German Law Journal (2021), **22**, pp. 1499–1510
doi:10.1017/glj.2021.78

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

The Role of the EU Charter of Fundamental Rights in Climate Litigation

Josephine van Zeben[1]

[1]Professor of Law and Chair of the Law Group, Wageningen University, the Netherlands
Corresponding author: josephine.vanzeben@wur.nl

(Received 21 October 2021; accepted 28 October 2021)

Abstract
Climate litigation has become a permanent fixture in the climate law and policy landscape. Across jurisdictions, climate litigation takes different shapes, with actions based on administrative, civil, or criminal law. An increasing number of cases incorporate human rights, leading to courts *inter alia* imposing more onerous mitigation obligations on governments and private actors in light of human rights provisions. Several landmark cases in this domain have come from European jurisdictions and have been argued with reference to both the European Convention on Human Rights (ECHR) and the European Union's Charter of Fundamental Rights. An analysis of case law from the European Member States shows that the emerging picture is one of the Charter playing a secondary role to the ECHR. Based on this jurisprudential analysis, this article reflects on the future role of the Charter in climate litigation, and by extension, in shaping environmental human rights.

Keywords: Climate litigation; human rights; European Convention on Human Rights; EU Charter of Fundamental Rights; judicial dialogue

A. The Rise of Human Rights in Climate Litigation

Over the past decades, climate litigation—broadly defined as cases that relate to climate change mitigation, adaptation, or climate science[1]—has become a fixture in national and international courts.[2] Initially, litigation focused primarily on statutory interpretation,[3] with parties intent on ensuring, or undermining, the regulatory effect of statutes related to climate change mitigation measures, mostly via national courts.[4] Since these early cases, litigation has been initiated against

I am grateful to Lin Batten for valuable research assistance.

[1]*Global Climate Litigation Report, 2020 Status Review* 7, U.N. Environment Programme (UNEP), DEL/2333/NA (2020) https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y. This article follows the UNEP definition insofar that the author also excludes cases where the climate change factors are not decisive in determining the outcome of the case. For example, cases that relate to air pollution and also have an effect on climate change mitigation by affecting greenhouse gas emissions more generally would fall outside its scope.

[2]For an excellent overview of early developments, see Jacqueline Peel and Hari M. Osofsky, Climate Change Litigation (Cambridge University Press, 2015). For an overview of climate change litigation globally, *see The Climate Change Litigation Databases of the Sabin Center for Climate Change Law*, Columbia Law School, http://climatecasechart.com/climate-change-litigation/ (last visited Oct. 13, 2021).

[3]*See also* Jacqueline Peel and Hari M. Osofsky, *A Rights Turn in Climate Change Litigation*, 7 Transnat'l Envtl. L. 37 (2018).

[4]*See also* Jacqueline Peel & Hari M. Osofsky, *Litigation as a Climate Regulatory Tool*, *in* International Judicial Practice on the Environment: Questions of Legitimacy, 311–36 (Christina Voigt ed., 2019).

states and private parties at national, regional, and international levels.[5] In addition to administrative claims, cases founded in civil law—primarily via the vehicle of tort law—and even criminal law, have been brought before the courts.[6] The narrative that emerged from these cases is one of progressive judicial action on climate change in the face of governmental inaction and regulatory failure at the national and international level.[7] This framing—though welcomed by many societal groups and scholars[8]—has led to debates on the constitutional position of courts vis-à-vis the legislature,[9] and questions as to the "appropriate" use of litigation within the legal system.[10]

Since the 2010s, human rights claims have started to play an increasingly important role in climate litigation.[11] The use of human rights in environmental protection has taken place primarily through the "greening" of existing human rights law,[12] and there has been a noticeable convergence and cross-fertilization in related case law from the different human rights systems, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the American Convention on Human Rights (AmCHR), and the African Charter on Human and Peoples' Rights (AfCHPR).[13] The greening of human rights refers to the application, and interpretation, of rights such as the right to life, the right to private life, and the right to possessions and property in such a way so as to impose positive obligations on the government to regulate environmental risks, or disclose environmental information.[14] It has also led to the enforcement of environmental obligations against private actors, at times beyond existing statutory obligations.[15]

The use of human rights in climate litigation is in many ways a logical extension of the use of human rights in environmental protection more generally.[16] This development has been problematized in specific ways; most significantly, through the objection that the protection of the environment based on human rights reflects a deeply anthropological approach to environmental degradation, which does not reflect the intrinsic importance of the environment apart from, and beyond, its relation to human welfare.[17] Pragmatically, human rights have proven to be one of

[5]An overview of each can be found in the Climate Change Litigation Databases, *supra* note 2.

[6]Perhaps most notoriously HR, 19/00135, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda* (Dec. 20, 2019), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007 (Neth.), and more recently, the Australian case of *Sharma v. Minister for the Environment* FCA 560 (2021)(Austl.) annotated by Jacqueline Peel and R. Markey-Towler, *A Duty to Care: The Case of Sharma v. Minister for the Environment,* J. Envt'l Law (2021) both based on the duty of care of the government to protect its population from adverse environmental effects.

[7]*See* Laura Burgers, *Should Judges Make Climate Change Law?,* 9 Transnat'l Envtl. L. 55 (2020).

[8]*See also* Kim Bouwer and Joana Setzer, *Climate Litigation as Climate Activism: What Works?*, British Academy (2020), https://www.thebritishacademy.ac.uk/publications/knowledge-frontiers-cop26-briefings-climate-litigation-climate-activism-what-works/.

[9]Some of these considerations were mentioned in Josephine van Zeben, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?,* 4 Transnat'l Envt'l. L. 339 (2015).

[10]*See generally*, Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism* 9 Eur. J. Risk Reg. 48 (2018).

[11]*See id.* for developments through 2018. *See also* Chiara Macchi, *The Climate Change Dimension of Business and Human Rights: Legal and Policy Trends in the European Union*, 6 Bus. & Hum. Rts. J. 93 (2021).

