

KATHARINA PABEL\*

## **The urgent need for climate protection as reflected in supreme court rulings in the European Union\*\***

**ABSTRACT:** It goes without saying that the climate change will affect the enjoyment of human rights, e.g., the right to life, the right to private life, economic rights. It is therefore not surprising that applications are being brought up to the supreme courts to enforce the effective climate protection measures. Nevertheless, the human rights documents in most of the European states as well as the EU Charter of Fundamental Rights and the European Convention on Human Rights do not contain a fundamental right to climate protection or to a healthy environment.

The article will provide an overview of the respective decisions of several supreme courts across Europe without claiming to be complete. It will also analyze the relevant case law of European courts, i.e. the ECJ and the ECtHR. Against this background, the question is raised as to whether fundamental rights actions can be regarded as an effective instrument for enforcing climate protection measures.

**KEYWORDS:** climate protection, fundamental right, case law of the highest courts in Europe.

### **1. Introduction and research questions**

The need for effective climate protection is now undisputed.<sup>1</sup> In the Paris Agreement of 2015, the international community agreed on a series of

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\* Full professor of public and international law at the Department for Public Law and Tax Law at the University of Economics and Business, Vienna/Austria. [katharina.pabel@wu.ac.at](mailto:katharina.pabel@wu.ac.at).

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common climate targets. Specifically, global warming ought to be limited to a maximum of two degrees Celsius compared to pre-industrial levels and, if possible, stabilized at 1.5 degrees Celsius. Global greenhouse gas emissions should peak as quickly as possible and be reduced to net zero by the middle of the 21st century in order to achieve climate neutrality.<sup>2</sup> According to Article 4 of the Paris Agreement, states should also submit and implement national emission reduction contributions every five years. Ambitions should be continuously increased. However, signing the Paris Agreement by a state results in a national commitment that remains legally non-binding.<sup>3</sup> Neither the measures with which these targets are to be achieved nor their intensity and urgency are specified in a binding manner in the Paris Agreement. The definition of concrete measures as well as their implementation remain at the discretion of the states. They may be the subject of international political negotiations and political decision-making at national level. Political priorities are often shifted by current global political developments, such as the Russian attack on Ukraine, but also by domestic political developments, and the importance of climate protection among other targets is varying accordingly. Nevertheless, in the political and legal discourse, the Paris Agreement serves as an important point of reference for calling on states and international organizations to make greater efforts to protect the climate.

Against this backdrop, fundamental rights, namely national and EU fundamental rights as well as those of the ECHR, are also being brought into play. Committed individuals, associations, and NGOs use them as instruments to promote climate protection with the help of the courts.

Climate cases before courts are a topical issue and both the general public and experts debate intensely.<sup>4</sup> The term “climate case” has become established to describe proceedings in which climate activists seek to achieve more or more intensive measures for climate protection or adaptation to climate change with the help of the courts. Like other lawsuits, they are often motivated by a political objective (‘strategic litigation’). They

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<sup>1</sup> On the following, see Pabel, 2024, pp. 16-37.

<sup>2</sup> Art 2 para 1 lit a Paris Agreement of December 2015 (UN, 2015).

<sup>3</sup> There is no agreement under international law that the member states of the Convention are bound by the calculations of the Intergovernmental Panel on Climate Change (IPCC). There is also no consensus on the question of how the calculated residual CO2 budget should be distributed among the states.

<sup>4</sup> See Stürmlinger, 2020, pp. 169-185; Krömer, 2021, pp. 178-184; Schulev-Steindl, 2022, pp. 17-19; Ennöckl, 2022a, pp. 137-143; Ennöckl, 2022b, pp. 184-191.

serve not only to achieve legal success, but often also (or above all) to generate attention and advance climate protection politically.

“Climate lawsuits” against large international companies whose climate-damaging projects are to be stopped or which are to be obliged to pay compensation are cases of civil law nature.<sup>5</sup> In the following, however, the focus will be on climate lawsuits that are based on fundamental rights. Those lawsuits deal with constellations in which state action or inactivity is challenged in court and is potentially qualified as a violation of fundamental rights.<sup>6</sup> The aim of these climate cases is to oblige the legislator (or the executive branch) to take more effective climate protection measures.

The following article presents some judgments of supreme courts in the EU and Switzerland that can be described as decisions in fundamental rights climate cases, without claiming to be exhaustive. Furthermore, it will briefly examine the relevant case law of the ECJ, followed by a more detailed look at the case law of the ECtHR to date. Finally, a summary will address the question of whether fundamental rights actions are an effective instrument for enforcing climate protection measures.

## **2. No fundamental right to a healthy environment**

Before examining the case law of the various courts, I would like to discuss some more general aspects of fundamental rights.

There is no doubt that climate change and global warming have an impact on the enjoyment of fundamental rights and will have an increasing impact in the future. In a more hostile environment, the level of protection of fundamental rights will no longer be the same. In the political debate, the reference to fundamental rights can therefore be useful to illustrate the effects of climate change on humanity. However, it is less clear whether, from today’s legal perspective, the enforcement of fundamental rights before the courts is (or should be) an effective instrument for forcing through climate protection measures.

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<sup>5</sup> See e.g. LG Essen 15.12.2016 - 2 O 285/15; Rechtbank Den Haag, 26.5.2021 - C/09/571932.

