

Economic and Legal Issues of Climate Change in the EU

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Summary: Climate change has begun to make itself felt also in Europe. The article seeks to identify responses to the challenges from the law through the protection of fundamental rights to life, health, occupation and property, as well as ‘environmental rights’, and private law rights. It establishes that, in spite of a general consensus that these rights are guaranteed and protected by the law, it is practically very difficult to substantively show and prove a violation of such a right. Following this, the enforcement of these rights by individuals and environmental protection organisations is explored, in particular looking at the Peoples’ Climate Case recently dismissed by the European Court of Justice. In doing so, the article will suggest solutions *de lege ferenda*, including some sketches as to how to develop individual and associations’ rights further in order to increase pressure on political processes to mitigate and adapt to climate change, and to compensate for climate-change-induced losses. The article concludes by identifying a gap in traditional legal protection of human rights, first, regarding the rules on showing and proving that a specific activity or failure to act has resulted in a specific damage. Secondly, an extension of standing for individual applicants regarding legislative acts, and a relaxation of the definition of individual concern, as well as an extension of standing to climate change organisations are suggested as options to bring mitigation and adaptation to climate change forward. Overall, the law may have to choose between adapting legal instruments in order to maintain classical human rights protection in the face of new challenges or accepting a gap in the protective system for short-term gains of current business and our daily convenience.

Keywords: causation, climate change, compensation, environmental protection rights, human and fundamental rights, individual rights, Peoples’ Climate Case – standing before court

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1. Introduction

Climate change has begun to make itself felt also in Europe. Thus many scientists believe that it lies behind the more extreme weather conditions experienced in recent years. These changes do not only affect the environment, but our lives and societies, and livelihoods, too – resulting in loss of lives and health, jobs and economic loss extending as far as insolvencies. The article will seek to identify responses from the law, if any, already in place regarding individual consequences, in particular existing possibilities to prevent or demand state or private action, or to compensate people and business entities whose basic rights to life, health, work or property are affected by climate change. In doing so, it will look at existing rights under EU constitutional law¹ – classical Human Rights and more recent ‘environmental rights’, and private law rights, as legal bases for this (2). Following this, the enforcement of these rights by individuals (3) and environmental protection organisations (4) before court will be explored. In doing so, the article will suggest solutions *de lege ferenda*, including some sketches as to how to develop individual and associations’ rights further in order to increase pressure on political processes to mitigate and adapt to climate change, and to compensate for climate-change-induced losses.

2. Rights as Legal bases

2.1. Individual Rights

2.1.1. *Problems of Definition and Allocation*

The primary legal bases to consider for preventing or demanding action, or compensation, are individual rights. Individual rights are allocated by law to individual persons, with corresponding obligations on the EU, states, or private entities, to respect and protect these rights. However, it is difficult to allocate a right against climate change to an individual person, as it is a phenomenon that concerns all. In addition, it is a highly complex issue with multiple sources contributing to it, and multiple effects as well as multiple other interests to be considered in mitigating or adapting to it. Accordingly, demanding that a state or private stakeholder who (putatively) contributes to climate change refrain from some activity, as well as demanding state or private action for mitigating climate change, will be a matter of scientific and political discourse to ensure a full and proper balancing of all interests involved. However, political decision-making

¹ Leaving aside Member State constitutional law for reasons of space.

possibly takes longer than humanity has left in order to avoid uncontrollable rises in global temperature. In addition, political decision-making, or indeed the failure to take any or sufficient decisions and actions, must respect individual rights. Some of these cannot be disposed of even by a majority, thus protecting minorities from being encroached upon excessively, or singled out to bear the burden of the general public. In our context of climate change, these rights may provide a starting point for a given natural or legal person to prevent or demand environmental action, insofar as the relevant rights protect specific interests or goods otherwise at risk. Similarly, after the event, a given claimant may in principle seek damages from the state or from private entities contributing to climate change by showing that his or her rights have been violated, resulting in damage.

2.1.2. Classical Human Rights

A. General Issues

Individual rights are, first and foremost, the classical human rights. The Convention on Human Rights² and the Social Charter³ of the Council of Europe⁴, as well as the European Union's Fundamental Rights Charter (CFR)⁵ and the constitutions of the EU Member States, as well as many other states, protect relevant rights to life and health, inviolability of property, and freedom of occupation and business. The EU Fundamental Rights Charter, looked at here, is representative for the other Human Rights documents, as it encompasses the guarantees under the Convention and the Charter as well as the essence of Human Rights protection in the EU Member States⁶.

