B. European Union, Germany and Austria

Climate change litigation in Germany and Austria – an overview*

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Abstract

The *Urgenda* case[1] in the Netherlands was the first successful climate change litigation case in the world. However, many other attempts in other countries to obtain such a favourable court ruling have foundered. In recent times, the number of successful climate change litigation cases has been continuously increasing. Plaintiffs in Ireland[2] (the *Friends of the Irish Environment* case[3]) and France[4] won their cases. A short time ago, the German Federal Constitutional Court also handed down favourable rulings on several pending constitutional complaints. In all these cases, non-governmental organisations and/or private individuals were able to obtain a court order for the emission of greenhouse gases to be cut by a greater amount than had been planned by the national governments. Attempts were also made in Austria to force more ambitious climate action through the courts. However, these attempts have not been successful. The following essay explores which legal proceedings have been conducted in Germany and Austria, why most failed and which conclusions can be drawn for proceedings in other countries.

1 Germany

1.1 General and overview

Over the past few years, several lawsuits have been filed in Germany to enforce more stringent climate action through the courts. These lawsuits pursue different strategies, in particular regarding the question of whom they have been brought against. Climate action lawsuits can be filed against the state and its authorities or against private companies, to hold them accountable for their environmentally unfriendly behaviour.

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1 Supreme Court of Netherlands 20 December 2019 No 19/00135 (*Stichting Urgenda v State of the Netherlands*).

2 Charlotte Renglet, 'Decision of the Irish Supreme Court in *Friends of the Irish Environment v Ireland*: A significant step towards government accountability for climate change?' (2020) 3 CCLR 163.

3 Irish Supreme Court 31 July 2020, Appeal No 205/19 (*Friends of the Irish Environment CLG v Government of Ireland*).

4 Conseil d'État, 19 November 2020, N° 427301, ECLI:FR:CECHR:2020:427301.20201119.

Within the first group, a distinction should be made, specifically: against which state power is the lawsuit being filed – The executive or the legislative?[5]

The first lawsuit discussed below (see Section 1.2) was based on a legal action brought by three families, all of whom were farmers, and an NGO. They applied to the Administrative Court of Berlin for an order which would force the German federal government to step up its efforts to achieve the climate action targets that Germany itself had set, as well as those of the EU.[6] The lawsuit was based on the allegation that the state administration had failed to meet its statutory and European law commitments to mitigate climate change. This resulted in citizens' fundamental rights being infringed. The executive branch should therefore be forced to intensify its efforts to combat global warming.

Several constitutional complaints against the legislature have been filed with the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) (see Section 1.3). On the one hand, these complaints argued that neither the German parliament's lower nor upper house (Bundestag, Bundesrat) had adopted sufficient measures to mitigate climate change. On the other hand, one of them also posited that a specific Act, namely the Climate Protection Act (*Klimaschutzgesetz*, KSG), passed at the end of 2019, was, respectively, inadequate.[7]

Another lawsuit – which was not brought against the state but a multinational stock market-listed energy conglomerate – has been filed with a German civil court. A Peruvian citizen who has been affected by the consequences of climate change is demanding that the defendant company pays a portion of the costs for protection measures implemented, which have become necessary due to global warming (see Section 1.4).

1.2 *Family farmers and Greenpeace Germany v Germany* – ruling of the Administrative Court of Berlin

In autumn 2018, 13 citizens and Greenpeace Germany filed suit against the German federal government at the Administrative Court of Berlin.[8] The German federal government had adopted the 'Climate Action Programme' in December 2014. This programme set the goal of cutting greenhouse gas emissions in Germany by 40% by the end of 2020 (in relation to 1990 levels). Despite earlier assumptions, this 'Climate

5 Johannes Sauer, 'Strukturen gerichtlicher Kontrolle im Klimaschutzrecht – Eine rechtsvergleichende Analyse' (2018) ZUR 679, 683.

6 Andreas Buser, 'Eine allgemeine Klimaleistungsklage vor dem VG Berlin' (2020) 17 NVwZ 1253.

7 Thomas Groß, 'Die Ableitung von Klimaschutzmaßnahmen aus grundrechtlichen Schutzpflichten' (2020) 6 NvWZ 337.

8 The complaint is available at <https://bit.ly/3iIpQHF> accessed 28 March 2022.

Action Target 2020' was achieved. However, this was due solely to the corona pandemic which was not foreseeable at the time of the court proceeding. Seen from the perspective at that time, Germany would have failed to meet its obligations under the effort sharing decision 406/2009/EC of the European Union.[9] To meet the target, it would have had to buy emission permits from other EU member states.