<sup>6</sup> The ECtHR also understands climate claims in this sense, see *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024, para. 439-440 and 545-549; *Carême v. France*, App. No. 7189/21, 9 April 2024, para. 17 see also; *Duarte and others v. Portugal and others*, App. No. 39371/20, 9 April 2024, para. 192.

Neither the EU Charter of Fundamental Rights nor the ECHR or the national catalogs of fundamental rights contain a specific fundamental right to a healthy environment or a healthy climate. Some national constitutions may have enshrined environmental protection or climate protection as a state objective, but without granting it the quality of a subjective right, i.e. a fundamental right. For example, Article 20a of the German Grundgesetz states that the state – mindful also of its responsibility towards future generations – shall protect the natural foundations of life and animals by legislation and by executive and judicial action. In Austria, the Federal Constitutional Law on Sustainability and Comprehensive Environmental Protection commits the federal, state, and local governments to the principle of sustainability in the use of natural resources and comprehensive environmental protection.<sup>7</sup> At best, the national objectives aimed at climate protection oblige the state to pursue the goal in its policy, and just answer the question whether states have to take climate protection into consideration while making decisions. The extent to which and by what means climate protection is actually pursued is not determined by the state objective. Furthermore, climate protection is always one of several state objectives that require attention and, in some constellations, require measures that are less or not expedient for the fulfillment of another state objective.

Fundamental rights climate cases are therefore based on unspecific, one could say “climate-neutral”, fundamental rights. Typically, applicants refer to the right to life (Art 2 ECHR) and the right to respect for private and family life (Art 8 ECHR). Points of reference in this respect can be found in the case law of the ECtHR.<sup>8</sup>

In terms of fundamental rights doctrine, fundamental rights in the context of climate cases are usually positioned in their function as the state’s positive obligation (i.e. obligation to protect).<sup>9</sup> The state should take measures to protect the legal interests guaranteed by fundamental rights that

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<sup>7</sup> Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung, BGBl I 111/2013 idF BGBl I 82/2019.

<sup>8</sup> *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 90; *Fadeyeva v. Russia*, App No. 55723/00, 9 June 2005, para. 134; *Budayeva and others v. Russia*, App No. 15339/02 and others, 20 March 2008, para. 160. See below 9.

<sup>9</sup> Spieth and Hellermann, 2020, p.1406; Calliess, 2021, p. 325; Piska, 2021, pp. 1149-151; Hollaus, 2023, pp. 379-381.

are challenged by climate-damaging behavior (of private and state actors).<sup>10</sup> In this respect, one specific problem with climate cases becomes clear: as a rule, the courts will – if at all – find a violation of a positive obligation due to a lack of protection, but will not impose an obligation to take any specific additional or further-reaching measures on the legislator.<sup>11</sup> Courts, including constitutional courts, are not and should not be substitute legislators. Apart from this, the traditional dogmatic understanding of positive obligations requires a direct threat to, or impairment of the legal interests of the holders of fundamental rights, which is not yet so easy to establish in the case of the effects of climate change.

Against this background, we now embark on a tour of the highest courts in Europe and their case-law on climate issues.

### 3. The Dutch Hoge Raad

The starting point of our tour is the judgment of the Hoge Raad of the Netherlands from 2019 in the *Urgenda* case.<sup>12</sup> This broke new legal ground by obliging the Netherlands to make specific reductions in greenhouse gases.<sup>13</sup> The decision has certainly boosted climate litigation across Europe. It was the non-governmental organization Urgenda, together with 886 other private plaintiffs, who pursued the procedure as a public interest action under Art 3:305a of the Dutch Civil Code.<sup>14</sup> The Hoge Raad confirmed a decision by the Court of Appeal in The Hague obligating the Netherlands to reduce greenhouse gas emissions by at least 25% by 2020 compared to the 1990 baseline. The court did not consider this to be an unlawful interference in the political decision-making sphere or a contradiction to the global nature of the problem of the obligation to reduce emissions. In its reasoning, the court also referred to Article 2 (“right to life”) and Article 8 (“right to respect for private and family life”) of the ECHR, which the Netherlands

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<sup>10</sup> Calliess, 2021, p. 325; Hollaus, 2023, p. 379.

<sup>11</sup> See BVerfGE 149, 293 (Fixierungen) para. 74; BVerfG 1 BVL 8/15, para. 70; see also Spieth and Hellermann, 2020, p. 1406-1407.

<sup>12</sup> Hoge Raad 20.12.2019, 19/00135; see Stürmlinger, 2020, pp. 170-171; Binder and Huremagic, 2021, pp. 109-111; Van der Veen and De Graf, 2021, p. 363; Ennöckl, 2022a, p. 142.

<sup>13</sup> See also Wegener, 2019, pp. 3-4; Binder and Huremagic, 2021, p. 109; Van de Veen and De Graf, 2021, p. 363 para. 10-11; Ennöckl, 2022a, p. 142.

