The first Austrian climate lawsuit

Julia Wallner

Abstract

Globally, climate litigants seek to hold governments and companies responsible for their contribution to climate change and try to enforce effective climate action while raising public awareness for climate change. In 2020, the trend of climate litigation reached Austria: Numerous plaintiffs, led by the environmental organisation Greenpeace, filed a human rights-based climate lawsuit before the Austrian Constitutional Court, alleging that the preferential tax treatment of air travel over train travel violated their fundamental rights. However, the application was dismissed for being inadmissible, and a corresponding procedure is now pending before the ECtHR. Against this background, this article seeks to understand the reasons for the lawsuit's rejection and thereby elaborates on the obstacles the Austrian Constitution presents to effective climate protection and its judicial enforcement. Further, the challenges climate lawsuits against states face will be examined with a particular focus on the specific issues arising in the context of human rights-based claims.

1 Introduction

The Austrian Panel on Climate Change (APCC) highlighted that Austria is particularly affected by climate change.[1] In 2018, the increase in average temperature amounted to more than 2°C compared to pre-industrial levels and was more than twice as high as the global average.[2] Climate change effects can already be felt in Austria: They include, *inter alia,* a higher number of hot days and tropical nights, heavy precipitation events and mudslides, the melting of glaciers and increased occurrence of parasites such as the bark beetle. Those effects will further intensify and proliferate in the future.[3] Yet, climate protection measures taken in Austria were little

1 Austrian Panel on Climate Change, *Österreichischer Sachstandsbericht Klimawandel 2014 (AAR14)* (Verlag der Österreichischen Akademie der Wissenschaften 2014) 231, the report is available at <https://ccca.ac.at/wissenstransfer/apcc/aar14> accessed 20 October 2021.

2 Rechnungshof Österreich, 'Klimaschutz in Österreich – Maßnahmen und Zielerreichung 2020, Bericht des Rechnungshofes' (Rechnungshof Österreich 2021) 11 <https://bit.ly/3NpPUWh> accessed 29 March 2022.

3 Michael Anderl et al., *Klimaschutzbericht 2021* (Umweltbundesamt GmbH 2021) 27 and 28 <www.umweltbundesamt.at/fileadmin/site/publikationen/rep0776.pdf> accessed 20 October 2021.

ambitious and have, so far, not achieved any significant emission reduction. Quite the opposite is the case: national greenhouse gas (GHG) emissions have risen by roughly 5% throughout the last 30 years while they have decreased by 24% on average in all EU member states.[4] Thereby, the transportation sector proves particularly problematic as transport emissions have risen by tremendous 74% since 1990 and in 2019, accounted for 30% of total Austrian GHG emissions.[5]

Against this background, the first Austrian climate lawsuit was raised before the Constitutional Court (*Verfassungsgerichtshof*) in February 2020.[6] Therein, over 6,000 individuals, led by the environmental organisation Greenpeace, alleged that the preferential treatment of air traffic compared to train traffic, which is provided for in the Federal Value Added Tax Act (*Umsatzsteuergesetz*)[7] and the Federal Mineral Oil Tax Act (*Mineralölsteuergesetz*)[8], constituted a violation of their fundamental rights. These tax benefits lead to lower prices for airline tickets and thus promote climate-damaging behaviour; the effects of the climate crisis, in turn, violate the applicants' fundamental rights, in particular their right to life (Article 2 ECHR, Article 2 CFR), their right to respect for private and family life (Article 8 ECHR, Article 7 CFR) and their right to equality before the law (Article 7 B-VG, Article 2 StGG, Article 20 CRF). In the following, the background of the application and the reasons for its rejection for lack of standing by the Constitutional Court shall be examined in some detail.

2 Climate litigation as a global phenomenon

First, it has to be noted that the Austrian climate lawsuit does not constitute a stand-alone attempt to enforce climate protection measures but forms part of the global phenomenon of climate litigation: In light of the ever-intensifying climate crisis, plaintiffs around the world seek to hold states and companies accountable for their contribution to climate change and resulting damages.[9] They demand that regulatory gaps between scientific recommendations and often little ambitious climate policies

4 Rechnungshof Österreich (n 2) 11, 12.
5 Michael Anderl et al. (n 3) 69.
6 The application is available at <www.klimaklage.at/wp-content/uploads/2020/09/Klimaklage-Individualantrag-Feb2020.pdf> accessed 1 October 2021; the Constitutional Court's decision is available at <https://bit.ly/3qLaN4h> accessed 29 March 2022.
7 *Umsatzsteuergesetz* 1994 Federal Gazette I 1994/663 (Federal Value Added Tax Act).
8 *Mineralölsteuergesetz* 1995 Federal Gazette 1994/630 (Federal Mineral Oil Tax Act).
9 Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2021 snapshot' (Grantham Research Institute on Climate Change and the Environment, Columbia Law School Sabin Center for Climate Change Law, Centre for Climate Change Economics and Policy 2021) <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> accessed 24 October 2021.

are closed and thereby raise public awareness for the all-encompassing task of climate change.[10] Despite the relatively low success-rate[11], some encouraging victories have been achieved: In 2019, the Dutch Supreme Court ordered the government to reduce national GHG emissions by 25% until 2020,[12] and in 2021, the German Constitutional Court ruled that the Federal Climate Protection Act violated future freedom protected by fundamental rights.[13] A sensational success was also accomplished against the carbon major Royal Dutch Shell: In 2021, a Dutch court ordered RDS to reduce the GHG emissions of the Shell Group's entire supply chain (including suppliers and consumers) by 45% until 2030.[14] With the first Austrian climate lawsuit in 2020, the trend of climate litigation has now reached Austria.[15]