[12]*See* Alan Boyle, *Human Rights and the Environment: Where Next?,* 23 Eur. J. Int'l L. 613, 614 (2012).

[13]*Id.*

[14]*See id.* for a summary of early case law on this.

[15]*Id.*

[16]The UN Human Rights Coucil's resolution recognizing access to a healthy and sustainable environment as a universal right was a watershed moment in this movement.

[17]*See e.g.*, Susana Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature* 5 Transnat'l Envtl. L. 113 (2016); Joshua Bruckerhoff, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 Tex. L. Rev. 615 (2007). In parallel, there has been a call for the development of rights of nature; the creation of "human" rights for ecosystems and species. *See e.g.*, *What is Rights of Nature*, Global Alliance for the Rights of Nature (GARN), https://www.therightsofnature.org/what-is-rights-of-nature/ (last visited Oct. 13, 2021). Similarly, cases have been made for extending other rights, such as the right to property, rights of standing, and even citizenship, to non-human animals. *See* respectively, Karen Bradshaw, Wildlife as Property Owners: A New Conception of Animal

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

the most promising avenues for environmental protection in the absence of regulation, or in the face of regulation that is considered inadequate.[18] Recent European cases[19]—including the *Urgenda* jurisprudence, especially in the appeals,[20] the case of *Milieudefensie v Royal Dutch Shell*,[21] and the ruling against the German Federal Climate Change Act[22]—plaintiffs have successfully invoked domestic and international human rights to ensure more ambitious public and private climate action.[23]

Within the European Union, two human rights instruments have played a central role in the development of this jurisprudence: The European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (the Charter).[24] The ECHR is one of the oldest and most influential human rights instruments in force today, having entered into force in 1953.[25] Its membership extends beyond the European Union Member States to countries such as Albania, Turkey, and Russia.[26] Compared to the ECHR, the Charter is a relatively young instrument. The Charter was introduced as part of the most recent EU Treaty reforms, which came into force in 2009.[27] There are several other fundamental differences between the scope, application, and ambitions of the ECHR and the Charter that will be discussed in detail below.

This article considers the respective roles of the ECHR and the Charter in climate litigation, specifically in light of recent climate litigation before the courts of EU Member States. The ECHR has been formative for the protection of fundamental rights in the EU and in many ways has shaped the EU Charter of Fundamental Rights. Many of the rights overlap and the jurisprudence of the European Court of Human Rights may expressly be used to interpret Charter rights that

RIGHTS (University of Chicago Press, 2020); Randall S. Abate, *Legal Personhood for Wildlife: US and Foreign Domestic Judicial Developments*, *in* CLIMATE CHANGE AND THE VOICELESS: PROTECTING FUTURE GENERATIONS, WILDLIFE, AND NATURAL RESOURCES 97 (Cambridge: Cambridge University Press, 2019); A. Staker, *Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals* 6 TRANSNAT'L ENVTL. L. 485 (2017), Charlotte E. Blattner and Raffael Fasel, *The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights,* TRANSNAT'L ENVT'L. L. 1 (2021), https://doi.org/10.1017/S2047102521000170.

[18]*See also* Borràs, *supra* note 17; Vincent Bellinkx, Deborah Casalin, Gamze Erdem Türkelli, Werner Scholtz, & Wouter Vandenhol, *Addressing Climate Change Through International Human Rights Law: From (Extra) Territoriality to Common Concern of Humankind*, TRANSNAT'L ENVTL. L. 1 (2021), https://doi.org/10.1017/S204710252100011X.

[19]This development extends far beyond the European Union, *see e.g.*, *Leghari v. Federation of Pakistan,* (2015) W.P.No. 25501/201 (Pak.).

[20]Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.); *Stichting Urgenda*, Case-19/00135.

[21]Rb. den Haag, 26 mei 2021, Prg. 2021 mnt HA ZA 19-379 (*Milieudefensie/Royal Dutch Shell PLC*), para 5.3, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339.

[22]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, Mar. 24, 2021, paras. 1–270 [hereinafter *Judgement of Mar. 24, 2021*], http://www.bverfg.de/e/rs20210324_1bvr265618en.html.

[23]Apart from the growing number of successful challenges, it is important to note that many cases continue to fail, *for* example due to lack of standing of the plaintiffs. See for example the ongoing case of *Juliana v. United States* 947 F.3d 1159 (9th Cir. 2020), where standing was initially denied but is currently on appeal. *Juliana v. United States*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/juliana-v-us (last visited Oct. 1, 2021). *See also* Annotation in Harvard Law Review, *Juliana v. United States Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court*, 34 HARV. L. REV. 1929, 1929 (March 10, 2021), https://harvardlawreview.org/2021/03/juliana-v-united-states/.

[24]Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended - ECHR) and Charter of Fundamental Rights of the European Union, Dec. 14, 2007, O.J. 2007 C303/1 [hereinafter Charter of Fundamental Rights].

[25]European Convention on Human Rights, Apr. 11, 1950. *Details of Treaty No. 005*, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005.

[26]A complete list includes Iceland, Norway, Liechtenstein and Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, North Macedonia, Montenegro, Moldova, San Marino, Serbia, Switzerland, Turkey, Russia and the United Kingdom. *See Chart of Signatures and ratifications of Treaty*, COUNCIL OF EUROPE PORTAL, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005.

[27]The Charter—in different forms—has a much longer history within the EU, see Grainne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights,* 6 EUR. L. REV. 799 (2015).

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

overlap with those in the ECHR.[28] However, as is discussed in more detail below, the EU's—and the Court of Justice of the European Union (CJEU)'s—ambitions for the Charter is for it to provide much stronger and more ambitious protection than the ECHR. This is possible due to the nature of EU law—specifically its primacy—and the remedies that the CJEU and national Courts are able to offer for violations of EU law. However, the Charter is, as the analysis in this article will show, far less frequently invoked in the context of climate litigation in the European Union. As these cases continue to proliferate and European policy on climate change becomes an ever-more central part of the EU's raison d'être, examining these developments is particularly timely.

