Current Developments in Carbon & Climate Law

Germany and Austria

Climate Change Litigation in Germany and Austria - Recent Developments

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The past few months have seen successful climate change litigation cases in both Ireland[1] (the Friends of the Irish Environment case[2]) and the Netherlands (the Urgenda case[3]). Non-governmental organisations 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. This led to attempts in both Germany and Austria to force more ambitious climate action through the courts. However, these efforts have not been successful in either country so far. The following article explores the legal proceedings that have taken place in these countries, why they failed and what conclusions can be drawn.

I. Germany

1. Overview

Over the past few years, several lawsuits have been filed in Germany with the aim of forcing more stringent climate action through the courts. These lawsuits have pursued different strategies, in particular regarding the choice of defendants. Climate action lawsuits can be filed against the state and its authorities or against private companies to hold them to account for their environmentally unfriendly behaviour. Within the first group, a distinction should be made between cases against the executive and cases against the legislative branch of government. [4]

The first lawsuit discussed below (see section 2) was based on a legal action brought by three families of 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. [5] 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 have also been filed against the legislature: these are currently pending at the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) (see section 3). It was argued that neither the Federal Parliament (*Bundestag*) nor the Federal Council (*Bundesrat*) had adopted sufficient measures to mitigate climate change. On the other, these complaints also posited that a specific law, namely the Climate Protection Act (*Klimaschutzgesetz*, KSG), passed at the end of 2019, is inadequate. [6]

Another lawsuit – which was not brought against the state but a multinational stock market-listed energy conglomerate – was filed with a German civil court. A Peruvian citizen affected by the conse-

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1 *Charlotte Renglet*, The Decision of the Irish Supreme Court in Friends of the Irish Environment v Ireland: A Significant Step Towards Government Accountability for Climate Change? (2020) CCLR 3, 163 - 176.

2 Irish Supreme Court, 31.7.2020, Appeal No 205/19, *Friends of the Irish Environment CLG/Government of Ireland*.

3 Supreme Court of Netherlands, 20.12.2019, No 19/00135, *Stichting Urgenda/State of the Netherlands*.

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

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

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

quences of climate change demanded that the defendant company pays a portion of the costs for the protection measures which have become necessary due to global warming (see section 4).

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.[7] The German federal government had adopted the 'Climate Action Programme' in December 2014. This set the goal of cutting greenhouse gas emissions in Germany by 40 % by the end of 2020 (in relation to 1990 levels). The German government has been forced to admit that this target will not be met and it looks as though Germany will only achieve a reduction of 32 %.[8] Germany will also fail to meet its obligations under the effort sharing decision 406/2009/EC of the European Union.[9] In principle, Germany is obliged to reduce its greenhouse gas emissions by 14 % in the sectors which are not covered by the EU Emissions Trading Scheme in relation to 2005 levels.[10] This target will not be achieved by reductions made in Germany. For the target to be met, emission permits will have to be bought in from other EU member states.

The plaintiffs sought an order from the Administrative Court of Berlin (*Verwaltungsgericht Berlin*) that the German government should implement measures necessary to ensure that the 'Climate Action Target 2020' is met. They argued that they, as the owners of organic farms, as well as their children, are particularly affected by climate change. It was argued that families from Brandenburg, Schleswig-Holstein and from the North Sea island Pellworm were already feeling the impact of changes caused by global warming, i.e. the arrival of new vermin or rising sea levels. Without adequate measures to mitigate climate change, they will be unable to keep their businesses going 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 Art 2 II (the right to life and physical integrity), Art 12 (occupational freedom) and Art 14 I (right to property).[11]

Such an action 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 omission. The plaintiff in the individual case had to be able to show that the German federal government had acted unlawfully in failing to meet its 'Climate Action Target 2020'. They also had to prove that their subjective rights have been infringed.