3 Constitutional background in Austria

Austria is a party to the UN Framework Convention on Climate Change (UNFCCC)[16] and the Paris Agreement[17], and, by virtue of its EU membership, obliged to reduce its GHG emissions in sectors not covered by the EU Emission Trading System (ETS).[18] The current Effort Sharing Regulation[19] foresees a reduction in GHG emissions in the non-ETS sector of 36% until 2030 compared to 2005 levels[20] – a

10 Eva Schulev-Steindl, 'Klimaklagen: Ein Trend erreicht Österreich' (2021) ecolex 17.

11 Wilhelm Bergthaler, Ferdinand Kerschner and Eva Schulev-Steindl, 'Klimaklage nun auch in Österreich' (2019) Recht der Umwelt 178.

12 Supreme Court of the Netherlands 20 December 2019 19/00135, the judgment *Urgenda* is available at <www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 24 October 2021.

13 Federal Constitutional Court of Germany 24 March 2021 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, the judgment *Neubauer* is available at <https://bit.ly/3JPNqy6> accessed 29 March 2022.

14 The Hague District Court 26 May 2021 C/09/571932 / HA ZA 19-379, the judgment *Royal Dutch Shell* is available at <http://climatecasechart.com/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 24 October 2021.

15 Schulev-Steindl (n 10).

16 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

17 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTC No 54113.

18 The Emissions Trading System puts a cap on total GHG emissions permissible in certain sectors and allows for the trading of respective emission permits; the ETS covers about 40% of total EU GHG emissions; for further details see, e.g. <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en> accessed 27 October 2021.

19 Regulation (EU) 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 (EU Effort Sharing Regulation) (2018) OJ L 156/26.

20 In 2021, the European Commission proposed to amend the Effort Sharing Regulation: the proposal foresees GHG emission reduction of 40% in relation to 2005 levels until 2030 in the

target that is to be achieved particularly through appropriate legislative and administrative measures. However, current projections show that Austria is likely to miss its 2030 EU emission reduction targets in the non-ETS sector.[21] According to calculations by the Austrian Court of Audit, this may result in compensation payments (purchase of emission certificates) of up to 9.2 billion Euro.[22]

In part, this alarming trend may be traced back to the constitutional framework, which is, so to say, not originally dedicated to climate protection: To begin with, the Austrian constitution does not (yet) contain a fundamental right to a healthy environment.[23] Plaintiffs who want to challenge the constitutionality of climate protection measures perceived as insufficient thus may rely on other fundamental rights, in particular the right to life and the right to private and family life (Articles 2 and 8 ECHR), which are considered to have a climate-relevant scope of protection.[24] However, one has to bear in mind that the Constitutional Court has not yet handed down any decision on positive obligations in the climate change context – prospects of success of respective claims are thus uncertain.

Nonetheless, climate protection is a constitutional concern: According to the Federal Constitutional Act on Sustainability (*BVG Nachhaltigkeit*)[25], Austria is committed to comprehensive environmental protection and sustainability.[26] This state objective is binding for all public authorities (legislative, executive, judiciary) and, according to academia, causes the unconstitutionality of conflicting 'simple' law.[27] The

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non-ETS sector and requires Austria to reduce GHG emissions by 48% until 2030, see: Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending 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' COM (2021) 555 final, 14 July 2021.

21 International Energy Agency, 'Austria 2020 Energy Policy Review' (International Energy Agency, May 2020) 81 <www.iea.org/reports/austria-2020> accessed 27 October 2021.

22 Rechnungshof Österreich, 'Climate protection is not centrally coordinated in Austria' (Rechnungshof Österreich, 16 April 2021) <https://bit.ly/3iOT3k0> accessed 29 March 2022.

23 The anchoring of a fundamental right to climate protection was requested in the course of the 2020 climate referendum <https://klimavolksbegehren.at/forderungen/> accessed 20 October 2021; a respective study, commissioned by the National Parliament, recently confirmed that the inclusion of a fundamental right to climate protection would be feasible: Daniel Ennöckl, 'Kurzstudie Möglichkeiten einer verfassungsrechtlichen Verankerung eines Grundrechts auf Klimaschutz' (Parliament 2021), the study is available at <https://bit.ly/3qK6MNC> accessed 29 March 2022.

24 The Dutch Supreme Court in its much-cited *Urgenda* decision (n 12) recently confirmed that a duty to protect against the climate crisis and its disastrous impacts arises from said provisions.

25 Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, on Water and Food Security as well as Research, Federal Gazette I 2013/111, an English translation is available at <https://bit.ly/3uBzvFt> accessed 29 March 2022.

26 §§ 1, 3 Federal Constitutional Act on Sustainability.

27 Ferdinand Kerschner, 'Klimaschutz aus umweltrechtlicher, insbesondere auch aus völkerrechtskonformer Sicht' (2019) Recht der Umwelt 49, 50.