The plaintiffs sought an order from the Regional Administrative Court of Berlin that the German government should implement the measures necessary to ensure that the 'Climate Action Target 2020' is met. They argued that they, as the owners of organic farms (or as the children of those owners), are particularly affected by climate change. The farmer families from Brandenburg, Schleswig-Holstein and the North Sea island Pellworm can already feel the impact of changes caused by global warming, i.e., the arrival of new pests or rising sea levels. Without adequate measures to mitigate climate change, they will be unable to keep their businesses operational over the long term. Therefore, the lack of action on the part of the German government had resulted in their fundamental rights under the German Basic Law (*Grundgesetz*, GG) being infringed, including under Article 2 para 2 (the right to life and physical integrity), Article 12 (occupational freedom) and Article 14 para 1 (right to property).[10]

Such an action to obtain performance is only admissible, under Section 42 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO), if a plaintiff can prove that their subjective rights have been infringed by an administrative act or the omission of such an administrative act. The plaintiff in the individual case must therefore be able to show that the federal government, in failing to meet Germany's Climate Action Target 2020, had acted unlawfully. They must also prove that their subjective rights have been infringed.

The Administrative Court of Berlin rejected the arguments brought forward on both of these points and, at the end of October 2019, dismissed the action as being unfounded.[11] Firstly, it held that the plaintiffs' subjective rights had not been infringed by Germany's failure to achieve the climate action targets set in 2014. In the view of the court, the 'Climate Action Programme' constitutes a mere political declaration of intent. It only sets out broad political guidelines. It did not lay down any legally binding rules which would grant the plaintiffs a legal claim to measures being taken to mitigate climate change.[12] The federal government also amended the Cli-

9 Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 136-148.

10 Christian Roschman, 'Climate change and human rights' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate change: International law and global governance, Volume 1: Legal responses and global responsibility* (Nomos 2013) 203ff; Thomas Groß, 'Verfassungsrechtliche Klimaschutzpflichten' (2020) 6 NVwZ 360.

11 Verwaltungsgericht Berlin 31 October 2019, 10 K 412/18.

12 Buser (n 6) 1254.

mate Action Target 2020 in the autumn of 2019 by government resolution. It now states that the 40% reduction in greenhouse gas emissions should be achieved by the end of 2023.

Additionally, the Administrative Court of Berlin rejected the argument that the plaintiffs' fundamental rights had been infringed by the failure to meet climate action targets. It held that, even though greenhouse gases may have been emitted by Germany, they cannot be attributed to the German state; the German government, therefore, has no direct responsibility for these emissions. Consequently, the plaintiffs cannot derive any direct defence claims from their fundamental rights.

Still, the Administrative Court of Berlin acknowledged that the fundamental rights invoked did not just entail a right of defence against state authorities but also a duty to protect on the part of the state. It follows that public authorities have a duty to protect citizens' fundamental rights, including against infringements by private parties.[13] However, the court also held that the state has broad discretion when discharging its duties to protect. According to the German case law, the duty to protect fundamental rights is only infringed if the measures taken were 'wholly inappropriate and completely inadequate'.[14] The Administrative Court of Berlin held that this was not the case in relation to the climate action measures taken in Germany. If, by the end of 2020, a reduction of 32% has been achieved instead of 40% and the 'Climate Action Target 2020' would only be met three years later, this does not suffice for the assumption that the measures previously taken were completely inappropriate and inadequate. The goal of cutting greenhouse gases by 40% does not represent the minimum level of climate action required under constitutional law.

The Administrative Court of Berlin left the question of whether the plaintiffs were directly concerned (required to bring an action before the German administrative courts) open.[15] The court stated that everyone is affected by climate change in one way or another, which weakened the argument in favour of direct concern. However, it was possible for the plaintiffs to be directly concerned if their organic farming businesses were particularly exposed to the effects of climate change.

The Administrative Court of Berlin held that Greenpeace itself did not have *locus standi* (in contrast to the other plaintiffs). The German Environmental Legal Remedies Act (*Umwelt-Rechtsbehelfegesetz*, UmwRG) does not confer any right on environmental organisations to file climate action lawsuits. Furthermore, the court held that it was not possible to invoke Article 9 para 3 of the Aarhus Convention (access to justice) because the Climate Action Target 2020 was not based on provisions of European law. In view of the clear requirements set by the EU to cut greenhouse

13 Stephan Meyer, 'Grundrechte in Sachen Klimawandel?' (2020) 13 NJW 894, 898.
14 Bundesverfassungsgericht 29 October 1987, 2 BvR 624/83; BVerfGE 77, 170-240.
15 Meyer (n 13) 899.

gases – including under the EU Effort Sharing Regulation[16] – this statement comes as a surprise.

