



Fundamental Rights and Climate Change

Exploring New Perspectives and Corresponding Remedies

EDITED BY

Alicja Sikora-Kalèda · Inga Kawka

Krakow Jean Monnet
Research Papers

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Alicja Sikora-Kalèda · Inga Kawka



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Alicja Sikora-Kalèda
Jagiellonian University, Kraków, Poland
📧 <https://orcid.org/0009-0001-1204-7020>
✉ alicja.1.sikora@uj.edu.pl

Inga Kawka
Jagiellonian University, Kraków, Poland
📧 <https://orcid.org/0000-0001-6909-5798>
✉ inga.kawka@uj.edu.pl

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INTRODUCTION

*The environment is where we all meet;
where we all have a mutual interest;
it is the one thing all of us share.*

Lady Bird Johnson

The monograph outlines the growing importance of fundamental rights in the European Union, particularly in the context of environmental protection and the fight against climate change. These rights have become a cornerstone in shaping policies that address ecological challenges while balancing economic and social aspects. The European Green Deal (EUGD), a landmark initiative, embodies the EU's commitment to transitioning into a climate-neutral, modern economy by 2050. This ambitious goal requires comprehensive legislative action and coherence in implementing policies across various sectors, ensuring that all measures align with and uphold fundamental rights as enshrined in the EU legal framework.

This monograph is the culmination of scholarly work inspired by discussions from the conference titled 'Fundamental Rights and Climate Change in EU Law and Beyond – Mapping Fundamental Rights, Nature's Rights, and Corresponding Legal Remedies,' organized in September 2023 as part of the Jean Monnet Module project, 'Sustainability and Climate Change in EU Law.' This academic event, hosted by the Chair of European Law at the Jagiellonian University, brought together experts from diverse fields to discuss and exchange perspectives on sustainability and the legal frameworks within the EU. The insights shared during the conference laid the foundation for the analyses presented in this book, highlighting the complex interplay between fundamental rights, environmental challenges, and legislative coherence.

The chapters of this book reflect a collective scholarly effort to explore diverse aspects of fundamental rights and their intersections with environmental law within the EU framework. The opening chapter, authored by Alicja Sikora-Kalèda investigates the limits of human rights as instruments to advocate for global climate action. It examines how climate litigation impacts human rights and evaluates the potential evolution of environmental rights in EU law. Ilona Przybojewska contributes with an analysis of how poor environmental conditions can lead to state liability, referencing a notable 2021 Polish Supreme Court resolution. Her work probes the extent to which environmental issues can be recognized as affecting personal rights and the broader implications of this recognition.

This monograph aims to serve as a comprehensive resource for legal practitioners, scholars, and policymakers, encouraging further dialogue on the integration of environmental and human rights within the EU legal system.

Alicja Sikora-Kalèda
Inga Kawka

ALICJA SIKORA-KALÉDA¹

The views expressed are of the author and in no way reflect the views of the Council or the European Council.

RIGHTS IN THE ERA OF CLIMATE CHANGE CONTEMPLATING THE LIMITS OF HUMAN RIGHTS AS INSTRUMENTS OF PRESSURE FOR THE PLANETARY CAUSE

ABSTRACT: One of the ways to address a “triple planetary crisis” (climate change, biodiversity loss, toxic pollution) consists in challenging existing legal frameworks, principles and remedies. The aim of this chapter is first, to contemplate, against the background of normative, judicial and ethical developments, both the impact of climate litigation on human rights’ architecture and also possible ways forward in the process of development of rights as instruments of pressure in a global attitude to tackle climate change. Secondly, current developments in the environmental and climate field of the EU legal order from a constitutional perspective are addressed, including the impact of the ECtHR *Klimaseniorinnen* judgement on the EU legal framework. Whilst the EU Courts are under pressure of an irrefutable link between human rights and the climate, the limits of judicial creativity should trigger a new debate about the feasibility of environmental rights in the EU legal order at large.

KEYWORDS: fundamental rights, environmental human rights, climate change litigation, EU legal order, environmental law, climate change, climate rights

1. Environmental rights – contemplating a change

1.1. Introduction

One of the ways to address a “triple planetary crisis” (climate change, biodiversity loss, toxic pollution)² consists in challenging existing legal frameworks, principles

¹ Dr hab. A. Sikora-Kaléda, Chair of European Law, Jagiellonian University, <https://orcid.org/0009-0001-1204-7020>.

² E. Morgera, *International Environmental Law: A Case for Transformative Change through the Lens of Children’s Human Rights*, “Environmental Policy and Law” 2024, vol. 53, no. 5-6. For the concept

and remedies. Indeed, the temporal outline of environmental governance ‘is not just to value the future but also to respond and manage a changing future.’³ In the context of a broadly understood environmental constitutionalism,⁴ advocating the link between human rights and climate change⁵ and the overall concept of environmental human rights⁶ can be understood as a universal expression of a need for groundbreaking change given the magnitude of the climate change as a “polycentric issue.”⁷ Challenging existing legal and philosophical *status quo* equally implies reinventing foundational reasoning underpinning rights in a broad sense including understanding their purpose, scope and feasibility. Indeed, the impact of climate change litigation on the architecture of human rights is undeniable. Human rights have been in recent years operationalised through the judicial debate and have gradually become an instrument of pressure on state actors echoing a need for change of the legal and economic framework in many jurisdictions around the globe. Indeed, the substantial focus on rights has shifted recently from the normative area to the judicial creativity sphere in a context of a climate change litigation in order to put pressure on govern-

of a triple planetary crisis in the UN context, see Universal Rights Group, *Realising Human Rights as a Critical Contribution to Confronting the Triple Planetary Crisis*, 2024, <https://www.universal-rights.org/urg-policy-reports/human-rights-triple-planetary-crisis/>.

³ B.J. Richardson, *Time and Environmental Law: Telling Nature’s Time*, Cambridge 2017, p. 124.

⁴ J.R. May, E. Daly, *Global Climate Constitutionalism and Justice in the Courts* [in:] *Research Handbook on Global Climate Constitutionalism*, J. Jaria-Manzano, S. Borrás (eds), Cheltenham-Northampton 2019, pp. 42-57; E. Daly, J.R. May, *Introduction: Implementing Environmental Constitutionalism* [in:] *Implementing Environmental Constitutionalism: Current Global Challenges*, E. Daly, J.R. May (eds), Cambridge 2018, pp. 1-12; J.R. May, *Constituting Fundamental Environmental Rights Worldwide*, “Pace Environmental Law Review” 2006, vol. 23, no. 1, pp. 113-182; J.R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, “Cardozo Law Review” 2020, vol. 42, no. 3, p. 983; S.J. Turner et al. (eds), *Environmental Rights: The Development of Standards*, Cambridge 2019, pp. 383-400; J.C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, London 2017; S. Bookman, *Demystifying Environmental Constitutionalism*, “Environmental Law” 2024, vol. 54, no. 1, pp. 1-77; A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Zutphen 2020; E. Daly, M.A. Tigre, N. Urzola, *Common but Differentiated Constitutionalisms: Does ‘Environmental Constitutionalism’ Offer Realistic Policy Options for Improving UN Environmental Law and Governance? US and Latin American Perspectives* [in:] *Constitutionalism and Transnational Governance Failures*, E.-U. Petersmann, A. Steinbach (eds), Leiden–Boston 2024, pp. 172-205.

