect on fossil giants remains to be seen. But it is already apparent that such cases harm a company's reputation and generate media exposure.

A study by the Heinrich Böll Foundation compared this new area of litigation to previous action against the tobacco industry. What can we learn from these efforts?

The experiences with the tobacco industry serve as an inspiration for climate litigation cases. The tobacco industry has been challenged by governments and private claimants alike – at times with remarkable success. Similar to the ExxonMobil case, the multinational cigarette manufacturer Philip Morris was sued for spreading misinformation regarding the dangers of its product. For years, they denied the link between cigarettes and cancer, but in one individual case, the company had to pay millions of US dollars in punitive damages.

It is remarkable to see how the campaigns run by the fossil fuel industry follow the big tobacco playbook. Take ExxonMobil again as an example. In the early 1980s, the group of scientists employed by the company pretty accurately predicted last year's carbon dioxide concentration. However, this information was not shared with the public. Similar to tobacco companies, fossil fuel companies cause public nuisance and harm but chose to mislead the public. This is exactly where litigation efforts could succeed – by showing that the companies did not act in good faith.

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Polluting states and companies will retaliate. What can climate litigators do to protect against that, knowing that the polluters are at a huge advantage in terms of resources?

Some of the cases are brought by individuals or small organisations. Their resources obviously do not match the legal teams and funding that states and multinationals have at their disposal. However, science is on the side of the litigators. We also should mention that this is not new: companies have already sued organisations such as Greenpeace in several cases. It is a basic scare tactic and litigators need to anticipate this kind of risk.

But how exactly can litigators anticipate that, knowing that the other side will go against them with all they have? How can they better prepare, and how can supporters help?

Climate litigators embark on an uphill battle when they sue large corporations with significant economic power. As it is often a case of David versus Goliath, it can expose the litigators to serious outside pressure, criticism and, not to forget, economic burden. Greenpeace has been sued for illegal conspiracy when they fought against logging in the Canadian boreal forest. Big fossil fuel companies like Exxon Mobil have also brought counter lawsuits against climate litigators in California in 2018, claiming abuse of process and civil conspiracy. However, many corporations or governments depend on their public image. Climate litigators can use this opportunity to weaken these players' discursive power by unveiling, for example, how the big corporation is attacking the small NGO or ordinary citizen fighting for a just cause.

At the EU level, the People's Climate Case saw families challenge the EU's 2030 climate and energy targets. The European Parliament and the Council argued in their responses that the plaintiffs should not be heard in European courts. What does this case tell us about the potential of climate litigation on the EU level?

Access to the European courts is tightly regulated. The treaties and the interpretation of the European Court of Justice set out in a very precise manner who has standing in which context. This is a bit legalistic but individual claims are only admissible under specific conditions: the applicants have to be the addressees of the contested norms and the contested acts have to be regulatory acts, not legislative acts. If one is to look at earlier case law from the court and the text of the treaties, the argumentation neither of the Parliament nor the Council nor the findings of the court come as a surprise.

This individual case does not say anything about future chances of climate litigation on the EU level, but only shows that the court is sticking to its earlier case law. The increasing number of climate-related actions launched before the European Court of Justice should push it, as well as the Council and the European Parliament, to adapt its position and interpretation of the treaties regarding the legal standing. Indeed, access to justice for European citizens should be guaranteed according to the Aarhus Convention, of which the EU is a party.

Is climate litigation on the agenda of the Greens in the EU?

As Greens, we support such procedures in principle, but as a parliamentary group and thus part of the legislature, we do not openly support climate litigation. One of the reasons is that we do not have standing before the Court. Individual MEPs of the Green Group, however, went to the European Court of Justice and won access to the European Food Safety Authority's documents related to the cancer risks of glyphosate a few years ago.

But there are other ways to push things forward. As a group, we will fight in the next negotiations on the EU climate law for it to include the fundamental rights of every European to a stable climate and healthy environment. If we win, this should, in turn, allow citizens in the future to take the Commission and member states to court if they do not take the necessary measures. As the group that has always promoted precise, ambitious climate and environment directives, we are happy to see that those help other actors to protect the environment and the people living in it. The case of the NGO Deutsche Umwelthilfe, which is taking city governments to court for increasing NOx emissions,^[2] is based on an EU directive on air quality.

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Climate litigation is just another way for citizens to show what they expect from lawmakers. This call should not go unheard. As a parliamentary group, we use our leverage in different ways and work on setting an advantageous regulatory framework. We can, for instance, support litigators by funding climate science research. To take the People's Climate Case again as an example, the Court found that the applicants did not have standing because the claimants were not individually concerned by the contested measures. A lesson for the Greens could be to push for an evolution of the legal standing so that citizens and NGOs can go before the Court more easily with broader access to justice.

The preamble of the Paris Agreement is the first international document that recognises the concept of climate justice. How does that influence the opportunities for climate litigation?

