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Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Provisions in the European Climate Cases *Arctic Oil*, *Neubauer*, and *l'Affaire du siècle*

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ABSTRACT

This article examines three constitutional environmental provisions and how they have been applied by courts in Europe in three climate cases from Norway, Germany and France. In each of these cases, directive principles, that is, constitutionally entrenched state obligations to protect social values, generally by enacting legislation, played a key role in judicial decisions regarding climate change mitigation. We engage with Lael K. Weis's analytical framework on directive principles to clarify the allocation of institutional responsibility for climate change mitigation as applied in these three cases, and argue that clarifying these roles alleviates some of the criticism regarding the democratic legitimacy of judicial decision making on climate change. Importantly, while courts do not directly enforce these types of constitutional directive principles, they must adjudicate them. When courts interpret constitutionally mandated legislation in light of directive principles, they develop new constitutional environmental norms. While most scholarly analysis of environmental constitutionalism has focused on environmental rights, our examination confirms Weis's thesis that directive principles aimed at legislatures are also important forms of environmental constitutionalism, and deserving of further attention.

KEYWORDS: Climate change litigation, right to a healthy environment, constitutional law, public interest litigation, *Arctic Oil* case, *Neubauer* case, *l'Affaire du siècle* case

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1. INTRODUCTION

The last several years have seen a dramatic increase in European climate change litigation.[1] Starting with the well-known Dutch Urgenda case, which was decided in its final appeal by the Dutch Supreme Court in 2019,[2] public interest litigants have been successful in several groundbreaking cases. Other climate cases have not been successful from the point of view of the claimants. As noted by environmental law scholar Laura Burgers, the explosion in climate litigation raises the question of what the appropriate role for courts should be in making decisions about climate change mitigation.[3] While some have argued that the extent to which measures should be taken to combat climate change is a political decision which should be made by democratically elected legislatures in order to have democratic legitimacy, Burgers' rejoinder is that the global climate change litigation trend in itself is an indication of a realisation that a sound environment is a constitutional matter.[4]

An often-overlooked aspect of the discussion of the judicial role in deciding climate cases is constitutional design. Arguments made by climate litigants have often rested on international human rights but also on national constitutional provisions. During the second half of the 20th century, more than three quarters of the world's countries adopted some type of constitutional provision related to the environment,[5] a legal development often referred to as 'environmental constitutionalism.'[6] Likely influenced by the 1972 UN Stockholm Declaration, which endorsed a fundamental right to an environment 'that permits a life of dignity and well-being', the majority of these constitutions include a right to a healthy environment.[7] The right to a healthy environment has received considerable academic attention,[8] and, in 2022, the UN General Assembly adopted a resolution recognising the 'right to a clean, healthy, and sustainable environment as a human right', in part predicated on the fact that 'a vast majority of States' already recognised some form of this right, through national constitutions or otherwise.[9]

This focus on substantive environmental rights has to some extent come at the expense of the examination of an even more common type of constitutional environmental protection, state obligations to protect the environment. For example, Germany's constitutional provision on the environment, which will be discussed in greater detail below, requires the state to enact legislation to protect the environment. As noted by constitutional scholar Lael K. Weis, while environmental rights are common in environmental constitutional provisions, these state obligations, which include environmental directive principles, are nearly universal, occurring both alone and alongside rights.[10] Weis argues that the role directive principles play in developing constitutional norms related to the environment is under-examined. Furthermore, she argues, it is necessary to pay close attention to the formal design of environmental constitutional provisions—whether they are rights-granting provisions, value statements, or state obligations, and whether they occur in preambles or bills of rights, for example—to understand how they are intended to be given effect.[11]

1 Kleoniki Pouikli, 'A Short History of the Climate Change Litigation Boom across Europe' (2021) 22 ERA Forum 569.
2 André Nollkaemper and Laura Burgers, 'The State of the Netherlands v. Urgenda (Neth. Sup. Ct.)' (2020) 59 International Legal Materials 811.
3 Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 TEL 55.
4 Burgers, ibid, 56. The argument that climate change is a matter for the political branches and not the judiciary has been made by defendants in a number of climate cases, such as for instance *Urgenda*.
5 United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (2019) 2, available at <https://tinyurl.com/y53utsjn> accessed 1 January 2023.
6 James R May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014).
7 David R Boyd, *the Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 59, 90.
8 See especially, Boyd, ibid; May and Daly (n 6).
9 Resolution adopted by the General Assembly on 22 July 2022, A/RES/76/300.
10 Lael K Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16 ICON 836, 842.
11 ibid 843.

In this article, we look at how constitutional responsibility for deciding on environmental matters is allocated between the judiciary and democratically elected branches of government in three constitutions, and how courts have understood this division of responsibility in three climate cases that invoked the relevant constitutional environmental provisions. In line with the broader global development towards environmental constitutionalism, Norway, Germany and France introduced constitutional environmental provisions in 1992, 1994 and 2005, respectively.[12] As will be described in greater detail below, the first of these provisions is framed primarily as a right, the second is framed as a state obligation, and the third is a unique constitutional charter that includes both rights and obligations. Recently, these provisions have been invoked in strategic climate litigation in the Norwegian *Arctic Oil* case (2020), the German *Neubauer* case (2021), and the French *l'Affaire du siècle* case (2021). These cases illustrate that, perhaps unsurprisingly, it may be difficult to predict how the courts will interpret their own role in applying environmental constitutional provisions, regardless of how these provisions are formulated or where they occur in the constitution. This could perhaps reflect a sense of hesitation with regard to how issues relating to environmental protection and the climate are to be dealt with constitutionally and judicially—that we are in the midst of a legal transition.[13] However, in each of these cases, constitutional design and state obligations intended to be implemented by the legislature were important factors in delineating the judicial role. Drawing on Weis's framework for analysing environmental directive principles, we will argue that the application of constitutional environmental provisions in climate cases helps clarify the role of the legislature and the role of the courts in mitigating climate change.

Our selected cases come from European civil law countries. We chose these cases because they were part of a wave of European climate cases that were decided in rapid succession in 2020 and 2021, and were among the first significant judicial decisions on government liability for climate change in their jurisdictions. These cases are not necessarily representative of the hundreds, if not thousands, of climate cases that have been or are being litigated around the world.[14] However, we believe that taken together, they have relevance for understanding climate change litigation in European civil law countries. We hope that this study will help inform and inspire further comparative research in the European context and worldwide.

In the next section, we elaborate on environmental constitutionalism, distinguishing between fundamental rights and directive principles. In section 3, we examine the abovementioned cases in light of environmental constitutionalism, considering the constitutional environmental provisions invoked, and the reasoning of the respective courts in applying them. Then, in section 4, we make two arguments supported by the decisions in the three climate cases: first, the right to a healthy environment, although included in some form in most constitutions, is not the only powerful form of environmental constitutionalism, despite the focus of much of the literature. We argue that in the examined cases, the constitutional environmental provisions at issue functioned as directive principles, and had varying legal impacts. Second, the application of constitutional environmental provisions in these cases offers important clarifications about the responsibilities of the legislatures and the courts for climate change mitigation. Constitutionally obligatory legislation played a key role in the judicial outcomes, reflecting that the institutional responsibility for climate change mitigation is primarily allocated to the legislature in Norway, Germany and France. Even so, the cases also illustrate that courts nevertheless have an important role to play. In light of the cases, we discuss some aspects of what the judicial role entails, and other aspects that remain unclear after the judicial decisions. In section 5, we draw some

12 Boyd (n 7) 47–50.

13 This argument has been put forth by Laura Burgers, *Justitia, the People's Power and Mother Earth. Democratic legitimacy of judicial law-making in European private law cases on climate change* (doctoral thesis Universiteit van Amsterdam 2020) 67.

14 See <http://climatecasechart.com/> accessed 1 January 2023.

conclusions, in particular with respect to the implications of our analysis for litigants in climate cases. We argue that, whether a constitutional environmental provision is a right or a directive principle, its application can result in the creation of new constitutional environmental norms. Strategic litigation therefore is not only essential for understanding environmental constitutionalism, the arguments and strategies used in such litigation impact the constitutional environmental legal norms generated. Those engaged in strategic litigation therefore, we lastly argue, have a great responsibility as their work impacts how constitutional environmental law evolves.