⁵ C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, “European Journal of International Law” 2022, vol. 33, no. 3, pp. 925-951.

⁶ For the purpose of this chapter the “environmental human rights” notion is used to denote the human rights jurisprudence on the application of human rights norms to environmental harm and climate change. See Environmental human rights (EHRs) (see J.R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge 2014).

⁷ European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECLI:CE:ECHR:2024:0409JUD005360020, para. 419.

ments and industrial players to reduce greenhouse gas emissions and to raise the level of ambition in the field of climate neutrality and thus amend the current legal framework.⁸ Strategic litigation embodied in the climate change rationale is a new form of legal practice.⁹ The aim of this chapter is thus to contemplate, in the first part, against the background of normative, judicial and ethical developments, possible ways forward in the process of construing environmental rights in tackling climate change. In the second part, current developments in the environmental and climate field of the EU legal order from a constitutional perspective are addressed, including a potential impact of the European Court of Human Rights (ECtHR) *Klimaseniorinnen* judgement on the attitude of the European Court of Justice (CJEU) in the field of environmental, climate rights. The centre of gravity in the modern debate about rights and environment should be precisely about “their underlying rationale, their necessity, feasibility, and use in international and national law and policy.”¹⁰ It seems that existing normative and judicial expressions of greening human rights by deriving environmental rights from expressly recognised human rights are about to reach their limits. Thus, contemplating their philosophical foundations and possible legal avenues of construing a new generation of environmental rights adapted to the climate change reality, societal and technological challenges is worthwhile.

1.2. Normative and judicial expressions of environmental human rights

Constitutional entrenchment of environmental human rights has been viewed in the global context of a “growing global consciousness of environmentalism in tandem with increasing threats to social and environmental sustainability [which] have

⁸ M. Bönemann, M.A. Tigre (eds), *The Transformation of European Climate Litigation*, Berlin 2024; J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, London 2024, <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>; I. Alogna et al. (eds), *Climate Change Litigation in Europe: Regional, Comparative and Sectoral Perspectives*, Cambridge–Antwerp–Chicago 2023; C. Beauregard et al., *Climate Justice and Rights-Based Litigation in a Post-Paris World*, “Climate Policy” 2021, vol. 21, no. 5, pp. 652–665.

⁹ J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, London 2021, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf; J. Peel, R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, “German Law Journal” 2021, vol. 22, no. 8, pp. 1484–1498; Ch. Eckes, *Strategic Climate Litigation before National Courts: Can European Union Law Be Used as a Shield?*, “German Law Journal” 2024, vol. 25, no. 6, pp. 1022–1042.

¹⁰ M. Scobie, *Framing Environmental Human Rights in the Anthropocene* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 9–30.

contributed to the greening of constitutions”¹¹ and considering “environmental quality as fundamentally related to human rights.”¹² As noted in the classical “*Environmental Constitutional Rights*” monograph by Hayward, constitutional recognition of environmental human rights, “entrenches a recognition of the importance of environmental protection; it offers a possibility of unifying principles for legislation and regulation; it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.”¹³ An initial question about the relationship between human rights law and global climate change has already been addressed by arguing that a “mutually exclusive relationship” between human rights law and general international law would counter the evolution of international environmental law as a whole and international human rights law.¹⁴ A human rights-based approach to climate change remains a complex trend in national and international legal orders,¹⁵ enhanced notably through the climate change litigation and judicial response of national and international courts,¹⁶ both through the prism of a general link between climate and human rights¹⁷ and intergenerational perspective of rights and responsibilities.¹⁸ However, this effort, as noted by scholars, is paved with many hurdles, including primarily the absence of an explicit right to a healthy environment in the

¹¹ E. Daly, J.R. May, *Learning from Constitutional Environmental Rights* [in:] *The Human Right to a Healthy Environment*, J.H. Knox, R. Pejan (eds), Cambridge 2018, pp. 42-57.

¹² J.C. Gellers, *The Global...*, p. 2.

¹³ T. Hayward, *Constitutional Environmental Rights*, New York 2005, p. 8.

¹⁴ A. Boyle, *Human Rights and the Environment: Where Next?*, “European Journal of International Law” 2012, vol. 23, no. 3, pp. 613-642.

¹⁵ Ex multis, B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Brisbane 2018, p. 153ff.

¹⁶ Ch. Eckes, *Constitutionalising Climate Mitigation Norms in Europe* [in:] *Constitutionalism and Transnational Governance Failures*, E.-U. Petersmann, A. Steinbach (eds), Leiden-Boston 2024, pp. 107-144.

¹⁷ C. Heri, *Climate Change...*

¹⁸ United Nations General Assembly, *The Pact for the Future (A/RES/79/1)* that includes a *Global Digital Compact* and a *Declaration on Future Generations*. Pact, Action 35, point e “Address the adverse impact of climate change and other environmental challenges that constitute threats to the ability of young persons to enjoy their human rights and a clean, healthy and sustainable environment.” See also, Bundesverfassungsgericht, *Neubauer et al. versus Germany*, order of 24 March 2021 – 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>, operative part, para. 2 “If there is scientific uncertainty regarding causal relationships of environmental relevance, a special duty of care imposed upon the legislator by Art. 20a of the Basic Law – also for the benefit of future generations – entails an obligation to take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments.”

European Convention on Human Rights (ECHR).¹⁹ More broadly, environmental human rights are anchored in various trends of environmental justice,²⁰ planetary justice and Earth system justice in the era of the Anthropocene.²¹ Whilst climate change is “increasingly viewed as a human rights issue”, scholars equally emphasise that this is a relatively novel issue in the international fora which started globally to arise in the context of the claims of indigenous communities.²² Since the 1900s, approximately one hundred States have adopted the right to a healthy environment “by writing anew or amending their constitutions to include substantive environmental human rights provisions.”²³ Scholars note that approximately half of the constitutions around the globe explicitly or implicitly provide for a substantive right to a clean or quality or healthy environment, and “about half of those also guarantee procedural rights to information, participation, or access to justice in environmental matters.”²⁴ However, global human rights treaties do not include such a substantive right to healthy environment. In 2008, the U.N. Human Rights Council adopted Council Resolution 7/23, which affirmed that “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.”²⁵ The concept of environmental human rights has been further categorised among “new human rights” and prominently highlighted by the 2022 UN endorsement of “a right to a clean, healthy, and sustainable environment” in the UNGA Resolution 76/300.²⁶

¹⁹ C. Heri, *Climate Change...*

²⁰ L. Pellegrini et al., *International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case from the Ecuadorian Amazon*, “Journal of International Economic Law” 2020, vol. 23, no. 2, pp. 455–468; M. Scobie, *Framing Environmental Human Rights...*

²¹ J. Gupta et al., *Earth System Boundaries and Earth System Justice: Sharing the Ecospace*, “Environmental Politics” 2024, vol. 33, no. 7, pp. 1–20.

²² B. Lewis, *Environmental Human...*, p. 153.

²³ Cf. <https://iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>, see also Ch. Jeffords, *On the Relationship between Constitutional Environmental Human Rights and Sustainable Development Outcomes*, “Ecological Economics” 2021, vol. 186. For the US perspective, see J.H. Knox, N. Tronolone, *Environmental Justice as Environmental Human Rights*, “Vanderbilt Journal of Transnational Law” 2023.