The Administrative Court of Berlin rejected the arguments brought forward on both points and dismissed the action as being inadmissible.[12] 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 court's view, the 'Climate Action Programme' constitutes a mere political declaration of intent. It only set 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.[13] The federal government also amended the Climate Action Target 2020 in the autumn of 2019 by government resolution. It now states that the 40 % reduction in greenhouse gas emissions should now be achieved by the end of 2023.[14]

However, the Administrative Court of Berlin also 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 Ger-

7 See, <https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/20182710-greenpeace-guenther-klageschrift-klimaklage.pdf> accessed 19 December 2020.

8 See <https://www.umweltbundesamt.de/daten/klima/treibhausgas-emissionen-in-deutschland#emissionsentwicklung-1990-bis-2018> accessed 19 December 2020.

9 Decision No 406/2009/EC of the European Parliament an oft he 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, 5.6.2009, 136–148.

10 ibid art 3, Annex II.

11 Christian Roschmann, 'Climate Change and Human Rights' in Oliver Christian Ruppel et al., (Eds.), *Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility* (Nomos 2013) 203 ff; Thomas Groß, 'Verfassungsrechtliche Klimaschutzpflichten' (2020) NVwZ, 360.

12 Verwaltungsgericht Berlin, 31.10.2019, 10 K 412/18.

13 (n 5) 1253 (1254).

14 (n 12) no 56.

man government, therefore, has no direct responsibility for these emissions. Consequently, the plaintiffs cannot derive any direct defence claims from their fundamental rights.

Further, 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.[15] 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'.[16] 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, it cannot be said 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.[17] 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 Art 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 gases - including under the EU Effort Sharing Regulation[18] - 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 shortly 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. Considering 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 (Bundesverfassungsgericht) (see section 3 below).

3. Several Constitutional Complaints Pending Against the German Legislature

In 2018, eleven individuals, the Bund für Umwelt und Naturschutz Deutschland and the Solarenergie-Förderverein Deutschland filed a constitutional complaint.[19] In this lawsuit, the claimants 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 nor the upper house of the German parliament (the *Bundestag* and the *Bundesrat*) had

15 Stephan Meyer, Grundrechte in Sachen Klimawandel?' (2020) NJW, 894 (898).

16 BVerfG, 29. Oktober 1987, 2 BvR 624/83; BVerfGE 77, 170-240.

17 (n 15), 899.

18 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, 19.6.2018, 26–42.

19 Case Göppel et al, Az 1 BvR 2656/18.

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.[20]

Further constitutional complaints were submitted in January and February 2020. The complainants include nine people aged between 15 and 32 years - including some who had already been plaintiffs in cases brought before the Regional Administrative Court of Berlin. They were supported by the NGOs Greenpeace and Germanwatch.[21] On the other hand, the environmental organisation Deutsche Umwelthilfe filed constitutional complaints on behalf of ten children and youths living in Germany[22] and 15 children and youths living in Bangladesh[23] and Nepal.[24]

These constitutional complaints no longer simply took aim at the lack of action on the part of the legislature. The ruling was sought 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 alleged that their fundamental rights had been infringed, namely the right to life and physical integrity (Art 2 para 2 German Basic Law) and the right to property (Art 14 para 1 German Basic Law). 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.

It is considered unlikely that these constitutional complaints will be successful.[25] Firstly, the German Federal Constitutional Court applies a restrictive standard; its previous case law provides that the constitution is only breached if there has been a manifest breach of the duty to protect fundamental rights.[26] The case law also sets out that it is primarily for the legislator to decide how it wishes to discharge its duties to protect. It must implement the necessary measures to guarantee effective protection and avoid breaching the prohibition on insufficient action (*Untermaßverbot*). However, it is granted significant discretion when deciding which rules it will enact.[27] In particular, this applies if the measures taken to provide protection result in the rights of third parties – i.e. companies that emit greenhouse gases – being restricted. Then, in principle, the legislative has to weigh up the competing interests against one another. In the context of environmental lawsuits, the Federal Constitutional Court has not yet held any statutory rules to be insufficient and unconstitutional.[28] The court would have to break new legal ground if it were to rule in favour of the complainants in this case.[29]

4. Luciano Lliuya v. RWE AG – A Civil Lawsuit Before the Regional Court of Essen/Higher Regional Court of Hamm

In the cases discussed so far, it was the state having action brought against it. However, in a 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. He has argued that 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, in turn, a direct effect of climate change. The defendant company, RWE, is one

20 See, <https://klimaklage.com/wp-content/uploads/2020/02/Klimaklage-Endfassung-Internet.pdf> accessed 19 December 2020.

