Protected Rights and their Enforcement

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Climate Rights Enforcement in the EU: Individual Rights – Causation – Standing

Summary: Climate change has begun to make itself felt also in Europe. The article seeks to identify responses to the challenges from the law through the protection of fundamental rights to life, health, occupation and property, as well as 'environmental rights'. It establishes that, in spite of a general consensus that these rights are guaranteed and protected by the law, it is very difficult to substantively show and prove a violation of such a right by a specific entity. Following this, the hurdle of the right to access to justice regarding enforcement of these rights by individuals is explored, in particular looking at the Peoples' Climate Case recently dismissed by the Court of Justice of the European Union (ECJ). In doing so, the article identifies a gap in traditional legal protection of human rights. The article will identify solutions *de lege lata* and suggest solutions *de lege ferenda*, including causation and standing issues in order to at least increase pressure on political processes to mitigate and adapt to climate change. Overall, European Union (EU) law may have to choose between adapting existing human rights instruments in order to maintain protection in the face of new challenges or accepting a gap in the protective system for short-term convenience, risking the acceptance of EU law supremacy and the ECJ's prerogative to assess compatibility of EU climate change mitigation and adaptation measures with fundamental rights.

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Introduction

I. Consequences of climate change impacting on individual rights

Climate change has become an undeniable part of our lives, hitting ourselves or our neighbourhood, with more extreme or more changeable weather conditions, such as torrential rain and flooding, devastating storms and the extreme summer heat, draught and wildfires, warmer or colder, longer or shorter winters, experienced in recent years. These changes do not only affect the environment, but result in loss of lives and health, jobs and economic loss extending as far as insolvencies. For instance, farmers find that they cannot use their land any more, or not in the same way as before, or that their cattle cannot adapt to new conditions. Industry or businesses may be affected by temporary or permanent changes in options for land use, higher costs, for instance for heating and cooling or to balance out instable wetness or dryness, for safety measures such as dykes, pump or irrigation systems, higher energy costs, changes in demand, generally less reliable conditions with an ensuing rise in insurance premiums or unavailability of insurance, frustrated investment, higher risk of insolvencies, etc. Effects on individual persons include threats to life and health in extreme conditions. Changes may require retraining of large numbers of people if their jobs are lost or require new knowledge. Costly changes to our everyday way of life will ensue, particularly hitting the more vulnerable parts of the population, with prices for essential food staples going up, housing and transport becoming more vulnerable and costly. Essential and less essential goods and services may become less affordable.[1]

II. Answers from the law?

These consequences of climate change constitute new challenges to all entities, public or private, local, regional and national, supra- and international. Are thus all greenhouse gas (GHG) emitting activities of the EU and the Member States, or law and decisions permitting such emissions, in principle, illegal violations of fundamental rights? This would pertain to activities such as the running of fossil-powered plants or power stations,

1 Cf. IPCC Sixth Assessment Report, AR6 Climate Change 2021: The Physical Science Basis, https://www.ipcc.ch/report/ar6/wg1/?utm_source=POLITICO.EU&utm_campaign=0ca76056ca-EMAIL_CAMPAIGN_2021_08_12_05_07&utm_medium=email&utm_term=0_10959edeb5-0ca76056ca-189019861 (2/1/23); Leuchner, in: Frenz, Klimaschutzrecht, Einl. D., no. 1 et seq.

starting a combustion-engine-powered car, etc. – many everyday activities regarding which political consensus to restrict or prohibit them is hard to achieve, even more so as rights or legitimate expectations may be involved to continue such activities. The law will have to provide a framework for the instruments to change peoples', industries' and other stakeholders' behaviour. The EU and its Member States, as well as other states, have started to react, the EU in particular with the Green Deal strategy. Still, a strategy needs to be implemented, and answers from the law are evolving rather too slowly: aims for mitigating climate change, institutions and processes of progress monitoring have been included in the law, namely in the UN Paris Agreement[2], the Climate Law regulation of the EU[3] or in the German Climate Act[4]. However, including aims into the law does not produce much of a result as long as the instruments for achieving these aims, concrete provisions leading there in particular, are lacking. The legislative program under way for implementation of the EU's Green Deal strategy highlights paths and chances[5], however, the legal framework is far from complete. This is not surprising: politically, namely in the legislative procedure, numerous interests will need to be taken into consideration. Demanding state or private action, or demanding that the state or private stakeholders refrain from some activity, will thus, first, be an issue of scientific and political discourse to ensure a full and proper balancing of all rights and interests involved, and majority views will prevail in a democracy.

Still, majority decision-making finds its legal limits namely in fundamental individual rights. These cannot be disposed of even by a majority, thus protecting individual human beings from being encroached upon excessively, or singled out to bear the burden of all. So, as political decision-making takes its time, it may lead to Greta Thunberg's 'How dare you?'[6], or 'How dare you violate my human rights – by your inadequate law-making? – by not outlawing and effectively prohibiting continuing GHG-emitting production, provision of services, consumption?', to put the

2 United Nations Treaty Series (UNTS), I-54113 Multilateral Paris Agreement. Paris, 12 December 2015 Entry into force: 4 November 2016; text https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

3 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate ('European Climate Law'), OJ L 243/1–17.

4 Federal Climate Act/Bundes-Klimaschutzgesetz of 12 December 2019 (BGBl. I p. 2513), last amended by Article 1 of the Act of 18 August 2021 (BGBl. I p. 3905).

5 Cf. the EU Commission's webpage https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal_en.

6 Greta Thunberg, 23 September 2019, UN Climate Summit, New York, on https://www.youtube.com/watch?v=TMrtLsQbaok.

question more legally. The democratic majority, and governments carried by it, still appear to accept violations of individual rights by the lack of sufficient legislation, in order to avoid burdens on the electorate's current way of life – although these violations are not open even for a majority to authorise. Accordingly, the question has been brought before numerous courts[7], including the ECJ and its General Court, where, in the 'Peoples' Climate Case'[8], 36 applicants from various countries in the EU and the rest of the world, from agricultural or tourism sectors, and an association representing young indigenous Sami, a Scandinavian people living traditionally on reindeer herding[9], addressed the lack of ambition in EU law; this action was brought against certain directives and regulations ('legislative package') implementing the Paris Agreement and the UN Framework Convention on Climate Change[10], for not taking more ambitious measures. The applicants sought the annulment in part of the said 'legislative package' and an injunction obliging the EU Commission, Council and Parliament, to adopt measures 'requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate'.[11] The applicants based this on the submission that the EU's level of ambition at the time was not sufficiently high with regard to reducing greenhouse gas emissions, and infringes binding higher-ranking rules of law.[12]

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7 Cases are collected in two major data bases, the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter, http://climatecasechart.com and the Grantham Research Institute on Climate Change and the Environment/LSE at https://climate-laws.org/litigation_cases.