The preamble of the Charter states for the EU that '*it seeks to promote balanced and sustainable development*'. More specifically, the preamble posits relevant limits for any charter rights in so far as '*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations*'. Seen in the light of climate change, sustainable development must include mitigating and adapting to it, and responsibility to

² The European Convention on Human Rights [online]. Available at: <https://www.echr.coe.int/Documents/Convention_ENG.pdf>

³ The Social Charter [online]. Available at: <<https://www.coe.int/en/web/european-social-charter>>

⁴ The Council of Europe [online]. Available at: <<https://www.coe.int>>

⁵ EU Charter on Fundamental rights [online]. Available at: <https://europa.eu/european-union/law/treaties_en>

⁶ The latter had also fed into the EU's Court of Justice's case law establishing human rights protection as 'general principles common to the laws of the Member States' over the years, cf. CJEU website: [online]. Available at: <https://curia.europa.eu/common/recdoc/repertoire_jurispr/bull_1/tab_index_1_04.htm>

future generations arguably implies that any holder of these rights is required to exercise them in a way that preserves the climate in a state that allows future generations the exercise of the same rights. For the present, the exercise of any fundamental rights under the Charter is limited by the rights of others and the interests of the human community. Such rights are, to start with, negative rights of defence against the state and the EU, meaning that they entail the right to not have one's sphere protected under the right encroached upon; in addition, they may also impose positive obligations on the states or the EU to act in order to protect these rights. Both will be looked at in turn.

B. Fundamental Rights as Defensive Rights

Scope of Protection, Encroachment and Causal Link

Proceeding with the specific rights under the Charter relevant for preventing the EU, or Member States, from further contributing to climate change, first, Article 2 CFR recognises that '*Everyone has the right to life*', under Article 3 '*the right to respect for his or her physical and mental integrity*'. Article 15 CFR generally guarantees that '*Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation*' and, under Article 16 CFR, '*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised*'. Another relevant fundamental right is guaranteed by Article 17 (1), under which '*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions*'. In the Solidarity chapter the Charter sets out rights beyond these classical rights, which will be examined below (II.).

Each of these rights is legally binding on the EU and its Member States under Art. 51 CFR. Taken as negative rights, they allow their holders to defend their individual interests protected thereunder, i.e. their lives, health, freedom of occupation or business activity, and their property, against the EU and the Member States wherever an encroachment on any of them by the latter can be shown. More specifically, it must be shown that there is a right, a holder of the right and an encroachment on it by an EU or state activity.⁷ Finally, there must be a causal link between the activity and the encroachment upon the right in order for the right to form the basis of an action for preventing the relevant activity. Examples of state activity violating fundamental rights in the context of climate change may be the running of state industries emitting greenhouse gases, the granting of permits by the state to start or to continue emitting greenhouse

⁷ See above A), in more detail e.g. SCHWERDTFEGER, A., Article 51. In: MEYER, J./HÖLSCHIEDT, S. (eds), *Charta der Grundrechte der Europäischen Union. 5th ed.* Baden-Baden: Nomos Verlag, 2019, no 67.

gases for industries or energy providers, permits for producing and using cars and lorries or ships, to name just a few.

However, whilst the right of being left alone to enjoy one's life, health, occupation, business or property may be uncontested in principle, and while the encroachment on these, e.g., by extreme weather conditions will also be clear, it is the showing and proof of the causal link between a specific activity by a specific entity, such as the granting or the use of a permit, and the specific encroachment on such a right which pose the greatest problems in the context of climate change. Given the all-encompassing nature of global warming and climate change, and the fact that the composition of the atmosphere, with the prevalence of various gases, has changed considerably due to human greenhouse gas emissions from the beginning of industrialisation, it is not possible, for instance, to nail down one individual source as the cause and originator, say, of a specific draught or flooding event encroaching on a right of one individual or enterprise. There are always likely to be alternative causes. An approach that could help here would be to adopt an aggregated causal view, in which a claimant need only to show that the defendant state's or EU's activity contributed to climate change at large, and that a specific loss of rights is caused by climate change. Accordingly, any emitting activity of the EU and the Member States, or decision permitting such emissions, would be, in principle, illegal: such as the running of fossil-powered plants, starting a combustion-engine-powered car, etc. – many everyday activities regarding which political consensus to restrict or prohibit them is hard to achieve. Can, and should, courts fill this gap in the protection of fundamental rights?