In its own judgment, the Regional Administrative Court of Berlin allowed an appeal to the Higher Regional Court. The question of whether individual citizens have *locus standi* due to the infringement of basic rights in relation to climate action is a legal question of fundamental significance. Therefore, the option to appeal the decision to the higher courts must be kept open.

Despite this ruling, the plaintiff chose not to lodge an appeal against the decision. This was because the legal framework in Germany was changed soon after the Administrative Court of Berlin handed down its decision. The German Bundestag enacted the Federal Climate Change Act (*Bundes-Klimaschutzgesetz*, KSG) in December 2019. In view of the fact that this law had only just entered into force, it would have been almost impossible to prove that the federal government had failed to discharge its legal duties. Therefore, instead of appealing the decision, Greenpeace Germany chose to call on the Federal Constitutional Court in Karlsruhe (see Section 1.3 below).

1.3 Several constitutional complaints against the German legislature – ruling by the Federal Constitutional Court

In 2018, eleven individuals, the *Bund für Umwelt und Naturschutz Deutschland* and the *Solarenergie-Förderverein Deutschland* filed a constitutional complaint.[17] This climate action lawsuit alleged that Germany had failed to implement the necessary measures to fulfil its commitments under international agreements on combating climate change. The objective of the complaint was to obtain the ruling that neither the lower and upper house of the German parliament (the Bundestag and the Bundesrat) had taken sufficient measures to achieve the targets set by the Kyoto Protocol and the Paris Agreement. In addition, the ruling was sought that both the parliament and the federal government have a duty to implement the measures necessary to achieve zero emissions in time to limit global warming to 1.5°C.[18]

Further constitutional complaints were submitted in January and February 2020. The complainants include nine people aged between 15 and 32 years – some of whom were already plaintiffs in cases brought before the Regional Administrative

16 Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 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 and amending Regulation (EU) No 525/2013, OJ L 156, 26-42.

17 Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (Case Göppel et al. 1 BvR 2656/18).

18 The complaint is available at < https://bit.ly/3wG8Z0b> accessed 28 March 2022.

Court of Berlin. They were supported by the NGOs Greenpeace and Germanwatch.[19] On the other hand, the environmental organisation Deutsche Umwelthilfe filed constitutional complaints on behalf of ten children and youths living in Germany,[20] and 15 children and youths living in Bangladesh,[21] and Nepal.[22]

These constitutional complaints no longer simply took aim at the lack of action on the part of the legislature. The ruling sought was that, by setting a target of reducing emissions by only 55% by 2030, in relation to 1990 levels, the legislature had infringed the complainants' fundamental rights. The federal legislator should also be placed under an obligation to enact appropriate climate action targets within a period to be defined or to ensure – by restating the reduction target – that the volume of greenhouse gases emitted by Germany is kept as low as possible.

Even if the constitutional complaints differed in terms of the form of order sought from the court, the arguments brought forward were, in essence, the same: All complainants allege that their fundamental rights have been infringed, namely, the right to life and physical integrity (Article 2 para 2 German Basic Law), the right to property (Article 14 para 1 German Basic Law) and their rights to liberty in general. As a corollary to the fundamental rights conferred, the state has a duty to prevent those rights from being infringed by private parties. The German legislator failed to do just that by not implementing sufficient measures to mitigate climate change.

Contrary to the expectation articulated in the relevant literature,[23] the Federal Constitutional Court partially granted the rulings sought in the complaints in an astonishing judgment and declared the German Climate Protection Act to be partially unconstitutional.[24] It was not only the substantive arguments of the top court which were a surprise. Even at the stage of the admissibility check, it demonstrated an approach to fundamental rights that was largely new and which will probably lead to far-reaching consequences for the doctrine of fundamental rights.[25]

To be able to lodge an admissible constitutional complaint, complainants must demonstrate that they are presently, personally, and directly concerned. The direct-

19 The complaint is available at <https://bit.ly/3qJZrO9> accessed 28 March 2022.

20 Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (Case *Steinmetz et al.* 1 BvR 96/20).

21 Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (Case *Yi Yi Prue et al.* 1 BvR 78729).