8 Order of the General Court (Second Chamber) of 8 May 2019, Case T-330/18 *Carvalho and Others*, Appeal ECJ, 25 March 2021, C-565/19 P.

9 The case of minorities, such as the Sami people in Scandinavia, being specifically affected by climate change has been considered by the author, Minderheitenschutz und Klimawandel, in: Festschrift Gornig, p. 197 et seq. regarding their traditional way of life.

10 Directive (EU) 2018/410 to enhance cost-effective emission reductions and low-carbon investments; Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3); Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework (OJ 2018 L 156, p. 1); Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement (OJ 2018 L 156, p. 26). These are acts of the EU whereby the European Union seeks to comply with its commitments under the Paris Agreement, namely to reduce emissions by 40 % over 1990 levels by 2030 (now increased to 55 %).

11 Order of the General Court, Case T-330/18 *Carvalho and Others*, para 22.

12 Order of the General Court, Case T-330/18 *Carvalho and Others*, para 22 et seq.

This contribution will seek to identify responses from the law as to how far, due to legally protected individual rights and interests, the EU, states or regions are already under legal obligations to legislate or act otherwise, refrain from or prevent climate-unfriendly activity, even in the absence of sufficient specific legislation. In doing so, it will look at existing rights – classical human rights and more recent 'solidarity rights' or 'environmental rights', and their limits (part A).

Following this, the procedural enforcement of these rights before court will be explored. What should the procedural powers of individual persons, as holders of individual rights, be regarding climate change mitigation and adaptation? (part B).

In doing so, the article will identify solutions *de lege lata* and suggest solutions *de lege ferenda*, including causation and standing issues in order to at least increase pressure on political processes to mitigate and adapt to climate change. Finally, the question remains as to whether courts can, and should, fill the gap in the protection of fundamental rights?[13]

A. Climate Change Rights and Interests

First, this contribution shall establish the legal requirements under which protected rights and interests may help address climate change issues. In doing so, first, we need to consider the definition and allocation of **rights to individuals** (I.1.), which are the relevant **rights** and interests (I.2.) and what may be an **encroachment** on them by an EU or state activity or failure to act in the context of climate change (I.3.). Second, to be legally relevant the encroachment on the rights must be connected by a **causal link** to a specific activity or failure to act. (II.). Third, there is a question how far such an encroachment may be **justified** by other rights or interests, and consideration will be given to the details of such potential justification (III.).

I. Individual rights – Fundamental Rights and Encroachment

1. Definition and Allocation of Individual Rights

The primary legal bases to consider regarding climate change issues are individual rights. Individual rights are allocated by law to individual persons, with corresponding obligations on the EU, states, or other public (in

13 This contribution builds on and extends the author's previous article on the climate change rights, Economic and Legal Issues, European Studies (8) 2021, p. 161 et seq.

particular sub-state) or private entities[14], to respect and protect these rights. In the absence of more specific legislation, such individual rights can be found at the constitutional law level, i.e. among human and fundamental rights. With human and fundamental rights it is usually quite clear that there is a right and who is the holder of the right. The main difficulty here is to allocate a right against climate change to individual persons, as it is a phenomenon that concerns all. Still, fundamental rights may provide a starting point for a given natural or legal person to prevent legislation or administrative measures, or demand environmental action, insofar as the relevant rights protect specific interests or goods otherwise at risk, and may also provide a basis for assessing the compatibility of climate change legislation with higher constitutional principles, or a source of inspiration regarding the interpretation of climate-relevant law.[15]

2. Relevant Fundamental Rights

At the EU level, modern human and fundamental rights protection finds its legal basis first and foremost in the EU Fundamental Rights Charter (CFR), in force as a legal document since 2009[16], supplemented where necessary by common principles of law under Art. 6 (3) of the Treaty on European Union (TEU), namely rights protected by the European Convention on Human Rights (ECHR)[17] and the Social Charter[18] of the Council of Europe, and the member state constitutions[19]. Here we will focus on the EU's CFR, which may be regarded as the essence of modern European fundamental rights protection.[20] Each of the fundamental rights mentioned is legally binding on the EU and its Member States under Art. 51 CFR within the scope of the Treaties (and beyond under the ECHR and the member state constitutions).

14 Regarding types of applicants and defendants in litigation see Savaresi/Setzer, Mapping the Whole of the Moon, p. 5 et seq.

15 With case law Setzer/Higham, Climate change litigation, p. 18 et seq.

16 Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

17 The European Convention on Human Rights, Council of Europe, https://www.echr.coe.int/ documents/convention_eng.pdf.

18 The Social Charter, Council of Europe, https://www.coe.int/en/web/european-social-charter.

19 The latter have also fed into the EU's Court of Justice's case law establishing human rights protection as 'general principles common to the laws of the Member States' over the years, cf. the Court's website: https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_1/tab_index_1_04.htm.

20 Cf. Craig/de Búrca, EU Law, p. 429 et seq.: 'a creative distillation of the rights contained in the various European and international agreements and national constitutions.'

These rights will be examined in turn, first the classical fundamental rights (a), and below the solidarity rights (b), as to how far they may be helpful regarding climate change issues.

a) Classical Fundamental Rights: Defensive Rights and Rights to Protection

Specific rights under the Charter potentially relevant for preventing the EU, or Member States and sub-state entities, from further contributing to climate change, or from not taking sufficient steps to mitigate it, or regarding adaption measures, are guaranteed: Article 2 CFR recognises that '*Everyone has the right to life*', and Article 3 CFR '*the right to respect for his or her physical and mental integrity*'. Article 15 CFR generally guarantees that '*Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation*' and, under Article 16 CFR, '*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised*'. Another relevant fundamental right is guaranteed by Article 17 (1) CFR, under which '*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions*'. The scope of protection afforded by these rights extends to all human beings, and to legal persons, such as companies, where appropriate.[21] The core of their substantive scope appears self-explanatory, and there is nothing in the text of the charter to suggest that these fundamental rights were to be non-existent in the context of climate change. This is supported by the preamble of the CFR, which states for the EU that '*it seeks to promote balanced and sustainable development*'. Considering the scientific evidence outlined above,[22] sustainable development must include mitigating and adapting to climate change, as there is no viable alternative for humanity. An interpretation of fundamental rights protection to include climate change issues may also be supported by more specific norms, at EU level namely the integration clause of Art. 37 CFR, mirroring Art. 11 TFEU, which require environmental concerns to be considered in all EU policies or activities.