²⁴ E. Daly, J.R. May, *Learning from...*

²⁵ A/HRC/RES/7/23 Human Rights and Climate Change. For an outline of political and historical context of the UN debates, see M. Limon, *For People; For Planet: The Long and Winding Road to United Nations Recognition of the Universal Right to a Clean, Healthy, and Sustainable Environment*, <https://www.universal-rights.org/urg-policy-reports/for-people-for-planet-the-long-and-winding-road-to-united-nations-recognition-of-the-universal-right-to-a-clean-healthy-and-sustainable-environment/>.

²⁶ Cf. <https://documents.un.org/doc/undoc/gen/n22/442/77/pdf/n2244277.pdf>.

Furthermore, many environmental constitutional rights are related to either sustainable development or preserving the environment for future generations. As emphasised in the scholarship, the *The Environmental Rights Revolution* was facilitated in the 20th century by three, converging trends: “a wave of new and amended constitutions in both emerging and established democracies, the human rights revolution, and growth in the magnitude and awareness of the global environmental crisis.”²⁷ In order for “uniform restatement of general principles that have emerged in international human rights law in the context of the environment,”²⁸ in 2020 the so-called “Strasbourg Principles of International Environmental Human Rights Law” were enacted by a group of human rights and environmental law experts.²⁹ Global concerns and the reality of a climate change and environmental degradation is nevertheless universally recognised and reflected even in the most controversial jurisdictions such as the US.³⁰ In this respect scholars argue that “environmental rights should be recognised as *natural rights* that need not be granted by a constitution or a statute but rather understood to be inherent in what it means to be human.”³¹ Consequently, this approach would imply that “(t)he near-universal acceptance of environmental rights provides a starting point for the argument that the right to a healthy environment should be recognized as an element of natural law.”³²

Whilst “environmental rights revolution” has not led to a recognition of a normative, enforceable, substantive human, environmental right worldwide, climate change litigation, for its part, represents a unique, universal phenomenon in the legal history anchored in the ‘court-centric approach’³³ having led to the “climate constitutionalisation” which indeed arises to a global legal reality.³⁴ Notwithstanding conceptual tensions, human rights continue to be at the heart of both judicial and constitutional

²⁷ D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Toronto 2012, p. 3.

²⁸ *The Strasbourg Principles of International Environmental Human Rights Law – 2022*, “Journal of Human Rights and the Environment” 2022, vol. 13, pp. 195-202.

²⁹ *Ibidem*.

³⁰ J.A. Basseches et al., *Climate Policy Conflict in the U.S. States: A Critical Review and Way Forward*, “Climatic Change” 2022, vol. 170, p. 32; M.G. Burgess et al., *Supply, Demand and Polarization Challenges Facing US Climate Policies*, “Nature Climate Change” 2024, vol. 14, pp. 134-142.

³¹ D.C. Esty, *Should Humanity Have Standing? Securing Environmental Rights in the United States*, “Southern California Law Review” 2024, vol. 95, no. 6, pp. 1345-1392.

³² *Ibidem*.

³³ C. Rodríguez- Garavito, *Human Rights: The Global South’s Route to Climate Litigation*, “American Journal of International Law” 2020, vol. 114, p. 40; J.R. May, E. Daly, *Global Climate Constitutionalism...*; Ch. Eckes, *Constitutionalising Climate...*

³⁴ Ch. Eckes, *Constitutionalising Climate...*

conversations about climate change³⁵ and through this debate one can denote that environmental (human) rights are evolving. The concept of greening human rights by deriving environmental rights from the human right to life and family life under the ECHR and under the open clause of American Convention on Human Rights (ACHR), is a prominent trend.³⁶ As echoed in the judicial conversations around the globe³⁷, before both international, constitutional and supreme courts such as the European Court of Human Rights (ECtHR)³⁸, International Court of Justice (ICJ),³⁹ International Tribunal for the Law of the Sea (ITLOS),⁴⁰ the Inter American Court of Human Rights (IACHR), Irish Supreme Court,⁴¹ the German Federal Constitutional Court (BVerfG),⁴² Dutch jurisdictions,⁴³ French Conseil d'État,⁴⁴ Belgian courts,⁴⁵

³⁵ See, ex multis, S.J. Turner et al. (eds), *Environmental Rights...*; J.H. Knox, R. Pejan (eds), *The Human Right to a Healthy Environment*, Cambridge 2018; J. Jaria-Manzano, S. Borrás (eds), *Research Handbook on Global Climate Constitutionalism*, Cheltenham–Northampton 2019; J.R. May, E. Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Cheltenham 2019.

³⁶ A. Rocha, R. Sampaio, *Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Human Rights Bodies*, “Review of European, Comparative & International Environmental Law” 2023, vol. 32, no. 2, pp. 279–289.

³⁷ Cf. <https://climatecasechart.com/non-us-jurisdiction/>.

³⁸ On derived environmental rights, see https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG. Among the key recent cases in relation to climate change, see https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG and in particular European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz...*

³⁹ International Court of Justice, *Obligations of States in Respect of Climate Change*, <https://www.icj-cij.org/case/187>.

⁴⁰ International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law: Advisory Opinion*, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

⁴¹ Irish Supreme Court, *Friends of the Irish Environment –v– The Government of Ireland & Ors*, https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf.

⁴² Bundesverfassungsgericht, *Neubauer...*

⁴³ Supreme Court of the Netherlands, *Climate Case Urgenda*, 20 December 2019, ECLI:NL:HR:2019:2006 (English translation ECLI:NL:HR:2019:2007, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>).

⁴⁴ Conseil d'État, n° 42730, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, ECLI:FR:CECHR:2020:427301.20201119; Conseil d'État, n° 427301, 5 et 6e chambres réunies, 1 July 2021, ECLI:FR:CECHR:2021:427301.20210701; Conseil d'État, n° 467982, Commune de Grande-Synthe et autres, 10 May 2023, ECLI:FR:CECHR:2023:467982.20230510.

⁴⁵ Brussels Court of Appeal, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, 30 November 2023, see E. Slautsky, *Climate Litigation, Separation of Powers and Federalism à la Belge: A Commentary of the Belgian Climate Case*, “European Constitutional Law Review” 2024, vol. 20, no. 3, pp. 506–526.

Pakistani courts,⁴⁶ Czech courts,⁴⁷ EFTA Court,⁴⁸ and recently the South Korean Supreme Court,⁴⁹ human rights are being operationalised as instruments of pressure on executive, legislative and judicial branches.⁵⁰ Arguing an insufficient level of ambition mostly in relation to the emission of States before the judiciary triggered discussions of an unprecedented dynamism and scope about the constitutional dimension of both anthropocentric and ecocentric approaches, human rights, intergenerational rights, common responsibilities and States' positive obligations in the context of climate change as well as the limits of judicial power in separation of powers.⁵¹ In France, inspiring developments following the constitutionalisation of environmental human rights embodied in the *Charte de l'Environnement*, are illustrated by the case law of the national courts.⁵² The Inter-American Court of Human Rights is currently debating a climate case filed on January 9, 2023 by Chile and Colombia, who signed a joint advisory opinion aiming to clarify the scope of the state obligations for responding to the climate emergency under the frame of international human rights law.⁵³ The recently closed hearing before the International Court of Justice has sparked considerable attention and gathered ninety-eight States and twelve international organisations.⁵⁴ At the level of the EU, the first attempt of the climate litigation before the EU

⁴⁶ Lahore High Court, *Leghari v Federation of Pakistan*, 4 April 2015, WP N0 25501/2015.