Justification of an Encroachment in the Context of Climate Change

Assuming the law were in principle prepared to interpret rights to defend oneself against actions furthering climate change in the suggested way, it would still need to be assessed whether the EU or state could justify the encroachment as a permissible restriction of the right. Such a restriction must comply with Article 52 (1) CFR, under which '*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*'. It follows that, even if an encroachment on a right and the causal link to a specific action can be proven, the relevant EU or state action may be justified in the public interest if occurring on a legal basis and still within the limits of proportionality. Here the public interest in energy supply, products and services, transport, etc, as well as fundamental rights and legitimate expectations

of others would have to be balanced against the fundamental rights encompassing defending oneself against climate change. It will remain to be seen how far courts would consider themselves equipped to overrule political decisions undertaking exactly this balancing of rights and interests involved.

C. Fundamental Rights as Rights to Demand Action: Mitigation and Adaptation

In addition to the defensive side of rights, Article 51 CFR provides for the rights to also be bases for demanding protective action: under para 1 the institutions, bodies, offices and agencies of the Union and the Member States shall not only ‘*respect the rights*’, but also ‘*promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*’. This may encompass the right to measures of mitigation and adaptation to climate change. However, fundamental rights are often not specific enough to pinpoint one specific action that the state must take in order to defend them. For this purpose, the holders of the rights mostly have to rely on legislation to specify the relevant required actions or decisions.⁸ This applies particularly in the context of climate change: with its multiple sources and global chains of causation it is difficult to see what a fundamental rights court judgment imposing a specific duty on the EU, or a specific state, might be. Only where the causal links are clear, and the specific action can be identified which might at least ease the encroachment on the fundamental right, can this be crystallised into a judgment leading to a concrete and identifiable obligation. Otherwise, the EU, or Member State, could plausibly argue that there are many other ways to achieve the result, and that it should be decided in the political process which route to take. Overall this does not leave much scope for an interpretation of the fundamental rights in line with the preamble’s demand for ‘*promoting balanced and sustainable development*’ directly. Accordingly, some Member State courts⁹ have now at least stated that the slow and insufficient response of the state is illegal, and demanded action from them.

However, even if it is difficult to see how individual persons should have an individual right to specific action derived from the fundamental rights as such, there are systems in place, or may have to be put in place, to respond to

⁸ SCHWERDTFEGER, A., Article 51. In: MEYER, J./HÖLSCHIEDT, S. (eds), *Charta der Grundrechte der Europäischen Union*. 5th ed. Baden-Baden: Nomos Verlag, 2019, no 68.

⁹ Netherlands: Urgenda case, De Hoge Raad, no 19/00135, 20 December 2019, ECLI:NL:HR:2019:2006 (Dutch), ECLI:NL:HR:2019:2007 (English); Germany, Federal Constitutional Court, nos. 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, 24. März 2021, <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>>

the ultimate consequences of encroachments on the rights. One example here are the health systems of the Member States, which look after persons affected by infections, whether these have existed for a long time, or are new infections e.g. carried by species migrating due to climate change. Similarly, legal systems will have to adapt their rules to new climate-induced threats regarding health and safety of buildings, work places, etc.

2.1.3. Individual Rights under Private law

In addition to demanding climate change mitigation and adaptation measures against the state, individuals may also invoke rights in private law to bring claims against private individuals or entities. The legal basis for such claims may be found in tort law, the part of private law of each state dealing with legal relationships coming into existence due to an illegal violation of an individual right by a private person or entity. The rights protected against these mostly mirror the individual rights protected under the Fundamental Rights Charter and the member state constitutions. Similarly, the same problem occurs of showing and proving the causal link between an action of a private entity, a potential violation of the right and resulting damage. However, if this impediment can be cleared, the claimant may assert the relevant right against any further interference from the private party. In addition, in some cases there are specific legal bases for this: a person may prevent interferences with their landed property by neighbours by obtaining a court injunction. The extent of such private law protection will depend, though, on the definition of private individual rights, i.e. on whether, in excess of life, health and property, further rights are protected.