2. ENVIRONMENTAL CONSTITUTIONALISM: FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

Much of the scholarly literature on environmental constitutionalism has focused on the importance of substantive environmental rights.[15] However, constitutional provisions take many forms and locate rights and duties for environmental protection with different actors. In their book, *Global Environmental Constitutionalism*, May and Daly classified seven common types of environmental constitutional provision, including substantive environmental rights, individual environmental duties or responsibilities, state environmental duties, environmental policy directives, future generations, rights to water, and procedural rights.[16]

These categories are not mutually exclusive; most constitutions contain provisions from multiple categories. It is also not always clear what category a provision falls under. For example, May and Daly differentiate between a 'state environmental duty' and a 'environmental policy directive', identifying the latter as provisions 'intended to influence governmental decision making' but 'generally not judicially enforceable.'[17] Most environmental constitutional provisions are untested, and it is often not obvious which provisions courts will judge to be judicially enforceable before they rule in particular cases. The often-limited adjudication of national constitutional environmental provisions has led some to suggest that the provisions are largely of symbolic value only.[18] Others, including May and Daly, argue that while most constitutional provisions have not been explicitly applied by courts, there is an emerging trend to apply constitutional environmental rights.[19] They claim substantive human rights, which occur, by their count, in 2/5 of countries worldwide, are the strongest type of environmental constitutionalism. They write:[20]

> There is good reason that substantive environmental rights are the most common brand of environmental constitutionalism. As a general matter, substantive rights also provide "repose" because they are often viewed as being self-executing and enforceable. [citation deleted] They are also "less susceptible to... political airs," [citation deleted] and more likely to endure because of resistance to constitutional reform. [citation deleted] Substantive environmental rights, therefore, aim to afford the most durable and enforceable means for environmental protection.

Weis however counters that the scholarly work on environmental constitutionalism has been too narrowly focused on judicial rights enforcement and on how constitutional environmental provisions can supplement or supersede ordinary law. Weis argues that this focus neglects the

15 See e.g. Boyd (n 7); May and Daly (n 6); Joshua C. Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge 2018).
16 May and Daly (n 6).
17 ibid 73–74.
18 Douglas A Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale UP 2010) 231.
19 May and Daly (n 6) 278.
20 ibid 65.

fact that 'the principal way that state obligations are entrenched is not as conventional rights provisions but as constitutional directive principles, which are not designed to be given effect by direct judicial enforcement'[21]. In a suite of three articles, Weis sets out a framework describing constitutional directive principles and the legislative role in developing constitutional norms.[22]

Directive principles, according to Weis, have two features. First, they oblige the state to take action, usually through constitutionally mandated, or 'directed', legislation to be enacted by the legislature. Second, they are 'contrajudicative', that is, intended to be defined in scope and content through legislation rather than by the courts.[23] It may be considered preferable for legislatures to define the scope and content of constitutionally entrenched social values, such as environmental protection, for several reasons, according to Weis: first, the legislature may be in a better position than courts to weigh protected values against each other; second, implementation of some values require 'fact-finding and specialized expertise', and third; implementation may require state resources, and the legislature may be in a better position to decide on their allocation.[24] The implementation of environmental values implicates all of these reasons, due in part to the complexity of environmental issues as well as to the many disagreements that exist with respect to how these issues are to be handled.[25]

Constitutional directive principles challenge the paradigm of judicial rights enforcement in two ways, as Weis explains: 'First, they shift the allocation of institutional responsibility for articulating the scope and content of constitutionally entrenched … social values and for defining the legal norms that they require from the judiciary to the political organs of the state. Secondly, they simultaneously remove direct judicial enforcement as a mechanism for ensuring state compliance with constitutional obligations to promote the social values in question,' in our examples climate change mitigation and environmental protection.[26] This does not necessarily make this type of constitutional provision less powerful, and courts continue to have an important role in interpreting and applying them. Importantly, while directive principles are designed to be given content by legislatures, courts must determine whether the legislature has met its constitutionally allocated obligations. Further, courts must interpret and give appropriate weight to constitutionally obligatory legislation once enacted.[27] This legislation may be regarded as a source of constitutional norms.[28] In the next section, we examine how courts have understood their own role in applying constitutional environmental provisions in several cases.

3. *ARCTIC OIL*, *NEUBAUER*, AND *L'AFFAIRE DU SIÈCLE*: CONSTITUTIONAL ENVIRONMENTAL PROTECTION IN THREE CLIMATE CASES

For each of the three cases described below, we first give a brief overview of the claims made by the litigants in the case. We then introduce the constitutional provision or provisions invoked, followed by a description of how the court applied those provisions. We conclude each subsection with a comment on how the court interpreted the constitutional allocation of institutional responsibility for climate change mitigation.

21 Weis (2018) (n 10) 842. Italic removed from quotation.
22 ibid 838; Lael K Weis, 'Constitutional Directive Principles' (2017) 37 Oxford Journal of Legal Studies 920; Lael K Weis (2018) (n 10); Lael K Weis, 'The Constitutional Office of the Legislature' (2020) 70 University of Toronto Law Journal 214.
23 Weis (2017), ibid 921.
24 ibid 935.
25 Weis (2018) (n 10) 854–855.
26 Weis (2017) (n 22) 917.
27 Weis (2018) (n 10) 866–867.
28 Weis (2017) (n 22) 940–941.

3.1 *Arctic Oil*: A Constitutional Environmental Right is Not (Necessarily) a Right to a Particular Level of Environmental Protection

In its *Artic Oil* decision of 22 December 2020, the Norwegian Supreme Court (*Høyesterett*) considered whether article 112 of the Norwegian constitution, *Grunnloven*, should be interpreted as conferring a general constitutional right on individual citizens that can be judicially reviewed.[29] Greenpeace Nordic and the youth organisation *Natur og Ungdom* (Nature and Youth) had brought a legal action against a decision by the Norwegian Ministry of Petroleum and Energy to award ten petroleum production licenses for a total of 40 blocks or sub-blocks on the Norwegian continental shelf in Barents Sea South and Barents Sea South–East.[30] The decision to grant these licenses was made pursuant to Norway's Petroleum Act, and to an earlier decision by the *Storting*, Norway's legislature, to open parts of the Barents Sea to petroleum production.[31] The claimants argued that the licensing decision, as well as the *Storting*'s decision enabling the granting of licenses, was contrary to the Petroleum Act, interpreted in light of article 112 of the constitution, on the right to the environment.[32] The cumulative effects resulting from the challenged licenses, the claimants argued, contribute to global warming, which will have catastrophic consequences. Therefore, article 112 of the Norwegian constitution prevents the granting of licenses for further exploration and production, without first establishing an appropriate national tolerance limit for CO_2 emissions and a framework ensuring that production licenses are adapted to such a tolerance limit, according to the claimants.[33] Further, according to the claimants, article 112 establishes an enforceable right and an absolute threshold, governing the extent of the damage and risk to which the environment can be exposed. Therefore, the claimants argued, the licensing decision should be declared invalid. In the alternative, the claimants argued that the decision was invalid in light of the right to life and the right to private life and a family, as protected by the constitution and the European Convention on Human Rights (ECHR).[34]

3.1.1 Environmental protection in Norwegian constitutional law

Grunnloven, adopted in 1814, is the oldest written European constitution still in effect and for almost 200 years, Norwegian courts have been competent to review administrative action in light of the it.[35] Since the middle of the 19th century, Norwegian courts have also been considered entitled to judicially review the constitutionality of legislation adopted by Parliament.[36] The constitutional judicial review was codified in article 89 *Grunnloven* via amendments in 2015 and 2020.[37] Despite the long history of constitutional judicial review in Norway, there has been disagreement about the intensity of the review.[38] Connected to this issue is the question of the

29 Høgsteretts dom 22. desember 2020, HR-2020-2472-P, (sak nr. 20-051052SIV-HRET), para 79, available in English at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-2472-p.pdf> accessed 1 January 2023. For a more detailed description of the background, procedure and outcome of this case, see Christina Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics' (2021) 33 JEL 697.