⁴⁷ Czech Supreme Administrative Court, *Klimatická žaloba ČR v. Czech Republic*, 9 As 116/2022-166, 20 February 2023 (English translation: <https://www.law.muni.cz/dokumenty/62964>).

⁴⁸ EFTA Court, *E-11/23: Låssenteret AS v Assa Abloy Opening Solutions Norway AS*, <https://eftacourt.int/cases/e-11-23/>.

⁴⁹ South Korea Constitutional Court, *Do-Hyun Kim et al. v. South Korea*, 29 August 2024 (2020 Hun-Ma389, 2021Hun-Ma1264, 2022Hun-Ma854, 2023Hun-Ma846 (consolidated)), <https://english.court.go.kr/site/eng/ex/bbs/List.do?cbIdx=1143>.

⁵⁰ An overview of cases from France, Germany, Ireland, Netherlands, Norway, Spain, United Kingdom and Belgium makes part of the legal background of the ECtHR judgment in case European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz...*, paras 235-272.

⁵¹ See, ex multis, S.J. Turner et al. (eds), *Environmental Rights...*; J.H. Knox, R. Pejan (eds), *The Human Right...*; J.R. May, *Constituting Fundamental Environmental Rights Worldwide*, "Pace Environmental Law Review" 2006 vol. 23, no. 1, p. 113; J.R. May, *The Case for Environmental Human Rights: Recognition, Implementation and Outcomes*, "Cardozo Law Review" 2020, vol. 42, no. 3, p. 983; J.R. May, E. Daly, *Global Environmental...*; J.R. May, E. Daly, *Environmental Constitutionalism*, Cheltenham 2016; J.R. May, E. Daly (eds), *Human Rights and the Environment...*; Ch. Eckes, *Constitutionalising Climate...*

⁵² D. Marrani, *Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts*, "Sustainable Development Law & Policy" 2009, vol. 10, no. 1, pp. 52-57.

⁵³ Cf. https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

⁵⁴ Cf. <https://www.icj-cij.org/sites/default/files/case-related/187/187-20241108-pre-01-00-en.pdf>.

Courts failed at the stage of admissibility,⁵⁵ but other sectoral remedies under Aarhus Regulation⁵⁶ continue to trigger judicial debates.⁵⁷

However, climate change litigation as we know it today, in particular in the case of “winning”, should be carefully assessed. First, this phenomenon has a price in terms of human rights evolution. As indicated in the scholarship, climate litigation risks ‘betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives.’⁵⁸ Derived environmental human rights are undoubtedly affecting the core of human rights’ architecture. Secondly, judicial trends are subject to fluctuation as courts do not operate in a social and political vacuum. Once the State’s responsibilities have been concretised in a given case, notably in the light of international human rights obligations, the judiciary has exhausted its role. Even if the constitutional precedent continues to thrive in a legal system, it is subject to further interpretations in various legal contexts including balancing. Thirdly, and most importantly, the multilevel implementation of judicial decisions in climate related cases in a given national order is key. Thus, the biggest challenge nowadays consists of translating judicial decisions into the normative language. A recent critical response of the Swiss government to the ECtHR judgement in the *Klimaseniörinen* case⁵⁹ both demonstrates the relevance of implementation phase and illustrates potential risks of compromising the impact of ECtHR judgement. In particular, the Swiss government argued that the legislation approved immediately before and after the ruling has already adjusted Swiss Net Zero trajectory,⁶⁰ but this interpretation was not unanimously shared among experts.⁶¹

⁵⁵ Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2022:297. See G. Winter, Armando Carvalho and Others v. EU: *Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, “Transnational Environmental Law” 2020, vol. 9, no. 1, pp. 137-164.

⁵⁶ Council Regulation 1367/2006 of Sept. 6, 2006, *On the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies*, “Official Journal of European Union” 2006, L 264, pp. 13-19.

⁵⁷ Case C-212/21, *EIB v. ClientEarth*, ECLI:EU:C:2023:546 and pending case T-579/22, *ClientEarth v Commission*.

⁵⁸ B. Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, “American Journal of International Law” 2021, vol. 115, no. 3, pp. 409-451.

⁵⁹ Cf. <https://rm.coe.int/0900001680b1ddd9>.

⁶⁰ Cf. <https://chambers.com/topics/climate-seniors-echr-case-global-impact>.

⁶¹ Cf. <https://cms.law/en/che/publication/bill-on-a-secure-electricity-supply-from-renewable-energy-what-are-the-changes>.

In parallel, the nature and substance of climate litigation is shifting from States to big industrial market players. As demonstrated by the judgement of 11 November 2024 in the Dutch case *Shell*,⁶² companies might be held responsible and considered as having an obligation towards citizens to limit its CO₂ emissions. After having relied on groundbreaking cases such as *Urgenda* and *Klimaseniorrinen*, the Dutch Court of Appeal has nevertheless dismissed the appeal of environmental organisations since it was not able to establish that the social standard of care entails an obligation for Shell to reduce its CO₂ emissions by a given percentage.⁶³ Commentators refer therefore to the “corporate climate (un)accountability.”⁶⁴ Whilst the EU regulatory framework has recently advanced considerably in the field of the corporate accountability,⁶⁵ it remains a universal legal and ethical challenge which will inevitably come back before various courts.

More globally, notwithstanding impressive progress in operationalising human rights such as the right to life, health protection, and respect for family life for the purpose of the climate cause, a normative architecture of environmental (human) rights continues to represent a very arduous enterprise. From a conceptual perspective, establishing a link between climate change and fundamental rights requires a new legal structure including identification of the “right holders” and “duty-bearers.”⁶⁶ More and more, the environmental (human) rights notion is decomposed as far as right holders are concerned and thus the lacuna of legal protection of specific groups such as indigenous communities, children, woman, climate induced immigrants forms part of a global discussion on a climate and human rights.⁶⁷ Novel attempts encapsulated in

⁶² Court of Appeal The Hague, 200.302.332/01, *Shell Plc v. Environmental Defense Association e.a.*, ECLI:NL:GHDHA:2024:2100.

⁶³ Cf. <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100>.

⁶⁴ Cf. <https://climatehughes.org/blog-corporate-climate-unaccountability-landmark-shell-ruling/>.

⁶⁵ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending; Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760; Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, pp. 15-80.

⁶⁶ B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Brisbane 2018, pp. 209-211.

⁶⁷ Ex multis, M. Hurlbert, *Advancing Environmental Rights through Indigenous Rights* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 132-148; E. Morgera, *International Environmental Law...*, pp. 307-319; M.C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge 2012; D. Andreolla Serraglio, F. de Salles Cavedon-Capdeville, F. Thornton, *The Multi-Dimensional Emergence of Climate-Induced Migrants in Rights-Based Litigation in the Global South*, “Journal of Human Rights Practice” 2024, vol. 16, no. 1, pp. 227-247.