The remainder of this article is structured as follows: It first provides an overview of relevant differences, and overlaps, between the Charter and the ECHR when it comes to their respective potential roles in climate litigation (Section B). The subsequent analysis of case law from the European Member States shows that, in practice, the emerging picture is one of the Charter playing a secondary role to the ECHR (Section C). In light of this reality, the article concludes by reflecting on the future role of the Charter in climate litigation, and in shaping environmental human rights (Section D).

B. European Human Rights Instruments in Climate Litigation: Potential

There are several ways for citizens of European Member States to challenge climate related action, or inaction, on a human rights basis:[29] First, they can challenge action, or inaction, by reliance on human rights protected by domestic law, for example in constitutional protections,[30] or protected by international human rights treaties, such as the ECHR or the Charter.[31] Second, human rights can play a role as interpretative tools in the application of other rights and/or legal provisions. For example, in determining the standard of care under national tort law.[32] In both situations, domestic courts would be the first port of call, after which cases may escalate to international bodies such as the ECtHR—in case of the ECHR—or the CJEU—in case of reliance on the Charter and/or involving other issues of EU law.

The ECtHR has played an important part in the initial jurisprudence on human rights-based environmental protection.[33] This prominence reflects the ECtHR's fundamental role in human rights protection generally, and the timing of the initial cases involving human rights related to the environment, which predated the adoption of the Charter.[34] The importance of this jurisprudence cannot be overstated. At the same time, the Strasbourg court has also been careful to stress that national authorities are best placed to assess and act on environmental issues and that wide discretion will be awarded to them in doing so.[35] This position is in line with the

[28]*See* Charter of Fundamental Rights, *supra* Note 24, at Article 52(3); *infra* Section B.

[29]The focus of this Article is on non-state parties bringing cases against national authorities or other private actors. The term "citizens" refers broadly to individuals, non-governmental organizations, and other non-state parties.

[30]An increasing number of constitutions recognize a "right to a healthy environment" or similar substantive environmental human right, alongside other human rights, such as the right to life, property, private life, that have been used in aid of climate litigation. *See e.g.*, Tim Hayward, Constitutional Environmental Rights (Oxford University Press, 2005). For recent case, *see Judgement of Mar. 24, 2021,*

[31]This article focuses on jurisprudence related to the ECHR and the Charter within European Member States. For jurisprudence involving other human rights instruments, such as the ICCPR or the ICESCR, please refer to Ginevra Le Moli, *The Human Rights Committee, Environmental Protection, and the Right to Life*, 69 Intn'l & Comp. L. Q. 735 (2020); S. Yusuf & J. Woodham, *The Role of National Human Rights Institutions in Environmental Protection: A Focus on the Asia-Pacific* 2 Envtl. L. & Prac. Rev. 1 (2013); Carole Billiet & Luc Lavrysen, *The ECHR, ICCPR and EU-Charter as Beacons in Environmental Prosecution and Adjudication: Belgian Report* (Nov. 19, 2016), http://hdl.handle.net/1854/LU-8130277.

[32]See specifically the *Urgenda* and *Shell* judgments, *supra* notes 20, 21.

[33]*See e.g.*, Loucaides, *Environmental Protection Through the Jurisprudence of the ECHR*, 75 British Y.B. Int'l L. 249 (2004); Richard Desgagné, *Integrating Environmental Values into the ECHR*, 89 Am. J. Int'l L. 263 (1995).

[34]On these early cases, see also Human Rights Approaches to Environmental Protection (Alan E. Boyle & Michael R. Anderson eds., 1996).

[35]Council of Europe: Final Activity Report on Human Rights and the Environment, DH-DEV (2005) 006 rev, Nov. 10 2005, App. II, 10, at para. 13. *See also,* for example, *Hatton and others v. United Kingdom,* App. No. 36022/97, paras. 97–104 (July 8, 2003), http://hudoc.echr.coe.int/eng?i=002-4790.

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

more broader position of the ECHR as providing a minimum level of rights protection—a "floor"[36]—and the margin of appreciation that it awards to domestic authorities and courts in its application.[37] The scope of the margin of appreciation remains notoriously vague but has played an important role in shaping the rights under the ECHR and the relationship between the European Court of Human Rights (ECtHR) and domestic courts.[38] While generally considered a "strong" source of rights protection, reinforced by a "strong" international court, the margin of appreciation and the non-binding nature of the ECtHR's judgments,[39] as well as the lengthy road to the ECtHR, are reminders of the challenges of enforcing international law, including the ECHR,[40] domestically and internationally.[41]

Compared to the ECHR, the position of the Charter within the EU's legal order is an entirely different one. Perhaps most importantly, the Charter differs from the ECHR insofar that it looks to set a "ceiling" for the level of human rights protection, not a floor. This is reflected in Article 52(3) and (4) of the Charter, which emphasize that Charter rights shall be interpreted in harmony with international and domestic traditions without preventing the EU from providing "more extensive protection."[42]

These provisions affect the relation between the Charter and fundamental rights protection in the Member States based on national constitutions, as well as the relationship between the Charter and the ECHR. The relationship between the Charter and national constitutional human rights was subject of a much-debated preliminary reference brought by the Spanish Constitutional Court. In *Melloni*, the protection provided by Spanish constitution was higher than that provided by the Charter.[43] The Court held that the principles of primacy, uniformity, and effectiveness of EU law meant that Member States could only uphold higher standards of human rights protection, if such a measure does not conflict with these principles.[44] Put differently, Member States can apply national standards of fundamental rights protection only in cases of minimum harmonization, and even then the principles of primacy, uniformity, and effectiveness need to be respected. This clearly limits the extent to which national courts and authorities may set higher standards than EU law based on their constitutional provisions. While this reasoning and holding is in line with established CJEU jurisprudence, it can create problems within a national legal order.