Fundamental rights have a considerable range of legal consequences: taken as 'negative' rights, they allow their holders to defend their individual interests protected thereunder, i.e. their lives, health, freedom of occupation or business activity, and their property, against any encroachment on any of

21 Already ECJ, 13 December 1979, C-44/79 – *Hauer*, ECR 290 regarding property rights; regarding business freedom ECJ C-314/12, 27/03/2014 - *UPC Telekabel Wien*, ECR 192 no. 49. Different e.g. for the protection of privacy and personal data ECJ, 9 November 2010, C-92, 93/09 – *Volker und Markus Schecke GbR u.a./Land Hessen* ECR 284 no. 52 et seq.

22 Introduction I. above.

them by the EU and the Member States. They are rights 'to be left alone' in one's sphere. In the context of climate change, examples of relevant encroachment may be any state activity leading to GHG emissions, such as running of emitting state industries or other state-governed emitting activities e.g. in fossil-fuelled public transport, or the granting of permits or subsidies for GHG emitting activities.

Conversely, in terms of a 'positive' side of fundamental rights, and complementing the 'negative' side, individual persons may have a right against the states or the EU that they act in order to protect these rights. This is underlined by Art. 51 (1) CFR: the institutions, bodies, offices and agencies of the Union and the Member States shall not only '*respect the rights*', but also '*promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*'.

With regard to climate change, this may involve the right to protective legislation, enforcement or administrative action, to have the state or the EU prevent others from emitting GHG, to stipulate prohibitions of emitting activities, environmental quality standards or limit values in legislation.[23] In addition, the EU might provide incentives for climate-friendly behaviour and disincentives for any behaviour aggravating climate change, for instance, an effective emissions trading system.

However, classical fundamental rights are often not specific enough to dictate a particular concrete action that the state or the EU must take in order to protect them in the face of climate change. Often there are various ways to achieve protection, and, whilst the right involved has been clarified by long lines of case law of the ECJ, the European Court of Human Rights and Member State constitutional courts[24], often there seems no identifiable

23 Cf. on a case-law basis Savaresi/Setzer, Mapping the Whole of the Moon, p. 10 et seq.

24 More or less successful climate cases based on Human rights protection include the *Urgenda* case Hoge Raad (Netherlands), case no. 19/00135 (Engels), 20 December 2019, ECLI:NL:HR:2019:2007. In English translation https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007, original Dutch judgment ECLI:NL:HR:2019:2006 https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2006&showbutton=true&keyword=urgenda&idx=3. Similar Federal Court of Australia, case *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, File number: VID 607 of 2020, Bromberg J, 27 May 2021, No 179 on standing based on relevant activities during the last two years https://www.Judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca 0560#_Ref72921796. Also ECHR case no 39371/20 - *Duarte Agostinho and Others v. Portugal and Others* (pending), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2239371/20%22]}; ECHR No 36022/97 – *Hatton and Others v. United Kingdom*, https://hudoc.echr.coe.int/. Cf. the collection of Sabin Center

single path towards protection against climate change, meaning that the exact content of the positive side of a fundamental right is difficult to identify with the preciseness required to make it enforceable before court. Accordingly, only in rare cases can courts pronounce and give judgment on how to avoid the violation. Still, even if the courts may not be in a position to remedy a specific situation by identifying a specific measure to be taken, they will at least be able to state that actions are insufficient or that omissions of public or private entities leave gaps in protection in violation of human rights. Under the rule of law such a judgment should at least trigger more ambitious and more specific legislation.[25] Such cases have been termed 'Systemic Mitigation Cases', meaning that the claim was not regarding a specific action or inaction, but rather for an overhaul of the whole system.[26] The issue of what exactly such a law suit seeks to achieve will be relevant later (part B) when it comes to the requirements of standing: Does the procedural law of access to court include a right to bring a law suit for systemic action?

A concrete path of action may be easier to specify regarding adaptation measures: for instance, one might argue that the EU or a state, having failed to effectively mitigate climate change, might still be under an obligation to take adaptation measures, such as building a dam to protect a specific property against floods, or a specific irrigation system against droughts (or to provide the financing for these), or provide means of insulation for buildings against heat or cold, or air-conditioning, etc. At least if there is only one way of achieving protection, the obligation on the public or private entity or individual may be sufficiently clear and precise to be claimed against them. The ECJ has shown itself up to such challenges already to some extent, by at least identifying rights to procedural measures from existing,

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for Climate Change Law (Fn. 7). With further references Winter, ZUR 2019, p. 259 et seq. (269); Beyerlin, ZaöRV 2005, p. 525 et seq.; Wegener, ZUR 2019, p. 3 (6); Frenz, E. Klimaschutz und Grundrechte, in: Frenz, Klimaschutzrecht, no. 2 et seq.

25 Cf. the example of the German Federal Constitutional Court in *Neubauer et al. v Germany*, decision of 24/03/2021, 1 BvR 2656/18 et al., https://www.bundesverfassungsgericht.de/ SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html; commented on by Schlacke, NVwZ 2021, 912. For the example of the legislative (and political) follow-up on the (previous) Climate Case in Ireland Jackson, Systemic climate litigation, p. 44 et seq. in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks.

26 Jackson, Systemic climate litigation, p. 26 et seq. in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks; Setzer/Higham, Climate change litigation, p. 5 (15 et seq.) in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks.

more specific legislation, such as the right to an action plan for improving air quality, by means of a wide interpretation of the implementing law.[27]

In addition, there are existing systems under specific law, which may require adaptation to protect fundamental rights. One example here are the health systems of the Member States, which, among other illnesses, look after persons affected by infections, and must include new infections e.g. carried by species migrating due to climate change. Similarly, legal systems will have to adapt their rules to new climate-induced threats regarding health and safety of buildings, work places, etc. As more legislation of this kind is enacted, rights to demand specific action will become increasingly identifiable, and thus an effective protection of fundamental rights may gain shape in the context of climate change.

b) Solidarity Rights

In its Solidarity Chapter IV the CFR sets out relevant rights beyond the classical fundamental rights, such as workers' rights including '*fair and just working conditions*' (Art. 31 CFR), the right to *family and professional life* (Art. 33 CFR), to *social security and assistance* (Art. 34 CFR), to *health care* (Art. 35 CFR), or to *access to services of general economic interest* (Art. 36 CFR), which would include essential facilities such as energy, heating/cooling, water, transport etc. The solidarity rights chapter also stipulates an obligation to include environmental protection (Art. 37 CFR), stating that '*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*'.