22 Deutsche Umwelthilfe, 'Verfassungsbeschwerde gegen das Bundes-Klimaschutzgesetz' <www.duh.de/klimaklage/> accessed 16 November 2021.

23 Kurt Faßbender, 'Der Klima-Beschluss des BVerfG – Inhalte, Folgen und offene Fragen' (2021) 29 NJW 2085, 2085.

24 Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (Case *Göppel et al*. 1 BvR 2656/18).

25 Marc Ruttloff and Lisa Freihoff, 'Intertemporale Freiheitssicherung oder doch besser "intertemporale Sachgerechtigkeit"? – auf Konturensuche' (2021) NVwZ 917, 917; Sabine Schlacke, 'Klimaschutzrecht – Ein Grundrecht auf intertemporale Freiheitssicherung' (2021) 13 NVwZ 912, 916.

ness of the concern was recognised by the Federal Constitutional Court without further ado. The same went for the requirement of personal concern. Against the backdrop of the extremely restrictive case law of the European Court of Justice and the Austrian Constitutional Court on the question of which persons may contest a legal norm,[26] this is remarkable but not really new. With regard to the interpretation of the present concern, it is a different story. Here, the top court recognised that the risk of restrictions on liberty in the future could mean that peoples' fundamental rights are being affected in the present. The current legal framework creates facts on the ground that will directly affect the legal position of the complainants.[27] This intertemporal dimension of fundamental rights is a novelty in the doctrine of fundamental rights.

The substantive examination of the complaints by the Federal Constitutional Court was no less innovative. First, it addressed the question of whether there had been an infringement of the obligations to protect, which flow from the right to life and physical integrity and right to property, and concluded that there had not. The court justified its decision by stating that, with regard to obligations to protect, the legislator is accorded significant discretion, which had not been exceeded in the present case by the measures taken in the Climate Protection Act.[28] In a further step, the Federal Constitutional Court examined the alleged infringement of rights to liberty in general. Here, the court once again entered new theoretical territory by holding, under the heading 'protecting liberty on an intertemporal basis', that the provisions of the Climate Protection Act under examination had an 'advance effect similar to infringement' on the complaints' liberties as guaranteed by the fundamental rights.[29] This advance effect requires a constitutional law justification.

In the subsequent steps of the examination, the court reviewed the provisions of the Climate Protection Act against the standards of the Basic Law, specifically Article 20a, the provision regarding the state objective of protecting the environment. The court did not merely derive an obligation on the part of the state to mitigate climate change: it prescribed a mandate for climate neutrality.[30] Article 20a is not infringed by the Climate Protection Act because the Act itself has the aim of achieving climate neutrality. However, the provisions of the Act run counter to the Basic Law to the extent that they permit very high greenhouse gas emissions until the year 2030 but do not contain any sufficiently specific rules about what should happen afterwards. This results in a disproportionate shift in the obligation to reduce emis-

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26 E.g., Case C-565/19P *Armando Carvalho et al. v Parliament and Council* (2020) ECLI:EU:C:2021:252; Verfassungsgerichtshof 30 September 2020, G 144-145/2020, V 332/2020.

27 Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 para 130.

28 Ibid para 153.

29 Ibid para 184.

30 Ibid para 198.

sions to the years after 2030 and, therefore, also a risk of massive restrictions on liberties. To be able to achieve climate change mitigation targets later, fundamental restrictions would have to be imposed on almost all areas of life after 2030. In conclusion, the provisions of the Climate Protection Act forming the subject matter of the court's examination breach the legislator's obligation (derived from the principle of proportionality) to spread the necessary reductions across a period of time in a way that protects fundamental rights and achieves intergenerational fairness. For that reason, they should be considered unconstitutional.[31]

Formally, the Federal Constitutional Court's judgment only gave rise to an obligation to further specify the reduction objectives for the period after 2030. However, the arguments advanced by the court made changing only these parts of the Act (and thus achieving a result that would be in line with constitutional law) appear very difficult. The German legislator responded to the ruling swiftly and comprehensively and increased the reduction target for 2030 to 65%. Climate neutrality should be achieved by 2045.[32]

1.4 *Peruvian farmers v RWE* – a civil lawsuit before the Regional Court of Essen/Higher Regional Court of Hamm

In the cases so far discussed in this essay, it was the state having action brought against it. Now, in a climate action lawsuit currently pending before the Higher Regional Court of Hamm, the action has been brought against a private company. The Peruvian farmer Saúl Luciano Lliuya is pursuing legal action against the German energy conglomerate RWE. Lliuya owns a house in the city of Huaraz at the foot of the Peruvian Andes. His property is acutely at risk of being flooded due to rising water levels in the lake lying high above, in the mountains. The reason for this increase in water levels is that the surrounding glaciers are melting, which is, ultimately, an effect of climate change. The defendant company, RWE, is one of the largest CO_2 emitters in Europe and is responsible for 0.47% of global historical CO_2 emissions. 21.59% of all greenhouse gas emissions in Germany in 2015 could be attributed to RWE.