BVG does not, however, create any subjective rights.[28] Further, its scope has been called into question by the controversially discussed judgement of the Constitutional Court regarding the expansion of Vienna Airport by a third runway.[29] Therein, the Court suggested that the state objective only is to be considered in the balancing of interest if there is a respective reference in simple law.[30] It does not, however, constitute an independent public interest that requires consideration in balancing decisions.[31] This view challenged prevailing scholarly opinion and caused considerable and lasting uncertainty as to the legal relevance of the BVG Sustainability.[32]

In addition, the special characteristics of the Austrian Constitutional Court and its limited competence to review climate protection measures have to be considered: The Austrian Constitution does not allow the contesting of legislative inaction before the Constitutional Court; instead, only existing laws may be reviewed as to their constitutionality.[33] Thereby, the court acts as a 'negative legislator'. Thus, it may repeal laws or legal provisions it finds to be unconstitutional but may not give concrete orders to the legislator (as, for example, the Dutch Supreme Court has done in the *Urgenda* decision).[34] For this reason, the plaintiffs were compelled to only challenge specific legal provisions – presumably with the aim of establishing climate change-related positive obligations at the national level that in turn lead to stricter climate protection measures and enable future climate lawsuits.

28 Eduard Christian Schöpfer, 'Gedanken zur Verankerung eines Grund- bzw. Menschenrechts auf eine gesunde Umwelt' (2019) Newsletter Menschenrechte 183, 184.

29 Austrian Constitutional Court 29 June 2017 E 875/2017-32, E 886/2017-31, the judgment is available at <https://bit.ly/3uA7hL9> accessed 29 March 2022.

30 Gottfried Kirchengast et al., 'Flughafen Wien: VfGH behebt Untersagung der dritten Piste durch das BVwG wegen Willkür' (2017) Recht der Umwelt 252, 258.

31 Gerhard Schnedl, 'Die Rolle der Gerichte im Klimaschutz' in Gottfried Kirchengast et al. (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (Studien zu Politik und Verwaltung Bd. 112, Böhlau Verlag Wien 2018) 139, 140.

32 Schnedl (n 31) 140.

33 Peter Oberndorfer and Britta Wagner, 'Gesetzgeberisches Unterlassen als Problem Verfassungsgerichtlicher Kontrolle' (Landesbericht Österreich für den XIV. Kongress der Konferenz der Europäischen Verfassungsgerichte in Vilnius, Litauen vom 2. bis 7. Juni 2008) <www.confeuconstco.org/reports/rep-xiv/report_Austria_de.pdf> accessed 26 October 2021.

34 Walter Berka, *Verfassungsrecht* (8th edn, Verlag Österreich 2021) 369.

4 The claim

4.1 Contested provisions

The need for a greening of the Austrian tax system has not only been acknowledged by the current government program[35], it is also evident from the tax provisions contested in the first Austrian climate lawsuit: In principle, the Federal Value Added Tax Act prescribes a (reduced) VAT rate of 10% for the domestic part of international passenger transport services, regardless of the means of transport chosen.[36] However, international air travel is exempt from this general rule and the VAT does not apply.[37] This means that consumers have to pay 10% more for a train ticket than for a plane ticket, provided that the net ticket price is the same and transport companies pass on the tax burden to the consumers via the ticket price. In addition, the Federal Mineral Oil Tax Act excludes the aviation fuel paraffin from the mineral oil tax.[38] Unlike railway companies, airlines thus do not have to pay taxes on propellants required for the transportation service. Consumption taxes for propellants are generally passed on to consumers via a higher net ticket price for train tickets. However, this net ticket price serves as the basis for calculating the VAT, making train tickets more expensive on two grounds: a higher calculation basis for the VAT + a tax rate of 10%. In fact, the applicants demonstrated that a plane ticket from Vienna to Munich and back only costs 119 Euro whereas a train ticket for the same trip amounts to 206 Euro. At the same time, a flight causes, on average, about 31 times more CO_2 than a train journey.

4.2 Admissibility

By means of an individual application for standard control (*Individualantrag auf Normenkontrolle*),[39] the applicants asserted the unconstitutionality of the tax provisions that result in preferential treatment of air traffic and thereby fuel the climate crisis: An individual application is a subsidiary means of legal protection and may only be raised if the applicant's legal position is directly affected by the contested norm ('direct concern') and obtaining a judgement or administrative decision is un-

35 'Out of a sense of responsibility for Austria. Government Programme 2020-2024' (Die neue Volkspartei, Die Grünen – Die Grüne Alternative, 2020) 12 <https://bit.ly/3INmUUK> accessed 29 March 2022.
36 § 10 para 2 no 6 *Umsatzsteuergesetz*.
37 § 6 para 1 no 2 lit d *Umsatzsteuergesetz*.
38 § 4 para 1 no 1 *Mineralölsteuergesetz*.
39 The individual application for standards control is anchored in Article 140 of the Federal Constitutional Law, an English translation is available at <https://bit.ly/3Liiw1A> accessed 29 March 2022.

reasonable ('no reasonable diversion').[40] In its case law, the Constitutional Court further elaborated the first criterion of 'direct concern' and held that the contested norm must affect the applicant's legal sphere; mere factual or economic effects do not suffice. Further, the applicant must (in general) be the addressee of the contested norm and allege its unconstitutionality. And finally, the interference with the legal sphere must be sufficiently determined by the contested norm as to its nature and extent and it must be actual, not merely potential. As to the second criterion, 'no reasonable diversion', the Constitutional Court held that unlawful conduct never constitutes a reasonable diversion, even if a judicial decision or a ruling could be obtained.[41]