<sup>14</sup> See also Burtscher and Schindl, 2022, pp. 660-661.

would be violating.<sup>15</sup> The court assumed that climate change posed a real threat, resulting in a serious risk that the current generation of citizens would be confronted with the loss of life and/or disruption of family life.<sup>16</sup>

The Hoge Raad based its decision on the UN Climate Convention and the legal obligations of the state to protect the life and well-being of its citizens and explicitly pointed out that the Constitution requires Dutch courts to respect the ECHR.<sup>17</sup>

With these decisions, the Dutch courts further developed the approach by the ECtHR on positive obligations, which I will discuss later. The Hoge Raad derives specific CO<sub>2</sub> reduction obligations from the Intergovernmental Panel on Climate Change (IPCC) 2007 report, which identifies specific reduction quantities for states for certain periods of time. Additionally, it referred to the voluntary commitment of the Dutch government. In conjunction with the duty to protect the dimension of fundamental rights, it concludes an obligation to reduce harmful greenhouse gases of the Dutch government.<sup>18</sup> This is one of the first and one of the not very numerous<sup>19</sup> cases to date in which a national supreme court has assumed an obligation on a governmental entity to reduce greenhouse gas emissions.<sup>20</sup>

#### 4. The German Bundesverfassungsgericht

The climate case delivered by the Bundesverfassungsgericht (BVerfG) in March 2021 also attracted a great deal of attention. It has taken a completely different, very innovative dogmatic approach in terms of fundamental rights.<sup>21</sup>

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<sup>15</sup> Hoge Raad 20.12.2019, 19/00135, para. 5.8-5.10.

<sup>16</sup> Hoge Raad 20.12.2019, 19/00135, para. 4.2.

<sup>17</sup> Ennöckl, 2022a, p. 142.

<sup>18</sup> See also Stürmlinger, 2020, pp. 170-174; Binder and Huremagic, 2021, p. 109; Ennöckl, 2022a, p. 142.

<sup>19</sup> Another climate action, albeit of a private law nature, is the case against Royal Dutch Shell. In the judgment of the court of first instance, the Dutch court ruled that companies along their value chain are also bound by human rights, in this specific case Articles 2 and 8 ECHR; see Rechtbank Den Haag, 26.5.2021, C/09/571932.

<sup>20</sup> Binder and Huremagic, 2021, p. 109; Ennöckl, 2022a, p. 142.

<sup>21</sup> Also on the following already Pabel, 2024, pp. 16-37; on the decision of the BVerfG in particular Calliess, 2021b, pp. 355-358; Ekardt and Heß, 2021, pp. 579-585; Hofmann, 2021, pp. 1587-1590; Meßerschmidt, 2021, pp. 109-120; Möllers and Weinberg, 2021, pp. 1069-1078; Polzin, 2021, pp. 1089-1136; Ruttloff and Freihoff, 2021, pp. 917-922;

The BVerfG expressly examined the possible violation of positive obligations to protect life and physical integrity as well as property and rejected them in their entirety.<sup>22</sup> It does assume that the positive obligations arising from the fundamental right to life and physical integrity *inter alia* require protection through measures that contribute limiting anthropogenic global warming and the associated climate change and to take adaptation measures to counter the dangers of climate change that has already occurred or can no longer be stopped.<sup>23</sup> However, the BVerfG leaves it up to the legislator to decide how these dangers are to be counteracted and how a protection concept and its normative implementation are to be specifically designed. Given the legislature's discretion for assessment, evaluation and design, the extent of constitutional court review is limited.<sup>24</sup> The BVerfG therefore expressly rejects a violation of fundamental rights due to inadequate fulfillment of positive obligations.<sup>25</sup>

The Bundesverfassungsgericht then becomes creative in terms of the doctrine of fundamental rights and develops the concept of “intertemporal safeguarding of freedom” (“intertemporale Freiheitssicherung”), to which the fundamental rights oblige.<sup>26</sup> The Karlsruhe climate case was therefore rightly described as the ‘most innovative decision in terms of fundamental rights doctrine’<sup>27</sup> among climate cases. The BVerfG defines the concept of intertemporal protection of freedom as follows: ‘The Basic Law obliges, under certain conditions, to safeguard freedom protected by fundamental rights over time and to distribute opportunities for freedom proportionately across generations.’<sup>28</sup> In order to counteract a one-sided shift of the greenhouse gas emissions imposed by Article 20a of the German Grundgesetz (protection of the natural foundations of life) into the future, the fundamental rights therefore have the effect of safeguarding freedom intertemporally. The Bundesverfassungsgericht therefore assumes an

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Schlacke, 2021, pp. 912-917; Britz, 2022, pp. 825-834; Fister, 2022, pp. 460-465; Jahn, 2022, pp. 47-72; Wolf, 2022, pp. 451-464; Holoubek, 2024, pp. 102-104.

<sup>22</sup> BVerfGE 157, 30 (*climate protection*) para. 165, 168, 170, 172.

<sup>23</sup> BVerfGE 157, 30 (*climate protection*) para. 149-150.

<sup>24</sup> BVerfGE 157, 30 (*climate protection*) para. 152.

<sup>25</sup> BVerfGE 157, 30 (*climate protection*) para. 170, 172.

<sup>26</sup> BVerfGE 157, 30 (*climate protection*) para. 116-135 (admissibility), para. 182-265 (merits); see also Ekardt and Heß, 2021, pp. 579-581; Ruttloff and Freihoff, 2021, pp. 917-918; Schlacke, 2021, pp. 913-914; Fister, 2022, pp. 460-463.