The plaintiff sought an order from the Regional Court of Essen according to Section 1004 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) that RWE should contribute such a proportion of financing for protection measures (a new drainage system, additional dams for the lake) as corresponds to the company's share

31 Ibid para 243.

32 Erstes Gesetz zur Änderung des Bundes-Klimaschutzgesetzes (First Law Amending the Federal Climate Protection Act) BGBl I 59/3905.

in global greenhouse gas emissions.[33] According to the arguments put forward in the pleading, this would amount to € 17,000. The competence of the Regional Court was established by RWE's headquarters being located in Essen.

Initially, the action was dismissed by the Regional Court of Essen in December 2016.[34] The Higher Regional Court of Hamm, as the appeal court, held in November 2017 that the action was, in principle, admissible, and opened proceedings to adduce evidence.[35] Experts now have to clarify whether RWE, one of the world's biggest emitters of CO_2, bears a share of the responsibility for the risk of flooding in Peru and, if so, how great this responsibility is. However, the process of collecting evidence has been delayed due to the COVID-19 pandemic.

The decision of the Higher Regional Court of Hamm is of great significance. It looks like, for the first time, a European court has held that private companies may be held liable for climate change-related risks and damage according to their share in global greenhouse gas emissions. In spite of this, it is highly doubtful whether the case will yield a successful outcome for the plaintiff. The liability risks for companies that produce a large volume of greenhouse gases are considered, *de lege lata*, to be low. Substantive liability law, in particular, presents problems.[36]

Civil laws in the continental European tradition set out three central requirements for liability: damage, proof of causality and unlawful or negligent conduct.[37] The requirement for damage to have occurred does not present any difficulties. It is sufficient for the plaintiff to assert a risk or impairment to life, health or property. Mere ecological damage, such as the extinction of species, the drying up of bodies of water or the melting of glaciers, only provides grounds for awarding compensation if they entail damage to property rights.[38]

The causality of conduct is usually assessed by applying the *conditio sine qua non*-test.[39] According to this, each act is causal if – without it – the damage would not have occurred. The plaintiff bears the onus of proof for causality.[40] For the Peru-

33 Complaint available at <www.germanwatch.org/sites/germanwatch.org/files/static/19019.pdf> accessed 16 November 2021.

34 Landgericht Essen 15 December 2016, 2 O 285/15.

35 Oberlandesgericht Hamm 30 November 2017, I-5 U 15/17.

36 Alexandros Chatzinerantzis and Benjamin Herz, 'Climate change litigation – Der Klimawandel im Spiegel des Haftungsrechts' (2010) 11 NJW 910.

37 Bernhard Burtscher and Martin Spitzer, 'Liability for climate change: Cases, challenges and concepts' (2017) 2 JETL 137, 156.

38 Monika Hinteregger, 'Klimaschutz mit den Mitteln des Privatrechts?' in Gottfried Kirchengast, Eva Schulev-Steindl and Gerhard Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (Studien zu Politik und Verwaltung 113, Böhlau 2018) 197, 209.

39 Helmut Koziol, 'Comparative conclusions' in Helmut Koziol (ed), *Basic questions of tort law from a comparative perspective* (Jan Sramek 2015) recital 8/204.

40 Erik Pöttker, *Klimahaftungsrecht. Die Haftung für die Emission von Treibhausgasen in Deutschland und in den Vereinigten Staaten von Amerika* (Studien zum ausländischen und internationalen Privatrecht 307, Mohr Siebeck 2014) 149ff.

vian farmer, this means that he has to prove that risks to his property would not have arisen (or would not have arisen to that extent) but for the activities of RWE. Due to the sheer number of emitters of greenhouse gases and how they are spread across the globe, it is, of course, tremendously difficult to prove such causality.[41] The relevant literature pleads instead for attribution of responsibility according to the extent to which risk was increased. According to this approach, every company's liability for the detrimental effects of climate change (worldwide) would be in line with the volume of greenhouse gases it emits. Whether the courts adopt this approach or the legislator would have to implement 'liability according to proportionality' remains to be seen.