21 See, <https://www.germanwatch.org/sites/germanwatch.org/files/Klimaklage%202020%20-%20Verfassungsbeschwerde_online.pdf> accessed 19 December 2020.

22 Case Steinmetz et al, Az 1 BvR 96/20,

23 Case Yi Yi Prue et al, Az 1 BvR 78/20.

24 See, <https://www.duh.de/klimaklage/> accessed 19 December 2020.

25 (n 15) 894 (899).

26 BVerfGE 56, 54 (82); NVwZ 2009, 1489 (1490); NVwZ 2011, 991 (993); NJW 1983, 2931 (2932).

27 (n 15) 894 (899); (n 11) Groß, 337 (338).

28 Andreas Voßkuhle, 'Umweltschutz und Grundgesetz' (2013) NVwZ 1, 7; (n 11) Groß, 337 (338).

29 (n 11) Groß, 337 (342).

of the largest CO_2 emitters in Europe and is responsible for 0.47 % of global historic CO_2 emissions an accounted for a fifth (21.59 %) of total greenhouse gas emissions in Germany in 2015.[30]

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 the financing for the protection measures (a new drainage system, additional dams for the lake) as corresponds to the company's share in global greenhouse gas emissions.[31] 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 as unfounded by the District Court of Essen (Landesgericht Essen) in December 2016.[32] The Higher Regional Court of Hamm (Oberlandesgericht Hamm), as the appeal court, held in November 2017 that the action was, in principle, admissible and opened proceedings to adduce evidence.[33] Experts now have to clarify whether RWE, as 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 this year due to the COVID-19 pandemic.

The decision is of great significance for the Higher Regional Court of Hamm. It looks like, for the first time, a European court has implied that private companies could be held liable for climate change-related risks and damage according to their share in global greenhouse gas emissions. Despite this, it is highly doubtful whether the case will yield a successful outcome for the plaintiff. The liability risks for companies which produce a large volume of greenhouse gases are considered, *de lege lata*, to be low. Substantive liability law in particular presents problems.[34]

Civil laws in the continental European tradition set out three central requirements for liability: damage, proof of causality and unlawful or negligent conduct.[35] 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, limb 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.[36]

The causality of conduct is usually assessed by applying the *conditio sine qua non* test.[37] 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.[38] For the Peruvian farmer, this means having to prove that the risk 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.[39] The relevant literature pleads instead for attribution of responsibility according to the extent to which risk was increased.[40] 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 ac-

30 Die Zeit, Peruanischer Bauer bringt RWE vor Gericht, 30.11.2017; Frankfurter Allgemeine, 'Bauer aus Peru erzielt Teilerfolg gegen RWE' *Frankfurter Allgemeine* (Frankfurt, 31 November 2017).

31 See, <https://germanwatch.org/sites/germanwatch.org/files/static/19019.pdf> accessed 19 December 2020.

32 Landgerichte Essen, 15.12.2016, 2 O 285/15.

33 Oberlandesgericht Hamm,. 30.11.2017, I-5 U 15/17.

34 Alexandros Chatzinerantzis and Benjamin Herz, 'Climate Change Litigation – Der Klimawandel im Spiegel des Haftungsrechts' (2010) NJW, 910.

35 Bernhard Burtscher and Martin Spitzer, 'Liability for Climate Change: Cases, Challenges and Concepts' (2017) JETL 137, 156.

36 Monika Hinteregger, 'Klimaschutz mit den Mitteln des Privatrechts?' in Gottfried Kirchengast et al (Eds.), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (Vandenhoeck &, Ruprecht 2018) 197.

37 Helmut Koziol, 'Comparative Conclusions' in Helmut Koziol (Ed.), *Basic Questions of Tort Law from a Comparative Perspective* (RZ 2015) 8/204.