“a right to *All or None*” has been argued in relation to the carbon emissions.⁶⁸ Given the definitional challenges, it has been argued that the scope of a right to healthy, decent or sustainable environment could be recalibrated and focus on one medium such as water and air, which would enhance its enforceability.⁶⁹ Although there is no doubt climate change affects enjoying a variety of human rights such as the rights to life, to health, access to food and water, to one’s home and family life or to a healthy environment,⁷⁰ determining the substance and boundaries of environmental, human rights *sensu stricto* remains one of the greatest challenges of most of the legal systems, including in the EU legal order which does not recognise a substantive right to a healthy environment.

Surprisingly, as demonstrated by the recent developments, one of the most successful concepts which has gone from a purely theoretical, ethical idea expanded through the international public law scholarship,⁷¹ reaching the legally substantive constitutional level⁷² and strong political dimension⁷³ is the concept of environmental rights of future generations including “do no harm” and the obligations and responsibilities of States. In this regard, first the German Constitutional Court judgement offered in the *Neuberbauer* case a fascinating legal construction by holding that “The state’s duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations.”⁷⁴ Likewise, the BvFG judged that in its objective dimension, Art. 20a of the Basic Law “encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence.”⁷⁵ Whilst the German Climate Change Act (KSA) was judged unconstitutional insofar

⁶⁸ O. Quirico, *The Obligation to Curb Carbon Emissions: A Right for All or None* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, pp. 149-226.

⁶⁹ A. Sikora, *Constitutionalisation...*, pp. 255-276.

⁷⁰ A. Rocha, R. Sampaio, *Climate Change...*

⁷¹ E.B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Tokyo–New York 1989; R.P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, Cambridge 2008, pp. 5-25.

⁷² Bundesverfassungsgericht, *Neubauer...*; European Court of Human Rights, *Verein Klima-Seniorinnen Schweiz...*

⁷³ Cf. <https://fitforfuturegenerations.eu/#whoweare> and European Commission, *Mission Letter: Commissioner-designate for Intergenerational Fairness, Youth, Culture and Sport*, https://commission.europa.eu/document/download/c8b8682b-ca47-461b-bc95-c98195919eb0_en?filename=Mission%20letter%20-%20MICALLEF.pdf.

⁷⁴ Bundesverfassungsgericht, *Neubauer...*, para. 1 of the operative part.

⁷⁵ *Ibidem*, paras 2-4.

as it deferred major emissions reductions to 2030, therefore impacting the freedoms of future generations, the added value of this judicial decision resides in framing obligations of a State towards future generations since “those who will be most affected – naturally have no voice of their own in shaping the current political agenda”⁷⁶ through the prism of the constitutional constraints on the legislator’s decisions – especially those with irreversible consequences for the environment – and a special duty of care, including a responsibility for future generations.⁷⁷ Other jurisdictions in Europe and beyond have equally been faced with claims of a duty of protection.⁷⁸ In particular, in light of available scientific reports, in the Finnish climate case⁷⁹ whilst having considered the appeal inadmissible, the Supreme Administrative Court of Finland admitted that ‘climate change is a matter of life and death for humankind that threatens the conditions of living of the current and future generations on Earth, unless rapid and effective measures are taken with regard to maintaining and increasing emission restrictions and carbon sinks.’⁸⁰ The Finnish Administrative Court recalled in 2025 that “climate change poses a serious threat to the living conditions of present and future generations on Earth and thus constitutes a threat to the realisation of human rights.”⁸¹ Likewise, although the *Duarte Agostino* application before the ECtHR was dismissed as inadmissible,⁸² there is no doubt new youth-related cases will be submitted both before the international and national courts.⁸³

To conclude, by focusing on climate mitigation and adaptation, normative and judicial expressions of environmental (human) rights have been operationalised as instruments of pressure, a bottom-up process of a global scope. It has equally been judicially recognized that climate change constitutes a threat for both the present

⁷⁶ *Ibidem*, para. 206.

⁷⁷ *Ibidem*, para. 229.

⁷⁸ Federal Court of Australia, *Sharma & Others v Minister for the Environment*, 2021, FCA 560 and Federal Court of Australia, *Sharma & Others v Minister for the Environment* (No 2), 2021, FCA 774, see J. Peel, R. Markey-Towler, *Recipe for Success?...*

⁷⁹ Korkein Hallinto-oikeus, *Suomen luonnonsuojeluliitto et al.*, ECLI:FI:KHO:2023:62, https://www.kho.fi/en/index/decisions/summariesofselectedprecedentsinenglish_0/eclifikho202362.html.

⁸⁰ *Ibidem*, para. 66. See K. Kulovesi et al., *Finland’s First Climate Judgment: Putting the Government On Notice*, <https://sites.uef.fi/cceel/finlands-first-climate-judgment-putting-the-government-on-notice/>.

⁸¹ Korkein Hallinto-oikeus, *Suomen luonnonsuojeluliitto et al.*, ECLI:FI:KHO:2025:2.

⁸² European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others*, 39371/20.

⁸³ A. Brucher, A. De Spiegeleir, *The European Court of Human Rights’ April 9 Climate Rulings and the Future (Thereof)* [in:] *The Transformation of European Climate Litigation*, “Verfassungsblog” 2024; C. Heri, *On the Duarte Agostinho Decision* [in:] *The Transformation of European Climate Litigation*, “Verfassungsblog” 2024.

and future generations. In this context traditional actors involved shift, new types of rights and responsibilities are being recognised and new legal tools and frameworks are needed, notably at the corporate responsibility level. Consequently, the question is to be asked how to make the most potential out of the climate and rights *momentum* and whether focusing on human dimension of rights is adequate or enough.

2. Contemplating theoretical dimension of environmental rights

2.1. Contemplating new environmental rights and climate claims

Among various critiques of environmental (human) rights, scholars argue that environmental rights are too nebulous, redundant, not easily enforceable and suffer from an anthropocentric bias.⁸⁴ In parallel, a critical aspect of advocacy in favour of substantive human rights, both within the environmental sphere and beyond, should be noted. Notably, the “multiplication of right-defining rules has not reduced, but in fact augmented the risk of violations”⁸⁵ which triggers a more universal question discussed in the legal theory notably of “what is the point of having a right? More specifically, what is the point of having an abstract right, unless you also have a way of securing whatever it is that you have a right to.”⁸⁶ Finally, in a broader context of the concept of abuse of rights, A. Sajó noted that “an underlying affinity towards the absoluteness of fundamental rights is translated into the false but self-assuring belief that parliaments and courts know for sure what is the clear meaning and resulting ‘extent’ or scope of a right. This assumption is clearly betrayed when constitutions and courts talk about a ‘core’ or essential meaning of a fundamental right”. In parallel, human (fundamental) rights and the rule of law are potentially considered “in ways that violate the fundamental rights of other people.”⁸⁷

⁸⁴ M. Scobie, *Framing Environmental Human Rights...*, pp. 15-16.

⁸⁵ G. Palombella, *The Abuse of Rights and the Rule of Law* [in:] *Abuse: The Dark Side of Fundamental Rights*, A. Sajó (ed.), Utrecht 2006, pp. 5-27, referring to L. Pannarale, “*Quod alii nocet, et sibi non prosit, non licet*”, “*Sociologia del diritto*” 2001, vol. 2, p. 167.

⁸⁶ O. O’Neill, *The Dark Side of Human Rights International Affairs*, “Sub-Saharan Africa” 2005, vol. 81, no. 2, pp. 427-439, referring to the famous question of E. Burke “What is the use of discussing a man’s abstract right to food or medicine? Th is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics” (E. Burke, *Reflections on the Revolution in France*, London 1984, p. 1).