2.1.4. Compensation and Damages

Where a defence of a right in kind fails, or where protective action would be too late, e.g. because a field or an industrial plant has already been flooded, or a property been damaged, defence of the right against interference, or the demanding of action in its protection, is not possible any more. Other compensation, restoration in kind or the payment of damages may become an issue, be it under public or private law liability. Accordingly, in principle the farmer or the business person who are out of business due to climate change will have a right to compensation for their losses. Liability may fall on private entities, on the state or on the EU. However, in order to claim damages, it must – once again – be shown that the violation of the right and the loss or damage occurred and were caused by a specific action or omission of the EU, state or private party (as the case may be). In addition, typically

the amount of damages available will be subject to significant limiting principles, such as remoteness of damage or the requirement that the claimant reasonably mitigates the loss (e.g. by adapting its business to the changed circumstances).

In this case, considering the preamble and Art. 51 CFR¹⁰, according to which the EU ‘*seeks to promote balanced and sustainable development*’, and the Union and the Member States shall ‘*promote the application*’ of fundamental rights, an approach to achieve more protection may be to depart from the normal need for claimants to show a causal link between the defendant’s specific activity and their injury, in order to at least give a right to restoration, or award damages for the losses suffered. What also remains to develop is how to fairly distribute the cost under a joint liability between the entities controlling the multiple sources of greenhouse gas emissions. The fundamental right to property under Article 17 (1) CFR already points in this direction, by requiring that ‘*No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss*’. Here the legal bases for compensation need to be established in order to comply with the fundamental right. An approach might be to base this on the relative share in causing the problem: where particular industries bear a disproportionate responsibility for causing climate change, their profits might be put to use for protection or mitigation. This may be easier to specify regarding adaptation measures: for instance, one might argue that the EU or a state, having failed to effectively mitigate climate change, might still be under an obligation to take adaptation measures, such as building a dam to protect a specific property against floods, or a specific irrigation system against draughts (or to provide the financing for these).

2.1.5. Conclusion on Individual Rights

The top level of the hierarchy of norms thus does not appear to provide many answers, nor concrete legal limits for activities, or inactivity, of the EU, states or private entities for not mitigating climate change, nor adapting to it. In a few instances, defence, prevention or compensation may be available. Otherwise it is necessary to rely on the political processes to produce legislation which protects specific individual rights. These could range from refraining from activities leading to emissions, measures allowing for wider participation in decision-making, e.g. in land use planning decisions, to prohibitions of emissions or other activities increasing climate change.¹¹

¹⁰ See above 2.1.2 A.

¹¹ This cannot be explored in any detail here and will be left to another paper.

2.2. Solidarity Rights: A Right to a quality environment encompassing climate change?

2.2.1. General

As shown it is difficult to derive a right against the EU, state or private entities to specific protection against climate change from classical human and fundamental rights protections, and to show the relevant chains of causation. What is even more difficult to carve out is a right to a healthy environment, or a quality environment. A right to a quality environment may be the basis for protecting the classical rights to life, health, occupation and property, and the recognition of such a right would make it easier to demand protective action by removing the need to explain and prove individually and specifically how one's own such right has been affected.¹² However, the difficulty starts with the definition of what is a quality environment. The latter already points into the direction of asking which quality – high, medium, low or minimum quality – is to be guaranteed. There are numerous definitions of the concept of a right to a quality environment at global, regional and national level, starting with the UN Stockholm Declaration on the Human Environment¹³, which requires 'an environment of a quality that permits a life of dignity and well-being'¹⁴.

2.2.2. The EU Fundamental Rights Charter

The EU Fundamental Rights Charter includes a step towards granting a right to a quality environment. In the Solidarity chapter (IV), the Charter sets out rights beyond the classical freedoms, encompassing Article 37 CFR, entitled 'Environmental protection'. This article provides that '*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*' However, although the Court of Justice of the EU (CJEU) regards Art. 37 CFR as a right within the meaning of Art. 52 (2) CFR, it shall be exercised under the conditions and within the limits defined by those Treaties.¹⁵ Given that the relevant provisions in the Treaty on the Functioning

¹² Above 2.1.1.