Finally, it is questionable to what extent companies that produce greenhouse gases are acting unlawfully or negligently. In general, as is argued in the action against RWE, an impairment to property or health is generally an indication of unlawfulness. But can you accuse a company that has an official permit for a plant and participates in the Emissions Trading Scheme of negligent conduct?[42] For claims which are brought in Germany, invoking the German Environmental Liability Act (*Umwelthaftungsgesetz*, UmweltHG) could provide a solution. The Environmental Liability Act provides for strict liability for personal injury and property damage caused by environmental impacts via the air. Whether individual liability for climate damage can be derived from this is subject to debate.[43]

The Higher Regional Court of Hamm will have to provide answers for all these questions in its judgment. Therefore, the outcome of the legal dispute will be of fundamental significance for climate action under civil law in continental Europe.

2 Austria

2.1 General overview

Environmental organisations and citizens have also been taking the initiative in Austria in the past few years, bringing two climate action lawsuits before the Austrian Constitutional Court (VfGH). However, Austrian constitutional law contains procedural hurdles to bringing actions before the Constitutional Court.[44] On the one hand – in contrast to Germany – inaction on the part of the legislator cannot form the subject matter of an action. If the parliament does not take any climate change mitigation

41 Giedre Kaminskaité-Salters, *Constructing a private climate change lawsuit under English law* (Kluwer Law & Business 2010) 159ff; Pöttker (n 40) 49.
42 Burtscher and Spitzer (n 37) 164.
43 Chatzinerantzis and Herz (n 36) 596.
44 Judith Fitz, 'Klimakrise vor Gericht. Klimaklagen als ultima ratio im Klimaschutz?' (2019) 1 juridikum 105, 111.

action, there can be no effective legal protection. Moreover, citizens are only able to challenge laws and regulations if they are directly concerned by those specific rules. According to the case law of the Constitutional Court, this is the case if the relevant rule is addressed directly to the affected person. They have to be the addressee of the norm, or the rule must infringe the citizen's legal sphere as protected by their fundamental rights.[45]

Due to these requirements, it is not possible to challenge the Austrian Climate Protection Act (*Klimaschutzgesetz*, KSG) before the Austrian Constitutional Court. This law does not impose any obligation on the state to implement specific climate change mitigation measures. The law merely sets out how and according to what process the EU's climate action targets are shared out across the various greenhouse gas-producing sectors in Austria. The law does not confer any legal claim on individual persons to certain actions being taken by the authorities with regard to climate change mitigation.

Therefore, members of civil society decided to contest two rules with immense symbolic value for the political debate on climate action at the Austrian Constitutional Court. However, neither of these two actions led to a positive outcome for them. In the first case, politicians took action before the court was able to produce a decision (see Section 2.2 below). In the second case, the action failed on procedural requirements (see Section 2.3 below). The third climate change litigation case took a different route by addressing the administration directly, requesting the competent federal ministry to enact a regulation containing climate change mitigation measures (see Section 2.4 below).

2.2 Application to the Constitutional Court to disapply the 140 km/h speed limit on motorways

First, an action was brought in December 2019 requesting the Constitutional Court to annul two regulations of the transport minister from 2018. The regulation increased the speed limit on two Austrian motorways along a 20km and a 40km stretch to 140 km/h (up from the limit of 130 km/h, which applies elsewhere in Austria). In substantive terms, the action brought before the Constitutional Court argued that the state has a duty to implement appropriate protection measures to shield the right to life under Article 2 of the European Convention on Human Rights (ECHR) from the effects of global warming. The increase in the speed limit on motorways breached

45 Walter Berka, *Verfassungsrecht* (7th edn, Verlag Österreich 2018) 374; Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (12th edn, facultas 2019) 493.

this obligation because it would result in too large a rise in greenhouse gas emissions, which in turn would make global warming worse.[46]

The Constitutional Court was not able to make a decision on the matter. This was due to changes in political circumstances in Austria. Even before the court could commence its deliberations on the matter, both regulations were annulled by the new transport minister. The case was therefore discontinued by the Constitutional Court without having handed down a judgment on the matter.[47]

2.3 Application to the Constitutional Court to annul tax privileges for the aviation industry

A second action was brought before the Constitutional Court in January 2020.[48] More than 8,000 people demanded that the Constitutional Court declare the tax privileges afforded to the aviation industry but not the rail sector unconstitutional. While domestic flights are exempted from kerosine tax and no VAT accrues on international flights, rail transport does not enjoy any such exemptions – even though it is 31 times more environmentally friendly than taking a flight for the same journey. The applicants argued that this resulted in them having to pay higher net ticket prices for a rail journey. This encourages behaviour that is detrimental to the environment. The associated climate change infringes the applicants' rights under Article 2 and Article 8 ECHR because these rights entail a duty on the part of the state to protect citizens.