⁸⁷ A. Sajó, *Abuse of Fundamental Rights or the Difficulties of Purposiveness* [in:] *Abuse: The Dark Side of Fundamental Rights*, A. Sajó (ed.), Utrecht 2006, pp. 29-98.

By the same token, one has to admit that the technological evolution of the modern societies, strong ecocentric and novel trends such as advocating rights of non-human entities⁸⁸ including artificial intelligence, resonate more and more.⁸⁹ Scholars indicate a globally growing role of narrative and emotional resonance in environmental and climate law which only illustrates the depth and justification of this primary legal, social and philosophical challenge.⁹⁰ Voices refer to the “constraints on the utilitarian calculus for the maximisation of human welfare” and argue for a respect for the intrinsic value of non-humans and legal rights for non-humans.⁹¹

Advocating human rights in relation to the climate change is indeed not free from certain paradoxes since it is precisely the human-induced climate change which is both triggering the recognition and challenging the enjoyment of human rights.⁹² It is also recognised that environmental human rights build upon a “transformational shift” given that “a new and destructive human–nature relationship, is that for the first time in humanity’s history, the access to a clean and healthy environment is uncertain for large groups of persons and ecosystems.”⁹³ Whilst this paper does not fully rely on the Critical Environmental Law (CEL), it is understood as a meaningful approach to environmental law that ‘exerts a radical critique of traditional legal and ecological foundations, while proposing in their stead a new, mobile, material and acentric environmental legal approach,’⁹⁴ it does refer to various analytical stances in order to critically anchor environmental rights from a climate change perspective. As argued by J. Gellers, “On the one hand, humans acknowledge the unique impact they have had on the environment and that any effort to meaningfully revise the status quo will require the demotion of human interests. On the other hand, this situation reifies the

⁸⁸ M.C. Nussbaum; *Justice for Animals: Our Collective Responsibility*, New York 2023; M. Rowlands, *Animal Rights*, Cambridge 2025; W. Kymlicka, *Rethinking Human Rights for a More-Than-Human World* [in:] *More Than Human Rights: An Ecology of Law, Thought and Narrative for Earthly Flourishing*, C. Rodríguez-Garavito (ed.), New York 2024, pp. 51-110.

⁸⁹ S. Vogel, *Thinking Like a Mall: Environmental Philosophy after the End of Nature*, Cambridge 2015; J.C. Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law*, London 2021.

⁹⁰ Ch. Hilson, *The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature*, “Journal of Environmental Law” 2022, vol. 34, no. 1, pp. 1-24.

⁹¹ Y. Epstein, E. Bernet Kempers, *Animals and Nature as Rights Holders in the European Union*, “Modern Law Review” 2023, vol. 86, no. 6, pp. 1336-1357.

⁹² A. Rocha, R. Sampaio, *Climate Change...*

⁹³ M. Scobie, *Framing Environmental Human Rights...*

⁹⁴ J.C. Gellers, *Rights for Robots...*, p. 117; A. Philippopoulos-Mihalopoulos, *Actors or Spectators? Vulnerability and Critical Environmental Law*, “Oñati Socio-Legal Series” 2013, vol. 3, no. 5, pp. 854-887.

centrality of humans among members of the living order as the only beings capable of coming to this realization.”⁹⁵

Consequently, a crucial question is whether remedying environmental and climate damage by relying on environmental (human) rights is an accurate approach and whether constitutional entrenchment of intrinsic value, worthiness and dignity of Nature coupled with the meaningful obligations of States, notably anchored through the general, efficient, enforceable principles tackling climate change, would be a more appropriate approach. In other terms, is addressing a planetary crisis, in particular climate change, through human “rights” only a pattern which lends itself to accomplishment through those forms both philosophically and legally, including efficiency? Given the underlying complexity, it is important to outline the reasoning behind it, especially against the background of the novel theoretical trends which will be addressed in the next section.

2.2. Philosophical foundations

A philosophical debate about rights is of unfathomable depths and its complexity goes beyond the scope of this chapter. The key concepts are nevertheless relevant in the context of exploring a link between climate and human rights and the potential justification of the construction of “climate human/non-human rights”. Advocating rights implies various theoretical sketches referring, inter alia, to interests, values and principles. Globally, “(r)ights are most often thought of either as claims to something or as protected options to act, though these categories are not exhaustive. (...) That someone has a right can provide a unique reason for action on the part of others or, less likely, the rightholder himself.”⁹⁶ Whilst “(h)uman rights are the distinctive legal, moral, and political concept of the last sixty years,”⁹⁷ as famously stated by J. Raz, “(t)he nature of rights is one of the perennial topics of practical philosophy.”⁹⁸ Constituting the central element of the contemporary moral and political discourse, “considerable theoretical disagreement remains regarding the nature of rights.”⁹⁹ As recalled in *The Last Utopia*, human rights only emerged as a relevant practice in the 1970s and remain equally challenging today.¹⁰⁰

⁹⁵ J.C. Gellers, *Rights for Robots...*, p. 117.

⁹⁶ F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, Oxford 2007, p. 238.

⁹⁷ R. Cruft, S.M. Liao, M. Renzo (eds), *Philosophical Foundations of Human Rights*, Oxford 2015, p. 1.

⁹⁸ J. Raz, *On the Nature of Rights*, “Mind” 1984, vol. 93, no. 370, pp. 194-214.

⁹⁹ J. Pallikkathayil, *Revisiting the Interest Theory of Rights: Discussion of The Morality of Freedom*, “Jerusalem Review of Legal Studies” 2016, vol. 14, no. 1, pp. 147-157.

¹⁰⁰ S. Moyn, *The Last Utopia: Human Rights in History*, Cambridge 2010, pp. 1-10.

Although environmental ethics tries to distance itself from the anthropocentrism embedded in traditional ethical views, discussing rights in a context of a climate change would not be complete without reaching to the justification of rights through the prism of their philosophical foundations. Indeed, notwithstanding potential answers and viability of legal and theoretical preferences, there is a pure value in exploring human rights and retrieving their theoretical foundations given that “(e)ven if our foundational inquiries do not promise to yield any sort of litmus test for assessing rights claims, still the questions we face in pursuing these inquiries help to deepen and enrich our understanding of human rights.”¹⁰¹ It is on this premise that this chapter builds. It is equally on the “understanding premise” in particular that the link between rights and climate change that will be further contemplated.

The key trends in human rights philosophical analysis regarding the *nature of human rights*, encompass human rights as an expression of natural rights where “these are rights that all human beings possess simply in virtue of their humanity,”¹⁰² later contested by the so-called ‘political’ conception of human rights where “human rights are not based on certain features of humanity; rather, the distinctive nature of human rights is to be understood in light of their role or function in modern international political practice.”¹⁰³ Whilst the naturalistic and political conceptions of human rights do not seem incompatible, inevitable, primary duties and responsibilities are to be borne by the states in the context of human rights potentially “due to the primacy and justiciability of state duties in human rights law.”¹⁰⁴ The question of the *human rights justifications* oscillates around the distinction between instrumental and non-instrumental justifications where the former amounts to view human rights “useful or essential means to realize or further valued features of human lives” notably through the prism of a good life, basic needs and agency, whilst the latter dissociates rights and interests. In the second trend, in his chapter “*Rights beyond Interests*”, F. M. Kamm argues that rights “are not concerned with protecting a person’s interests, but with expressing his nature as a being of a certain sort, one whose interests are worth protecting. They express the worth of the person rather than the worth of what is in the interests of that person.”¹⁰⁵ This non-instrumental approach stands in

¹⁰¹ J. Waldron, *Is Dignity the Foundation of Human Rights?*, “NYU School of Law, Public Law Research Paper” 2013, no. 12-73.