[36]Article 53 ECHR. This is also recognized in Article 52(3) of the Charter which states that the jurisprudence of the ECtHR will be followed by the Court of Justice of the European Union (CJEU) when it comes to the interpretation of rights that are guaranteed in both instruments. However, if the protection awarded by the EU is higher, such an interpretation will overrule the ECtHR's caselaw.

[37]For an overview of the development of the doctrine of the margin of appreciation, *see* Steven C. Greer, 'The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights' Human Rights, files No. 17, Council of Europe (2000). *See also* Eirik Bjørge, Domestic Application of the ECHR: Courts as Faithful Trustees (Cambridge University Press, 2015).

[38]See *id.* at 5–6. *See also* European Court of Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=home. *See also* European Convention on Human Rights, Section II European Court of Human Rights, para. 15.

[39]While the jurisprudence of the ECtHR is extremely persuasive, many jurisdictions do not consider themselves bound by its caselaw as a matter of law, see for example the long-standing debate in the UK as to the hierarchy between the British courts and the ECtHR. Lord Irvine, *A British Interpretation of Convention Rights* (December 14, 2021), http://www.biicl.org/files/5786_lord_irvine_convention_rights.pdf; Philip Sales, *Strasbourg jurisprudence and the Human Rights Act: a Response to Lord Irvine*, Public Law 253 (2012); Alison Young, *Whose Convention Rights are They Anyway*, UK Const. L. Ass'n. (Feb. 12, 2012), http://ukconstitutionallaw.org/2012/02/12/alison-l-young-whose-convention-rights-are-they-anyway/; Eirik Bjorge, *The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence*, 72 Cambridge L.J. 289 (2013).

[40]*See e.g.*, Alice Donald and Philip Leach, Parliaments and the European Court of Human Rights (Oxford University Press, 2016).

[41]*See e.g.* Carla Buckley, Alice Donald & P. Leach, Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems (Brill Nijhoff ed., 2016).

[42]Charter of Fundamental Rights, *supra* note 24, at Article 52(3)–(4).

[43]ECJ, Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107 (Feb. 26, 2013), https://curia.europa.eu/juris/liste.jsf?num=C-399/11. *See also* Aida T. Pérez, *Melloni, in Three Acts: From Dialogue to Monologue*, *10* Eur. Const. L. Rev. 308 (2014); Nik de Boer, *Addressing Rights Divergences under the Charter: Melloni*, 50 Common Mkt. L. Rev. 1083 (2013).

[44]*See Melloni,* at para. 60. *See also* de Boer, *supra* note 43, at 1083.

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

Prior to the *Melloni* judgment, the Spanish Constitutional Court had held that the Charter was compatible with the Spanish Constitution given that it set a minimum level of protection.[45] The CJEU's divergence from the Spanish court's reading of Article 53 of the Charter presents a challenge to this, and other, national constitutions.

Vis-à-vis the ECHR and the ECtHR, the CJEU follows the jurisprudence of the ECtHR in case of overlapping provisions, but does not hesitate to set a higher standard of protection if it sees fit. The CJEU's interpretation of Article 52 and its position on fundamental rights protection more generally has complicated the potential joining of the ECHR by the EU, which has been the express intention of the Member States and EU institutions.[46] The CJEU has advised negatively on the Draft Agreement that was to make this joining possible, stating that the agreement violated Article 6(2) of the Treaty on European Union by undermining the CJEU's autonomy and the autonomy and primacy of EU law generally.[47] This means that the EU institutions remain, for the time being, outside of the jurisdiction of the ECtHR. This can be problematic in cases where compliance with an ECtHR judgment by a Member State can only be achieved through a change in EU legislation.[48]

It is clear from its jurisprudence, including its negative opinion on the Draft Agreement on the accession of the EU to the ECHR, that the CJEU views the Charter as the touchstone for ambitious fundamental rights protection within the EU and its Member States.[49] This is reflected in its interpretation of Article 51 of the Charter which stipulates its scope of application. Article 51(1) provides that the Charter applies "only" to actions of EU institutions and Member States in the implementation of EU law.[50] On its face, this suggests that the scope of the Charter is more limited than that of the ECHR in terms of parties and areas of law.[51] However, the CJEU had read this provision as meaning that any connection to EU law brings actions within the application of the Charter.[52] Similarly, Article 51(1) suggests little to no horizontal effect of the Charter. However, the Court of Justice has applied the Charter in cases between private actors, specifically in cases where the right protected by the Charter was supported by other provisions of EU law or captured in general principles of EU law.[53] The Court has moreover explicitly held that Article 51(1) on the

[45]*See* de Boer, *supra* note 43, at 1094.

[46]The possibility of the EU becoming a Contracting Party to the ECHR has not been abandoned and negotiations between the EU and the Council of Europe are ongoing. For current status, *see Legislative Train Schedule Area of Justice and Fundamental Rights,* European Parliament (Sept. 20, 2021), https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr.

[47]ECJ, Case Opinion 2/13, ECLI:EU:C:2014:2454, 215–48 (Dec. 19, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-2/13.

[48]*See e.g.*, *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v. Ireland,* App. No. 45036/98 (July 30, 2006), http://hudoc.echr.coe.int/eng?i=001-69564; *Matthews v. United Kingdom,* App. No. 24833/94 (Feb. 18, 1999), http://hudoc.echr.coe.int/eng?i=001-58910; *Nederlandse Kokkelvisserij UA v. Netherlands,* App. No. 13645/05 (Jan. 20, 2009), http://hudoc.echr.coe.int/eng?i=001-91278 as discussed in Sionaidh Douglas-Scott, *The Relationship between the EU and the ECHR Five Years on From the Treaty of Lisbon*, *in* Sybe de Vries, Ulf Bernitz, Stephen Weatherill, Five Years Binding EU Charter of Fundamental Rights (Hart ed., 2015).