30 Friends of the Earth Norway and the Grandparent Climate Campaign acted as intervenors in the proceedings.

31 Høgsteretts dom 22. desember 2020 (n 29) para 32.

32 Burgers (n 3) 228.

33 Høgsteretts dom 22. desember 2020 (n 29) paras 24–25.

34 Notice of Proceedings, October 18, 2016, 8. The licensing decision was challenged also on procedural law grounds, which however is outside the scope of this article.

35 Carsten Smith, 'Judicial Review of Parliamentary Legislation: Norway as a European Pioneer' (2000) 32 Amicus Curiae 12; Eivind Smith, *Konstitusjonelt demokrati: statsforfatningsretten i prinsipielt og komparativt lys* (Fagbokforlaget 2021) 271.

36 Fredrik Sejersted, 'Grunnlovens funksjon i de Nordiske land' (2014) 127 Tidskrift for Rettsvitenskap 535. The result of the constitutional judicial review has effect *inter partes* only. Eyvind Smith '"Prøvningsretten" omsider grunnlovsfestet' (2020) 55 Jussens Venner, 325, 334.

37 Res. 12 June 2015 nr. 623; Smith (n 35) 271.

38 Smith (n 35) 276, 286.

margin of discretion afforded to the legislature in exercising its constitutional obligations, and the relationship between the judiciary and the non-judicial branches of government.[39]

Still, judicial review of parliamentary legislation has become more common in Norway as a result of EU and international laws' influence on the national legal system.[40] This development has in turn also affected the extent to which ordinary legislation is subject to constitutional judicial review.[41] The last three decades have witnessed a large number of cases in which the Supreme court has reviewed both administrative decision-making and parliamentary legislation in light of the constitution.[42]

A provision on environmental protection was first introduced in the Norwegian constitution in 1992, twenty years after the first proposal towards that end, and not long after the issue of the Brundtland report, *Our common future*, in 1987.[43] Revised in 2014 and included under the new heading of 'Human Rights', the constitutional protection of the environment is enshrined in article 112 *Grunnloven*, which reads:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The authorities of the state shall take measures for the implementation of these principles.

Article 112 *Grunnloven* thus states a legal *right* to the environment that is included alongside other rights provisions. The first two paragraphs of article 112 have the same wording as in 1992 and the third paragraph, establishing a duty for state authorities to take measures to ensure environmental protection in accordance with the article, was added in 2014.[44] While the article states a right to the environment, the constitutional drafting materials, known in the Norwegian legal system as preparatory works, for the 1992 provision complicate the analysis of whether this article is intended to convey substantive, justiciable rights.[45] The preparatory works emphasise a desire for the provision to both mark a political signal, for example, to the private sector and to other countries, and have legal effects.[46] These preparatory works further state that the constitutional environmental provision is to provide guidance for the exercise of legislative power, that it is to serve as an element in statutory interpretation, and be a mandatory consideration in the exercise of administrative discretion.[47] The preparatory works therefore do not straightforwardly answer the question whether article 112 confers an enforceable right.

39 On this long-standing constitutional debate in Norway, see Martin Sunnqvist, *Konstitutionellt kritiskt dömande. Förändringen av nordiska domares attityder under två sekel* (doctoral thesis, Lund University 2014).

40 Sejersted (n 36) 561.

41 ibid.

42 Sunnqvist (n 39) 1; Morten Kinander, 'Fra tilbakeholdenhet til aktivisme' (2016) 55 Lov og Rett 141, 146.

43 Forslag nr. 13 i Dokument nr. 13 for 1971–92; Hans Christian Bugge, 'Grunnlovsbestemmelsen om miljøvern: Hvordan ble den til?' in Ole Christian Fauchald and Eivind Smith (eds) *Mellom jus og politikk, Grunnloven § 112* (Fagbokforlaget 2020) 19.

44 Bugge (n 43) 38.

45 In Nordic legal systems, these preparatory works carry very substantial interpretive weight. Pia Letto-Vanamo and Ditlev Tamm 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gran Mortensen (eds) Nordic Law in European Context (Springer 2019) 1, 7.

46 Innst S nr 163 (1991-92) 5–6.

47 ibid 6.

3.1.2 *The application of the Norwegian constitution in Artic Oil*

In *Artic oil*, the Supreme Court recognised that the constitutional environmental protection afforded by article 112 *Grunnloven* also pertains to climate change. Accordingly, the provision sets out a duty for the legislature to take measures to prevent climate change. The Supreme Court then discussed article 112 in light of the wording of the provision, its position under the heading of 'Human rights' in the constitution, and particularly of its preparatory works, to evaluate whether article 112 can be invoked as the basis for a claim that an individual decision, made under the Norwegian Petroleum Act, is invalid.

The Supreme Court first noted that *Grunnloven* contains certain provisions that grant rights that can be asserted before the courts. Others are 'pure "manifestos", involving duties for the authorities', but do not establish individual rights.[48] According to the Supreme Court, there are also 'intermediate solutions': provisions which contain certain reviewable rights, but also set out obligations for the authorities that lack corresponding reviewable rights.[49] Furthermore, the intensity of the constitutional judicial review will depend on the character of the decision under scrutiny—whether for example, it is a legislative or administrative decision.[50]

The wording of article 112 is open to several interpretations, according to the Supreme Court. In Norwegian, the word 'rett' can indeed refer to a right, but it also has a more general meaning. While 'based on everyday language' the wording of the first paragraph of article 112 'viewed in isolation' indicates that the provision contains rights that can be enforced before the courts, it can also be read as a 'kind of principle or maxim without a corresponding right to assert the principle or maxim before the courts'.[51] The wording of the second paragraph indicates that it has to do with individual rights. But the third paragraph speaks of 'principles', which are 'natural to understand as something other than a right'.[52]

The fact that the constitutional environmental provision is located under the human rights heading is 'of little help in the interpretation', according to the Supreme Court. According to the court, this is because the right to an environment is not a binding rule under international law, and it has not been established by any international convention. For the Court, international law sources hence did not support an interpretation of article 112 as reflecting an enforceable right of international law.[53]

The Supreme Court then considered the preparatory works of the constitutional environmental provision to identify the intention of the legislature in adopting it. It concluded that the legislature had sought to introduce a constitutional provision with a number of legal effects, not merely a declaration of policy. Among the legal obligations created by the constitutional provision is a duty of the legislature, the executive, and the courts, to consider environmental protection as they exercise their respective competences. In the reasoning of the Supreme Court, the intention of the legislature had not been, however, to introduce a general legal right to the environment. Since decisions in cases regarding what the court calls 'fundamental' environmental issues often involve political balancing and broader prioritisation, democratic considerations support such decisions being taken by popularly elected bodies, and not by courts, according to the Supreme Court.[54] Only when a particular environmental problem has not been addressed by legislation at all can article 112 be relied on directly before the courts.[55] In order for the

48 Høgsteretts dom 22. desember 2020 (n 29) para 79.
49 ibid.
50 ibid para 80.
51 ibid para 88.
52 ibid paras 90–91.
53 ibid para 92. This decision came prior to the Resolution adopted by General Assembly on 22 July 2022 (n 9); the Court's interpretation of article 112 may change in a future case in light of developments in international law.
54 ibid para 141.
55 ibid para 139.

courts to set aside legislation or a decision based upon it, the legislature must have 'grossly disregarded its duties' under article 112(3). The function of the constitutional environmental provision is therefore to be 'a safety valve', at least when legislation on a subject already exists.[56] Furthermore, in reviewing the constitutionality of an individual decision, the Supreme Court held that it cannot review key parts of the Norwegian petroleum policy.[57] When legislation, such as the Petroleum Act, has been adopted with regard to a particular issue, that legislation constitutes the standard against which a particular decision is to be reviewed, not the constitution, according to the Supreme Court. The bar for concluding that environmental legislation is unconstitutional is very high after this decision.[58]

As the challenged decision in *Arctic Oil* was adopted on the basis of a law that balances the interest of protecting the environment against other interests, it does not involve a gross disregard of the duties laid down in article 112(3), the Supreme Court concluded.[59] What it would take for the legislature to grossly disregard its duties was not explained further.