¹³ UN Stockholm Declaration, 16 June 1972, A/CONF.48/14 and Corr. I. [online]. Available at: <<http://web.archive.loc.gov/all/20150314024203/http%3A//www.unep.org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503>>

¹⁴ Cf. with numerous examples BOER, B. Environmental principles and the right to a quality environment, in: KRÄMER, L./ORLANDO, E., *Principles of Environmental Law*, Cheltenham (UK)/Northampton, MA (USA), Elgar Publishing, 2018, pp. 55 et seq.

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

of the EU, similar to Art. 37 CFR, appear rather vague it is difficult to see how an individual could prevent or claim a specific action of the EU or its Member States. In this regard, he or she will rather need to await the enactment of specific rights under implementing secondary legislation of the EU and its Member States, to which enactment he or she may have an individual right.

3. Standing before Court for Private Individuals and Associations

3.1. Definition

Insofar as the existence of rights encompassing measures for mitigating and adapting to climate change were accepted in principle, a further requirement is of workable mechanisms for enforcing such rights. As mentioned near the beginning, rights have, as their counterpart, corresponding obligations to respect and protect them. Generally, the likelihood that the addressees of obligations will actually comply with the latter increases considerably if there are holders of rights connected with the obligations who may step forward to enforce them, pointing to practical consequences if the obligation is disregarded. Under the rule of law these consequences will be determined by the judgment of an independent court. The key to enforcement is thus access to court, i.e. the procedural right to bring an action, known as ‘standing’. It thus needs to be shown under which conditions holders of rights pertaining to climate change may have standing, and, examining ECJ case law, it will become apparent that there is a gap in the system.

3.2. The Conditions

Article 47 CFR demands that the EU and, within the realm of EU law, the Member States, respect the citizens’ right to an effective remedy and to a fair trial, stating that *‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [...]’* The three possibilities of standing against an EU act are laid down in Article 263(4) TFEU, which reads: *‘Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person, or which is of direct and individual concern to them, and against*

a regulatory act which is of direct concern to them and does not entail any implementing measures.'

The constellation of these relevant to climate change is the standing for a person who is directly and individually concerned, which would appear to cover, *prima facie*, having an individual right violated; Article 47 CFR appears to be complied with here, with the difficulties mentioned above (A). The relevant concept of 'individual concern' has, however, been extremely narrowly defined by the ECJ since its leading judgment from the 1960s in the *Plaumann* case: individual concern is only recognised where individuals are affected, 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors' distinguished individually just as in the case of the person addressed'¹⁶. The requirement of 'individual concern' thus defined has only been seen by the ECJ in a very limited number of cases for EU legislation¹⁷, whilst decisions, even if addressed to another person, could be made subject of an action somewhat more easily. Admittedly, the current wording opens more space for the admissibility of an action.¹⁸ However, so far no such action has been successful in the context of climate change. Here the court, even when accepting that the fundamental rights mentioned above (A) might be violated, has denied standing to the applicants.

The other relevant constellation is bringing an action against a regulatory act: here the requirement of 'individual concern' has been omitted, whilst applicants still need to show direct concern; this allows for individual applicants to also bring an action without being individualised like the addressee of a decision, against EU acts mostly made by the Commission, in order to implement EU legislation. On the face of it, this appears helpful to applicants, notably in situations where they would find it difficult to show the causal link between the EU act and the encroachment on their right. In the context of a regulatory act permitting climate change activity this may make it easier to assert the right. Similarly, where the holder of a right is affected in the same way as many other holders of the same right, meaning that the burden is a general one affecting the whole public, a given individual could nevertheless still be able to assert it before court.

¹⁶ Case 25/62 *Plaumann* [1963] ECR 95 para 31.

¹⁷ Such as CJEU Case T-135/96 *UEAPME* [1998] ECR II-2335; Joined Cases 87/77, 130/77, 22/83 and 9-10/84 *Salerno* [1985] ECR 2523.

¹⁸ PEERS, S./ COSTA, M. Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission. *European Constitutional Law Review*, 2012, vol. 8, no. 1, pp. 82–104.*

Even so, as regards climate change mitigation, the problem often lies in no or insufficient activity, rather than in an activity violating rights. Regarding a violation of a right by a failure to act, standing is made conditional on a direct legal relationship between the institution or entity expected to act, and the applicant: in order to have standing against such failure to act, in infringement of the Treaties, under Article 265 (3) TFEU ‘*Any natural or legal person may ... complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.*’ Accordingly, a failure to act can only be made subject of an action regarding an interest in the act that the applicant individually is deemed to have, not generally regarding a failure to act for protection of a fundamental right. Still, it remains possible that this could change, as will be shown regarding the following Peoples’ Climate Case.