<sup>27</sup> Holoubek, 2024, p. 102; see also Calliess, 2021b, p. 355.

<sup>28</sup> BVerfGE 157, 30 (*climate protection*) guiding principle 4.

‘interference-like effect on the freedom of the complainants – freedom that is comprehensively protected under the Basic Law’<sup>29</sup>, which requires justification.

This interference-like pre-emptive effect is the result of a decision by the ordinary legislator, which allows a certain amount of CO<sub>2</sub> emissions *until* 2030 as part of the Climate Protection Act of 2019 (KSG<sup>30</sup>). Consequently, the possibilities for permissible emissions for the period *after* 2030 are significantly reduced.<sup>31</sup> By deriving from the state objective of Article 20a GG the obligation to distribute the restriction of emission possibilities in a forward-looking and proportionate manner, the BVerfG concludes that the regulation of the KSG 2019 constitutes a future encroachment on fundamental rights.<sup>32</sup>

In order to justify this interference-like pre-emptive effect, the BVerfG first refers to the state objective of “protecting the natural foundations of life” pursuant to Article 20a GG. The temperature threshold laid down in the Climate Protection Act is regarded as a concretization of the climate protection objective of the GG and therefore constitutionally relevant.<sup>33</sup> According to the BVerfG, the measures taken by the legislator to tackle climate change are covered by the legislator’s “prerogative of concretization”.<sup>34</sup> However, the principle of proportionality has been violated. According to the Karlsruhe judgment, this requires an even distribution of the CO<sub>2</sub> reduction burdens up to climate neutrality over time.<sup>35</sup>

However, since the current provisions on allowed emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from the standpoint of today – while it is still possible to change course.<sup>36</sup>

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<sup>29</sup> BVerfGE 157, 30 (*climate protection*) para. 183.

<sup>30</sup> Bundes-Klimaschutzgesetz, BGBl I 48/2019.

<sup>31</sup> BVerfGE 157, 30 (*climate protection*) para. 183.

<sup>32</sup> Ekardt and Heß, 2021, p. 580; Möllers and Weinberg, 2021, p. 1073; Burtscher and Schindl, 2022, pp. 651-652.

<sup>33</sup> BVerfGE 157, 30 (*climate protection*) para. 209.

<sup>34</sup> BVerfGE 157, 30 (*climate protection*) para. 211.

<sup>35</sup> The keyword ‘intergenerational justice’ is not mentioned but is certainly taken into account in relation to future generations.

<sup>36</sup> BVerfGE 157, 30 (*climate protection*) para. 192.

In the proportionality test, the BVerfG actually applied an equal rights approach.<sup>37</sup> It is a question of an equal distribution of the reduction in freedom, ultimately a burden-sharing that is fair to all generations.<sup>38</sup> When assessing the equality of the distribution of the restriction of freedom it is once again the state objective and the climate neutrality that follows from it that functions as a benchmark.

For this purpose, a relationship is established between the current government measure that serves to reduce CO<sub>2</sub> emissions and the hypothetical measure that the remaining CO<sub>2</sub> budget would make necessary in an anticipated future scenario. The prerequisite for establishing this relationship is a fixed, remaining CO<sub>2</sub> budget (i.e. an identifiable ‘residual budget’).<sup>39</sup> Based on this reasoning, the BVerfG declared the provision of the Climate Protection Act that determines emissions up to 2030 unconstitutional.

The outcome of the BVerfG’s decision has been widely welcomed.<sup>40</sup> In terms of legal doctrine, however, some critical comments have been made.<sup>41</sup> In particular, some scholars questioned which fundamental right the BVerfG is actually examining. Furthermore, it can be criticized that according to the judgment’s contents of the climate agreement under international law were granted constitutional effect, meaning that they were lifted to the level of the constitution. The calculations of the national residual budget of the “Sachverständigenrat für Umweltfragen” (national expert committee for environmental issues), based on the reports of the Intergovernmental Panel on Climate Change (IPCC), are decisive for the BVerfG’s assessment. These values are non-binding guidelines which the legislator shall consider as part of its obligation under international law but do not have constitutional quality.<sup>42</sup>

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<sup>37</sup> See also Möllers and Weinberg, 2021, p. 1073; Ruttloff and Freihoff, 2021, p. 921; Holoubek, 2024, p. 107.

<sup>38</sup> Ekardt and Heß, 2021, p. 580; Möllers and Weinberg, 2021, p. 1073; Ruttloff and Freihoff, 2021, p. 918; Schlacke, 2021, pp. 914-915; Wolf, 2022, p. 462.

<sup>39</sup> BVerfGE 157, 30 (*climate protection*) para. 246-247.

<sup>40</sup> Schlacke, 2021, p. 914; Jahn, 2022, p. 49; with further references Hofmann, 2021, pp. 1587-1590.

<sup>41</sup> See inter alia Hofmann, 2021, p. 1587; Meßerschmidt, 2021, p. 114, pp. 119-120; Möllers and Weinberg, 2021, p. 1076; Polzin, 2021, p. 1099.

<sup>42</sup> Pabel, 2024, pp. 27-28.