The applicants acknowledged that the contested tax provisions are directed at businesses[42] and that they were thus not norm addressees in the strict sense. However, they nonetheless considered themselves to be directly affected, as it is not always required to be a norm addressee: In fact, the Constitutional Court had repeatedly assumed that non-addressees are directly affected if the content and purpose of the provision in question affects their legal sphere.[43] Both the VAT and the mineral oil tax are consumption taxes which are designed to burden the consumers and, according to the applicants, are collected from businesses solely for reasons of practicability. The applicants thus concluded that the tax provisions directly affect their legal sphere: Their preferred means of transport is disadvantaged, and they have to pay higher prices for utilising it, which violates the right to equality before the law. Furthermore, the contested provisions violate positive obligations under the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR). Pursuant to those provisions, the Austrian state is obliged to take effective measures against the climate crisis to protect its inhabitants' life, health and well-being. However, it disregards this obligation by not achieving its GHG reduction targets and even incentivises climate-damaging behaviour by providing subsidies to carbon-intensive airline companies, which in turn offer cheaper ticket prices. The applicants further held that the interference with their legal sphere is sufficiently determined and actual as the tax provisions are directly effective towards them: Tax benefits for aviation result in higher prices for train tickets and fuel the climate crisis. Also, there is no reasonable diversion to refer to the Constitutional Court for stand-

40 Peter Bußjäger, 'Art 140 B-VG' in Arno Kahl et al. (eds), *Kommentar zum Bundesverfassungsrecht, B-VG und Grundrechte* (Jan Sramek Verlag 2021) 1471.

41 Berka (n 34) 376ff.

42 Businesses are responsible for paying the VAT according to § 19 *Umsatzsteuergesetz*; the holder of the tax warehouse is responsible for paying the mineral oil tax according to § 22 *Mineralölsteuergesetz*.

43 For example, the Constitutional Court's decision on data retention, see: Austrian Constitutional Court 27 June 2014 G 47/2012-49, G 59/2012-38, G 62/2012-46, G 70/2012, G 81/2012-36, available at <https://bit.ly/3wLDoKH> accessed 29 March 2022.

ards review. The applicants, therefore, concluded that the claim was admissible and continued to outline their constitutional concerns.

4.3 Merits

On the merits, the applicants argued that the contested tax provisions violated the right to life, the right to private and family life and the right to equality before the law:

First, the applicants asserted a violation of the right to equality before the law. This fundamental right requires the legislator to treat equal matters equally and unequal matters unequally and prohibits objectively unjustifiable differentiations.[44] In addition, the principle of equality is understood to contain a general requirement of objectivity, prohibiting the enacting of regulations that cannot be objectively justified.[45] In their claim, the applicants first asserted that railways and planes constitute equivalent means of transportation: a well-established highspeed train network spans Europe, railway and airline companies thus compete with regard to short- and medium-distance transportation. Yet, airline companies and their customers enjoy a decisive advantage: ticket prices are lower as obtaining fuels is tax-free, and no VAT is due for the national part of cross-border air travel. According to the applicants, this exemption is unsystematic for granting benefits exclusively to airline companies and not objectively justified. It is clearly not in the public interest: Not only does the transport sector raise serious concerns due to the significant rise in GHG emissions and great deviations from sectoral targets. Incentivising climate-damaging behaviour also contradicts Austria's EU and international law commitments and reinforces the risk of already looming penalty payments. Further, behavioural changes may only be achieved if climate-damaging behaviour is not promoted by a state-subsidised penalty for environmentally conscious consumers. The applicants held that respective tax provisions thus violate the principle of equality before the law by burdening environmentally conscious customers who chose to travel per train.

Secondly, the applicants alleged a violation of their right to life. The right to life is understood to be the 'prerequisite of all fundamental rights' and obliges the state to comprehensively protect life from interference by public authorities or (private) third parties.[46] According to the ECtHR, the right to life further entails positive obligations

44 Berka (n 34) 587.

45 Lamiss Khakzadeh, 'Artikel 7 B-VG' in Arno Kahl et al. (eds), *Kommentar zum Bundesverfassungsrecht, B-VG und Grundrechte* (Jan Sramek Verlag 2021) 45.

46 Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck 2021) § 20 recital 1.

in case of external events such as environmental threats and natural disasters.[47] Such positive obligations also exist with regard to the climate crisis that poses severe threats to the applicants' lives. It is clear from the IPCC reports that many climate change-related dangers have already materialised, and that they will further intensify and broaden in the future.[48] Only immediate and drastic measures may prevent or at least limit the disastrous consequences of the climate crisis. Against this background, the applicants brought forward that state subsidies for emissions-intensive aviation are not only counterproductive but actively violate the obligation to protect under Article 2 ECHR. Positive obligations in the transportation sector oblige the state to promote climate-friendly behaviour, not the opposite. And due to the absolute character of the right to life, no justification exists – the contested tax provisions violate Article 2 ECHR.