3.1.3 Comment

On the basis of its constitutional design, several arguments speak in favour of understanding the Norwegian constitutional environmental provision as an enforceable right. The provision annunciates a right to an environment and it is listed in the human rights section of the constitution, together with enforceable rights provisions. The constitutionality of administrative decision-making and legislation can be judicially reviewed in light of rights listed in the same section. In their examination, May and Daly indeed had concluded that the Norwegian constitutional environmental provision includes a substantive environmental right.[60]

In *Arctic oil*, however, the Supreme Court held that the meaning of the word 'rett'—which can be translated as 'right', but also has a more open meaning—is not a generally enforceable right. In addition to relying on the text and structure of the constitutional environmental provision in its interpretation, the Supreme Court paid close attention to the preparatory works and the objectives of its drafters in concluding that article 112 is primarily directed to Parliament in its exercise of legislative power. Article 112 is nevertheless also relevant to the interpretation of ordinary legislation, and it guides the exercise of administrative discretion, according to the Supreme Court.[61]

Having held that article 112 leaves limited room for judicial review of an individual decision taken by the government on the basis of legislation—constitutional judicial review only occurs in exceptional cases—the Norwegian Supreme Court did not arrive at a discussion of the more precise meaning of some of the critical aspects of the constitutional environmental provision. While the case importantly clarified that the climate comes within the scope of article 112, questions remain with regard to the operationalisation of the provision with respect to the protection of the climate. For example, while the claims were brought by young people raising concerns about the future effects of climate change, the constitutional protection of their interests—or even the meaning of the concept of 'future generations' under the Norwegian constitution—were barely addressed in the judgment.[62] In leaving so much discretion to the legislature, the judgment of the Supreme Court provides little guidance on the nature of the

56 ibid para 142.
57 ibid para 162.
58 It can be noted that, with respect to the question of whether article 112 confers an enforceable right on individuals, the Supreme Court took a different view than both the district court and the court of appeal.
59 ibid paras 157–160.
60 May and Daly (n 6).
61 Høgsteretts dom 22. desember 2020 (n 29) para 138.
62 Burgers (n 3) 232, remarks on the absence of elaboration of what future generations are covered by article 112, how far into the future the protection under article 112 reaches, and other crucial questions with respect to the meaning of article 112 with respect to the protection of future generations, in the reasoning of the Oslo district court in the same case.

responsibility of the legislature and the executive under article 112, and the circumstances in which they cannot be considered fulfilled.

3.2 *Neubauer*: Legislation as Fundamental Orientation of Constitutional Environmental Obligations

In its *Neubauer* decision of 24 March 2021, the German the Constitutional Court (*Bundesverfassungsgericht*) considered whether a set of provisions contained in the 2019 German Climate Protection Act (*Bundes-Klimaschutzgesetz*), adopted to meet the requirements of the Paris agreement, violated the Basic law (the *Grundgesetz*, the German constitution).[63] In this case, the claimants, which included individuals from Germany, Nepal and Bangladesh, two associations and ten German children, alleged that Germany had failed to introduce a legal framework that sufficiently reduced the emission of greenhouse gases to limit the increase of the Earth's temperature to 1.5°C, or at least well below 2°C, compared to pre-industrial levels, as required by the Paris agreement. The claimants further argued that Germany had failed to respect the obligation committed to in the Paris agreement to pursue the long-term goal of greenhouse gas neutrality by 2050.[64] Achieving these two objectives were two of the fundamental tenets annunciated in the Climate Protection Act.[65] The claimants argued that the failure to create a legal framework that respects these obligations violated the duties of protection established by the human right to life and physical integrity, and the right to property and inheritance, as protected in articles 2(2), and 14(1) of the Basic law. They also relied on their right to a future consistent with human dignity, and a fundamental right to an ecological minimum standard of living, which they argued can be derived from the general freedom of action (*Allgemeine Handlungsfreiheit*) in article 2(1) read in conjunction with article 1(1), the right to human dignity. In addition, they argued that the failure of the state to take sufficient action amounted to a violation of their fundamental freedoms, in conjunction with article 20(3).[66]

The claimants argued that the failure of the state to take adequate measures was unconstitutional in essentially two ways. First, they submitted that state *failed to protect* the claimants from the effects of climate change, thereby violating human rights protected by the constitution. Second, they argued that the absence of adequate action on behalf of the state *restrained their freedom*, also protected by the constitution. In the jurisprudence of the German Constitutional Court, human rights are considered to have two functions. The first one is negative, and protects the individual from state action that impedes the freedoms protected by the Basic law (the so-called *abwehr-rechtliche Dimension*). Where the state is considered to have taken an action that restrains individual freedom in an unconstitutional manner, the action can be declared unconstitutional by the Constitutional Court. The second function of human rights is positive, and establishes a duty of protection for the state (the so-called *Schutzpflichtendimension*). To fulfill this duty, the state is required to take positive action to prevent human rights violations. For example, the Constitutional Court has held that the state must protect citizens from the serious risks associated with nuclear power plants.[67] According to the case-law of the Constitutional Court, the state has a significant margin of discretion when it comes to the exercise of the duty of protection.

63 BverfG Beschluss des Ersten Senats vom 24.3.2021 – 1 BvR 2656/18, available in English at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html> accessed 1 January 2023; Bundes-Klimaschutzgesetz vom 12. Dezember 2019, Bundesgesetzblatt I Seite 2513.

64 ibid paras 1--3.

65 Section 1 Bundes-Klimaschutzgesetz (n 63).

66 BverfG Beschluss des Ersten Senats (n 63) para 40.

67 Rupert Scholz, 'GG Art. 20a' in Günther Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar Werkstand 97. EL* (C.H. Beck 2022) para 9.

3.2.1 Environmental Protection in German Constitutional Law

A constitutional environmental provision was first introduced in article 20a of the German Basic law in 1994. The introduction of such a provision had been debated since the 1970s.[68] A provision on animal welfare was added in 2002. The constitutional environmental and animal protection provision currently reads:

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

In accordance with article 20a, German constitutional law categorises environmental protection and animal welfare as so-called *state objectives* (*Staatsziele*). State objectives are a named category of constitutional provisions contained in the Basic law, directed to the state in its legislative, executive and judicial capacity.[69] State objectives lay down particular goals rather than specify the means by which these goals are to be reached. At the same time, they are more than mere declarations of policy; they establish an obligation to take action in a particular direction, towards a defined end.[70] Article 20a creates an obligation to create or improve the law over time, in favour of ecological interests. But it is the legislature that determines the concrete steps to take to fulfil its obligation, and to balance interests in protecting the environment against other interests. The environmental state objective is, generally speaking, considered on equal footing as other state objectives. It does not create an obligation to give more weight to environmental protection than any other constitutionally protected interest.[71] The existing standard of protection may not be lowered, and it is considered that existing legislation must be adapted according to advancing scientific insights. It has also been argued that the environmental state objective requires the legislature to take proactive legislation when environmental harm can reasonably be expected.[72]

The German constitutional environmental provision is justiciable, that is, any measure adopted to fulfil the obligations of article 20a can be made subject to judicial review. Constitutional procedural law however provides that, in order for a constitutional complaint to be admissible, claimants have to argue that their constitutional subjective rights, as protected by the Basic law, have been violated. It has been clear from the outset that article 20a—formulated as it is, as a state objective—does not confer a subjective constitutional right on individuals.[73] Therefore, a constitutional complaint cannot be admitted on the basis solely of a proposed violation of the constitutional environmental protection provision. Article 20a also does not empower individuals to bring claims against administrative decisions or otherwise to take legal action.[74] While the introduction of a constitutional *right* to a healthy environment has been debated in Germany, it has been considered that the practical value of such a right is questionable since the adequate level of environmental quality cannot be defined in the constitution.[75] Still, the

68 Federal Law Gazette I, p. 3146. At the time of the introduction of article 20 a, provisions on environmental protection had already been introduced in a number of German federal state (*Land*) constitutions. Notably, already the 1919 Weimar Constitution contained a provision declaring that 'monuments of nature' and 'the countryside' are to be protected by the state. See article 150(1) of the Weimar Constitution; Stefan Huster and Johannes Rux, 'GG 20a' in Volker Epping and Christian Hillgruber (eds) *Grundgesetz - Aktueller Kommentar*, (C.H. Beck 2022) para 2.