For the purposes of this article, I will leave well alone with these reflections, which could be dealt with in detail. The development of the dogmatic figure of the ‘intertemporal safeguarding of freedom‘ is fascinating because it finds a new solution for the dogmatic question of the negative and positive effects of fundamental rights.<sup>43</sup> On second glance, however, it seems to be an artifice relying on the constitutional anchoring of concrete climate targets, which the German Grundgesetz probably does not contain.<sup>44</sup> It is questionable whether this concept can be transferred to other legal systems.

## 5. The Swiss Bundesgericht

In November 2016, the association “Klimaseniorinnen Schweiz” and four other applicants, supported by the NGO, applied at federal level. They stated that the federal government is violating the Swiss Federal Constitution (precautionary principle and right to life) and the ECHR with its current non-sufficient measures to achieve the climate target as a warming of more than 2 degrees is very likely to lead to a “dangerous anthropogenic disruption of the climate system”. The “Klimaseniorinnen” considered the risk that the federal government is taking by not currently pursuing the 2-degree target to violate human rights. According to the application, the federal government is not adequately fulfilling its duty to protect fundamental rights as enshrined in constitutional law.<sup>45</sup>

The “Eidgenössische Departement für Umwelt, Verkehr, Energie und Kommunikation” (Swiss Department for the environment, transport, energy and communications) refused to deal with the application. An appeal against this to the Federal Administrative Court was rejected in December 2018 on the grounds that senior citizens are not more affected by the effects of global warming than other people. The applicants then lodged an appeal with the Bundesgericht. In May 2020, the Federal Supreme Court dismissed the appeal: It held that the applicants’ concerns should not be enforced by legal means but by political means.

The applicants lodged an application with the ECtHR. In the proceedings there, the Swiss federal government argued that Switzerland’s

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<sup>43</sup> Möllers and Weinberg, 2021, p. 1073; Jahn, 2022, p. 68, with the finding of a convergence or mixture of the doctrines of defensive rights and protective obligations.

<sup>44</sup> See Schlacke, 2021, p. 915; Britz, 2022, pp. 826-827.

<sup>45</sup> Klagebegehren Klimaseniorinnen, 2016, para. 198.

political system with its direct-democratic instruments offered sufficient opportunities to advance climate issues.<sup>46</sup> “Judicialization” of such processes, i.e. assigning the decision on climate protection measures to the ECtHR, would be in tension with the principle of separation of powers and the principle of subsidiarity of the Convention system. It would also shorten the democratic debate and make it more difficult to achieve political solutions. This argument must of course be seen against the specific background of the Swiss legal system, which provides for far-reaching instruments of direct democracy but lacks a judicial review of norms. However, this highlights a general problem of climate cases concerning the principle of separation of powers between the courts and the administration/government.<sup>47</sup>

## 6. The Austrian Verfassungsgerichtshof

In international comparison, the Austrian Verfassungsgerichtshof (VfGH) has so far acted very cautiously regarding climate cases. To date, it has neither further developed the doctrine of the positive obligations, as the Dutch Hoge Raad did, nor has it followed the example of the German Bundesverfassungsgericht and added an intertemporal effect to fundamental rights or developed its specific own legal approaches of handling climate cases with respect to human rights.

It is discussed whether climate actions under fundamental rights are popular actions that are fundamentally inadmissible under the existing system of legal protection, which is geared towards the enforcement of individual legal positions.<sup>48</sup> The focus on the assertion of individual, subjective rights is an essential characteristic of legal protection under Austrian and German law as well as under the ECHR.<sup>49</sup> Accordingly, the –

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<sup>46</sup> *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024, para. 338.

<sup>47</sup> On 9.4.2024, the ECtHR ruled on the complaint by the ‘Klimaseniorinnen’. The complaint of the individual applicants was declared inadmissible due to a lack of victim status (Art. 34 ECHR). The ECtHR considered the complaint by the Climate Senior Women’s Association to be admissible and found a violation of the duty to protect under Art 8 ECHR and Art 6 ECHR. In essence, the ECtHR considered the inadequate measures taken by Switzerland to combat climate change to be a violation of the duty to protect under Art 8 ECHR, see also 9 below.

<sup>48</sup> Schäffer and Kneihs, 2013, para. 57; Rohregger and Pechhacker, 2024, para. 171.

<sup>49</sup> On Austria Schäffer and Kneihs, 2013, para. 56; Rohregger and Pechhacker, 2024, para. 170-171; on Germany Bethge, 2021, para. 336; Grünewald, 2022, para. 81; on the ECHR

at least potential – violation of individual rights is a prerequisite for the admissibility of fundamental rights applications. This has so far led to the inadmissibility of climate cases in proceedings before the Austrian Verfassungsgerichtshof.<sup>50</sup>

## 7. The French Conseil d’Etat

The French Conseil d’Etat also had to decide on a climate case.

In 2019, the municipality of Grande-Synthe, which is located in northern France in an area considered to be at high risk of climate change, and the mayor of Grande-Synthe turned to the Conseil d’Etat to challenge the government’s failure to take additional measures to achieve the Paris Agreement’s goal of reducing greenhouse gas emissions by 40% by 2030. The cities of Paris and Grenoble as well as several NGOs took part in the proceedings. In its first decision on November 19, 2020, the Conseil d’Etat declared the application admissible insofar as it was submitted by the municipality of Grande-Synthe. However, the Conseil d’Etat rejected the mayor’s individual application on the grounds that he had no legally protected interest in the matter. It was not enough that he had argued that his private house was located in an area that was at risk of flooding from 2040 onwards.

