A Leap Forward for Biodiversity Litigation

The *Naturschutz-Klage* in the Biodiversity and Climate Litigation Context

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On 23 October, 2024, BUND (Friends of the Earth Germany) and several individuals filed a constitutional complaint mirroring the *Neubauer* case, but directed at the biodiversity crisis. The claimants seek a declaration from the Federal Constitutional Court (FCC) that the lack of a coherent scheme for the protection of biodiversity infringes fundamental rights and seek an order from the court for the legislature to take the necessary measures to adopt an appropriate, legally binding protection scheme within a clear timeline.

This case presents a significant development in the field of strategic biodiversity litigation as the first systemic government framework case. It can be seen as the *Urgenda* of biodiversity litigation – but very much carried by previous developments in climate change litigation which seem to enable it to make a "rights leap" in biodiversity litigation.

Context of biodiversity litigation

As widely discussed on Verfassungsblog, climate litigation has grown rapidly in the last decade, with 70% of a total 2,666 cases analysed in Setzer and Higham's 2024 snapshot report filed since 2015. Despite the similarly broad scope and urgent nature of the biodiversity crisis, as well as the inherent interlinkage of the biodiversity and climate crisis, there has so far been no parallel growth in systemic biodiversity litigation. Several factors, besides the overall lower level of awareness of biodiversity issues, appear relevant to the diverging trends.

Less systemic

First, while biodiversity litigation is nothing new, most biodiversity cases so far have had a narrower approach, being either site- or species-specific (e.g. *In re Parque Isla Salamanca*) or focusing on specific issues such as pesticides (e.g. *Justice pour le Vivant*) or water pollution through nitrates (e.g. OVG Lüneburg 7 KS 8/21). While these cases may have been strategic – in e.g. protecting a unique habitat or banning harmful pesticides – their aim has not been to address the biodiversity crisis as such, making them less systemic.

No framework law

Second, as is the main point of the claimants in the *Naturschutz* complaint, most jurisdictions do not have an overarching biodiversity framework law, comparable to a national climate law (the Bundes-Klimaschutzgesetz in this case). It seems likely that this is also related to the differences in the international law structures. There is no Paris Agreement equivalent to the Convention of Biological Diversity (CBD) that sets out binding obligations clarifying the broad language of the CBD or requiring an equivalent to Nationally Determined Contributions (NDCs). While the Kunming-Montreal Global Biodiversity Framework (GBF), adopted in December 2022, sets out targets for 2030, they cannot be equated with a 1.5°C threshold or a clear "biodiversity budget". It is also not legally binding.

As highlighted by Higham, Setzer and Bradeen, framework climate litigation has focused on the ambition level of the existing climate laws or NDCs, or on the inadequate implementation of the framework. While not a bar to all systemic litigation, the current lack of a comparable framework in the biodiversity context appears relevant to the lack of biodiversity framework cases.

Higher complexity of biodiversity crisis and indicators

Thirdly, the biodiversity crisis and its indicators are inherently more complex. While climate progress can be tracked through greenhouse gas (GHG) emissions or global temperature increase, upon which

emission budgets can in turn be calculated, there is no such indicator for the biodiversity crisis.

Nonetheless, even though there is no comparable headline indicator, scientific evidence of the extent of the biodiversity crisis is as well-recognized as that supporting climate science. Like IPCC reports, IPBES summaries for policymakers are agreed upon by the IPBES government members (currently 147 states).

Overview of the complaint

BUND's *Naturschutz-Klage* (nature protection complaint) broadly follows the structure of the climate cases that it mirrors whilst repeatedly highlighting that the scale, urgency, and impact of the biodiversity crisis are even more severe than those of its climate counterpart.

It sets out the scientific evidence of the biodiversity crisis, its impacts on humans and the existing biodiversity-related law and policy landscape (such as the EU Birds and Habitats Directives, the Water Framework Directive or the new Nature Restoration Regulation), arguing that it is inadequate to address the crisis.

It then turns to the individual claimants, who are individuals as well as registered NGOs (BUND Germany and two regional BUND groups), setting out how they are affected by the biodiversity crisis and arguing that this constitutes an interference with their right to life (Art.2(2) Grundgesetz (GG)), right to property (Art.14(1) GG), and right to an ecological minimum standard of living. In addition, the complaint argues that the failure to take adequate biodiversity protection measures now interferes with the intertemporal guarantee of freedom (Art.20a GG).

Reliance on CBD

The claimants rely fundamentally on Art.1 CBD, which sets out the objectives of the convention, including "the conservation of biological diversity" and argue that this is comparable to the 1.5°/2° temperature limit of Art.2(1) of the Paris Agreement. Despite academic suggestions that the Kunming-Montreal GBF could be used as a benchmark for future litigation (e.g. Rodríguez-Garavito and Boyd or Henn et al), the claimants argue that the timeline of the GBF is too lax by setting objectives for 2030 and thus incompatible with the objective of the CBD to conserve biodiversity since 1993.

Indicators

To demonstrate the urgency of the biodiversity crisis, the claimants refer to a mix of different indicators. Besides numerous reports highlighting the overall decline of biodiversity in Germany, they particularly reference Rockström et al's work on planetary boundaries to argue that the danger of the biodiversity crisis is already significantly more advanced and urgent than that of the climate crisis (p. 33ff). They highlight that to maintain safe planetary boundaries, healthy ecosystems need to cover 50-60 % of the global land area, while in Europe, the percentage of broadly healthy ecosystems only constitutes 20 % of the land area (p. 36).