69 Claudia E Haupt, 'The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause' (2010) 16 Animal Law Review 223.

70 Sabine Schlacke, *Umweltrecht* (Nomos 2019) 59.

71 Huster and Rux (n 68) 40.

72 Haupt (n 69) 229.

73 Art. 93(1) Nr. 4a Basic law; Scholz (n 67) 12; BverfG Beschluss des Ersten Senats (n 63) para 112.

74 Schlacke (n 70) 59.

75 ibid.

Constitutional Court can review the constitutionality of legislation in light of article 20a within constitutional complaint proceedings, if a complainant argues that a constitutionally protected human right should be interpreted in light of the constitutional environmental provision, and if the complaint is admitted for review. It bears noting that environmental organisations generally do not have legal standing within a constitutional complaint procedure in Germany, unless their own subjective rights are alleged to have been violated.[76]

3.2.2 The application of the German constitution in *Neubauer*

The Federal Constitutional Court examined whether the German state had failed to live up to its duty of protection (*Schutzpflicht*) or taken any action that unconstitutionally limited the claimants' freedom (*Abwehrrecht*). It found that the duty of protection flowing from the right to life and physical integrity in article 2(2) of the Basic law, encompasses a duty to protect life and health against the risks posed by climate change. Therefore, the legislature has a constitutional obligation to ensure protection against climate-related extreme weather events such as heat waves, forest fires, hurricanes, heavy rainfall, floods, avalanches and landslides.[77] Since climate change can damage property, the state also has a duty of protection based on article 14 of the Basic law in relation to property risks caused by climate change.[78] Furthermore, the Constitutional Court continued, the duty of protection encompasses obligations towards future generations, as stated in article 20a. In fulfilling these duties of protection, the Constitutional Court noted, the state has a margin of discretion and evaluation as well as leeway in terms of design.[79] The measures taken to fulfil the duty of protection, such as the adoption of the Climate Change Act, were not so inadequate as to fall outside that margin, the Court concluded.[80] The duty of protection stemming from articles 2(2) and 14 of the Basic law had thus not been violated.

The Constitutional Court then considered whether the Federal Climate Change Act affected the freedom of the complainants. It noted that article 2(1) of the Basic law protects the general freedom of action, including 'the numerous forms of private, professional and economic activity that still directly or indirectly cause CO_2 to be released into the Earth's atmosphere'.[81] Paying attention to the constitutional environmental provision in article 20a of the Basic law and the national CO_2 budget, defined by the legislature, the Court concluded the Federal Climate Change Act creates disproportionate risks that the freedom of individuals will be impaired in the future.[82]

In short, the reasoning of the Court was the following. To the extent that the exercise of the fundamental right to freedom involves the emission of CO_2, it is limited by legislative measures that take climate action in accordance with article 20a.[83] If such measures—in particular those that determine the amounts of presently allowed CO_2 emissions—are less strict today, more stringent restrictions will be necessary in the future. Losses of freedom are then likely to be greater, as the timeframe for transitioning to climate-neutrality is shortened. Future generations will bear a greater burden than present ones:[84]

76 In *Neubauer*, the complaint brought by environmental organisations was declared inadmissible. BverfG Beschluss des Ersten Senats (n 63) para 136. See Gerd Winter,'The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection' (2021) 34 JEL 2, 9.
77 BverfG Beschluss des Ersten Senats (n 63) para 148.
78 ibid para 171.
79 ibid para 152.
80 ibid paras 151–157, 172.
81 ibid para 184.
82 ibid para 183.
83 ibid para 185.
84 ibid para 186.

> It is true that any exercise of freedom involving CO_2 emissions would essentially have to be prohibited at some point anyway because global warming can only be prevented if anthropogenic concentrations of CO_2 in the Earth's atmosphere do not rise any further. However, if the CO_2 budget were to have already been largely depleted by 2030, there would be a heightened risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments needed to enable today's still heavily CO_2-oriented lifestyle to make the transition to climate-neutral behaviour in a way that respects freedom (see para. 121 above). The smaller the remaining budget and the higher the emission levels, the less time will be left for the necessary developments. Yet the less that such developments are readily accessible, the more profoundly will holders of fundamental rights be affected by restrictions on CO_2-relevant behaviour […]

In using up significant portions of the remaining CO_2 budget, the Federal Climate Protection Act has 'an advance interference-like effect' (*eingriffsähnliche Vorwirkung*) on the freedom of the complainants, according to the Constitutional Court.

To be constitutional, the effect on fundamental rights in the future has to be justified. First, the risk of future losses of freedom has to be managed so that CO_2 reduction burdens are not unevenly distributed over time and generations, as required by the principle of proportionality and article 20a. The legislature is obliged to take precautionary measures to manage reduction burdens anticipated after 2030. As the provisions determining the amounts of presently allowed CO_2 emissions now stand, they pose considerable risk to freedom in later reduction phases. Therefore, they are not fully constitutionally justifiable according to the Constitutional Court.[85] Second, the relevant provisions of the Climate Change Act have to otherwise comply with article 20a, which obligates the legislature to take climate action.[86] The obligations stemming from article 20a of the Basic law require that the natural foundations of life are treated with such care as to leave them in such condition that future generations who wish to continue preserving these foundations are not forced to engage in radical abstinence. Therefore, the Court argued, it is constitutionally required that the transition to climate neutrality be planned and timely. The concrete steps to take in order to further reduce greenhouse gas emissions must be defined well in advance and in such detail that the required development and implementation processes are ensured. In light of the above, the Constitutional Court concluded that the Federal Climate Change Act, which required the Federal government to draw up a plan for further reductions of greenhouse gases only in 2025, by means of ordinance, was not adequate to limit global warming to well below 2°C and preferably 1.5°C above pre-industrial levels. Moreover, it insufficiently defined the further reduction pathway required in order to achieve climate neutrality by 2050. According to the Constitutional Court, it is also doubtful whether a plan setting out annual emission amounts after 2030 allows enough time to act if it is issued in 2025. The planned measures must extend sufficiently far into the future so as to be capable of proportionally distributing CO_2 reduction burdens over time.

3.2.3 Comment

The German constitutional environmental provision creates an obligation and a requirement for the legislature to adopt implementing legislation: 'the state *shall* protect the natural foundations of life and animals by legislation'. The wording of the constitutional provision and its categorisation as state objective makes clear that it is directed at the legislature, and that the constitutional environmental provision alone cannot be used in a constitutional complaint to claim

85 ibid para 195.
86 ibid para 196.

the unconstitutionality of ordinary law. The more precise content and contours of the German constitutional environmental provision is to be determined by the legislature, rather than the judiciary. In other words, the provision is contrajudicative. The German constitutional environmental provision can thus be categorised as directive principle.[87] The status of the German constitutional environmental provision is uncontroversial in this sense, and not subject to discussion by the Constitutional Court in *Neubauer*. The wording and structure of article 20a is thus not interpreted by the Court, and the intentions of the drafters of the constitutional environmental provision are not explicitly considered, as they were in *Arctic Oil*.