On the merits, the Conseil d’Etat decided in favor of the applicants. It found that the reduction in emissions in 2019 was too low and not significant enough in 2020, as economic activity had been reduced by the coronavirus crisis. It also found that compliance with the target pathway, which provides for a 12% reduction in emissions for the period 2024-2028, could not be achieved if new measures were not taken quickly.<sup>51</sup> The Conseil d’Etat therefore called on the government to take additional measures by March 31 2022 in order to achieve the target of a 40% reduction in greenhouse gas emissions by 2030.<sup>52</sup> Again, although not for the individual plaintiff, the climate case was successful on the merits, as the

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ECtHR *Findlay v. United Kingdom*, App. No. 22107/93, 25 February 1997, para. 67; Grabenwarter, Pabel and Edtstadler, 2018, para. 34; Grabenwarter and Pabel, 2021, p. 66, para. 16; Meyer-Ladewig and Kulick, 2023, Article 34 para. 22.

<sup>50</sup> Constitutional Court 30.9.2020, G 144/2020. On the popular complaint, see also Pabel, 2024, pp. 32-33.

<sup>51</sup> Conseil d’Etat, 1.7.2021, 427301, para. 5.

<sup>52</sup> Conseil d’Etat, 1.7.2021, 427301; see also Abel, 2023, pp. 13-14; Richter, 2022, pp. 217-218.

application proceeded by the municipality of Grande-Synthe achieved the objective of taking new and more effective measures against climate change in any case.<sup>53</sup>

## 8. The ECJ

We will now turn our attention to the European courts, the first one being the European Court of Justice (ECJ):

The vast majority of relevant cases before the European Court of Justice (ECJ) concerned EU emissions trading. In the first four years of its existence, there were more than 40 cases, mainly from member states that questioned the EU Commission's responsibility for reviewing the national allocation plans (NAPs) or the legality of the procedures.<sup>54</sup> Plant operators also tried to take the matter to court, but were not admitted.<sup>55</sup> In its decisions, the ECJ reaffirmed the importance of climate protection and the significance of EU emissions trading but stated that the EU Commission was not allowed to take market effects into account when reviewing NAPs.<sup>56</sup>

In 2018, an EU court dealt with a climate case similar to aforementioned ones for the first time. In the People's Climate Case, ten families from the EU, Kenya and Fiji brought an action before the General Court of the European Union (General Court) against the European Parliament and the Council of the European Union over the dangers of climate change directly affecting them in order to achieve a tightening of the EU's climate targets.<sup>57</sup> In May 2019, the GC dismissed their action as inadmissible due to a lack of individual concern. The applicants appealed to the ECJ in July 2019.<sup>58</sup> The main point of contention was the interpretation of "individual concern", which is required for a natural or legal person to

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<sup>53</sup> Conseil d'Etat, 10.5.2023, 467982; Richter, 2022, pp. 217-219.

<sup>54</sup> *Saint-Gobain Glass Germany v. Commission*, App. No. C-503/07 P, 8 April 2008; *US Steel Košice v. Commission*, App. No. C-6/08 P, 19 June 2008; *Germany v. Commission*, App. No. T-374/04, 7 November 2007; *United Kingdom v. Commission*, App. No. T-178/05, 23 November 2005; *Poland v. Commission*, App. No. T-183/07, 23 September 2009.

<sup>55</sup> *Fels-Werke and others v. Commission*, App. No. T-28/07, 11 September 2007.

<sup>56</sup> *United Kingdom v. Commission*, App. No. T-178/05, 23 November 2005, para. 60; *Poland v. Commission*, App. No. T-183/07, 23 September 2009, para. 113.

<sup>57</sup> *Carvalho and others v. Parliament and Council*, App. No. T-330/18, 8 May 2019.

<sup>58</sup> *Carvalho and others v. Parliament and Council*, App. No. T-330/18, 8 May 2019.

have standing to bring an action for annulment under Article 263 para. 4 TFEU. Both the General Court and the ECJ followed the established case law (“Plaumann formula”)<sup>59</sup> and demanded that the applicant must be particularly affected by the contested legal act of the Union. However, this was not the case for the applicants.<sup>60</sup>

With this decision, the ECJ confirms that, as a rule, legal protection for individuals is to be granted by the courts of the Member States. In doing so, it has ultimately taken itself out of the game when it comes to individuals’ fundamental rights actions on climate change.

## 9. The ECtHR

All eyes are currently on Strasbourg, where the Grand Chamber of the ECtHR recently ruled on three climate cases.<sup>61</sup> The Court had postponed six other climate cases in order to await the leading decision of the Grand Chamber.<sup>62</sup>

Even before the decisions in the climate cases, the case law of the ECtHR recognized positive obligations in principle<sup>63</sup> and assumed the violation of Convention rights in several cases relating to environmental

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<sup>59</sup> *Plaumann v. Commission of the EEC*, App. No. C-25/62, 15 July 1963; see also Fitz and Rathmayer, 2021, pp. 37-38; Winter, 2022, p. 367; Christiansen and Masche, 2023, pp. 32-33.