¹⁰² R. Cruft, S.M. Liao, M. Renzo (eds), *Philosophical Foundations...*, p. 4.

¹⁰³ *Ibidem*, p. 6.

¹⁰⁴ *Ibidem*.

¹⁰⁵ F. M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, Oxford 2007, p. 271.

contract with other theories, such as the famous theory of *J. Raz* who considered that “individual interests are ground for rights and rights are grounds for duties, duties being preemptory reasons for action.”¹⁰⁶ *J. Raz* also construed values as underlying rights, thus prior to rights, and dictating the scope and strength of rights.¹⁰⁷ Among a plethora of theories, a useful summary of conceptualising human rights reflects two approaches which rely, on the one hand, on the “the superiority of fundamental rights as moral principles over the law” (so called Moralism), and on the other a claim where “fundamental rights should be treated as any other rule, only encapsulating very important interests by way of stipulation (globally referred to as Positivism).”¹⁰⁸

In parallel, scholars emphasise that “theories of what rights are have reached an impasse”, in particular where “rights are construed in relation to the interests versus rights as expression of will.”¹⁰⁹ The contestable impact of rights as peripherising other forms of social and economic justice has been equally advocated by *S. Moyn* in his critically fêted book entitled *Not Enough*.¹¹⁰ In the EU law doctrine, new concepts are continuously advancing, such as the notable theory of *M. Kumm* who claims that “there are good grounds for recognizing a general right to liberty and a general right to equality. A conception of rights that shares these two features defines the ‘Rationalist Human Rights Paradigm’ (RHRP).”¹¹¹

Regarding the environmental and climate dimension of the human rights debate,¹¹² faced with environmental crises in the 1960s and the 1970s, it was precisely a substantive change of values in connection with environment that triggered the development of environmental ethics viewed as a sub-discipline of philosophy studies which focuses on “normative and evaluative propositions about the world of nature and, perhaps more generally, the moral fabric of relations between human beings and the world we occupy”¹¹³. It has been argued convincingly that human rights and

¹⁰⁶ A. Zanghellini, *Raz on Rights: Human Rights, Fundamental Rights, and Balancing*, “Ratio Juris” 2017, vol. 30, no. 1, pp. 25-40.

¹⁰⁷ *J. Raz*, *The Morality of Freedom*, Oxford 1986, p. 181.

¹⁰⁸ L. Zucca, *Monism and Fundamental Rights in Europe* [in:] *Philosophical Foundations of European Union Law*, *J. Dickson*, *P. Eleutheriadès* (eds), Oxford 2012, pp. 331-353.

¹⁰⁹ *J. Thomas*, *Thinking in Three Dimensions: Theorizing Rights as a Normative Concept*, “Jurisprudence” 2020, vol. 11, no. 4, pp. 552-573.

¹¹⁰ *S. Moyn*, *Not Enough: Human Rights in an Unequal World*, Cambridge 2018.

¹¹¹ *M. Kumm*, *Alexy’s Theory of Constitutional Rights and the Problem of Judicial Review* [in:] *Institutionalized Reason: The Jurisprudence of Robert Alexy*, *M. Klatt* (ed.), Oxford 2012, pp. 201-217.

¹¹² For an overview, see *A. Savaresi*, *Environment and Human Rights* [in:] *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1948>.

¹¹³ *S.M. Gardiner*, *A. Thompson* (eds), *The Oxford Handbook of Environmental Ethics*, Oxford 2015.

environmental protection each represent “different, but overlapping, societal values” and this approach frames an opinion whereby “clearly and narrowly defined international human right to a safe and healthy environment” could accommodate objectives both in human rights law and environmental law¹¹⁴. Among various trends, environmental ethics triggered new global concepts of an “ecological footprint” on the earth¹¹⁵ and by the exploration of planetary boundaries, the concept of a “safe operating space for humanity.”¹¹⁶ It is worth noting that human and environmental rights constitute merely a fraction of environmental ethics which discuss ecological ethos, value and meaning of nature, planetary justice, indigenous and feminist philosophies and much more.¹¹⁷ Regarding human rights: “advantages of a rights-based ethical framework include the linking of ethical norms of environmental protection or stewardship with international law and commitments to promoting humanitarian objectives, which provide those norms with an institutional foundation and help narrow the gap between environmental imperatives and those with global justice imperatives and development objectives.”¹¹⁸ Focusing on the climate change, a three-fold concept has been advanced in negative terms noting that human rights to life, health, and subsistence are all threatened by human-induced climate change. Without pretending that human rights optics responds to “all the morally relevant aspects of climate change”, “any account of the impacts of climate change which ignores its implications for people’s enjoyment of human rights” is considered to be incomplete.¹¹⁹ The prospects and limits of human rights as ethical constructs to address climate change and environmental threats continue to be discussed. A critical account of this approach focuses mostly on the individualistic nature of human rights (and thus the impossibility to violate rights of a collectivity) as well as the fact that “the human rights approach does not appear to add clarity or scope to standard climate ethics analyses of wrongful climate-

¹¹⁴ D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, “Stanford Journal of International Law” 1991, vol. 28, pp. 103-105.

¹¹⁵ A. Brennan, N.Y.S. Lo, *Environmental Ethics* [in:] *Stanford Encyclopedia of Philosophy Archive*, <https://plato.stanford.edu/archives/sum2024/entries/ethics-environmental/>, referring to Rees 1992, Wackernagel et al. 2018.

¹¹⁶ A. Brennan, N.Y.S. Lo, *Environmental...*, referring to Rokström et al. 2009, Biermann and Kim 2020.

¹¹⁷ S.M. Gardiner, A. Thompson (eds), *The Oxford Handbook of Environmental Ethics*, Oxford 2015.

¹¹⁸ S. Vanderheiden, *Human Rights and the Environment* [in:] *The Oxford Handbook of Environmental Ethics*, S.M. Gardiner, A. Thompson (eds), Oxford 2015, pp. 301-310.