[49]*See also* Grainne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 Maastricht J. Eur. & Comp. L. 168 (2013).

[50]Charter of Fundamental Rights, *supra* note 24, at Article 51(1).

[51]*See e.g.*, Andrew Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press, 2006).

[52]*See* ECJ, Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013); Willem B. van Bockel and P. Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, 6 Eur. L. Rev. 1 (2013); E. Hancox, *The Meaning of "Implementing" EU Law Under Article 51(1) of the Charter: Åkerberg Fransson*, 50 Common Mkt. L. Rev. 1411 (2013). *See* Filippo Fontanelli, *National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?* 14 Hum. Rts. L. Rev. 231 (2014) (arguing that further clarification as to the extent the Charter applies to national measures that are connected to EU law but do not directly implement it continues to be needed).

[53]In ECJ, Case C-555/07, Seda Kücükdevici v. Swedex GmbH&Co KG ECR I-365 ECLI:EU:C:2009:429 (July 7, 2019), the CJEU made clear that certain articles of the Charter could be horizontally enforceable, in this case Article 21. The Court later clarified that this horizontal effect did not apply to all articles but dependent on the right also being a general principle of EU law in ECJ, Case C-176/12, Association de mediation sociale v. Union locale des syndicats *CGT*, ECLI:EU:C:2014:2 (Jan. 15,

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

Charter's scope does not preclude the possibility that individuals too may be required to comply with certain provisions of the Charter.[54]

Looking more specifically at climate litigation, neither the ECHR nor the Charter incorporate any substantive or procedural environmental rights, specifically a right to a healthy environment.[55] That said, Article 37 of the Charter does establish a principle of environmental protection, which reads: "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".[56] However, close analysis of Article 37, its relationship to the other Charter provisions, Article 11 TFEU and EU law more generally, and its appearance—or lack thereof—in CJEU jurisprudence, indicates that Article 37 currently does not provide any limits or obligations on actors with respect to environmental protection or integration.[57] Nevertheless, the potential of Article 37 for "greening" actions of EU actors via the Charter is considerable,[58] given the EU's environmental, and climate, ambitions;[59] the fact that there is virtually no area of environmental policy that is not dominated by EU law;[60] and that the scope of Article 37 arguably extends far beyond environmental legislation.[61] Also in terms of remedies, reliance on the Charter by plaintiffs provides distinctive benefits, such as the ability to request the disapplication of the conflicting national measure in case of a violation, which may not be available when relying on the ECHR or national constitutions.[62]

Another important provision with respect to climate litigation is Article 47 of the Charter, which establishes the right to an effective remedy and to a fair trial. This Article has played a central role in addressing some of the weaknesses of the EU's approach to implementing the Aarhus Convention,[63] for example with respect to the standing of environmental associations.[64] The general principle of effective judicial protection has a long history in the European courts' jurisprudence and is arguably a broader one than that articulated in Article 47 of the Charter.[65] Recent analysis of the CJEU's case law on this topic, up to December 2019, shows that in general terms, the Court has increasingly used Article 47 to boost the effectiveness of the Aarhus Convention, even if there is no clear underlying right that would trigger the application of the Charter.[66]

2014). *See also* Dorota Leczykiewicz, *The Judgment in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations*, 16 EUR. REV. CONT. L. 323 (2020).

[54]ECJ, Case C-569/16 and C-570/16, Stadt Wuppertal v. Maria Elisabeth Bauer, ECLI:EU:C:2018:871 (Nov. 6, 2018), para. 87 as quoted in Leczykiewicz, *supra* note 53, at 333.

[55]This is particularly striking in view of the fact that the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (Aarhus Convention), to which the EU and almost all of its Member States are parties already provides these procedural rights.

[56]Charter of Fundamental Rights, *supra* note 24, at Article 37.

[57]See in detail Gracia Marìn Durán & Elisa Morgera, *Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection*, *in* COMMENTARY ON THE EU CHARTER OF FUNDAMENTAL RIGHTS (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2013).

[58]*See* Opinion of Advocate General Colomer at para. 36, Case C-87/02, Commission v. Italy (2004), as cited in Marìn Durán & E. Morgera, *supra* note 57.

[59]As evidenced by the adoption of the Green Deal, see *A European Green Deal*, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[60]See Ludwig Kramer, *Regional Economic International Organizations: The European Union as an Example*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 860 (Daniel Bodansky ed., 2007).

[61]Marìn Durán & E. Morgera, *supra* note 57, at 5.

[62]*See* Fontanelli, *supra* note 52.

[63]The United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention")* 2161 U.N.T.S. 447 (25AD), http://www.unece.org/env/pp/treatytext.html.

[64]*See e.g.*, ECJ, Case 243/15, Lesoochranárske zoskupenie VLK v. Obvodny úrad Trencín ECLI:EU:C:2016:838 (Nov. 8, 2016), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-243/15.

[65]*See* Sacha Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed? in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 143–57 (Paulussen C., Takacs T., Lazić V., Van Rompuy B. eds., 2015).

[66]Mariolina Eliantonio, *The Relationship Between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters: Towards a New Dawn for the 'Language of Rights'?*, 12 REV. EUR. ADMIN. L. 95 (2019).

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

The above shows that both the ECHR and the Charter provide bases for human rights-based claims in the climate litigation context. However, as mentioned, the actual use of these instruments varies significantly in practice. Section C analyzes the actual use of both these instruments in European Union Member State courts thus far.

C. European Human Rights Instruments in Climate Litigation: Practice

Since the early 2010s, there has been a considerable increase in climate litigation cases that reference human rights instruments. Our focus here is on a subset of these cases, namely those that are brought before a national court of one of the European Member States, the CJEU, or the ECtHR.