3.3. The Peoples’ Climate Case

The admissibility of an action against certain directives and regulations (‘legislative package’) implementing the Paris Agreement and the UN Framework Convention on Climate Change¹⁹, and for not taking more ambitious measures, has recently been tested in the ‘*Peoples’ Climate Case*’²⁰ supported by the Climate Action Network.²¹ At first instance, the General Court rejected the application as inadmissible due to lack of standing, and the Court of Justice upheld this on appeal. The applicants in the ‘*Peoples’ Climate Case*’ operate in the agricultural or tourism sectors; they are 36 individuals from various countries in the EU and the rest of the world, and an association governed by Swedish law, which represents young indigenous Sami, a people in northern Scandinavia living traditionally

¹⁹ Directive (EU) 2018/410 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments; Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3); Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ 2018 L 156, p. 1); Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement (OJ 2018 L 156, p. 26). These are acts of the EU whereby the European Union seeks to comply with its commitments under the Paris Agreement, namely to reduce emissions by 40 % over 1990 levels by 2030.

²⁰ Order of the General Court (Second Chamber) of 8 May 2019, Case T-330/18 Carvalho and Others, Appeal C-565/19 P – Carvalho and Others, judgment of 25/03/2021.

²¹ CLIMATE ACTION NETWORK (CAN), Press Releases, People’s Climate Case: Court acknowledges climate change is affecting everyone but dismisses the case. [online]. Available at: <<http://www.caneurope.org/publications/press-releases/1776-people-s-climate-case-court-acknowledges-climate-change-is-affecting-everyone-but-dismisses-the-case>>

on reindeer herding. The applicants sought the annulment in part of the said ‘legislative package’ for implementing the EU’s commitments, and an injunction obliging the EU Commission, Council and Parliament, to adopt measures ‘requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate’.²² The applicants based this on the submission that the EU’s level of ambition is not sufficiently high with regard to reducing greenhouse gas emissions, and infringes binding higher-ranking rules of law.²³ In terms of the EU’s failure to act, it appears clear that the applicants do not expect the EU to address any act to them, which would be the condition for standing in the case of failure to act under Article 265 (3) TFEU. Instead, the action was brought forward as an action for damages: the applicants argued that the non-contractual liability of the EU had been triggered by failing to comply with higher-ranking rules of law, namely their fundamental rights, causing them damage for which they request compensation in kind in the form of an injunction.²⁴

The General Court examined the conditions of standing under Article 263 in turn. First, it stated that the applicants were not addressees of any of the contested acts.²⁵ Secondly, it held that the directive and regulations were legislative rather than regulatory acts, as they had been made under the Ordinary Legislative Procedure under Articles 289 and 294 TFEU, and that the applicants thus needed to also show their *individual* concern in the matter.²⁶ Third, the Court, as well as the ECJ, confirmed the long-standing case law after *Plaumann* that the applicants did not have any particular attributes that might differentiate them from all other persons, and distinguish them individually just as in the case of the person addressed.²⁷ Thus, whilst the institutions of the EU are required to respect fundamental rights under Art. 47 CFR, the claim that an act infringes those rights was, according to the Court and the ECJ, not sufficient in itself to establish that the action brought by an individual was admissible, as long as that alleged infringement did not distinguish the applicant individually. In short, it appears (paradoxically) that if the rights of many or all people are encroached upon, none

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

²³ Order of the General Court, Case T-330/18 Carvalho, para 22 et seq.

²⁴ Order of the General Court, Case T-330/18 Carvalho, para 24.

²⁵ Order of the General Court, Case T-330/18 Carvalho, para 35.

²⁶ Order of the General Court, Case T-330/18 Carvalho, paras 37 et seq., relying on previous case law, namely judgment of 3 October 2013, Inuit Tapiriit Kanatami, C-583/11 P, para 60/61; order of 6 September 2011, Inuit Tapiriit Kanatami, T-18/10, para 56; and judgment of 25 October 2011, Microban International and Microban (Europe), T-262/10, para 21. Confirmed by ECJ C-565/19 P – Carvalho and Others, judgment of 25/03/2021, paras 35 et seq.