With regard to the requirement that the 8,000+ complainants have to be 'directly concerned', it was conceded that they are not the addressees of the contested tax exemptions – these were addressed solely to the respective company. However, because the relevant consumption taxes were charged to consumers, it had a knock-on effect on the users of the more environmentally friendly rail travel alternatives. Therefore, the complainants, who said that they chose to travel by rail for environmental reasons, were directly concerned by the rules at issue.

The Constitutional Court did not follow this argument and dismissed the action.[49] In the court's view, the complainants' rights were not directly infringed by the lack of tax exemptions for rail travel tickets. The taxation obligation with regard to VAT and mineral oil tax was addressed solely to the transport companies. If and to what

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46 Greenpeace, 'Greenpeace präsentiert erste Klimaklage Österreichs' (APA OTS, 29 August 2019) <www.ots.at/presseaussendung/OTS_20190829_OTS0082/greenpeace-praesentierte-erste-klimaklage-oesterreichs> accessed 16 November 2021.

47 Verfassungsgerichtshof 8 June 2020, V1/2020.

48 The complaint is available at <www.klimaklage.at/wp-content/uploads/2020/09/Klimaklage-Individualantrag-Feb2020.pdf> accessed 16 November 2021.

49 Verfassungsgerichtshof 30 September 2020, G 144-145/2020, V 332/2020.

extent these taxes are actually accrued on the market to the consumers and therefore the complainants, depends on many factors. Because the complainants had said that they only travelled by train, they are not affected by the tax law rules applicable to air travel. The Constitutional Court did not have to address the question of whether the tax privileges enjoyed by the aviation industry were justified and constitutional in the matter at hand.

The Constitutional Court's decision means that no climate change lawsuits are expected to be brought against the Republic of Austria using this method in the near future. Due to procedural hurdles, the prospects of success in such lawsuits are too low.

2.4 Request to enact a regulation according to Section 69 Crafts, Trade and Industry Code

In May 2021, a further climate action lawsuit was brought – this time against a government. The request was addressed to the Federal Minister for Digital and Economic Affairs and aimed to secure the enactment of a regulation based on the Austrian Crafts, Trade and Industry Code (*Gewerbeordnung*, GewO). The applicants were three private individuals, a municipality and an environmental organisation. Section 69 Crafts, Trade and Industry Code prescribes a power to enact regulations that may impose various obligations on traders to avoid risks to the life or health of humans or to avoid detriment to the environment. The possible measures could relate to the establishment of places of business, to the goods manufactured or sold, or to the services rendered.

The applicants requested a ban on the sale of solid combustibles, heating oil and fuels with a fossil origin. The point when the bans enter into force should vary: the first solid combustibles should be banned as of 1 January 2025. As justification, it is argued that these products accelerate the climate crisis and could already be replaced by alternatives.

Austrian law does not provide for any subjective right to the enactment of a regulation. Therefore, the applicants primarily base their claims on the law of the European Union. They draw parallels to the air pollution law where the Austrian Supreme Administrative Court recognised such a subjective right. The Effort Sharing Regulation, which sets out the quantified obligation of member states to reduce emissions outside of emissions trade, was also relied on. The applicants state that the objective of the regulation is to protect European citizens from the risks and consequences of the climate crisis. The obligation to provide such protection, in turn, establishes a subjective right. This results from the long-established case law of the European Court of Justice on the *effet utile*, which demands effective legal protection from the courts to enforce EU law claims.

In addition, the applicants also state Articles 2 and 8 ECHR as legal bases for their rights. Referring to the decisions of other top courts, including those of the German Federal Constitutional Court or the Dutch Supreme Court in the *Urgenda* case, they argue that the provisions of the ECHR (which rank equally with the constitution) confer on them a subjective right to the enactment of a regulation. Moreover, according to the applicants, such subjective rights result from the EU's Charter of Fundamental Rights.

The application was dismissed with the argument that, based on the competence for 'industry and trade', the Federation does not have any general competence for measures that aim to avoid greenhouse gas emissions in the interests of mitigating climate change. The applicants have filed a complaint against this decision with the Administrative Court in Vienna. No judgment has been handed down in this matter yet, but the prospects of success are generally seen to be slim.