The effectiveness of solidarity rights suffers from similar shortcomings as the 'positive' side of classical fundamental rights.[28] In particular, the holders of solidarity rights will need to await the enactment of specific rights under implementing secondary legislation of the EU and its Member States, to which enactment they may have an individual right. Moreover, it appears very difficult to carve out a right to a quality environment, starting with the problem of defining such an environment. Moreover, it may be contested what level of quality – high, medium, low or minimum quality – is to be guaranteed. There are numerous definitions of the concept of a right to a quality environment at global, regional and national level, starting

27 Cf. ECJ, 25 July 2008, Case C-237/07 – *Janecek*. For a more general view on law suits brought for adaptation measures, usually against states, see Savaresi/Setzer, Mapping the Whole of the Moon, p. 6 et seq.

28 Above A)I.2.a).

with the UN Stockholm Declaration on the Human Environment[29], which requires 'an environment of a quality that permits a life of dignity and well-being'[30]. In addition, although the ECJ regards Art. 37 CFR as a right within the meaning of Art. 52 (2) CFR, it shall be exercised under the conditions and within the limits defined by those Treaties.[31] Given that the relevant provisions in the TFEU, similar to Art. 37 CFR, appear rather vague it is difficult to see how an individual could prevent or claim a specific action of the EU or its Member States.

Accordingly, even though it may be clear what the scope of the solidarity rights is in its core, the scope remains unclear regarding which measures, including legislation, it may require in order to get beyond a mere statement of there being a violation of a fundamental right. However, in the same way as classical fundamental rights, solidarity rights may ground law suits aimed at systemic mitigation, to get courts to pronounce that there is a violation. Even without them also pronouncing a specific remedy in the shape of a specific action or prohibition addressed to the responsible legislative or administrative bodies, the demand that they live up to their obligations to protect fundamental rights is of more than symbolic value under the rule of law.[32]

3. Encroachment

a) General considerations

An encroachment on a fundamental right under the CFR is any loss or diminution within the scope of the relevant right or interest, resulting from an activity or failure to act by the EU, a state or other public entity[33] (or by a private entity[34]). Consequently, looking first at the 'negative' side of fundamental rights in the climate change context, any EU, state or other public

29 UN Stockholm Declaration, 16 June 1972, A/CONF.48/14 and Corr.l., http://webarchive.loc.gov/all/20150314024203/http%3A//www.unep.org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503.

30 Cf. with numerous examples Boer, Environmental principles, in: Krämer/Orlando, Principles of Environmental Law, p. 55 et seq. On the un-enumerated right to a quality environment under the Irish constitution Jackson, Systemic climate litigation, p. 26 (30/40 et seq.) in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks.

31 ECJ, judgment of 21 December 2016, C-444/15 – *Associazione Italia Nostra Onlus*.

32 Above A)I.2.b).

33 In more detail e.g. Schwerdtfeger, Article 51 in: Meyer/Hölscheidt, no 67.

34 Claims against private entities or persons have also been raised successfully to some extent, see Setzer/Higham, Climate change litigation, p. 18 et seq. in: Setzer/Higham/Jackson/So-

entity activity endangering or taking away a person's right to life, health etc. by aggravating or not acting against climate change, is an encroachment on the relevant fundamental right.[35] Member State actions with a potential of encroachment on fundamental rights to life, health, property etc. may be any state activity leading to GHG emissions, for instance, running of GHG-emitting state industries, public buildings and facilities, fossil-fuelled public transport or legislation promoting or allowing for GHG emissions.[36] On the administrative side this may include the granting of permits by the state to start or to continue emitting GHG for industries or energy providers, permits for producing and using cars, lorries or other means of transport. A more indirect way of encroachment may be the granting of state aid e.g. for fossil fuels.[37] On the EU's side, such encroachment may include EU legislation favouring climate-unfriendly activities, such as harmonising legislation regarding product standards including unambitious emission standards, or providing the basis for granting EU subsidies for GHG-emitting entities, eg by funding under the Common Agricultural Policy for GHG-emitting farming (in particular meat production), funding granted via the structural funds, such as the European Fund for Regional Development (EFRD), for regional GHG emitters, via the Connecting Europe Facility for road transport or for research under the Horizon program, unless it is strictly geared towards mitigating climate change. In addition, the EU may at least be involved in encroachments on rights by exempting climate-unfriendly state aid, for instance for LNG terminals, from the general prohibition of state aid in Art. 107 TFEU if it does not adequately consider environmental concerns in doing so.

Considering the 'positive' side of fundamental rights, requiring protective activity by the state or the EU, encroachments resulting in a diminution of fundamental rights will be failures to provide adequate protection by no or unambitious legislation, in particular including failure to prevent further GHG emissions.[38] For instance, this may include too little legislation containing prohibitions or disincentives, or a failure to provide a framework for those, or failures by government and administration to use existing legal

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lana: Climate change litigation and central banks. However, these will not be considered further here.

35 Whether this is an illegal violation of the right depends on whether there is a valid justification for the activity or inaction, explained in more detail below A.III.

36 Cf. above A)I.2.a) (negative rights with first examples).

37 See for government funding cases case law Setzer/Higham, Climate change litigation, p. 21 et seq. in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks.

38 Order of the General Court, Case T-330/18 *Carvalho and Others*.

bases to prevent emissions, e.g. by closing industrial facilities, or prohibiting car or lorry traffic unless climate-neutral.

b) Encroachment under limited competences to act?

In identifying potential encroachments on rights by failures to act on the side of the EU, a special difficulty arises due to the limits to the EU's competences in the environmental sphere. A relevant failure to act on the side of the EU can only occur if the EU can actually take action at all, and is obliged to do so. This pertains particularly to administrative measures, as most of EU administration is indirect, i.e. is performed by the Member States' administrations.[39] Regarding legislation, limits to EU competences stem in particular from the subsidiarity principle applying to shared competences, one of which is the competence for environmental legislation. Under the principle of subsidiarity, the EU can '*act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*' (Art. 5 (3) TEU). It thus appears particularly difficult to establish encroachments by the EU on fundamental rights by a failure to act, or to act more effectively: it will involve showing that the EU should have acted notwithstanding the principle of subsidiarity. This may end in EU and Member States pointing to each other as the competent actor, without adequate action being taken.