The landscape of human rights-based climate litigation in the EU comprises various levels of national and international courts, as well as national and international human rights instruments. In order to provide an overview of the state of play so far, we draw on the Climate Change Litigation database hosted and maintained by Columbia Law School's Sabin Centre for Climate Change.[67] This database represents the most complete overview of climate jurisprudence currently in place. It also provides the service of an English summary of cases brought in jurisdictions that would otherwise be beyond the linguistic capabilities of the author. The database comprises two databases: One focused exclusively on US climate litigation, and one that collects all non-US climate litigation. Our search was limited to the latter. Within this database, we used the parameters "suits against governments" and "suits against corporations and individuals" within the category of "Human Rights" and/or the principal law being the ECHR, in order to further filter our results. This means that the legal basis for the claims in these twenty judgments is the ECHR, the Charter, national constitutional rights, or a combination.

A search based on these parameters resulted in seventeen cases,[68] the earliest of which was lodged in 2014, the most recent in 2021.[69] The vast majority of cases—fifteen—were brought before national courts of EU Member States. Cases brought in the UK after January 1, 2020 were excluded. Two cases were brought before the European Court of Justice; one in reference to the EU's greenhouse gas emission reduction targets and one related to the revised Renewable Energy Directive and its categorization of forest biomass.[70] The latter was dismissed as being manifestly

[67]*See Climate Change Litigation Databases*, Sabin Center for Climate Change Law http://climatecasechart.com/climate-change-litigation/. The information used in this article is based on the database's contents as of September 17, 2021.

[68]Górska et al. v. Poland, App. No. 53698/00 (Jun. 3, 2003), http://hudoc.echr.coe.int/eng?i=001-61116; Rb. den Haag, KG ZA 20-933, 2 oktober 2020, Prg. 2020 mnt (*Greenpeace/Netherlands*) (Neth.); Conseil d'Etat [CE] [Council of State] Paris, Jan. 23, 2019, Commune de Grande-Synthe v. France, D.P. III 427301 (Fr.); Tribunal Administratif de Paris [Paris Administrative Court] Mar. 14, 2019, Notre Affaire à Tous and Others v. France, S. Jur. III 1904967 (Fr.); Plan B Earth v. Secretary of State for Transport, [2018] EWCA Civ 214 (UK); Rb. den Haag, 26 mei 2021, Prg. 2021 mnt HA ZA 19-379 (*Milieudefensie/Royal Dutch Shell PLC*), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339; ECJ, Case T-330/18, Armando Carvalho v. European Parliament and Council of the European Union (May 8, 2019), ECLI:EU:T:2019:324, https://curia.europa.eu/juris/liste.jsf?num=T-330/18&language=EN; ECJ, C-297/20 P, Peter Sabo and Others v European Parliament and Council of the European Union, (Jan. 14, 2019) ECLI:EU:C:2021:24, https://curia.europa.eu/juris/liste.jsf?num=C-297/20&language=EN; Oberster Gerichtshof [OGH] [Supreme Court] 20 Feb. 2020, G 144-145/2020-13, V 332/2020-13 30 (Austria); BVerfG, 1 BvR 2656/18, Mar. 24, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=871C7BA24BF9A1FCC8B80381BAC06F15.2_cid386 (Ger.); Civ. [Tribunal of First Instance] Brussels (Bel.), Apr. 13, 2021, Rev.dr.santé, 2021, 21/38/C; Městský soud [MS] [Circuit Court in the City of Prague] Klimatická žaloba ČR v. Czech Republic, 21 Apr. 2021 (pending decision) (Czech.); A Sud et al. v. Italy, 5 June 2021 (pending decision) (It.); Civ. [Tribunal of First Instance] Brussels (Bel.), VZW Klimaatzaak v. Kingdom of Belgium & Others, 2014, 2015/4585/A, N° 167, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf; 64S/18 FH-sk, Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany, 22 Nov. 2018; Family Farmers and Greenpeace Germany v. Germany, 25 Oct. 2018, VG 10 K 412.18.

[69]All care was taken to ensure that these results provide a complete reflection of current jurisprudence, including cross-references with national sources and internet searches based on different search terms. It is, however, possible that additional decisions are available which were missed, for example due to language barriers.

[70]ECJ, Case T-330/18, Armando Carvalho and Others v. European Parliament and Council of the European Union ECLI:EU:T:2019:324 (Mar. 25, 2021), https://curia.europa.eu/juris/liste.jsf?num=T-330/18&language=EN; ECJ, Case C-297/20 P,

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

unfounded, the former—which relied on a multitude of substantive Charter rights, including Articles 2, 3, 15, 16, 17, 20, 21, and 24—was dismissed for lack of standing. With the exception of the case of *Milieudefensie et al. v. Royal Dutch Shell*, all cases were brought against a national and/or regional government, or an EU institution.

Eight of the fifteen cases before national courts reference the Charter.[71] Table 1 provides an overview of these eight cases and their causes of action, in reverse chronological order based on date of lodging of complaint.