In addition, the complaint refers to extinctions per million species-years (E/MSY), arguing that the current extinction rate of more than 100 E/MSY or even 1000 E/MSY is dangerously above the rate of 10 E/MSY that has been identified as the extinction rate that can sustain the biodiversity essential for human life (p. 35).

However, the complaint also stresses that the difficulty of quantifying the target exactly (unlike a 1.5°/2°C target) does not absolve the state from its obligation to act. They stress that the 30-year long-standing obligation to stop biodiversity loss is clear enough to require the state to establish a coherent protection framework to halt the continuing downward trend (p.130).

Biodiversity litigation's early stages of a rights turn

Peel and Osofsky famously argued in 2018 that climate litigation, illustrated by cases such as *Leghari* and *Urgenda,* had taken a "rights turn". In 2023, Rodríguez-Garavito and Boyd then argued that biodiversity litigation was in the early stages of a similar rights turn. In analysing an original dataset of 49 rights-based biodiversity cases, they categorised existing cases according to those 1) based on the right to a healthy environment, 2) focused on other universal human rights, 3) involving the rights of indigenous people, and 4)

centred on rights of nature. The majority of the cases mapped are from the Global South, with cases focusing on indigenous rights, the inherent connection between humans and nature or the rights of nature itself.

Rodríguez-Garavito and Boyd conclude that despite the growing reference to rights in biodiversity cases, the links between biodiversity decline and rights interferences often remain vague and are often one of many issues, with systematic cases capable of pioneering change, akin to *Urgenda* in climate litigation, still absent.

The Naturschutz-Klage as a "rights leap" in biodiversity litigation

Against this backdrop, the *Naturschutz* complaint constitutes a significant development in the biodiversity litigation landscape, appearing to be the first systemic biodiversity case and the first such case relying exclusively on human rights grounds. The case is fundamentally built upon the groundwork of rights-based climate litigation, essentially combining the *Neubauer* ruling with the European Court of Human Rights' (ECtHR) *KlimaSeniorinnen* decision

Unlike earlier climate litigation, which had to establish concepts that previously seemed unimaginable in courts worldwide, the *Naturschutz* complaint can leverage these legal precedents. It thereby appears to make a "rights leap" for biodiversity litigation, rather than merely a step in a rights-turn.

Two examples seek to illustrate this point.

Standing

First, the case builds upon the standing for individuals granted in *Neubauer* and seeks to combine it with the recent broader approach to standing for associations established by the ECtHR in *KlimaSeniorinnen*.

Even though in the *Neubauer* ruling, the FCC held that NGOs, including BUND itself, did not have standing to claim that their fundamental rights were infringed, BUND is revisiting this issue, this time equipped with the *KlimaSeniorinnen* evolutive approach to victim status that enables NGO standing. This follows the integration of the ECtHR's broad approach to standing into numerous cases filed since then, including the "Zukunftsklage" constitutional complaint of Greenpeace and Germanwatch.

Human rights interference

Second, prior cases have clarified that the climate crisis can lead to an interference with human rights (whether directly or through an intertemporal approach) and established the test for assessing whether a government is failing in its human rights obligations.

To make the link between the biodiversity crisis and human rights, the claimants refer to the many ecosystem services that biodiversity provides, highlighting humanity's dependence on nature for food security through pollination and soil health; for human health through medicinal plants, the microbiome and mental health; for flood protection; and for the economy (p.22 ff). They then argue that their rights have been interfered with due to the lack of adequate action to protect the claimants from the loss of biodiversity and the resulting loss of ecosystem services. In doing so, they combine the standard of the FCC in *Neubauer* with the further specifications by the ECtHR in *KlimaSeniorinnen*.

In *Neubauer* the court held (Rn. 152):

> *The Federal Constitutional Court will find a violation of a duty of protection if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal.*

In *KlimaSeniorinnen,* the ECtHR established a five-step test to assess whether states have remained within their margin of appreciation in complying with their Art.8 ECHR obligations to take effective climate mitigation measures. These five elements include time-bound targets, intermediate targets, demonstrated compliance efforts, monitoring and regular updates, and the timely adoption of adequate implementation measures.

Applying these criteria to the biodiversity crisis, the claimants argue that the lack of a coherent biodi-

versity framework law, with time-bound targets and related measures, therefore constitutes a breach of Art. 2(2) GG, Germany's equivalent to Article 8 of the ECHR. In the words of the FCC in *Neubauer*, they argue that the German approach to the biodiversity crisis is equivalent to "allow[ing] climate change to simply run its course, using nothing but adaptation measures", which the court gave as an example for "[a] completely inadequate approach" (Rn.157).

Conclusions

A complaint is still far from a judgment, so whether this indeed constitutes a "rights leap" for biodiversity litigation will remain to be seen. It will be particularly interesting to see how the court addresses the distinct international law and indicator landscape of the biodiversity crisis and how the ECtHR's approach to standing and discretion is applied in the domestic context.

Regardless of its judicial outcome, the complaint is likely to have impacts through enhancing political pressure and raising awareness about our fundamental dependence on biodiversity. It may also inspire actions in other jurisdictions and contribute to cross-fertilisation between climate and biodiversity cases, potentially leading to a view of these issues as two facets of a single challenge in environmental litigation.

In any case, the more important question than whether this case constitutes a "rights leap" for litigation is the question of how it will contribute to the urgently needed reversal of biodiversity loss.

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