<sup>60</sup> *Carvalho and others v. Parliament and Council*, App. No. T-330/18, 8 May 2019, para. 71-80.

<sup>61</sup> The judgments of the ECtHR were delivered after this article was written, *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024; *Carême v. France*, App. No. 7189/21, 9 April 2024; *Duarte and others v. Portugal and others*, App. No. 39371/20, 9 April 2024.

<sup>62</sup> *Uricchio v. Italy and others*, App. No. 14615/21, case pending – 3 March 2021; *De Conto v. Italy and others*, App. No. 14620/21, case pending – 3 March 2021; *Müllner v. Austria and others*, App. No. 18859/21, case pending – 25 March 2021; *Greenpeace Nordic and others v. Norway and others*, App. No. 34068/21, case pending -16 December 2021; *Grandparents’ Climate Campaign v. Norway and others*, App. No. 19026/21, case pending – 26 March 2020; *Soubeste and others v. Austria and others*, App. No. 31925/22, case pending – 21 June 2022; *Engels v. Germany and others*, App. No. 46906/21, case pending -lodged in September 2022.

<sup>63</sup> See for all *Belgian Language Case v. Belgium*, App. No. 1474/62 et al, 23 July 1986; *Hokkanen v. Finland*, App. No. 19823/92, 23 September 1994, para. 55; *Siliadin v. France*, App. No. 73316/01, 26 July 2005, para. 112-130; *López Ostra v. Spain*, App. No. 16798/90, 9 December 1994, para. 51-58; see also Grabenwarter and Pabel, 2021 pp. 164-166.

law, in particular violations of Article 2 and 8 ECHR.<sup>64</sup> However, the assumption of a violation presupposes that the asserted environmental impacts are of a certain weight and represent a ‘real and immediate risk’ to the legal interests of the respective applicants.<sup>65</sup> In order to come to an interference with fundamental rights in need of justification, it is therefore required that the danger to the protected interests of life, private life, family, or property has, if not materialized, then at least intensified and become more concrete. State authorities had to be able to recognize that a danger exists (“foreseeability”).<sup>66</sup> As a third prerequisite, the ECtHR only assumes a violation of a positive obligation if it does not place a disproportionate burden on the state; the ECtHR grants states a wide margin of discretion.<sup>67</sup> Strasbourg case law has so far, i.e. prior to the decisions on the climate cases in April 2024, accepted environmental protection obligations on this basis in cases involving potential hazards from direct sources of danger such as a rubbish tip,<sup>68</sup> a gold mine,<sup>69</sup> or a river that is prone to flooding.<sup>70</sup> General, as yet unspecified hazards, such as those caused by climate change, had not yet been successfully brought before the ECtHR. However, if the risk of violations of fundamental rights becomes more concrete as a result of the temperature rise—think of flooding events caused by extreme weather conditions, such as those that occurred in Germany in the summer of 2021,<sup>71</sup>

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<sup>64</sup> *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 90; *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 160; *Kolyadenko and others v. Russia*, App. No. 17423/05 and others, 28 February 2012, paras. 187, 217; *Fadeyeva v. Russia*, App. No. 55723/00, 9 June 2005, para. 134.

<sup>65</sup> *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 101; mutatis mutandis *Osman v. United Kingdom*, App. No. 23452/94, 28 October 1998, para. 116; *Paul and Audrey Edwards v. United Kingdom*, App. No. 46477/99, 14 March 2002, para. 55; *Mastromatteo v. Italy*, App. No. 37703/97, 24 October 2002, para. 68.

<sup>66</sup> *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 158; see also Holoubek, 2024, p. 105.

<sup>67</sup> *Hatton and others v. United Kingdom*, App. No. 36022/97, 8 July 2003, para. 100; *Taşkin and others v. Turkey*, App. No. 46117/99, 10 November 2004, para. 116; *Fadeyeva v. Russia*, App. No. 55723/00, 9 June 2005, para. 134; *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 134-137; Grabenwarter and Pabel, 2021, pp. 345-346.

<sup>68</sup> *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004,

<sup>69</sup> *Taşkin and others v. Turkey*, App. No. 46117/99, 10 November 2004.

<sup>70</sup> *Kolyadenko and others v. Russia*, App. No. 17423/05 and others, 28 February 2012.

<sup>71</sup> Mehr als 100 Tote nach Überschwemmungen in Deutschland, Der Standard 16.7.2021, Available at: <https://derstandard.at/story/2000128224261/lage-in-deutschlands-hochwassergebieten-weiter-angespannt> (Accessed: 9 June 2024).

or the risk of landslides or avalanches in certain places – then it does not seem impossible that, in continuation of ECtHR case law, the violation of positive obligations will also be assumed for such climate impacts.