II. Causation issues

Having established previously how in principle the EU, the states or other entities can encroach upon fundamental rights, the next step is to look more closely at the connection between the diminution of the right and the action or failure to act of the EU, state or other entity. There needs to be a causal link between the two for them to be legally relevant, helping to identify who is responsible. In principle, under the traditional approach in law at least, any claim of a specific person against a specific defendant must be based on specific facts, excluding alternative causes or showing joint causation by several defendants, and the same for any measure sought. So it will be necessary to nail down individual sources and their share in

39 Cf. Gornig/Trüe, EuGH und EuG zum Europäischen Verwaltungsrecht – Teil 1, JZ 2000, p. 395 et seq.

the encroachment on the right. This starts with the natural sciences-proven causal link of 'factual causation'. Establishing this causal link poses a major problem in the context of climate change: even if the foregoing (rights and encroachment on them) are clear regarding a specific person, the showing and proof of the causal link between a specific activity or failure to act by a specific entity and the specific encroachment on such a right of a specific person is hard to prove, even more so the link between the encroachment and any option to end it, i.e. the remedy required. As explained in the beginning, with multiple sources contributing to climate change, and multiple effects in mitigating or adapting to it, demanding that the EU or a state who (putatively) contributes to climate change refrain from some activity, as well as demanding EU or state action for mitigating or adapting to climate change, will be a matter of difficult scientific proof. Given the all-encompassing nature of climate change, and the fact that the composition of the atmosphere, with the prevalence of various gases, has changed considerably due to human GHG emissions from the beginning of industrialisation, it is not possible to nail down one individual source as the sole cause and originator, say, of a specific drought or flooding event, in the sense that the event would not otherwise have occurred.[40] There are always likely to be many causes operating together that contributed to it, most of them being no more than the proverbial 'drop in the ocean'. Under German tort law the concept of 'alternative causation' would not help: it is only where there are several causes for damage occurring, each of which would alone have led to the damage occurring, that each of them is regarded as causal in the legal sense. Climate change is brought about by cumulative causation of many emitters, not by the individual emission of GHG, which would not in itself suffice to cause climate-related damage. Even if one wanted to bridge the causality gap by giving applicants the benefit of various proof modifications, including even reversing the burden of proof on causation, or introducing a legal presumption of responsibility, this might not hold against the problem of there being known and proven alternative causes (in the form of the GHG emissions contributed by other parties).

Still, with the progress of natural sciences, it is better understood nowadays which sort of activities, or failures to act, generally lead to an encroachment on rights by contributing to climate change, allowing, for instance, to show the exact share of a specific emitter in the change of atmospheric composition and specific weather events for encroachments of the said

40 In detail Stuart-Smith/Otto/Saad/Lisi/Minnerop/Cedervall Lauta/van Zwieten/Wetzler, Filling the evidentiary gap in climate litigation, in: Nature Climate Change 2021 p. 651 et seq.

rights occurring. It will 'only' be with regard to major emitters that this share reaches a relevant dimension to make legal action worthwhile, but this might still provide a step in the right direction. The problem here is that a claimant would need to sue many states around the world, and the EU (and, indeed, an even higher number of private parties) in order to achieve a relevant reduction of emissions, if each defendant is held responsible only for his or her own share. An approach that could help here would be to adopt an aggregated causal view, in which a claimant needs to show only that the defendant entity's activity/failure to act contributed to climate change at large, and that a specific diminution in the sphere of rights is caused by climate change. In the light of the preamble and Art. 51 CFR[41], according to which the EU *'seeks to promote balanced and sustainable development*', and the Union and the Member States shall '*promote the application'* of fundamental rights, such an approach could include a departure from the normal need for claimants to show a causal link between the defendant's specific activity and their specific injury.[42]

Similarly, the need to show causal links limits the possibility to demand a specific action or prohibition: with its multiple sources and global chains of causation it is difficult to see what a court judgment imposing a specific duty on the EU, or a specific state, might be. Only where the causal links are clear, and the specific action can be identified which might at least ease the encroachment on the fundamental right, can this be crystallised into a judgment leading to a concrete and identifiable obligation to act. Overall this does not leave much scope for an interpretation of the fundamental rights in line with the preamble's demand for '*promoting balanced and sustainable development*' directly.

III. Justification

Assuming that the obstacles concerning the identification of sufficiently specific rights, encroachments and causation mentioned above can be overcome in the individual case, and interpreting rights to defend oneself against actions furthering climate change in the suggested way, the next step to be considered on the path to successful climate law suits is the possibility of justification. In this regard, even fundamental rights protecting against

41 See above A)I.2.a).

42 Cf. the approach taken in Luciano Lliuya v. RWE AG, case no. 2 O 285/15 Essen Regional Court, appeal pending before OLG Hamm, no. 5 U 15/17. Cf. Stuart-Smith/Otto/Saad/Lisi/Minnerop/Cedervall Lauta/van Zwieten/Wetzler, Filling the evidentiary gap in climate litigation, in: Nature Climate Change 2021 p. 651 et seq. with further considerations.

consequences of climate change do not necessarily prevail, at least in the current legal situation, and an encroachment is not automatically an illegal violation of the right as long as there is a justification for it. This brings us back to the highly complex issues slowing down action in the political sphere, including multiple other interests to be balanced against each other, in mitigating or adapting to climate change. In the following an attempt will made to elaborate relevant cornerstones of any argument to be brought forward.

Specifying the relationship between conflicting general interest issues or rights, Article 52 (1) CFR requires that '*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*'. It follows that any encroachment on fundamental rights protecting against climate change due to activity or inaction of the EU, a Member State or other entity may be justified if occurring on a legal basis, not encroaching on the core substance of the right, and if it is within the limits of proportionality.[43] As regards the balancing of fundamental rights against each other, the Preamble of the CFR (para 6) posits relevant limits for any charter rights in so far as '*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations*'. This responsibility to future generations arguably also implies a precedence for fundamental rights protecting against climate change, demanding mitigation and adaptation measures, providing an argument for giving priority to rights related to protection against climate change. Any holder of fundamental rights opposing climate change mitigation, e.g. on the basis of property rights connected with old permits or law, is required to exercise such rights in a way that preserves the climate in a state that allows future generations the exercise of the same rights. This indicates at least that the protection of *status-quo*-related rights cannot generally prevail over mitigation and adaptation to climate change. Still, such conflicting rights must be respected to some extent in the transition to a climate-neutral economy and way of life. This is confirmed by the Preamble's para 3 stating that the EU '*seeks to promote balanced and sustainable development*'.

