



## Environmental Law Center

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Cécile Untermaier, Députée, l'Assemblée nationale  
Executive Committee, Green Deal Working Group  
Assemblée parlementaire franco-allemande

3 June 2020

**RE:** Statement of Prof. Dr. Kirk W. Junker, University of Cologne, Faculty of Law

Dear Members of the Green Deal Working Group of the Franco-German Parliamentary Assembly,

I am presenting this statement at the invitation of Ms. Cécile Untermaier, Member of the Executive Committee. I thank you for the invitation to address the important topic of improving administrative and judicial control in the field of environmental and climate protection and access to environmental law in Europe.

In particular, the first question regards improving the application and access to environmental law in Germany and France. The first point to be made here concerns transparency. Access to the benefits of environmental law can only be improved when those who need access know that help is possible. In Europe, understanding one's access to environmental law brings us back to the lingering question of understanding EU law. In my experience, very few Europeans, including lawyers, would be able to state whether a particular norm or procedure required by the law in his or her state is the direct application of a European regulation, the indirect application of a European directive, or the independent domestic law of his or her member state.

The first point in fact leads directly to the second question that has been raised regarding the utility of creating environmental tribunals. Environmental courts and tribunals are not new concepts. Worldwide, they have largely been functional in English-speaking countries, such as Australia, India,<sup>1</sup> Kenya, and New Zealand. Not only are they English-speaking, they are common law and work within that spirit of adversarial advocacy. It would

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<sup>1</sup> Gill, Gitanjali Nain, Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall? *Asian Journal of Law and Society* (2018), 1-42.

be important to study the political arguments as to whether India would establish a court or a tribunal. In the end, only a tribunal was established,<sup>2</sup> and the current government was therefore able to effectively disable it when it failed to re-appoint judges to the regional benches, leaving the National Green Tribunal's central court in Delhi to hear all matters. A constitutionally-established court would have been shielded from that maneuver.<sup>3</sup>

Probably the most comprehensive study of environmental courts and tribunals was conducted by George Pring and Catherine Pring for the United Nations Environment Programme: *Environmental Courts & Tribunals: A Guide for Policy Makers* (UNEP 2016) available at

<https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmentalcourts-tribunals.pdf?sequence=1> These two experts have also written "Greening Justice: Creating and Improving Environmental Courts and Tribunals" for the Access Initiative in 2009. <https://www.law.du.edu/documents/ect-study/greening-justice-book.pdf>

For continental Europe, there are two examples that can be compared. Austria did try it in Europe, and its successes and failures provide insight as to how environmental tribunals could work in continental civil law Europe.<sup>4</sup> In addition, Sweden has had an Environmental and Land Court since 1999, complete with instances at the Municipal Environmental Board and the County Administrative Board before one reaches the Land and Environment Court. From there, appeals remain in special jurisdiction at the Land and Environment Court of Appeal. Only at the last instance, the Supreme Court, are environmental matters placed into a court of general jurisdiction. The domestic government information on the Swedish Land and Environment Court is only available in Swedish, but the European Commission provides useful information at

[https://e-justice.europa.eu/content\\_access\\_to\\_justice\\_in\\_environmental\\_matters-300-se-en.do?member=1#!](https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-se-en.do?member=1#!)

The Swedish Land and Environment Court also handles civil disputes on land and environment cases, including claims for compensation and damages. Criminal cases are however not within the jurisdiction of these courts.

Both points—access to the courts and the specialized environmental courts—address a problem that has become more pronounced in recent years. When environmental matters became public law matters on a large scale in Europe in the 1970s, the state was a welcome power over and against the perceived environmental problems caused by industry. Fifty years later, the state may have become so specialized or distant from the concerns of citizens on environmental matters, that many citizens feel that they do not find help on environmental matters there. We have witnessed two instructive case studies in recent months to illustrate that point. If regulation does not address their issues of environmental

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<sup>2</sup> The National Green Tribunal sits in benches on which each bench has at least one Judicial Member and one Expert Member. Expert members should have a professional qualification and a minimum of 15 years experience in the field of environment/forest conservation and related subjects. See Everything you need to know about the National Green Tribunal (NGT) <https://www.conservationindia.org/resources/ngt>

<sup>3</sup> See, for example, Sridhar Rengarajan et al., "National Green Tribunal – an observation from environmental judgments," in: *Environmental Science and Pollution Research* 25 (2018), 11313-11318.