Neubauer illustrates the fact that the Constitutional Court can play a significant role in giving effect to a constitutional environmental provision even if the provision does not confer rights. First, the constitutional environmental provision informed the Court's interpretation of fundamental rights. Importantly, the Constitutional Court relied on the prospective content of article 20a to examine the potential violations of the future rights of the complainants resulting from climate change. Second, the Constitutional Court emphasised that the obligation of the legislature under article 20a encompasses the duty to take measures with respect to climate change. It further held that, to the extent that the German legislature carries out this obligation, the legislation adopted towards that end is to be regarded as a 'constitutionally relevant specification of the climate goal contained in the Basic law'.[88] This statement lends strong support to the thesis that norms created by implementing legislation ought to be regarded as having constitutional status.

Indeed, in *Neubauer*, the Constitutional Court concluded that in specifying the temperature limit to 2°C and preferably to 1.5°C in the Federal Climate Protection Act, the legislature had provided direction for the climate action required under article 20a. This suggests that, in exercising its legislative power for the purpose of fulfilling its obligations under article 20a, the German legislature itself creates constitutional norms. The Constitutional Court then assessed whether, through the concrete measures adopted in the Climate Protection Act, it will be possible to reach the objective that the legislature itself has formulated within its constitutional mandate. Because it insufficiently planned the necessary steps towards reaching the reduction targets, the Constitutional Court concluded that the Climate Protection Act is unconstitutional. Directed legislation, that is, legislation adopted to fulfil the constitutional obligation to take climate action, thus binds the legislature in its further efforts towards that end, according to the Constitutional Court. Through its interpretation of article 20a and the directed legislation adopted to meet the obligation in the constitutional environmental provision, the Constitutional Court played an important role in giving effect to constitutional environmental protection.

3.3 *l'Affaire du siècle*: A Duty to Repair Damage Done to the Ecosystem Itself

In its *l'Affaire du siècle* decisions of 3 February and 14 October 2021, the administrative court of Paris (*Tribunal administratif de Paris*) considered whether the French state could be held liable for not living up to the greenhouse gas emission reduction targets it had undertaken by entering into international agreements and adopting legislation on climate change mitigation and adaptation.[89] Oxfam France, Notre affaire à tous, Fondation pour la nature et l'homme, and Greenpeace France, along with intervenors, had sought to compel the French state to redress

87 Weis (2017) (n 22) 920.

88 BverfG Beschluss des Ersten Senats (n 63) para 208.

89 Tribunal administratif de Paris, jugement du 3 février 2021 dans l'affaire N°1904967, 1904968, 1904972, 1904976/4-1; Tribunal administratif de Paris, décision du 14 octobre 2021 dans l'affaire N°1904967, 1904968, 1904972, 1904976/4-1. For a more detailed description of the background, procedure and outcome of this case, see Christel Cournil, Antoine Le Dylio and Paul Mougeolle. 'L'affaire du Siècle: French Climate Litigation between Continuity and Legal Innovations' (2020) 1 CCLR 40.

ecological and moral damage under the French Civil Code.[90] The claimants and intervenors argued that the French state has a general obligation to combat climate change, derived from the French Energy Code, the Constitutional Environmental Charter and France's European and international law commitments.

The claimants argued that the state had failed to fulfil this general obligation in two ways. First, by not taking sufficient measures to ensure the respect of existing international commitments and national sectoral legislation aiming to reduce CO_2 emissions, to transition to renewable energy sources, to improve efficient energy consumption and to adapt to the effects of climate change. And second, by failing to adopt measures aimed at limiting the increase of the Earth's temperature to 1.5°C, as compared to pre-industrial levels, required by the Paris agreement. By failing to live up to these obligations, the claimants argued, the French state was liable for ecological and moral damage under the civil law. Ecological damage (*préjudice écologique*) is a specific form of damage under French civil law, introduced in 2016.[91]

3.3.1 Environmental protection in French constitutional law

In France, like in Norway and Germany, proposals for the introduction of a constitutional right to the environment began in the 1970s.[92] It was not until 2005 however, that France adopted and gave constitutional status to the Environmental Charter (*Charte de l'environnement*). The Charter lays down a number of environmental rights, duties, and principles. Among those are a right to live in a balanced environment, respectful of health (article 1), a duty to prevent and repair any damage done to the environment (articles 3 and 4), and the precautionary principle (article 5).[93] The aim of the Charter is to place the protection of the environment on equal footing with other constitutionally protected rights.[94] While the environment to some degree enjoyed constitutional protection also prior to the adoption of the Environmental Charter, the Charter explicitly proclaimed the constitutional status of environmental protection, signalling its fundamental importance.[95]

The Environmental Charter can be invoked in any court. The Constitutional Council (*Conseil Constitutionnel*) may review the constitutionality of both new and existing legislation in light of the Environmental Charter. First, it can review the constitutionality of the law prior to its adoption.[96] Second, when there is doubt as to the compatibility of existing law with provisions of the Environmental Charter establishing constitutional rights and liberties, and that law is applicable in a particular case pending before a court, the constitutionality issue can, under certain conditions, be referred to the Constitutional Council (the so-called *question prioritaire de constitutionnalité, QPC*). This possibility of constitutional judicial review *a posteriori* was introduced in 2008.[97] Under French law, there is no generally available legal action allowing abstract constitutional judicial review. When legislation has been adopted that implements the provisions of the Environmental Charter, the legality of an administrative action is assessed in light

90 The Féderation Nationale d'Agriculture Biologique, the Fondation Abbé Pierre and France Nature Environnement acted as intervenors in the proceedings.

91 Article 1246–1252, Code civil. A law on ecological damage was introduced in France in 2016, following the recognition by courts of an obligation to repair damages done to the environment itself in the *Erica* case. See loi 2016-1087 du 8 août 2016; Cour de cassation, criminelle, Chambre criminelle, 25 septembre 2012, 10-82.938.

92 See e.g. Commission spéciale sur les libertés, AN, no. 3455, 21 December 1977, art. 10 of the proposal.

93 Articles 1 and 2, Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement; article 1, Charte de l'environnement.

94 This is mentioned in the preamble. The French Constitutional Council early recognised that the Charter has the same status as the Declaration on the rights of humans and citizens from 1789 and the 1946 Constitution. Conseil constitutionnel, décision 2008-564 DC (2008). Both the 1789 Declaration and the 1946 Constitution contain provisions that, in a less explicit and partly indirect manner, protect the environment.

95 Agathe Van Lang, *Droit de l'environnement* (PUF 2016) 159.

96 Loi constitutionelle n° 74-904 du 29 octobre 1974 portant révision de l'article 61 de la Constitution.

97 Article 61-1, Constitution du 4 octobre 1958.

of that legislation, rather than the constitutional provisions (as mentioned, the constitutionality of the legislation as such can be made subject to review via the *QPC*).[98] The Constitutional Council has held that it does not have a general power to determine how the right to live in a balanced environment respectful of health is to be realized in practice. It may thus not replace a determination made by Parliament.[99] In some Environmental Charter provisions, such as for instance articles 3 and 4, it is said that the legislature is to define the concrete steps that are to be taken in advancing the rights and duties set out in the Charter. The Charter sets out rights and duties that apply to all public authorities in their respective areas of competence.[100] In addition, the Constitutional Council has held that the right to live in a balanced environment respectful of health, and the duty to preserve and ameliorate the environment (articles 1 and 2) also apply to private persons.[101] The Environmental Charter establishes constitutional duties to prevent damage to the environment itself, and to repair such damage if it nevertheless occurs (articles 3 and 4). In *l'Affaire du siècle*, articles 1, 2, and 3 were invoked before an administrative court, the Paris Tribunal, to establish the general obligation of the state to combat climate change.

3.3.2 The application of the French Constitutional Environmental Charter in l'Affaire du siècle

The administrative court delivered its judgment in *l'Affaire du siècle* on 3 February 2021, and a subsequent decision on injunctive relief on 14 October 2021.[102] In the judgment, the court indeed found that the French state has a general obligation to take measures to prevent climate change, that it derived from article 3 of the Constitutional Environmental Charter, the Paris agreement, Decision 406/2009/EC of the European Parliament and of the Council on greenhouse gas emissions reduction, and the legislation adopted to meet these requirements of international, EU and French constitutional law.[103] Article 3 of the Constitutional Environmental Charter reads:

> Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage.