Status-quo-related rights and interests to be balanced against mitigating climate change and adaptation include aspects of natural justice and the rule

43 See already the author's previous article on climate rights, Economic and Legal Issues, European Studies (8) 2021, p. 161 (165).

of law, including the principle of non-retroactivity and the protection of legitimate expectations, fundamental rights to property and occupation based on the previous legal situation. In addition, there is the public interest in a functioning economy, issues regarding provision of essential public services, including security of supply with energy, food, other products and services, transport etc., and social cost and social justice issues.[44] Cases arising from the desire to protect the latter are known as 'just transition litigation'.[45] In such cases applicants try to query the justification of climate action based on their own fundamental rights; they often do not object to climate action in and of itself, but rather to the way in which it is carried out, for instance, for encroaching upon traditional land uses[46] and livelihoods.[47] Here an assessment is required how far alternatives to a demanded course of climate change mitigation or adaptation may be better suited to also accommodate rights of others such as legitimate expectations, or the general interest in security of energy supply etc. Where there are clearly identifiable alternatives courts may well be able to scrutinise decisions taken by administrative authorities or even the legislature, and correct these in the interest of 'just transition'.

Where such clarity cannot be achieved, the law and in particular the courts will need to check whether the proposed balancing respects the legal limits, and pick up on any violation of rights that must be recognised at least in extreme cases. In this regard, the courts may find a violation of climate-related fundamental rights based on the assumption that an encroachment is not justified as long as the justification of the encroachment cannot be shown and proven. This derives from the principle that each party to litigation must show and prove what supports his or her claim or defence.

In summary, Part A) of this contribution has shown that, although fundamental rights are protected in principle, there are still many obstacles to overcome in order to develop a cause of action so far as to be able to win it on the merits, considering in particular causation (A.II.) and justification (A.III.) issues.

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44 A selection of cases can be found at Setzer/Higham, Climate change litigation, p. 17 et seq., in: Setzer/Higham/Jackson/Solana: Climate change litigation and central banks;

45 Savaresi/Setzer, Mapping the Whole of the Moon, p. 2 (16).

46 See Introduction I. above; for land use issues the author, Minderheitenschutz und Klimawandel, in: Festschrift Gornig, p. 197 et seq.

47 Savaresi/Setzer, Mapping the Whole of the Moon, p. 2 (16).

B. Standing before court

I. Introduction

The best rights are useless if they only exist on paper, i.e. if there is no effective enforcement. It is thus crucial that there are courts to enforce fundamental rights, and that the holders of these rights have access to court, i.e. the procedural right to bring an action, known as 'standing'. Accordingly, Article 47 CFR demands that the EU and, within the realm of EU law, the Member States, also respect the citizens' right to an effective remedy, stating that '*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. […]*'

However, the question arises as to what remedy is available if more or less everybody's rights are affected? Access to courts is usually limited in order to avoid overload, keeping litigation within a reasonable number of cases. This is achieved by defining conditions under which people have access to court: it is generally recognised that individual claimants can only enforce their own rights and legally protected interests, not the general interest of the public. The latter is to be looked after by the political processes.[48] The conditions under which holders of rights pertaining to climate change may have standing before the ECJ thus need to be examined in more detail: from ECJ case law, it will become apparent that there is a gap in the system.

II. Standing Conditions by Type of Action

1. Conditions of Standing before the ECJ: Annulment

Starting with the option to have climate-unfriendly law annulled, there are three possibilities of standing against an EU act, which are laid down in Article 263(4) TFEU: '*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person, or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail any implementing measures.*'

48 Cf. Wegener, ZUR 2019, p. 3 et seq.

The effect of this provision is to confer standing on applicants in three alternative constellations. The first of these applies in respect of EU decisions, as a form of act addressed to the applicant individually (i.e. by name). So far, though, there is not much, if any, legislation in place authorising decisions towards individual persons on climate change matters, let alone at EU level. It is in line with this that the General Court stated that the applicants in the Peoples' Climate case were not addressees of any of the contested acts (Paris Agreement, EU legislative package for implementing it).[49] Admittedly, this may become more relevant in the future, once specific acts fleshing out climate change law have been made.

The second constellation recognises standing for a person who is 'directly and individually concerned' by the EU act. This might appear to cover, *prima facie*, having an individual right violated, with the individualisation being effected by the allocation of the right to individual persons by the CFR; Article 47 CFR seems to be complied with here. The relevant concept of 'individual concern'[50] has, however, been extremely narrowly defined by the ECJ since its leading *Plaumann* judgment in the 1960s: individual concern is only recognised where individuals are affected, '*by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguished individually just as in the case of the person addressed*'[51]. According to *Plaumann*, sufficient individuality requires that one's individual right encroachment is a very singular matter, whilst the violation of the individual rights of many persons would appear to not be enough for 'individual concern'. Following *Plaumann*, individual concern indeed appears to be a numerical rather than an individual rights matter[52], and has only been recognised by the ECJ at

49 General Court, Case T-330/18 - *Carvalho*, para 35, see Introduction II. for details regarding the legislative package.

50 The requirement of ‚direct concern' appears less of a hurdle regarding climate actions and will not be considered further here; it serves as a protection against overload as well, and, in addition, helps preserve the allocation of competences in executing EU law by member states' authorities, and legal remedies against member state authorities by member state courts or administrative tribunals, cf. Winter, ZUR 2019, p. 259 (265 et seq.).

51 Case 25/62 - *Plaumann* [1963] ECR 95 para 31. This judgment has been relied upon in numerous other cases by the ECJ or the General Court, e.g. recently C-583/11 P – *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, no. 72; C-132/12 P – *Stichting Woonpunt and Others v Commission*, EU:C:2014:100, no. 57; C-133/12 P – *Stichting Woonlinie and Others v Commission*, EU:C:2014:105, no. 44; General court cases see e.g. T-330/18 – *Carvalho et al.*, para 45. On standing Gornig/Trüe, EuGH und EuG zum Europäischen Verwaltungsrecht – Teil 1, JZ 2000, p. 395 (398 et seq.).