Thirdly, two of the applicants alleged a violation of their right to respect for private and family life. This fundamental right comprehensively protects private and family life but also one's health, physical and mental integrity and general well-being.[49] According to the ECtHR, the fundamental right protects against environmental interferences, provided that they reach a minimum threshold. Thereby, the circumstances of the individual case, such as intensity and duration of the nuisance or its physical and mental effects, are decisive in determining the minimum threshold.[50] The ECtHR has further affirmed the applicability of Article 8 ECHR in the case of natural disasters.[51] Against this background, the applicants alleged that the contested tax provisions violate Article 8 ECHR as they promote climate-damaging behaviour and are partly responsible for the health consequences of climate change-induced extreme weather events including heatwaves, floods and storms. One of the applicants (a 72-year-old female) argued that longer periods of hot weather result in greater and more frequent stress on her circulatory system. In this context, she alleged that people over 65 years are particularly affected by heatwaves, and 80% of heat-related deaths occur in people 75 years and older, with women being more affected than men. Another applicant, who suffers from a temperature-dependent form of multiple sclerosis, brought forward that the increased number of warm and hot days severely impair his health and well-being: at temperatures of 25°C or higher, he experiences signs of paralysis which worsen as temperature rises. Due to the warming caused by climate change, the applicant is thus more frequently dependent on a wheelchair. The

47 Reinhard Klaushofer, 'Artikel 2 EMRK' in Arno Kahl et al. (eds), *Kommentar zum Bundesverfassungsrecht, B-VG und Grundrechte* (Jan Sramek Verlag 2021) 1762.

48 See the IPCC reports available at <www.ipcc.ch/reports/> accessed 30 October 2021.

49 Berka (n 34) 487.

50 Alexander Forster, 'Artikel 8 EMRK' in Arno Kahl et al. (eds), *Kommentar zum Bundesverfassungsrecht, B-VG und Grundrechte* (Jan Sramek Verlag 2021) 1872f.

51 *Budayeva and Others v Russia* App no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008).

applicants further argued that the interference with their fundamental right to private and family life is not justified. The contested tax provisions are diametrically opposed to the public interest as the advancement of the climate crises entails serious consequences for life and health and is detrimental to the general economic well-being. They held that a violation of positive obligations under Article 8 ECHR was thus present.

5 The Constitutional Court's decision

In its decision of 30 September 2020, the Constitutional Court dismissed the application for being inadmissible.[52] The Court held that the applicants were not affected in their legally protected sphere and were not the addressees of the relevant tax provisions:

Although the court recognised that the VAT and the mineral oil tax are consumption taxes, it determined that it depends on a multitude of factors whether and to what extent the tax burden is actually passed on to the consumer. It follows that consumers are not affected in their legal sphere, regardless of whether the tax burden is actually passed on to them or not.[53]

In addition, the Court acknowledged that, in earlier decisions, it had recognised applicants as norm addressees even if the contested provisions were not directly addressed to them. The prerequisite for this recognition was that purpose and content of the norm in question not only affected the applicant's personal situation but interfered with his/her legally protected sphere. However, in the present case, a similar interference with the applicants' legal sphere is not present as the applicants stated that they do not make use of the services of air carriers.[54] The Court concluded that the applicants could therefore not be the addressees of the relevant tax provisions which only apply to air transportation. Consequently, it rejected the individual application for standard control for being inadmissible.

6 Application to the European Court of Human Rights

Following the Constitutional Court's rejection of the first Austrian climate lawsuit, one of the applicants filed a complaint with the European Court of Human Rights

52 Austrian Constitutional Court 29 June 2017 E 875/2017-32, E 886/2017-31.
53 Ibid recital 66f.
54 Ibid recital 68.

(ECtHR).[55] The applicant suffers from a temperature-sensitive form of multiple sclerosis: From a temperature of 25°C he shows signs of paralysis and is dependent on the wheelchair and from a temperature of 30°C he completely loses control over his muscular strength.

His claim might be summarised as follows: The recent increase in warm and hot days due to the climate crisis severely burdens the applicant and poses a serious risk to his physical and mental integrity and the quality of his private and family life. Austria thus violates its positive obligations pursuant to Article 8 ECHR, which requires it to take reasonable and appropriate measures to effectively protect the health and well-being of the applicant (and all its citizens). It follows from ECtHR case law that Austria is required to offer effective protection from the climate crisis with due diligence.[56] This obligation is informed by the best available science as expressed in the IPCC reports and the international consensus to reach the 1.5°C temperature target embodied in the Paris Agreement. Although the ECtHR recognised that the choice of means to fulfil positive obligations falls within the state's 'margin of appreciation', it found a violation of Article 8 ECHR in cases of 'manifest errors of appreciation'.[57] The applicant derives a respective error of appreciation from the fact that Austria failed to establish an appropriate administrative and legislative framework to achieve emission reductions. This is vividly exemplified by the fact that no emission reduction has been achieved in the period 1990-2019[58] and by the Federal Climate Protection Act (*Klimaschutzgesetz*),[59] which does not provide for reduction targets for the years 2021 onwards. A follow-up law for climate protection was announced but has not yet been passed.[60] According to the applicant, the absence of (ambitious) legal regulations on emission reduction, combined with the above-mentioned state subsidies for climate-damaging behaviour, amount to a violation of Article 8 ECHR.

Moreover, the Austrian legal system did not allow the applicant to assert his claim: As mentioned above, the Austrian Constitution does not offer a possibility for challenging legislative inaction before the Constitutional Court or any other court.[61] Also, the current Federal Climate Protection Act does not contain a complaint mechanism if no or too unambitious emission reduction targets are set or if respective

55 The application is available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf> accessed 29 October 2021.

56 *Fadeyeva v Russia* App no 55723/00 (ECtHR, 30 November 2011) recital 128.

57 *Buckley v United Kingdom* App no 20348/92 (ECtHR, 29 September 1996).