<sup>4</sup> See, Madner, Verena, "The Austrian Environmental Senate," *Journal of Court Innovation* 3 (2010), 23-35.

concern, citizens will resort to courts.<sup>5</sup> It might be best if they would be environmental courts.<sup>6</sup>

In the now famous case of *De Staat Der Nederlanden v. Stichting Urgenda*, on 20 December 2019, the Dutch Supreme Court, upheld the previous decisions of lower Dutch Courts, finding that the Dutch government has obligations due to international climate agreements, EU law, and human rights law to urgently and significantly reduce emissions. Citizens from all over the world were emboldened by this case to take actions against not the polluters, but against their own governments for failure to protect them from polluters.<sup>7</sup>

In another case, Paul François, a cereal farmer in Lyon, fell ill in 2004 after being exposed to Lasso, a weedkiller containing monochlorobenzene that was legal in France until 2007 but had already been banned in 1985 in Canada and in 1992 in Belgium and Britain. François alleged Monsanto was aware of Lasso's dangers long before it was withdrawn from the French market and sought damages of more than €1m for chronic neurological damage that led to long hospital stays. On April 11 2019, the appeals court in Lyon ruled Monsanto was liable. Many commentators have suggested that this was a missed opportunity for a legislative response by France or the EU to ban or regulate such chemicals, including glyphosate. As a result, in a related case activists destroyed containers of glyphosate. Their defense was that it is an illegal product in violation of Article 168 of the Treaty on the Functioning of the European Union. The criminal court in France thus sent four questions to the Court of Justice of the European Union for a preliminary reference. In all three of these cases, there is evidence that citizens have become active in taking actions against their own governments under EU law and against defendants under EU law for environmental harms. Environmental courts in the member state jurisdictions, or special tribunals in the EU, would be an outlet for such matters. The success of the Urgenda citizens group and the large number of citizens groups worldwide that are following that outcome, suggests that the lethargy of states to submit their Nationally-Determined Contributions, as per the requirements of the Paris Agreement, could well lead to further citizen litigation against their own states.

Finally, there is the omnipresent issue of the corona virus, COVID 19. In the 1970s, there was a problem characterized as "inadvertent climate modification." Only in 1979 did the Massachusetts Institute of Technology's Charney Report abandon "inadvertent climate modification." "if carbon dioxide continues to increase, [we find] no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible and speak of "global warming." "Global warming" then was re-characterized as "climate change." Importantly, in a September 10, 2018 address at United Nations Headquarters, Secretary General António Guterres again re-characterized "climate change," now as the "climate crisis," because the description of "climate change" as a fact had for decades failed to succeed as prescription to change. But we have witnessed little by way of crisis response to climate. The Harvard School of Public Health reports that this is precisely the time to use the

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<sup>5</sup> Marek Prityi, Ana Miola, Yuan Ye, Ryan Kraski and Saskia Münster, "Locating environmental law functions among legislative, judicial, and implementation bodies," in *Environmental Law Across Cultures*, Kirk W. Junker, ed. (Routledge, 2020), pp. 43-75.

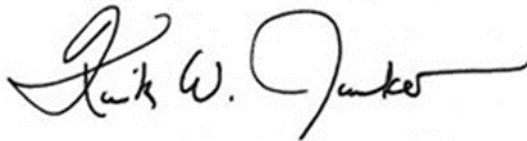
<sup>6</sup> See, Sebastian Bechtel, „Umweltgerichte und -tribunale. Eine institutionelle Revolution im Umweltschutz,“ UFU-PAPER 01/2016, <https://www.ufu.de/publikationen/ufu-paper/>

<sup>7</sup> Vanessa Johnston, Tsegai Ghebretkle, Ryan Kraski, Jorge Ignacio García Nielsen, Ana Miola and Mrinalini Shinde, "Resolution of environmental disputes," in *Environmental Law Across Cultures*, Kirk W. Junker, ed. (Routledge, 2020) pp. 76-118.

fear and understanding that citizens may still have for the corona virus crisis to develop a crisis response to the climate crisis.<sup>8</sup> It is a moment to use the sense of crisis to achieve climate action. What we should address is stopping the reverse from happening: If citizens believe that surviving corona by doing nothing is proof that they can survive the climate crisis by doing nothing, then nothing will be done.

Thank you for the opportunity to address you. Please feel free to contact me with any questions at [kirk.junker@uni-koeln.de](mailto:kirk.junker@uni-koeln.de)

Sincerely yours,

A handwritten signature in black ink that reads "Kirk W. Junker". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Professor Dr. Junker

Director, Environmental Law Center

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<sup>8</sup> "Coronavirus, Climate Change, and the Environment  
A Conversation on COVID-19 with Dr. Aaron Bernstein, Director of Harvard C-CHANGE,"  
<https://www.hsph.harvard.edu/c-change/subtopics/coronavirus-and-climate-change/>