On April 9, 2024, the Grand Chamber of the ECtHR delivered its judgments in three climate cases. A violation of fundamental rights was only found in the case of the “Klimaseniorinnen” against Switzerland. Firstly, the Court found a violation of Article 6 ECHR due to the rejection of the case by the Swiss courts. Secondly, Article 8 ECHR was violated because the Swiss authorities had not acted in time and in an appropriate way to devise, develop, and implement relevant legislation and measures that could combat the negative effects of climate change.<sup>72</sup> In another climate case, Portuguese teenagers and young adults filed another application against Portugal and 32 other states.<sup>73</sup> They objected to the states’ contribution to greenhouse gas emissions, which led to global warming and thus to increased heat waves. The applicants alleged a violation of the state’s obligation to protect the right to life and respect for private life and referred to the Paris Agreement on climate change. They also considered the prohibition of discrimination to be violated, as, due to their young age, the expected adverse effects on them were greater and more severe than on members of older generations. The ECtHR declared the application inadmissible with regard to Portugal, as the applicants had not exhausted the domestic appeal procedure (see Article 35 ECHR). The application against the other states was also inadmissible, as the ECtHR did not recognize a case of the extraterritorial effect of the Convention in the constellations in question.<sup>74</sup>

The third case was brought by the now former mayor of the municipality of Grande-Synthe in the north of France. As mentioned before, his proceedings were declared inadmissible by the Conseil d’Etat,<sup>75</sup> against which he subsequently appealed to the ECtHR. The ECtHR also declared this application inadmissible, as the applicant, who no longer lived in the French municipality, did not meet the requirements for victim status.

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<sup>72</sup> *KlimaSeniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024.

<sup>73</sup> *Duarte and others v. Portugal and others*, App. No. 39371/20, 9 April 2024

<sup>74</sup> *Duarte and others v. Portugal and others*, App. No. 39371/20, 9 April 2024, para. 213-214.

<sup>75</sup> See point 7.

It may also be interesting to note the pending application of an applicant from Austria<sup>76</sup> who suffers from a temperature-dependent form of multiple sclerosis, which makes him reliant on a wheelchair from a temperature of around 25 degrees and on external assistance from around 30 degrees. Particularly in comparison to the Swiss ‘Klimaseniorinnen’, for whom the ECtHR had denied victim status, the case of the applicant in the Austrian case once again focuses on the question of what degree of affectedness the Court requires for the assumption of victim status. The person concerned, who has multiple sclerosis, is already suffering from health problems due to the increased number of hot days caused by climate change. If the victim status due to the effects of climate change were to be rejected in this constellation as well, it would be difficult to imagine an individual situation at present that would warrant a complaint to the ECtHR. Applications to Strasbourg against inadequate state climate protection measures would then be limited to eligible associations or organizations.

This article does not provide a comprehensive analysis of the ECtHR’s climate cases. It is an open question whether the reasons given by the ECtHR in the various proceedings and the legal consequences of Switzerland’s condemnation of climate protection in this country will strengthen hopes for the effectiveness of climate cases based on fundamental rights.

## **10. Can fundamental rights actions be regarded as an effective instrument for enforcing climate protection measures?**

Following this overview of the case law of the highest courts in Europe on fundamental rights climate cases, I will briefly summarize and highlight three points by ending with open questions.

1. Whether a climate case is successful before courts depends not least on the structure of legal protection in the respective legal system. In the Netherlands and France, proceedings in which the focus is not on the individual violation of fundamental rights, exist. It is rather the conduct of state bodies that is objectively assessed against the standard of fundamental rights. Ultimately, the most recent case law of the ECtHR also points in this direction as it is very cautious in granting individuals the status of victim and thus, the right to applications but considers the application of an

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<sup>76</sup> *Müllner v. Austria and others*, App. No. 18859/21, case pending – 25 March 2021; see Krömer, 2021, p. 179.

association to be admissible without it being clear which subjective rights it represents.

2. In proceedings, such as those in Germany and Austria, but also before the ECtHR, where the fundamental rights review is based on the possible violation of subjective rights, the traditional effect of fundamental rights in their negative and positive dimension is not sufficient to fully grasp the typically not yet concretized threats to individual fundamental rights posed by climate change. Successful climate actions therefore require innovative approaches by the courts, be it the development of the intertemporal effect of fundamental rights by the Bundesverfassungsgericht or the conception of a form of representative action in climate actions by the ECtHR. The climate targets set by the Paris Agreement play a key role in both developments of the protection of fundamental rights. It was only by referring to these targets that the courts were able to define a (protective) minimum standard which, if not met, led to a violation of fundamental rights.

3. It is remarkable that climate activists are relying heavily on the effectiveness of the courts to achieve their goals with climate actions. The courts, especially the constitutional courts and the European Court of Human Rights, therefore, have high hopes of advancing climate protection and persuading states and politicians to do more to protect the climate. At the same time, however, this also shows a lack of trust in the democratic processes in the states. Activists seem to regard state actors as too hesitant and the existing democratic procedures as too slow, thus concluding that they have no real influence in this matter with ordinary methods. However, the role of jurisdiction in the concept of the separation of powers should be reflected. In a legal system that provides for constitutional court control of legislation, the powers of the legislature and the judiciary are intertwined in this aspect. The constitutional courts exercise control over the legislature within the scope of their powers, and their standard of review is determined by constitutional law. This in turn can be bound by international law or be amended and supplemented. So, what are the implications of the Constitution and fundamental rights for climate protection? Are the Paris climate protection goals part of domestic constitutional law? And does the political goal of limiting global warming take precedence over other political goals? Does the Constitution give it priority? Or is it not ultimately up to the legislator to decide?

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