58 Statista, 'Treibhausgas-Emissionen in Österreich von 1990 bis 2019' (Statista, 3 February 2021) < https://bit.ly/3q1qMLk> accessed 12 March 2021.

59 *Klimaschutzgesetz* Federal Gazette I 2011/106 (Federal Climate Protection Act).

60 Pressedienst der Parlamentsdirektion, 'Gewessler peilt Begutachtung für Klimaschutzgesetz ab Sommer an' (APA OTS, 9 June 2021) <https://bit.ly/3iLnlEw> accessed 29 March 2021.

61 Oberndorfer and Wagner (n 33).

targets are not met or at risk of not being met.[62] And finally, there is also no general duty of care, non-compliance with which may be established in court. Accordingly, the applicant had resorted to the only option available, namely an individual application for standard control by the Constitutional Court according to Article 140 B-VG. This application is in turn subject to restrictions: Only individual provisions can be challenged on the grounds of their unconstitutionality, always provided that they directly affect the applicant who further needs to be the norm addressee. As shown above, the attempt to assert a right to more effective climate protection failed due to the narrow interpretation of the admissibility criteria by the Constitutional Court. Altogether, the applicant concluded, this amounts to a lack of legal protection against the climate crisis and a violation of the right to an effective remedy according to Article 13 ECHR. A respective decision by the ECtHR has not yet been issued.

7 Remarks

7.1 On the relationship between courts and legislators

It becomes clear from the above that climate lawsuits may be understood as a response to institutional failure[63]: despite ever more alarming warnings from the scientific community about the disastrous consequences of the climate crisis and its incipient materialisation[64], global emissions have not yet peaked.[65] Arguably, the complexity of the climate crisis with its global nature, multiple causes and interrelated impacts make it a 'super-wicked problem'[66], which existing institutions and legislators are not equipped to tackle effectively. Against this background, the novel instrument of climate litigation seeks to 'debate, enforce, augment, or challenge climate legislation'.[67] Courts thus enter the discourse on climate protection and are called upon to review legislative and executive measures and policies. At the same time, concerns have been raised about the prominent role of courts in climate protection: Different scholars and courts suggested that the shaping of climate policies

62 Federal Climate Protection Act (n 59).

63 Joana Setzer and Lisa C Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 (3) WIREs climate change, 7 <https://wires.onlinelibrary.wiley.com/doi/epdf/10.1002/wcc.580> accessed 27 October 2021.

64 IPCC (n 48).

65 Hannah Ritchie and Max Roser, 'CO_2 and greenhouse gas emissions, global emissions have not yet peaked' (Our World in Data, 2020) <https://ourworldindata.org/co2-and-other-greenhouse-gas-emissions> accessed 27 October 2021.

66 Anne Saab, 'The super wicked problem of climate change action' (Graduate Institute Geneva, 2 September 2019) <www.graduateinstitute.ch/communications/news/super-wicked-problem-climate-change-action> accessed 27 October 2021.

67 Setzer and Vanhala (n 63) 7.

constitutes a 'political question' courts are not mandated to answer according to the principles of separation of powers and representative democracy.[68]

7.2 Lack of standing

In the present case, the Austrian Constitutional Court exercised what may be called 'judicial self-restraint'[69] and evaded participating in the judicial discourse on climate protection by not allowing the first Austrian climate lawsuit due to a lack of standing. The Constitutional Court's unwillingness to extend the narrow criteria for the admissibility of individual applications has met with little approval in literature: Scholars argued that the court had overestimated the businesses' scope for decision-making and that entrepreneurs, as suggested by the applicants, merely serve as 'pass-throughs' for consumption taxes borne by consumers.[70] Moreover, the Constitutional Court's suggestion that the applicants might be able to challenge the tax provisions if they purchased a flight ticket was perceived to be 'cynical' – after all, the applicants try to reduce individual GHG consumption and therefore choose to travel per train.[71] However, it is not uncommon for climate lawsuits to not overcome the hurdle of admissibility[72]: Legal standing, just as separation of powers, is a key challenge to justiciability that most climate litigants face.[73] Even though criteria for standing vary considerably in different legal systems, they generally require that parties raise a claim only if they have a 'genuine and current stake in the outcome' and the court is capable of resolving the dispute and granting effective remedy to the parties.[74] In the present case, the required but not established 'direct concern' arguably referred to the first criterion – the plaintiffs had not shown a sufficient level of concern by the contested tax provisions.

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68 See, for example, Laura Burgers, 'Should judges make climate change law?' (2020) 9 (1) Transnational Environmental Law 55 <www.cambridge.org/core/services/aop-cambridge-core/content/view/D9B088113959571B24E97F5E976CA107/S2047102519000360a.pdf/should-judges-make-climate-change-law.pdf> accessed 26 October 2021.

69 Berka (n 34) 343; judicial restraint may be understood as judicial decision-making characterised by a deliberate restraint with regard to acts of legislature.

70 Simona Buss, 'Der VfGH kann sich nicht für den Klimawandel erwärmen – Die "erste Klimaklage" Österreichs' (2021) Spektrum des Wirtschaftsrechts 127, 130.

71 Eva Schulev-Steindl, 'Klimaklage: VfGH weist Individualantrag gegen steuerliche Begünstigung der Luftfahrt zurück' (2020) Recht der Umwelt 251, 256.