52 Similar Winter, Not fit for purpose, Europarecht 2022, p. 367 (368 et seq.).

present in a very limited number of cases for EU legislation, in particular in the following groups of cases:

– 'Closed shop', i.e. a group of persons is concerned which cannot be joined by more persons,[53] or
– On the basis of a provision of EU law protecting specific interests of specific claimants; here the individualisation is effected by the granting of specific individual rights to specific persons.[54]

Regarding the question of standing for a systemic action aiming at a court statement that the current legal situation does not live up to the obligations under higher-ranking EU law such as the fundamental rights under the CFR, it will be obvious that these are no cases of 'individual concern' under the *Plaumann* case law, as there is no individualisation based on smallest numbers of persons concerned. ECJ procedural law of access to court thus does not include a right to bring a law suit for systemic action.

Arguably, the wording of Article 263(4) TFEU allows a wider interpretation of 'individual concern', covering more constellations than the *Plaumann* ones,[55] as this could also be plausibly based on whether there is an individual right involved. However, so far such arguments have been unsuccessful even in the context of climate change. In particular, the General Court and the ECJ, while accepting that fundamental rights might be violated, recently denied standing to the applicants in *the Peoples' Climate Case*:

> "*48 It is apparent from the case-law that, although it is true that, when adopting an act of general application, the institutions of the Union are required to respect higher-ranking rules of law, including fundamental rights, the claim that such an act infringes those rules or rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of*

53 Such as CJEU Case T-135/96 *UEAPME* [1998] ECR II-2335; Joined Cases 87/77, 130/77, 22/83 and 9-10/84 – *Salerno* [1985] ECR 2523; ECJ, C-309/89 – *Codorniu/Council*, 1994 ECR I-1853 no. 21.

54 E.g. General Court, cases T-481/93 and T-484/93 – *Vereniging van Exporteurs in Levende Varkens/Commission*, 1995 ECR II-2941, no. 61; T-480/93 und T-483/93 – *Antillean Rice Mills/Commission*, 1995, ECR II-2310, no. 67 ff.; older ECJ case C-152/88 – *Sofrimport/Commission*, 1990, ECR I-2477; case C-11/82 – *Piraiki-Patraiki/Commission*, 1985, ECR 207, no. 75, recently e.g. case T-315/01 – *Kadi*, ER 2005 II-3659. With a finer differenciation and analysis of inconsistencies in ECJ case law, plus further references Winter, Not fit for purpose, Europarecht 2022, p. 367 (369, 374 et seq.).

55 Peers/Costa, Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; European Constitutional Law Review 2012, pp. 82-104; Winter, Not fit for purpose, Europarecht 2022, p. 367 (375).

> *Article 263 TFEU meaningless, as long as that alleged infringement does not distinguish the applicant individually just as in the case of the addressee. …*
> *50 It is true that every individual is likely to be affected one way or another by climate change,… . However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application. …"*[56]

Thus, whilst the institutions of the EU are required to respect fundamental rights under Art. 47 CFR, the claim that an act infringes those rights was not regarded as sufficient in itself to establish that the action brought by an individual was admissible. In short, it appears (paradoxically) that if the individual rights of many or all people are encroached upon, none of them will have standing, leaving the rights to the political process[57]. The Court also applied this to members of the Sami minority, in spite of this minority's specific exposure to climate change due to specific attributes. This approach neglects specific international rights protection for ethnic minorities, which is not even discussed in the case.[58]

The third constellation under Art. 263 (4) TFEU – only added in 2009 – confers standing in an action against '*a regulatory act which is of direct concern to them*': here the requirement of 'individual concern' has been omitted; this allows for individual applicants to bring an action against EU acts, mostly made by the Commission, in order to implement EU legislation. On the face of it, this appears helpful to applicants: where the holder of a right is affected in the same way as many other holders of the same right, a given individual could nevertheless still be able to assert it before court.

In the *Peoples' Climate Case*, however, the General Court held that the directive and regulations within the legislative package of the EU for implementing the Paris Agreement were legislative rather than regulatory acts, as they had been made under the Ordinary Legislative Procedure under Articles 289 and 294 TFEU, and that the applicants thus needed to also show their *individual* concern in the matter under the second alternative of Art. 263 (4) TFEU.[59] Standing against regulatory acts may thus only become

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56 General Court, Case T-330/18 – *Carvalho*. Confirmed by ECJ C-565/19 P – *Carvalho*.

57 Supporting this approach e.g. Wegener, ZUR 2019, p. 3 et seq.

58 See in detail the author, Minderheitenschutz und Klimawandel, in: Festschrift Gornig. p. 197 et seq.

59 General Court, Case T-330/18 – *Carvalho*, paras 37 et seq., relying on previous case law, namely ECJ, 3 October 2013, C-583/11 P – *Inuit Tapiriit Kanatami*, para 60/61 and order of 6 September 2011, T-18/10 – *Inuit Tapiriit Kanatami*, para 56; ECJ 25 October 2011, T-262/10 – *Microban*, para 21. Confirmed by ECJ C-565/19 P - *Carvalho*, paras 35 et seq.

relevant in the future regarding climate change once there are relevant regulatory rather than merely legislative acts in place.

2. Conditions of Standing before the ECJ: Failure to Act

Given that the problem of climate change mitigation often lies in no or insufficient activity by a relevant legislative or administrative entity violating rights, rather than in an activity as such, the gap under Art. 263 (4) TFEU under ECJ case law might be filled to some extent by looking at a failure to act: regarding failures to act, standing is made conditional on a direct legal relationship between the institution or entity expected to act, and the applicant. Under Article 265 (3) TFEU '*Any natural or legal person may … complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.*' Still, a failure to act can only be made subject of an action where the applicant shows an interest in the hypothetical act that should have been addressed to him or her individually, or – mirroring Art. 263 (4) TFEU[60] – if the applicant would (had there been such an act) have been directly and individually concerned by it, akin to an addressee. In both cases, this would require a pre-existing legal relationship between the applicant and the EU sufficiently close to give rise to such an expectation.[61] This would not be the case if the relevant act, namely a regulation or directive, would be addressed to the general public or the Member States, as in the *Peoples' Climate Case*. Still, possibly in the future there may be more specific climate change mitigation law authorising EU institutions to prohibit specific climate-unfriendly behaviour of competitors or other market players affecting the applicants. The latter might then base their expectation of the relevant institution's activity against the relevant person or undertaking on the existence of such law.