Through the examination of scientific evidence, the court found that the rise in temperature caused by climate change has had a number of socioeconomic and ecological effects in France. For example, the court held that the rise in temperature would accelerate the shrinking of glaciers, cause flooding and erosion of coastal areas, all of which will affect human health and nature. For the court, these impacts amounted to ecological damage for which the French state is in part liable, in accordance with civil law.[104] It bears noting, that according to another decision by the Constitutional Council, the law on ecological damage is to be regarded as specifying the content of the obligation in article 4 of the Constitutional Environmental Charter.[105] Article 4 reads:

98 Conseil d'État, 19 June 2006, *Association Eau et rivières de Bretagne*. Michel Lascombe, Xavier Vandendriessche and Christelle de Gaudemont, *Code Constitutionnel et des droits fondamentaux, Annoté et Commenté* (Dalloz 2017) 405.

99 Conseil constitutionnel, décision n° 2012-282 (2012) para 7.

100 Conseil d'État, 3 October 2008, *Cne d'Annecy*.

101 Conseil constitutionnel, décision n° 2011-116 (2011) para 5.

102 Jugement du Tribunal administratif de Paris rendu le 2 Mars 2021 dans l'affaire N°1904967, 1904968, 1904972, 1904976/4-1; Décision du 14 octobre 2021 dans l'affaire N°1904967, 1904968, 1904972, 1904976/4-1.

103 ibid paras 18-21. To speak of a general obligation in this context was new in relation to earlier case law. See Christel Cournil and Marine Fleury, 'De « l'Affaire du siècle » au « casse du siècle »? Quand le climat pénètre avec fracas le droit de responsabilité administrative' (2021) La Revue des droits de l'homme, Actualités Droits-Libertés 4.

104 Jugement du Tribunal administratif de Paris rendu le 2 Mars 2021 (n 102) para 16.

105 Conseil Constitutionnel, décision n° 2020-881 (2021) para 7. See further, Gilles J. Martin, 'La definition du prejudice écologique à la lumière de l'article 4 de la Charte de l'environnement. À propos de Cons. Const., 5 févr. 2021, n° 2020-881 QPC' (2021) 8-9 La Semaine Juridique Edition Générale 217.

> Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.

The court finally examined whether the action taken by the state was insufficient to meet its general obligation to take climate action, and if so, whether it had caused and contributed to the worsening of the ecological damage. In this regard, the claimants had argued that the state was at fault for several reasons; CO_2 reduction targets had not been reached, the transition to renewable energy sources had not taken place in accordance with the objectives set, adaptation to climate change was insufficient, and so forth. The court agreed that the action taken was insufficient. However, it considered that, since the claimant had not asked for compensation in kind, as required by the Civil Code, the ecological damage could not be repaired.[106] Only with respect to the failure of the state to reduce emissions in accordance with its own CO_2 budget, did the court find that the state was liable. Consistent with the contrajudicative model, the court interpreted and applied legislation, but did not replace the legislature's scientific evaluations with its own.

3.3.3 *Comment*

The French Constitutional Environmental Charter contains a number of provisions, some of which are framed as rights, and others as obligations for different actors. As noted above, it is in particular two provisions of the Environmental Charter that come into play in *l'Affaire du siècle*. Both articles 3 and 4 speak of obligations 'of every person' to take a particular action. Also, both provisions explicitly refer to ordinary legislation ('la loi'), which is to define more specific conditions for the realisation of the obligations under the respective provisions. In other words, they confer a constitutional mandate on the legislature to adopt directed legislation that defines the details of the constitutional provisions. By conferring binding obligations on the legislature, articles 3 and 4 take the form of directive principles.

Unlike the Norwegian and German cases, *l'Affaire du siècle* does not involve a constitutional judicial review of legislative or administrative action. Instead, the claimants sought to hold the state responsible for damage done to the ecosystem in accordance with French civil law. The claimants further successfully argued that causing such damage constitutes a breach of a general duty of the French state to protect the climate.

The court relied on article 3 of the Charter (together with other sources of law, such as legislation adopted to implement international climate commitments) to establish that the state has a general duty to protect the climate. The court emphasised that through its various engagements, expressed in legislation and international commitments, the state itself had identified steps to take in order to combat climate change.[107] Therefore, and although article 3 of the Environmental Charter makes no explicit mention of the climate, the court concluded that a general obligation to mitigate climate change can be derived from it. The court thus apparently treated ordinary legislation as a source of constitutional norms.[108] Furthermore, the court linked the general obligation to mitigate climate change to the obligation under ordinary law to repair ecological damage. As concluded by the Constitutional Council in another case, the latter obligation is to be considered constitutionally mandated by article 4 of the Constitutional Environmental Charter.[109] Although the Paris Tribunal did not explicitly refer to it as such *l'Affaire du siècle*, the

106 Jugement du Tribunal administratif de Paris rendu le 2 Mars 2021 (n 102) para 37. For a critique of the claims in this regard and a discussion of the subsequent decision on injunctive relief, see Julien Bétaille 'Le préjudice écologique à l'épreuve de l'« affaire du siècle » : un succès théorique mais des difficultés pratiques' (2021) 38 AJDA 2228.

107 Jugement du Tribunal administratif de Paris rendu le 2 Mars 2021 (n 102) paras 22–34.

108 Weis (2017) (n 22) 940.

109 Martin (n 105); Bétaille (n 106) 2230.

legislation on ecological damage can be considered directed legislation, which gives content to the constitutional environmental provision.

In *l'Affaire du siècle*, the court did not review the constitutionality of ordinary legislation, it rather interpreted ordinary legislation enacted to give effect to constitutional environmental norms. Consequently, it did not address the question of whether, through the adoption of legislation, the state had fulfilled its constitutional environmental obligations. Nevertheless, the court intertwined the interpretation of the law on ecological damage with the general obligation to protect the climate, in a manner that articulated the purposes of both articles 3 and 4. It concluded that, by not taking adequate action, the state did not live up to the requirements of ordinary legislation that it had adopted to give scope and meaning to the fundamental value of protecting the environment under the Constitutional Environmental Charter.

Both in terms of constitutional design and of how the constitutional environmental provisions are applied in *l'Affaire du siècle*, the legislature is given a prominent role in defining the more concrete form of these particular provisions of Constitutional Environmental Charter. Even so, in the case, the state was found to be in breach of a general obligation it itself had created.

4. ENVIRONMENTAL CONSTITUTIONALISM AND THE ALLOCATION OF INSTITUTIONAL RESPONSIBILITY FOR CLIMATE CHANGE MITIGATION

As shown in the previous section, there are important differences in the design of constitutional environmental protection in Norway, Germany and France. For instance, both the French Charter and Norwegian provision explicitly include rights as well as duties, whereas the German provision is explicitly excluded from the human rights section of the Basic law, and characterised as a state objective. Nevertheless, the above analysis supports Weis's argument that directive principles and other state obligations may be more important than rights in developing and understanding environmental constitutionalism, at least in these cases.

Climate change litigation, and the resulting judicial decisions, have often been criticised on the grounds of democratic legitimacy.[110] Critics have argued that courts act contrary to the principle of separation of powers when they decide climate cases and that climate change is a political matter that should be the responsibility of the legislature, rather than the judiciary.[111] In the following, we examine the roles of the court and legislature in light of courts' rulings in the above examined cases. The courts' application of environmental directive principles in these cases helps clarify the roles of legislatures and courts in effectuating climate change mitigation, which may alleviate concerns that the climate litigation trend could lead to undemocratic results.

4.1 The Role of the Legislature

The analysis in Section 3 confirms that in Norway, Germany, and France, the primary institutional responsibility for climate change mitigation is constitutionally allocated to the legislature. Even where constitutional environmental provisions name rights, a primary function of the provisions is to create a constitutional obligation for the legislature to take climate mitigation measures.