72 Schulev-Steindl (n 10) 17.

73 United Nations Environment Programme, *Global climate litigation report: 2020 Status review* (UNEP, Columbia Law School Sabin Center for Climate Change Law 2020) 37.

74 UNEP (n 73) 37.

7.3 The European Court of Human Rights as driver of innovation

In substantive terms, the claim aimed at challenging Austria's unambitious climate policy. This general intent is particularly clear from the application to the ECtHR, which, in contrast to the national claim, is not limited to challenging specific legal provisions. A respective ECtHR judgment could force Austrian courts to take a stand on the constitutionality and adequacy of national climate policies. And if the ECtHR finds a violation of Article 13 ECHR, legal protection mechanisms in climate matters will have to be modified or extended in some way.[75] A respective adjustment could be achieved by introducing a fundamental right to climate protection. Such an enforceable right might either entail an obligation to comply with international climate protection commitments, to achieve climate neutrality or to implement adequate climate protection measures.[76] Alternatively, the anchoring of a legal protection mechanism in the new Federal Climate Protection Law or facilitating the access to the Constitutional Court may close the existing gap in legal protection.

Apart from procedural changes, a decision by the ECtHR on state obligations to protect in the climate crisis could also have far-reaching substantive implications for Austria and other ECHR member states. Based on its case law on environmental hazards and natural disasters[77], and by limiting the states hitherto assumed wide margin of appreciation in fulfilling positive obligations[78], the ECtHR could derive concrete climate protection obligations from fundamental rights. This would, in turn, have a direct impact on Austrian jurisprudence as the ECHR is part of constitutional law and is interpreted by the Constitutional Court in accordance with the ECtHR's case law.[79] If, for example, the ECtHR suggests that fundamental rights require the reduction of GHG emissions to a certain extent, the Austrian Constitutional Court will most likely adhere to this interpretation. Moreover, a favourable judgment could give further impetus to the already observed rights turn in climate litigation[80] and

75 According to Article 46 ECHR, judgments are binding for the contracting parties; Grabenwarter and Pabel (n 52) § 16 recital I suggest that the contracting parties have to remedy a violation of the Convention – thereby, the choice of means is left to the state parties which only owe the desired result.

76 Ennöckl (n 23) 30.

77 For an overview see, Council of Europe, *Manual on human rights and the environment* (2nd edn, Council of Europe 2012), the report is available at <https://bit.ly/3tPf8FL> accessed 29 March 2022.

78 Hana Müllerová, 'Environment playing short-handed: Margin of appreciation in environmental jurisprudence of the European Court of Human Rights' (2014) Review of European, Comparative & International Environmental Law 83.

79 Edith Seeber, 'Die Bedeutung der Judikatur des Europäischen Gerichtshofs für Menschenrechte in der Judikatur der österreichischen Höchstgerichte über den entschiedenen Fall hinaus' (Dr. iur. thesis, University of Graz 2015) 110.

80 Jacqueline Peel and Hari M. Osofsky, 'A rights turn in climate change litigation?' (2017) 7 (1) Transnational Environmental Law <https://bit.ly/36vekNr> accessed 29 March 2022.

enable many more well-founded human rights-based claims across ECHR member states.

7.4 Human rights-based climate litigation

In fact, human rights increasingly serve as a legal basis for climate lawsuits.[81] There are several reasons for this development: On the one hand, the link between human rights and climate change is nowadays beyond question – there is an overwhelming consensus that climate change threatens and violates a multitude of human rights.[82] On the other hand, the human rights regime is relatively robust and opens up new avenues for enforcing environmental and climate protection before national and international fora.[83] Nonetheless, the perceived 'human rights turn'[84] also comes with some challenges, in particular the reactive nature of fundamental rights and the territorial limitation of their application. Also, proving a causal link between a state's inaction or emitting of GHGs and the resulting negative implications for human rights poses difficulties.[85]

One of the characteristics of climate change is that the emission of greenhouse gases and the resulting violation of fundamental rights are often temporally distant: the emission of a certain amount of greenhouse gases today may lead to a violation of fundamental rights in a few decades' time. However, a violation of human rights must generally have occurred to be established (reactive nature of human rights regime). It is, therefore, sometimes difficult to establish the human rights impacts of climate change.[86] In tackling this problem, the German Federal Constitutional Court, in its *Neubauer* decision[87], has adopted a novel approach: it held that the high emission levels legally permitted until 2030 have an 'advance interference-like effect' on the freedom of the applicants as emission possibilities after 2030 are considerably narrowed. Fundamental rights constitute 'intertemporal guarantees of freedom' and protect against the 'offloading' of GHG reduction burdens onto the future.[88] Greenhouse gas emissions permitted today thus already constitute a violation of fundamental rights, even if the actual restrictions of freedom will only occur in the future. With this approach, the Federal Constitutional Court elegantly circumvented the problem

81 Setzer and Vanhala (n 63) 10.
82 John H. Knox, 'Climate change and human rights law' (2009) 50 (1) Virginia Journal of International Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480120#> accessed 30 October 2021.
83 Setzer and Vanhala (n 63) 11.
84 Peel and Osofsky (n 80).
85 Setzer and Vanhala (n 63) 10.
86 Ibid 10.
87 Federal Constitutional Court of Germany *Neubauer* (n 13).
88 Ibid recital 183.