3. Analysis

Based on the judicial findings discussed in 1.-3. above, it is apparent that, following the *Peoples' Climate Case*, there is no appropriate EU procedural framework of access to justice to deal with putative violations of fundamental rights by the EU, in particular in climate change mitigation or adaptation cases. In short, there is no standing, no access to court, at EU level. This

60 Above B)II.1.

61 This would namely be the case if the claimant can only enforce his or her rights via the act demanded, e.g. as a competitor of an undertaking receiving state aid defending the level playing field under state aid law.

is in violation of the right of access to justice in fundamental rights cases under Art. 47 CFR. Above all, the approach of guaranteeing these rights even against the will of a majority, by regarding them as inalienable, is undermined if the guarantee is given into the hands of the EU's and Member States' legislature.[62]

Given the complexity of the issue of climate change it may appear understandable that the courts cannot take on the task of the legislature in solving the issues, but on the other hand elementary rights are left entirely without legal protection, if not even a 'systemic judgment' stating the illegality of the current legal situation is offered, supported by a reference to the rule of law.[63] An alternative might be to at least admit such actions and deal with them on the merits – winning the action, as shown under A., will still be extremely difficult to achieve for any applicant, but at least the competing policy concerns at issue could be debated in the open before court, and for the whole of the EU.

Whether it is sufficient here to rely on the member state court systems, as the General Court and the ECJ do,[64] i.e. to refer claimants to bringing actions against Member States, remains subject to considerable doubt for various reasons.[65] Regarding climate change it needs to be considered in particular that the relevant EU legislative competence is a shared one. Under the principle of subsidiarity, at least framework legislation regarding global climate change issues appears not only best placed at EU level, but can necessarily only be achieved effectively at EU level within the global scene. Sole Member State court jurisdiction would result in fragmentation, even if these may refer cases before them to the ECJ for a preliminary ruling under Art. 267 TFEU, as no Member State court would have the global and summary standing of the ECJ, but could only look at the relevant Member State's share in the matter. In addition, the necessary effort for any applicant would be a strong disincentive for seeking recourse to courts, as they would need to bring an action in each Member State in order to cover the whole of the EU.

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62 One might want to consider here that the majority at EU level is not a simple majority in Parliament, as the European Parliament is only one of the legislating institutions, and that the Council with its complicated double majority voting represents the Member State governments, with the ensuing potential democratic deficit, weakening concerns regarding democratic majority rule and calling even more for the control by the ECJ, cf. Winter, Not fit for purpose, Europarecht 2022, p. 367 (381 et seq.).

63 Cf. above A)I.2.a).

64 General Court, Case T-330/18 – *Carvalho,* para 52 et seq.

65 With further arguments Winter, Not fit for purpose, Europarecht 2022, p. 367 (376 et seq.).

In addition, the reference to Member State courts by the General Court and the ECJ contradicts the decades-old approach of the ECJ itself to claim jurisdiction over EU law for itself even regarding human rights protection, building up a human rights protection in its case law, which was crowned by the entering into force of the CFR. It the ECJ does not offer a by and large adequate fundamental rights protection regarding climate change mitigation and adaptation, this is called into question. Friction within the system of fundamental rights protection can only be avoided by an adequate access to the ECJ, and adequate answers on the merits of such cases.[66]

Conclusion

A. As shown the current EU system in principle offers a legal framework for the protection of fundamental rights against human-induced climate change, consisting of the implementation of the UN Framework Convention on Climate Change and the Paris Agreement, taken together with the EU Treaties and, in particular, the EU Charta on Fundamental Rights. However, in terms of enforcement, the system still leaves various gaps:

First, the rules on showing and proving that a specific activity or failure to act has resulted in a specific violation of a right, and in damage, are difficult to apply in practice regarding climate change. Defining a legal solution bridging the causality gap could include proof modifications or even reversing the burden of proof on causation, or introducing a legal presumption of responsibility of emitters, and the EU and Member States permitting or subsidising emissions. However, this will not help much unless a more global causation approach is taken, regarding it as sufficient in terms of causation to show a contribution to the general problem of climate change, without having to prove a direct causal link to the violation of a person's fundamental right.

Second, there is ongoing EU and Member State legislation, namely for the implementation of the EU Green Deal legislative package. The more this includes specific rights for individuals, translating reduction and adaptation targets into concrete action obligations and specific individual rights, the easier it will become for holders of individual rights to claim these. Still, the political processes in the EU, its Member States and sub-state levels are so slow that immediate enforcement appears absolutely necessary in order to effectively protect fundamental rights today, against the will of a majority to

66 See specifically regarding minority rights the author, Minderheitenschutz und Klimawandel, in: Festschrift Gornig, p. 197 et seq.

complacently continue business more or less as usual, ignoring the damage to fundamental rights already on its way, or already materialised. The Green Deal legislative package appears no more than a hopeful beginning here.

B. Regarding access to court, the current EU system has shown itself strikingly inadequate. If the ECJ finds itself unable to come to a wider interpretation of the rules of standing and access to court regarding fundamental rights, and in spite of individual rights enforcement being fully covered under the wording of Art. 263 (4) TFEU as well as demanded by the entering into force of Art. 47 CFR in 2009, the paradoxical situation remains that the more catastrophic the situation, the more holders of individual rights affected, the less legal protection will be afforded to them.[67] This situation is untenable from a fundamental rights point of view, and cannot be reconciled with the demands under Art. 47 CFR, and raises doubts regarding the Arhus Convention[68]. The next Treaty Amendment will need to include an amendment of the standing provisions in Art. 263 and 265 TFEU.[69] This appears the more necessary in order to make sure that the ECJ's jurisdiction matches the wider competences conferred on the EU, and Art. 47 CFR. The limited ECJ jurisdiction is incompatible with the leading role the EU has assumed in climate change matters which has manifested itself in particular in the Green Deal package. Regarding the global issue of climate change, individual action of Member States, important as it may be, cannot achieve equal weight to that of the EU.

Second, appropriate associations, such as environmental protection organisations or the Saminuorra representing the Sami minority in the *Peoples' Climate Case*, might be recognised as entitled to represent current and future generations.[70] An extension of standing for individual applicants regarding legislative acts, and a relaxation of the definition of individual concern, as well as an extension of standing to climate change organisations might be options to bring mitigation and adaptation to climate change forward. This may well also be necessary to bring the EU's procedural law obligations into line with international law.

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67 Winter, Not fit for purpose, Europarecht 2022, p. 367 (369).

68 Cf. Findings and recommendations of the Compliance Committee, 17 March 2017, https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf.

69 For suggestions here see Winter, Not fit for purpose, Europarecht 2022, p. 367 (379 et seq.)

70 Cf. the Netherlands' *Urgenda* case, De Hoge Raad (fn. 24). In more detail the author, Minderheitenschutz und Klimawandel, in: Festschrift Gornig. p. 197 et seq.; Winter, Not fit for purpose, Europarecht 2022, p. 367 (373, 378 et seq.).

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