110 E.g., Lucas Bergkamp and Jaap C Hanekamp. 'Climate change litigation against states: the perils of court-made climate policies.' (2015) 24 Eur. Energy & Envtl. L. Rev. 102.

111 Described in Burgers (n 3) 58.

Neubauer and *l'Affaire du siècle* confirm that directed legislation, that is, legislation adopted to fulfil constitutional obligations, can be a source of new constitutional norms. In these cases, the courts consider climate commitments reflected in ordinary legislation to implement the constitutional obligation to mitigate climate change. When the German and French legislatures enact directed legislation, courts treat them as constitutionally bound by the future directions set out in that legislation. For example, in *Neubauer*, the Constitutional Court relied on the emission reduction targets set out in legislation, in ruling that the Climate Protection Act must set out a concrete and specific plan for future CO_2 reduction in order to be constitutional. Legislation enacted to mitigate climate change is mandated by the constitution, and is therefore of constitutional relevance, according to the Constitutional Court. In *Arctic Oil* as well, the Norwegian Supreme Court confirmed that the legislature has the primary institutional responsibility for climate change mitigation. Accordingly, it held that the Court neither could nor should define any independent threshold. Indeed, judicial review in relation to a threshold independently determined by the court did not take place in any of the three cases. In other words, the courts operated outside of what Weis refers to as the traditional 'judicial rights-enforcement paradigm'.[112]

4.2 The Role of Courts

Where institutional responsibility for environmental protection or climate change mitigation is allocated to the legislature, it might appear that courts' role in giving effect to these constitutionally protected social values is quite limited. However, as also argued by Weis and illustrated by the above cases, such a conclusion would be incorrect. Indeed, all three cases analysed in this article resulted in new constitutional environmental norms being announced by the courts. This demonstrates that—even where institutional responsibility for climate change mitigation is allocated primarily to the legislature—courts have a role to play with respect to constitutional environmental protection.[113]

First, it remains the role of the court to interpret legislation, even when such legislation is constitutionally obligatory. Where the court finds that legislation has been adopted to meet the constitutional obligation to mitigate climate change, it is the role of the court to give it appropriate weight. In our view, *L'Affaire du siècle* is a good example of how a court gives weight to the constitutional obligations of preventing environmental damage and compensating any damage done to the environment (articles 3 and 4 of the Environmental Charter) in its interpretation of directed legislation.

Second, where a constitutional environmental provision does not itself confer judiciable rights, it can be used by courts in the 'greening' of other constitutional rights.[114] This is illustrated by *Neubauer*, in which the constitutional environmental directive principle informed the interpretation of the rights to life and property, and the freedoms protected by the Basic law.

Undoubtedly, questions nonetheless remain with respect to the role of courts in climate cases. As illustrated in particular by *Arctic Oil*, one such question is what the role of courts is in determining whether the legislature has acted in accordance with the constitutional obligation. According to the reasoning of the Norwegian Supreme Court, it is only when the legislature 'grossly disregards' its duties under the constitutional environmental provision, that the court can review its action (or inaction). What this means, in more practical terms, was not further explained in the judgment.

112 Weis (2017) (n 22).
113 Weis (2018) (n 10) 866.
114 The European Court of Human Rights has long engaged in such a 'greening' practice. See e.g. Natalya Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds.) *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (CUP 2019) 99.

Weis points to a risk of 'collapse into political constitutionalism' if courts defer too much to legislative 'judgments about the scope and content of the legislature's own constitutional obligations'.[115] *Artic Oil* may be argued to illustrate the risk. By giving so much discretion to the legislature, the Supreme Court also allows the latter to define the content of its constitutional obligations. As argued by Christina Voigt, this decision may have been impacted by 'the motivation to align the law with the prevailing political preferences for unlimited petroleum exploration, extraction and export.'[116] Whether or not this indeed was the case, it is obviously problematic if courts do not resist political considerations in their interpretation of constitutional environmental provisions. Weis argues that, in response to this risk, it is a challenge of constitutional law theory to 'provide an account of judicial role that is compatible with the allocation of institutional responsibility for fundamental social values to the political branches, yet simultaneously resists this collapse'.[117] By drawing attention to the allocation of institutional responsibility for climate mitigation and highlighting the role of the courts in enforcing constitutionally directed legislation, we hope to contribute to developing this theoretical bulwark.

5. CONCLUSION AND FURTHER THOUGHTS: THE PROOF IS IN THE PUDDING, AND THE PUDDING IS MADE BY STRATEGIC LITIGANTS

Our analysis of the Norwegian, German and French constitutional environmental provisions and climate cases confirm that these provisions function, at least to a considerable degree, as directive principles in the manner described by Weis. In other words, rather than establishing enforceable rights to a healthy environment, the Norwegian, German and French constitutional environmental provisions at issue in the examined cases, while obligatory, are primarily addressed to non-judicial branches of government. In the three cases analysed, the constitutional environmental provisions were interpreted in a manner that gives the legislature a prominent role in defining the constitutional value of environmental protection. However, while they do not operate within the paradigm of traditional constitutional rights, these provisions are meaningful to the development of constitutional norms. Even when constitutional provisions on environmental protection are primarily directed at the legislature, these provisions may be litigated. Courts must determine whether the legislature has fulfilled its constitutional duty in legislating, and give appropriate weight to constitutionally mandated legislation. The legal effects of directive principles are therefore tangible.

Our examination of three European climate cases supports Weis' argument that the right to a healthy environment, although included in some form in most constitutions, may not be the predominant form of environmental constitutionalism. Notably, in contrast to the cases examined by Weis, all three cases examined in this article are in civil law jurisdictions, which traditionally are more focused on the legislature as guardian of fundamental rights and values than common law jurisdictions. In such constitutional contexts, it arguably becomes even more crucial to look closely at courts' role in determining the scope and content of constitutional environmental provisions.

The above analysis further demonstrates that litigation can both foster and restrain the development of the impact and meaning of constitutional environmental provisions. This means that litigants—and the legal arguments they make—thus also contribute to the creation of constitutional environmental norms. It is therefore essential for litigants to take the role of the legislature into account when formulating their constitutional claims. As Justice Arnfinn Bårdsen of the

115 Weis (2018) (n 10) 869.
116 Voigt (n 29) 708.
117 Weis (2018) (n 10) 869.

Norwegian Supreme Court wrote, '"The proof of the pudding is in the eating"… It is usage that verifies that the Bill of Rights is not a paper tiger, but a genuine body of operative constitutional law.'[118] Regardless of whether a constitutional environmental provision is framed as a right or obligation, it is not possible to say what it means and what its impact will be until it is utilised, either by courts or other branches of government.

Strategic litigation is thus not only essential for understanding environmental constitutionalism, the arguments and strategies used in such litigation impact how cases are decided, and what these provisions will mean. Peel and Osofsky have argued that, 'a more systematic approach to designing and implementing climate change litigation programmes will increase their chances of functioning in a strategic fashion to promote positive regulatory outcomes'.[119] We find that this conclusion is valid also with respect to promoting a better understanding of the meaning and implications of constitutional environmental provisions for climate law. Those engaged in strategic litigation therefore have a great responsibility as their work impacts the content and evolution of constitutional environmental norms. As state obligations in the form of constitutional directive principles have proved to be a powerful form of environmental constitutionalism capable of resulting in judicial enforcement, litigants should not overlook the potential of these state obligations to develop constitutional environmental law, particularly in conjunction with various substantive rights.

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118 Arnfinn Bårdsen, 'Interpreting the Norwegian Bill of Rights', Annual Seminar on Comparative Constitutionalism 21-22 November 2016 Faculty of Law, University of Oslo, para 3, available at <https://www.venice.coe.int/CoCentre/Bardsen_Arnfinn_Interpreting_the_NOR_bill_of_rights.pdf> accessed 1 January 2023.

119 Jacqueline Peel and Hari M Osofsky, 'Litigation as a Climate Regulatory Tool' in Christina Voigt (ed) *International Judicial Practice on the Environment. Questions of Legitimacy* (CUP 2019) 335.