Case	Issue	Human rights provisions referenced	Status
A Sud et al. v. Italy June 5, 2021	Does inaction by the Italian government regarding the climate emergency constitute a violation of fundamental rights?	Articles 2, 8, 14 of the ECHR Article 2043 of the Italian Civil Code **Article 6 of the Charter**	Pending
Klimatická žaloba ČR v. Czech Republic April 21, 2021	Does inaction by the Czech government regarding the climate emergency constitute a violation of fundamental rights?	Articles 2 and 8 of the ECHR **Articles 6, 10, 11, 26, 31, 35 of the Charter**	Pending
ClientEarth v. Belgian National Bank April 13, 2021	Does the Belgian National Bank's purchase of bonds from fossil fuel companies violated EU law?	Article 11 of the TFEU **Article 37 of the Charter**	Pending, request for preliminary ruling, no documents available
Greenpeace et al. v. Austria February 20, 2020	Do tax credits on air travel violate human rights due to the danger of greenhouse gas emissions?	Articles 2 and 8 of the ECHR **Articles 2, 7, and 37 of the Charter**	Dismissed for lack of standing
Neubauer, et al. v. Germany February 6, 2020	Does the 55% by 2030 from 1990 levels emissions reduction target in the Federal Climate Protection Act violate human rights?	Articles 2(2) and 20(a) of German Basic Law Federal Climate Action Act **Article 47 of Charter**	Claim by plaintiffs was upheld—parts of the Federal Climate Act were struck down
Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany November 22, 2018	Does the failure to reach greenhouse gas reduction goals by German government constitute a violation of plaintiffs' fundamental rights?	Articles 2(2) and 14(1) of German Basic Law **Article 47 of Charter**	Pending
Family Farmers and Greenpeace Germany v. Germany October 25, 2018	Does the failure to reach greenhouse gas reduction goals by German government constitute a violation of plaintiffs' fundamental rights?	Articles 2(2), 12(1) and 14(1) of German Basic Law **Article 47 of Charter**	Dismissed—held the cabinet decision to reduce emissions was not legally enforceable

(*Continued*)

Peter Sabo and Others v. European Parliament and Council of the European Union, ECLI:EU:C:2021:24 (Jan. 14, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-297/20&language=EN.

[71]Seven cases refer exclusively to the ECHR—most often Articles 2 and 8—and/or national constitutions. Specifically, Górska et al. v. Poland, App. No. 53698/00 (Jun. 3, 2003), http://hudoc.echr.coe.int/eng?i=001-61116; Rb. den Haag, KG ZA 20-933, 2 oktober 2020, Prg. 2020 mnt (*Greenpeace/Netherlands*) (Neth.); Conseil d'Etat [CE] [Council of State] Paris, Jan. 23, 2019, Commune de Grande-Synthe v. France, D.P. III 427301 (Fr.); Tribunal Administratif de Paris [Paris Administrative Court] Mar. 14, 2019, Notre Affaire à Tous and Others v. France, S. Jur. III 1904967 (Fr.); Plan B Earth v. Secretary of State for Transport, [2018] EWCA Civ 214 (UK); Rb. den Haag, 26 mei 2021, Prg. 2021 mnt HA ZA 19-379 (*Milieudefensie/Royal Dutch Shell PLC*), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339; Friends of the Irish Environment v. Ireland, [2020] JR 793 JR (SC) (Ir.)

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

(*Continued.*)

Case	Issue	Human rights provisions referenced	Status
VZW Klimaatzaak v. Kingdom of Belgium & Others 2014	Is the Belgium federal and regional government obliged to reduce emissions more aggressively based on tort law and human rights?	Articles 2 and 8 of the ECHR Article 1382 of the Belgium Civil Code **Articles 2, 7 and 24 of the Charter**	Rules in favor of plaintiffs, violation of Article 1382 of Civil Code as well as Articles 2 and 8 of ECHR, but no specific emissions reduction order in light of separation of powers

In some ways, this remaining sample of cases is overinclusive; all cases that reference Charter provisions at any stage of the proceedings have been included. This means that if the Charter is referenced by one of the parties in their submissions, the case is included in this overview —even if the court later does not refer to, or base its decision on, these provisions. For example, in *VZW Klimaatzaak v. Kingdom of Belgium & Others*, the Flemish Region asked the Court to refer a question to the CJEU as to the compatibility of the EU ETS Directive and the Effort Sharing Regulation with Articles 2, 7, and 24 of the Charter.[72] The Court does not engage with this in its judgment and instead decides on the basis of Article 1382 of the Civil Code and Articles 2 and 8 of the ECHR.

In three cases—noticeably all before a German court—Article 47 of the Charter is used to deal with problems of standing. Though it is unclear why the plaintiffs decided against strengthening their national fundamental human rights protection with Charter rights, this use of the Charter nevertheless constitutes an important development for a rights-based protection more generally by providing access to the courts and paving the way for human rights-based climate litigation. Of the four cases that rely on substantive Charter rights—*A Sud et al. v. Italy, Klimatická žaloba ČR v. Czech Republic, ClientEarth v. Belgian National Bank, Greenpeace et al. v. Austria*—one has been dismissed for lack of standing—*Greenpeace et al v Austria*—and three are pending. Interestingly, the two cases that refer to both the ECHR and the Charter—*A Sud et al. v. Italy* and *Klimatická žaloba ČR v. Czech Republic*—rely on different rights contained in both documents. Whereas some cases would cite, for example, the right to life under the respective Articles 2 of the ECHR and the Charter, in these cases, different human rights from each instrument are referenced.[73] The actual role that the Charter will play in this set of cases is yet to become clear.

Keeping in mind that the sample of cases is a very limited one, and that the field of human rights-based climate litigation itself is rapidly developing, a few observations may be made based on this overview. First, climate litigation in which a rights-based approach is adopted relies predominantly on national constitutional protections or rights expressed in the ECHR. Second, reference to the Charter is limited, with reference to procedural rights and/or rights also contained in the ECHR being most common, indicating that the effect of Article 47 has been a positive one with respect to climate litigation. Third, Article 37 of the Charter does not yet play a meaningful role in climate litigation.

[72]VZW Klimaatzaak, N° 167 at 44, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf.

[73]Specifically, from the ECHR, Articles 2 (Right to life), 8 (Respect for private and family life) and 14 (Prohibition of discrimination) are cited, whereas Article 2 (Right to life), Article 6 (Right to liberty and security), Article 7 (Respect for private and family life), Article 10 (Freedom of thought, conscience and religion), Article 11 (Freedom of expression and information), Article 16 (Freedom to conduct a business), Article 24 (The rights of the child), Article 31 (Fair and just working conditions), Article 35 (Health care), and Article 37 (Environmental protection), are cited.