²⁷ Order of the General Court, Case T-330/18 Carvalho, paras 43 et seq., ECJ C-565/19 P – Carvalho and Others, judgment of 25/03/2021, paras 35 et seq.

of them will have standing, leaving the rights to the political process. In so far as the action was based on damages, the General Court held that an applicant may not, by means of an action for damages, attempt to obtain a result similar to the result of annulling the act, where an action for annulment concerning that act would be inadmissible.²⁸

If this Order in the Peoples' Climate Case is upheld by the Court, the result will be that there is no appropriate answer from the procedural framework of access to justice to deal with putative violations of fundamental rights. It does appear unsatisfactory to dismiss the actions as inadmissible, as this clashes with the effectiveness of the fundamental rights. In effect, the approach of guaranteeing fundamental rights even against the will of a majority, regarding them as inalienable, is made ineffective if the guarantee is, after all, given into the hands of the EU's and Member States' legislature. Given the complexity of the issue of climate change it may appear understandable that the courts cannot take on the task of the legislature in solving the issues, but on the other hand elementary rights are left without legal protection. An alternative might be to at least admit such actions and deal with them on the merits – winning the action, as shown above, would still be difficult to achieve for any applicant, but at least the competing policy concerns at issue could be debated in the open.

4. Standing for Associations and Alternatives

In order to afford some protection to interests which are not allocated to individual persons in the *Plaumann* way an alternative is to allow standing to associations which have, as their purpose, the promoting of a specific public or private interest. This might avoid opening a popular action for anybody feeling entitled to act, whilst still affording some protection to the relevant interest. So far, under EU law associations only have access to the CJEU under specific conditions. In the Peoples' Climate Case the Court pointed out that the applicant association (Sáminuorra) had not shown that it was individually concerned. It referred to settled case-law that actions for annulment brought by associations are admissible only in three types of situation: firstly, where a legal provision expressly grants a series of procedural powers to trade associations; secondly, where the association represents the interests of its members, who would themselves be entitled to bring proceedings; and, thirdly, where the association is

²⁸ Order of the General Court, Case T-330/18 Carvalho, paras 65 et seq. and ECJ Appeal C-565/19 P – Carvalho and Others, judgment of 25/03/2021 paras 96 et seq. Also judgment of 15 December 1966, Schreckenbergh v Commission, 59/65.

distinguished individually because its own interests as an association, such as its negotiating position, are affected by the act in respect of which annulment is sought.²⁹ Considering the above, upholding the rights of a number of people who are not regarded as singled out sufficiently to be individually concerned might make a valid fourth situation to allow for standing of representative associations *de lege ferenda*.

5. Conclusions

As shown the current system leaves a gap in the protection of human rights, first, regarding the rules on showing and proving that a specific activity or failure to act has resulted in a specific damage. Defining a legal solution bridging the causality gap could, first, include the courts giving applicants the benefit of various proof modifications including even reversing the burden of proof on causation, or introducing a legal presumption of responsibility. Secondly, one may also regard it as sufficient in terms of causation to show a contribution to the general problem of climate change without having to prove a direct causal link to the loss or damage suffered. Third, another potentially promising approach might be to consider conferring rights on environmental goods and entities themselves (thereby in principle allowing these to bring suits in their own right). This approach may, at first sight, appear rather radical, but there are already some examples of this happening in jurisdictions like New Zealand (where e.g. a river has been invested with such legal personality).³⁰

Fourth, appropriate associations might be recognised as entitled to represent current and future generations.³¹ An extension of standing for individual applicants regarding legislative acts, and a relaxation of the definition of individual concern, as well as an extension of standing to climate change organisations might be options to bring mitigation and adaptation to climate change forward. These are all matters that deserve further research and considered academic deliberation.

²⁹ Order of the General Court, Case T-330/18 Carvalho, para 51, referring to order of 23 November 1999, *Unión de Pequeños Agricultores v Council*, T-173/98, para 47.

³⁰ Cf. WARNE K., SVOLD, M. A Voice for Nature, *National Geographic*, 2019, vol 4, <<https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person>>

³¹ Cf. the Netherlands' Urgenda case, *De Hoge Raad Netherlands Supreme Court*, case no 19/00135, 20/12/2019. [online]. Available at: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2006>>

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