38 Erik Pöttker, 'Klimahaftungsrecht: Die Haftung für die Emission von Treibhausgasen in Deutschland und den Vereinigten Staaten von Amerika' (Mohr Siebeck 2014) 149 ff.

39 Giedre Kaminskaité-Salters, 'Constructing a Private Climate Change Lawsuit under English Law' (Grantham Research Institute 2010) 159 ff; (n 39) 49 .

40 Will Frank, 'Climate Change Litigation – Klimawandel und haftungsrechtliche Risiken' (2010) NJW, 910; Alexandros Chatzinerantzis and Benjamin Herz, 'Climate Change Litigation – Der Klimawandel im Spiegel des Haftungsrechts' (2010) NJOZ, 596; (n 37) Monika Hinteregger.

tion against RWE, an impairment to property or health is generally an indication of unlawfulness. But can you accuse a company which has an official permit for a plant and participates in the Emissions Trading Scheme, of breach of law and/or negligent conduct?[41] 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.[42]

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

II. Austria

1. Overview

Environmental organisations and citizens have also been taking the initiative in Austria in the past few years, bringing two climate change lawsuits before the Austrian Constitutional Court (VfGH). However, Austrian constitutional law contains procedural hurdles to bringing actions before the Constitutional Court.[43] On the one hand - in contrast to Germany - inaction on the part of the legislator cannot form the subject matter of an action. In Austria, it is impossible to effectively combat failures by the parliament to take action against climate change. Moreover, citizens are only able to challenge laws and regulations if they are directly impacted by them. 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.[44]

Due to these requirements, it is not possible to challenge the Austrian Climate Protection Act (*Klimaschutzgesetz*, KSG) before the Austrian Constitutional Court. The Climate Protection Act 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 different industrial sectors in Austria. The law does not confer any legal claim on individual persons to certain action 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, a politician who took action before the court was able to produce a decision (see section 2). In the second case, the action failed on procedural grounds (see section 3).

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 dating 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 Art 2 of the European Convention on Human Rights (ECHR) from the effects of global warming. The increase in the speed limit on motorways breached this obligation because it would result in too large a rise in greenhouse gas emissions, which in turn would make global warming worse.[45]

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 of the regulations were annulled by the new Transport Minister, a member of the Green party. The

41 (n 36).

42 Alexandros Chatzinerantzis and Benjamin Herz (n 41).

43 Judith Fitz, Klimakrise vor Gericht, Juridikum 2019, 105 (111).

44 Walter Berka, Verfassungsrecht (2018) 374; Theo Öhlinger and Haral Eberhard, 'Verfassungsrecht' (2019) 493.

45 See, <https://www.ots.at/presseaussendung/OTS_20190829_OTS0082/greenpeace-praesentierte-erste-klimaklage-oesterreichs> 19 December 2019.

case was discontinued by the Constitutional Court without having handed down a judgment.[46]

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.[47] 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 which is detrimental to the environment. The associated climate change infringes the applicants' rights under Art 2 and Art 8 ECHR because these rights entail a duty on the part of the state to protect citizens.

With regard to the requirement that the over 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 on 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.[48] 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 extent these taxes are actually passed on the market to the consumers (and therefore the complainants) depends on many factors. Because the complainants had said that they travelled by train and not airplane, they are not affected by the tax law rules. 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 in the near future. Due to procedural hurdles, the prospects of success in such lawsuits are too low. The fight against climate change in the legal sphere 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.[49]

46 VfGH 8.6.2020, V1/2020.

47 See, <https://www.klimaklage.at/wp-content/uploads/2020/09/Klimaklage-Individualantrag-Feb2020.pdf> accessed 19 December 2020.

48 VfGH 30.9.2020, G 144-145/2020, V 332/2020. <https://www.vfgh.gv.at/downloads/VfGH_Beschluss_G_144_2020_vom_30._September_2020.pdf> 19 December 2020.