In the legal sphere, the fight against climate change in Austria will have to focus instead on the procedure for approving projects which are detrimental to the environment, such as motorways or airport expansions. However, this does not look very promising. The attempt to stop the expansion of Vienna International Airport for reasons of climate change mitigation failed in 2017 – before the Constitutional Court.[50]

3 Conclusion

The decisions and lawsuits discussed in this essay show that the question of whether climate change lawsuits can succeed or not almost never depends on the efforts made by the defendant state to mitigate climate change. Climate action lawsuits do not fail because the measures already taken by the respective governments and parliaments to cut greenhouse gas emissions were ambitious enough. They only result in success in some states because countries such as the Netherlands have generous rules about the admissibility of lawsuits brought by associations to enforce matters relating to the common good.[51] On the other hand, the progressive interpretation of the law by the Federal Constitutional Court in Germany enabled a climate change litigation case to succeed. The top court showed that it is also the job of the judiciary to counter the process by which fundamental rights are undermined by the inaction of the legislator. In Austria, climate change lawsuits (or at least those which are brought against the

50 Franz Merli, 'Ein seltsamer Fall von Willkür: Die VfGH-Entscheidung zur dritten Piste des Flughafens Wien' (2017) 12 WBL 682; Gottfried Kirchengast et al., 'Flughafen Wien: VfGH behebt Untersagung der dritten Piste durch das BVwG wegen Willkür' (2017) 6 RdU 252.

51 Sauer (n 5) 680.

legislator) have failed for the foreseeable future due to the latest decision of the Constitutional Court.

If a state's legal order requires direct or individual concern to be shown in order to challenge a law, this represents a hurdle to climate change lawsuits which is almost insurmountable.[52] In this respect, the decision of the Austrian Constitutional Court is similar to the European General Court's (EGC) decision in the *People's Climate Case*.[53] The EGC stated that the reasons for dismissing the case mainly were that, although the plaintiffs were affected by climate change in one way or another, they were not individually concerned in the legal sense. Climate change does not only affect the plaintiff families but potentially all humans. The key point was not the intensity of the effects but their exclusivity and unique nature. Because the plaintiffs were not the only ones to be affected by climate change, they did not have *locus standi*.

However, in view of the threat posed by climate change, clinging onto such a stringent interpretation of the term 'individual concern' hardly seems compatible with the principle of effective legal protection.[54] The plaintiffs in the *People's Climate Case* correctly stated this in their appeal to the ECJ: 'It cannot be the case that – if everybody is affected, then no one is affected and because everybody has contributed to the problem, no one is responsible.'[55]

From a substantive point of view, climate action lawsuits may still be successful even without a departure from the previous case law. All scientific findings prove that the efforts made by states until now have been far from sufficient to achieve the 1.5°C target set out in the Paris Agreement. The measures are completely insufficient within the meaning of the case law of the German Federal Constitutional Court to protect the life and health of humans over the long term. If one considers the effects of greater global warming on the future of humanity,[56] then it is clear that fundamental rights are being infringed and that this must be addressed by the courts – even if states are granted broad discretion in fulfilling their duties of protection.

Recently, fundamental concerns have been expressed about climate action lawsuits. The 'idea that you can save the world with court orders' overestimates the power of the judiciary and shifts the responsibility within democratic systems with a

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52 Groß (n 7) 340; Fitz (n 44) 111.

53 Case T-330/18 *Carvalho et al. v Parliament and Council* (2019) ECLI:EU:T:2019:324.

54 Lennart Wegener, 'Der Wert von Klimaklagen jenseits ihrer Symbolik – Umweltrecht am Freitag' (JuWissBlog 114/2019, 6 December 2019) <www.juwiss.de/114-2019/> accessed 16 November 2021.

55 The complaint is available at <www.peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf> accessed 16 November 2021.

56 IPCC, *Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press 2018).

separation of powers, as the accusation goes.[57] However, when you consider it rationally, the argument comes to nothing. It is the job of the judiciary to monitor the legislative and executive branches and impose limits on them if they have infringed fundamental rights. The courts should also do this in relation to climate change. It is about admitting that there are serious deficits in climate change action and that both the legislative as well as the executive branch have a duty to react. How they address and implement these more stringent obligations to cut greenhouse gases remains the job of the democratically legitimate legislature and administration.[58] At the end of the day, climate action lawsuits are nothing other than the legitimate enforcement of rights expressly conferred as well as an act of participation in the public debate about climate change.[59]

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