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

D. The Future of the EU Charter in Climate Litigation

In 2012, Alan Boyle analyzed the first wave of litigation aimed at "greening" human rights.[74] In the context of this broader development, he argued that climate change cannot be easily addressed through existing human rights because:

> [i]t affects many states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. [. . .] The response of human rights law—if it is to have one—needs to be in global terms, treating the global environment and climate as the common concern of humanity.[75]

Over the past decade, Boyle's observation has remained valid; much of the successful human rights-based climate litigation thus far excludes the interests of populations outside the national jurisdiction of the court in question, limiting its ability to meaningfully address this global problem.[76] However, Boyle's prediction that these cases could not lead to the derailment of economic policies driving greenhouse gas emissions has aged less well.[77] The decisions taken in *Urgenda*, *Neubauer*, and with respect to private parties, also *Milieudefensie v. RDS*, have led to real changes to climate policies.[78]

The EU claims to be at the forefront of both environmental and human rights protection. The latter has been demonstrated by the adoption of the Charter and the subsequent jurisprudence of the CJEU regarding the ambitious standard of protection it is meant to provide.[79] The rise of rights-based approaches in climate litigation would suggest that these two aspects provide a mutually reinforcing opportunity for plaintiffs in the EU—before national and European courts—to use the Charter to push for more ambitious climate action by Member States and/or the EU institutions. The fact that most cases are currently brought against Member States, rather than against private parties, and concern an area of shared competence—climate policy—which place these cases firmly within the scope of application of the Charter,[80] are factors that reinforce this assumption. However, as the above analysis shows, the Charter actually plays a rather marginal role in the climate litigation landscape. When it is cited—in half the cases, reference to the Charter is missing entirely—its effect is very limited. Reference to Article 47 is most common, which may be in part explained by its links to the Aarhus Convention and its European implementation with which environmental plaintiffs, such as environmental NGOs, have relatively extensive, and positive, experience.

This situation speaks to important issues regarding the penetration of EU law into domestic legal orders, the perception of EU law by lawyers and judges, and the relationship between the European courts. These issues deserve a separate contribution with its own methodology, centered on in-depth interviews with parties involved in these cases, which the author looks forward to

[74] *See* Boyle, *supra* note 12.

[75] *Id.* at 642.

[76] *See e.g.*, Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

[77] *See e.g.*, also the request for a preliminary reference in *VZW Klimaatzaak v. Kingdom of Belgium & Others*, *supra* note 72. Boyle, *supra* note 12, at 642. Moreover, much of the economic policy which drives greenhouse gas emissions worldwide is presently lawful and consistent with the terms of the UNFCCC and the Kyoto Protocol. It is no more likely to be derailed by human rights litigation based on ICCPR rights than the UK's policy on Heathrow airport in the *Hatton* case.

[78] For example, the German government has adjusted its climate law, see *Germany pledges to adjust climate law after court verdict*, Associated Press (Apr. 30, 2021) https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8; in the Netherlands, the government created a new "climate accord" see Klimaatakkoord, https://www.klimaatakkoord.nl/.

[79] *See supra* section B.

[80] As discussed in section B, in light of the CJEU's jurisprudence on this, there is no reason to expect that the scope of the Charter would exclude cases against private actors and/or cases that are less overtly linked to climate or environmental policy as set by the EU.

https://doi.org/10.1017/glj.2021.78 Published online by Cambridge University Press

engage with in the future. Some small clues as to this relationship may already be glimpsed from the jurisprudence; in *Neubauer,* the Court expressly engages with the question whether a constitutional complaint may be raised against the Federal Climate Change Act, given that the Act implements the EU's Effort Sharing Regulation.[81] Specifically, it admits that "[i]t is true that the Federal Climate Change Act might be regarded in some respects as implementing EU law within the meaning of Article 51(1) first sentence of the EU Charter of Fundamental Rights."[82] However, it also finds that caselaw of the German Constitutional Court and the CJEU allow for constitutional review in this situation.[83]

The Court's observation is in line with the two scenarios identified by de Boer where Member States may still be able to apply national rights standards that are higher than that of the EU: Where the Member States have discretion in implementing EU law and do so in line with national rights provisions without affecting the primacy of EU law, and where a derogation from EU law strengthens rather than undermines EU law's effectiveness.[84] Put differently, the German courts,' and several others,' reluctance to bring these cases into the scope of EU law or deciding them in reference to the Charter does not pose a legal problem.[85] It does however speak to an avoidance of judicial dialogue between the national and European courts on these issues. This avoidance limits the development of the Charter as a key instrument for human rights protection in general, and in climate litigation in particular.[86]

[81]EU Regulation 2018/842, 2018 O.J. (L 156).

[82]BVerfG, 1 BvR 2656/18, para. 5.

[83]*Id.* However, according to the case-law of the Federal Constitutional Court and the European Court of Justice, this does not preclude a review of conformity with the Basic Law. *Cf.* BVerfGE, 1 BvR 16/13, June 11, 2019, https://dejure.org/2019,40297 (Right to be forgotten I) (Ger.); CJEU, C-617/10, Åkerberg, EU:C:2013:105 (Feb. 16, 2013) para. 29, https://curia.europa.eu/juris/document/document.jsf?docid=134202&doclang=en.

[84]*See* De Boer, *supra* note 43, at 1096.

[85]*See e.g.,* the request for a preliminary reference in *VZW Klimaatzaak v. Kingdom of Belgium & Others*, *supra* note 72.

[86]These developments closely link to debates regarding the preferred place for dialogue about our constitutional values: Parliaments or courts, *see* Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 Oxford J. Legal Stud. 18–51 (1993); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L. J. 1346–1406 (2006), *as cited in* De Boer, *see supra* note 43, at 75.

Cite this article: van Zeben J (2021). The Role of the EU Charter of Fundamental Rights in Climate Litigation. *German Law Journal* **22**, 1499–1510. https://doi.org/10.1017/glj.2021.78