49 In February 2017, the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*, BVwG) held that no permit to build a third runway at Vienna International Airport could be granted and annulled the permit granted by the Regional Government of Lower Austria under the the Austrian Act on Environmental Impact Assessments (*Umweltverträglichkeitsprüfungsgesetz*, UVP-G) (BVwG 2.2.2017, W109 2000179-1/291E). In the Federal Administrative Court's view, the public interest in climate protection had not been taken into account sufficiently during the procedure to grant a permit. The construction of the planned runway would increase Austria's greenhouse gas emissions by between 1.79% and 2.02%. The Austrian Constitutional Court annulled this decision in June 2017, because it infringed the airport's right to equality before the law (VfSlg 20.185/2017). The Austrian Aviation Act (*Luftfahrtgesetz*, LFG), which was applied as part of the permit procedure, does not stipulate that climate protection concerns have to be taken into account when making the decision. The Federal Constitutional Law on Sustainability (Bundesverfassungsgesetz über Nachhaltigkeit) does not change anything about this. The decision of the Austrian Constitutional Court was largely criticised in the relevant literature. *Franz Merli*, Ein seltsamer Fall von Willkür: Die VfGH-Entscheidung zur dritten Piste des Flughafens Wien, wbl 2017/682; *Gottfried Kirchengast/Verena Madner/Eva Schulev-Steindl/Karl Steininger/Birgit Hollaus/Miriam Karl*, Flughafen Wien: VfGH behebt Untersagung der dritten Piste durch das BVwG wegen Willkür, RdU 2017, 252. The Federal Administrative Court then went on to grant permission to construct the third runway in March 2018. However, the permit was granted subject to the condition that the airport be CO2-neutral within five years of the new runway becoming operational (BVwG 23.3.2018, W109 2000179-1/350E). The Federal Administrative Court's decision was confirmed by the Higher Administrative Court (*Verwaltungsgerichtshof*, VwGH) in March 2019 (VwGH 6.3.2019, Ro 2018/03/0031).
Strictly speaking, the proceeding concerning the third runway is not a climate action lawsuit. The object of the proceeding was not to impose more stringent climate protection measures on Austria. It "only" concerned the question of whether the expansion of Vienna International Airport could be allowed to proceed from the point of view of environmental law.

III. Conclusion

The decisions and lawsuits discussed in this article 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 already. 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.[50] Unfortunately, neither Germany nor Austria has such rules. In Austria, climate change lawsuits are likely to fail for the foreseeable future due to the latest decision of the Constitutional Court. In Germany, there is at least a glimmer of hope.

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.[51] In this respect, the decision of the Austrian Constitutional Court is similar to that of the European General Court's (GC) in the *People's Climate Case*.[52] The GC stated that the main reasons for dismissing the claim were that - although the plaintiffs were affected by climate change in one way or another - they were not individually concerned in the legal sense.[53] 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 narrow 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 German case law to protect the life and health of humans over the long term. If one considers the effects which greater global warming could have on the future of humanity,[56] then – in my opinion - it is clear that fundamental rights are being infringed, 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 of democratic systems with a separation of powers – so the accusation goes.[57] However, when you consider it rationally, this 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 act on and implement 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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50 (n 4).

51 Groß (n 11); (n 44).

52 T-330/18 *Carvalho and Others v Parliament and Council* [2018] ECLI:EU:T:2019:324.

53 Gerd Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 Transnational Environmental Law 1, 137.

54 Lennart Wegener, 'Der Wert von Klimaklagen jenseits ihrer Symbolik – Umweltrecht am Freitag' (2019) <https://www.juwiss.de/114-2019/> accessed 19 December 2020.

55 See <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf> accessed 19 December 2020.

56 See, https://www.ipcc.ch/sr15/ accessed 19 December 2020.

57 Bernhard Wegener, 'Urgenda – Weltrettung per Gerichtsbeschluss?' (2019) ZUR, 3.

58 Thomas Groß, 'Verfassungsrechtliche Klimaschutzverpflichtungen' (2019) EurUP 362; (n 15) 894 (900).

59 Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, International Climate Change Law (2017) 285; Alexander Graser, 'Vermeintliche Fesseln der Demokratie: Warum die Klimaklagen ein vielversprechender Weg sind' (2019) ZUR, 271 (278).