The concept of climate justice incorporates a human rights-based approach that seeks to safeguard the rights of the most vulnerable people in the face of climate change. The starting point of this concept is the law; hence, it connects very well to climate litigation.

Climate justice means nothing else than compliance with the obligations that states have given themselves when drawing up human rights instruments such as the International Covenant on Civil and Political Rights. The drafters of our human rights treaties might not have anticipated today's environmental crisis, but this is exactly what legal texts should do – adapt to present-day conditions.

The incorporation of climate justice into the Paris Agreement is an important step to bring the concept further recognition. I do not think, however, that the Paris Agreement will necessarily lead to further litigation.

The Paris agreement is not binding upon governments. How can this limitation be overcome?

It is not a limitation per se; there are several other ways to access the courts. Although not legally binding in all of its parts, the conclusion of the Paris Agreement is a major achievement. The agreement is a mix of soft, hard, and non-obligations. It might lack a sanction mechanism towards signatories that fail to respect the agreement, but it is still legally binding. Even so-called soft law is not devoid of legal relevance, it just functions differently. We have seen in an EU context that legally binding norms can take a very long time to be implemented and ratified; the Paris Agreement has been valid since its ratification. The law is that it is always changing and adapting. Who would have thought some years ago that a national Supreme Court would order a state to reduce greenhouse gas emissions with an explicit reference to human rights?

What did the most recent UN climate change conference, COP25, mean for climate justice and climate litigations?

The big decisions such as the financing of adaption measures, as well as loss and damage, were postponed to the next conference. These are central issues of climate justice. The concept of climate justice itself was only mentioned in passing. As long as the demands of the climate justice movement are not met, there will be a steady rise in climate litigation. But frankly, the underlying problem is that, in the face of climate change, the international community has shown itself incapable of ensuring the full enjoyment of human rights. Climate litigation is only a symptom of an underlying problem: the continuous failure of governments to properly respond to the climate crisis.

How are Greens preparing for the next COP? What should be done there?

There is a large discrepancy between the goals set in the Paris Agreement and insufficient climate policies that will clearly fail to reach them. Stricter rules are necessary to achieve the 1.5 degrees target. As Greens, we want to push the European Union and all signatories to the Paris Agreement to step up their commitments. From a human rights perspective, it cannot be overstated how important it is to actually reach this goal. The upcoming summit in Glasgow in November 2020 needs to be about raising national targets. And about clear implementation plans for how to reach them with strict mechanisms in cases of non-compliance.

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A good occasion to show our sincerity are the various on-going negotiations for trade deals such as Mercosur, or

the upcoming EU-China summit in September. All EU trade deals have to be compatible with the Paris Agreement and should not undercut climate objectives. A way to achieve this is through mandatory provisions for both signatories. This tool has not been used so far, but Greens on all political levels are pushing for this to change.

You call litigation a symptom and say that politics should react. But can't it act as a tool to bring about change? In the fight for marriage equality, the abolition of the death penalty, and the end of segregation, the courts led the fight, while parties tried to avoid controversial topics, out of fear that they would alienate their core voters. Can climate litigation be used to overcome political stalemate?

The right to a remedy is central to a human rights-based approach to climate change. It is essential under the rule of law and I fully support this. If we only think about landmark rulings such as *Brown v. Board of Education* in the United States, which put an end to racial segregation, we can get a glimpse of what litigation can achieve. But again, as a part of the legislature, I insist on bringing about a regulatory framework that protects its citizens by default. In most cases, we turn to courts when our rights have been violated. But what if the violation never happened in the first place? In an ideal world, there would not be a grievance and no damages either and, therefore, the international climate regime should be designed in a way that it actually protects the environment and allows for the full enjoyment of our human rights.

Is climate litigation, seen in cases such as *Saúl vs. RWE*, becoming more relevant in Germany?

Things are changing in Germany. The particular case that you mention is especially intriguing because it was filed by a Peruvian farmer under German law. This is not the only high-profile case in Germany. Fridays for Future activists have recently [filed complaints](#) with the Federal Constitutional Court against the German government and the Parliament. The number of cases is growing, and rightfully so because Germany is missing its climate targets by about 7 per cent. The outcome remains to be seen but it shows once more the close link between human rights and climate change.

Footnotes

[1] The case was initiated by former New York Attorney General Eric Schneiderman, who subpoenaed Exxon for numerous internal documents in 2015 after news broke about the company misleading investors and the public. In the following case, the judge ruled that the state failed to provide sufficient evidence that the company made false statements in its disclosures to investors and that the false statements might have influenced investors' decisions.

[2] NOx is a generic term for nitric oxide and nitrogen dioxide, two gasses that contribute to air pollution.



Hannah Neumann is a German politician of the Alliance 90/The Greens who has been serving as a Member of the European Parliament since 2019.

Published March 31, 2020

Interview in English

Published in the *Green European Journal*

Downloaded from <https://www.greeneuropeanjournal.eu/polluters-in-the-dock-fighting-climate-change-in-court/>

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