of temporal distance. In terms of the extraterritorial applicability of fundamental rights, the Federal Constitutional Court has not expressed a conclusive opinion yet, it merely stated that the scope of protection of fundamental rights are not *a priori* restricted to Germany.[89]

The first Austrian climate formed part of the increasing number of human rights-based climate lawsuits and addressed the above-mentioned challenge of establishing a causal link between Austria's unambitious climate policy (which manifests in particular in state subsidies for climate-damaging aviation) and a violation of human rights. Perhaps inspired by the successful *Urgenda* decision[90], the applicants alleged a violation of the state's positive obligations under Article 2 and 8 ECHR, as well as a violation of the right to equality before the law. Thereby, the claim referred to the Paris Agreement and the target of limiting the temperature increase to 'well below 2°C'. On a broader scale, the applicants presumably wanted to promote the Paris Agreement's implementation and to align national climate policies with its goals and the thereof derived carbon budget. For climate litigants in and beyond Austria, the Paris Agreement has clearly become an essential point of reference in evaluating national climate policies.[91] The same holds for 'best available science' expressed in the IPCC reports: In climate lawsuits, plaintiffs typically seek to enforce decision-making and climate policies that are guided by scientific findings and the precautionary principle.[92] However, science also plays an essential role in the proceedings: Establishing a causal link between the emissions of certain GHGs or the failure to take adaptation or mitigation measures and concrete damages requires recourse to scientific findings on long-term changes or extreme weather events triggered by climate change. Recently, attribution science has yielded promising results which could be used in future lawsuits to prove a causal link.[93] This development also increases chances of success of climate lawsuits against carbon majors, which mostly seek injunctive relief or damages and often require proof of a causal link between the polluter's behaviour (emission of GHGs) and concrete climate damage on the plaintiff's side.[94] With this development, it is to be hoped that science will play a greater role, not only in courts but in decision-making on climate policies in general.

89 Ibid recital 101.
90 Supreme Court of the Netherlands *Urgenda* (n 12).
91 Setzer and Vanhala (n 63) 7.
92 Rupert F Stuart-Smith et al., 'Filling the evidentiary gap in climate litigation' (2021) Nature Climate Change 651.
93 Michael Burger et al., 'The law and science of climate change attribution' (2020) 45 (1) Columbia Journal of Environmental Law <https://doi.org/10.7916/cjel.v45i1.4730> accessed 3 November 2021.
94 For climate lawsuits based on tort law, see the contribution by Monika Hinteregger to this volume.

8 Conclusion and outlook

It can be concluded that human rights-based climate lawsuits are on the rise globally. The Austrian climate lawsuit initiated by Greenpeace forms part of this trend: the applicants alleged a violation of their rights to life and respect for private and family life and a violation of the right to equality before the law. This violation results from Austria's unambitious climate policy, which becomes apparent, among other things, in the contested tax provisions: state subsidies for carbon-intensive aviation constitute an incentive for climate-damaging behaviour and thereby fuel the climate crisis. Despite not being successful before the Constitutional Court, the plaintiffs managed to draw considerable public attention to the global concern of climate change and highlighted the shortcomings of legal protection against the climate crisis in Austria. Also, one has to be aware of the fact that the proceedings have not yet come to an end. The ECtHR is still to decide whether unambitious climate policies violate the right to respect for private and family life under Article 8 ECHR or insufficient means of legal protection violate the right to an effective remedy pursuant to Article 13 ECHR. It is to be hoped that the ECtHR takes the chance to limit the states' wide margin of appreciation in fulfilling their positive obligations, which it had so far assumed in connection with natural disasters. Also, it remains open whether the ECtHR will follow climate plaintiffs' view and refer to the Paris Agreement as a 'landmark' for assessing national climate policies or requires the consideration of scientific findings. In any case, the court has the possibility to decide on fundamental rights obligations in climate change also in the context of another lawsuit: In 2020, six Portuguese youth alleged that Austria and 32 other states violated human rights by not taking sufficient action on climate change.[95] Promisingly, the ECtHR gave priority to the case according to Article 41 Court Regulations and thereby recognised the 'importance and urgency of the issues raised'.[96]

Meanwhile, further efforts have also been undertaken at the national level: A second climate lawsuit, initiated by the environmental organisation Global 2000, seeks to enforce the phasing-out of fossil fuels.[97] The applicants therein require the Minister for Digital and Economic Affairs to issue an ordinance, which provides for a gradual ban on the sale of fossil fuels. The Minister is to issue this ordinance based on her competence to enact commercial police measures to prevent threats to life and health or to prevent environmental pollution. The applicants derived their respective subjective right to the enactment of an ordinance from EU law. However, in the first instance the Minister rejected the application in July 2021 as there was no federal

95 The application is available at <http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 31 October 2021.

96 Article 41 Rules of Court, available at <www.echr.coe.int/documents/rules_court_eng.pdf> accessed 1 November 2021.

97 The application is available at <https://bit.ly/3LsbXtz> accessed 29 March 2022.

competence for issuing the required ordinance. A complaint is now pending before an Administrative Court.[98]

What is hopeful, however, is that the Austrian legal system's scepticism and rejection towards previous legal actions does not stop climate activists and non-state actors from breaking new ground to enforce their right to climate protection in Austria and beyond.

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98 See, for example: ORF, 'Klimaklage: Global 2000 wehrt sich gegen Abweisung von Antrag' (ORF, 8 September 2021) <https://orf.at/stories/3227825/> accessed 31 October 2021.

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