¹¹⁹ S. Caney, *Climate Change, Human Rights, and Moral Thresholds* [in:] *Human Rights and Climate Change*, S. Humphreys (ed.), New York 2009, pp. 69-90.

related harm.”¹²⁰ All in all, linking human rights and climate change anchored in an anthropocentric approach nevertheless offers “several potentially valuable conceptual and political tools for environmental ethics.”¹²¹

2.3. New trends, dignity, responsibility, converging interests. Towards climate rights and climate claims.

Conceptualising environmental rights used to relate mostly to environmental ethics and dichotomy between intrinsic and instrumental value of nature,¹²² which would imply situating human rights in one or another ethical dimension. However, recent studies refer to a new trend which suggests a third value category such as “relational value” where “objects of relational value should be protected as a matter of respect for human well-being and human right.”¹²³ Relational value triggers “appreciation, concern, and responsibility toward the valuable object.”¹²⁴ Among the new trends, viewing dignity and responsibility as a landing zone for both an anthropocentric and non-anthropocentric perspective of climate related rights seems worth being explored. Construing such a *landing zone* at this stage implies skipping a definitional challenge and relying on “amorphous character of dignity”. As pointed out by J. Waldron, “dignity is the foundation of rights does not point us to a determinate premise. Rather, it instructs us to pay attention to questions about dignity in trying to address questions about rights; it implicates the one line of inquiry in the other.”¹²⁵ Relying on dignity as a foundational value for both human and non-human rights builds thus upon “responsibility characterizations of dignity” which are “works-in-progress, just like the idea of responsibility rights that they appear to underpin.”¹²⁶ As noted by M. Rosen, historically, there are three different meanings of dignity which encompass “dignity as a valuable characteristic not restricted to human beings, dignity as a high social status, and signity as behavior with a certain respect-worthy character (or indignity as behavior lacking it).”¹²⁷ Although in the Kantian approach dignity was always human dignity, M. Rosen emphasizes the link between dignity and sublimity (*Erhabenheit*) echoed in Kant’s *Observations on the Feeling of the Beautiful and*

¹²⁰ S. Vanderheiden, *Human Rights...*, p. 305.

¹²¹ *Ibidem*, p. 302.

¹²² A. Brennan, N.Y.S. Lo, *Environmental...*

¹²³ A. Deplazes-Zemp, *Beyond Intrinsic and Instrumental: Third-Category Value in Environmental Ethics and Environmental Policy*, “Ethics, Policy & Environment” 2024, vol. 27, no. 2, pp. 166-188.

¹²⁴ *Ibidem*.

¹²⁵ J. Waldron, *Is Dignity...*, p. 122.

¹²⁶ *Ibidem*.

¹²⁷ M. Rosen, *Dignity: Its History and Meaning*, Cambridge 2012, p. 16.

the Sublime. Thus, “this transcendent quality Kant asserts, should inspire awe and reverence in us in a way that is analogous to the awe-inspiring power of nature when it presents us with phenomena that go beyond our powers of perception.”¹²⁸ In particular, dignity of nature has been understood as “putting human aims and ambitions under moral constraint— for nature’s having some worth apart from the worth that is merely attributed by human valuers—is what is meant by nature’s having dignity: i.e. worthiness, some rank in the scale of things.”¹²⁹ Dignity beyond humans and thus reaching to the nature and non-humans is indeed being explored in many ways.¹³⁰

The underlying leitmotiv in this context is inspired by various attempts to redefine the relationship between Nature and humans characterising the Anthropocene which highlights the boundaries between human and nonhuman.¹³¹ Dignity understood as ontological property is the concept deserving special attention when advancing environmental rights precisely “as it relates to personhood, status, and rights” which characterize consciousness related trait relevant in the area of AI ethics.¹³² Construing dignity as a common ground echoes, without formally applying them, recent trends in the postnaturalist environmental philosophy which asserts that “[t]he distinction between humans and nature ... depends on a philosophically and biologically untenable dualism that forgets that human beings themselves are part of nature and instead treats them as exceptional creatures who somehow transcend the natural.”¹³³ In particular, S. Vogel suggests dropping the concept of “nature” and relying instead on the “environment” meant as the world that actually surrounds us, and thus replacing “nature” with “reality.”¹³⁴ Yet, if such a new understanding of environment was universally accepted, it would probably blur a determination of the entity meant to be vested with environmental rights as we understand it in many legal systems. However, this paper does refer to the idea of responsibility for climate change and what S. Vogel persuasively considers restoring a “*discursive connection to others (...)*. Restoring that connection, (...) might require first of all recognizing that although *I* as an individual have no way of overcoming the tragedy of the commons, *we*—the

¹²⁸ *Ibidem*, p. 29.

¹²⁹ F. Ferre, *Personalism and the Dignity of Nature*, “The Personalist Forum” 1986, vol. 2, no. 1, p. 109.

¹³⁰ P. de Araujo Ayala, J. Sousa Correia Schwendler, *Life without Dignity? The Search for an Integrative Sense of Dignity for Nature, the Human Condition and the Non-Human Condition*, “Veredas do Direito” 2021, vol. 18, no. 42.

¹³¹ J.C. Gellers, *Rights for Robots...*

¹³² *Ibidem*, p. 144.

¹³³ S. Vogel, *Thinking Like a Mall...*, p. 24.

¹³⁴ *Ibidem*, p. 105.

community as a whole—might together be able to do so. And this in turn requires understanding that in a certain sense the community is, or can be, something like a collective agent, capable of a kind of moral responsibility, and that such responsibility is not merely a matter of summing the responsibilities of the individual members of the community.”¹³⁵ In this regard, exercising environmental rights is a way of enforcing this “community, coordinated responsibility”, where, paraphrasing B. Johnson in his essay on inconsequentialism with respect to global warming, “it’s to change that social structure to make the kind of real coordination possible that will lead to actual protection of the climate.”¹³⁶ Interestingly, in the *Klimaseniorinnen* judgement, whilst emphasising that climate change is a polycentric issue, ECtHR noted that “(i)ndividuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations.”¹³⁷

Against this background, dignity coupled with responsibility might arise as a “common” justification for new climate right, joint human and Nature’s right construed through the prism of substantive dignity, a good life where dignity “stands for what is valuable for individuals and society at large,”¹³⁸ where rights are viewed expression of the common responsibility for tackling climate change. If a “rights based” approach is to be a viable catalyst in addressing climate change and enforcing climate related duties it could be further expounded in at least two ways.

First, a creation of new, horizontal legal instrument of *climate claims* construed as a horizontal tool of legality control can be a way forward. The *ratio* of climate claims would be to act as “emergency break” instrument allowing to either halt the legislative process for the purpose of *ex ante* control, to suspend administrative procedures such as permitting process or to raise it *ex post* in the context of judicial control, including through interim measures (judicial injunctions). Some examples in the EU legal order such as internal review under the Aarhus Regulation¹³⁹ and green claims

¹³⁵ *Ibidem*, p. 213.

¹³⁶ *Ibidem*, p. 215 referring to B.L. Johnson, *Ethical Obligations in a Tragedy of the Commons*, “Environmental Values” 2003, vol. 12, no. 3, p. 284.

¹³⁷ European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz...*, para. 419.

¹³⁸ N. Rao, *Three Concepts of Dignity in Constitutional Law*, “Notre Dame Law Review” 2013, vol. 86, no. 1, p. 221.

¹³⁹ Council Regulation 1367/2006 of Sept. 6, 2006, On the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264), pp. 13-19.

in the Commission's proposal in the field of consumer protection¹⁴⁰ punctually reflect the idea of reviewing the legality from a point of view of their compatibility with environmental and climate objectives. Whilst this instrument would however remain subject to various national or EU law related legal constraints, it would have an advantage of being an autonomous climate change legal tool, detached from the classical human rights law.

Secondly, a discussion about a new *climate right* as a concept applicable to human and non-human entities is to be addressed. Climate rights can be regarded from a pragmatic point of view as a *path forward*, one of many legal tools balancing social, economic and environmental objectives of modern societies, encapsulating active, responsible approaches to climate change dignifying both humans and Nature. As noted above, human rights are already performing a role an *instrument of pressure*, a tool relied upon before the judge, an argument voiced in the legislative process and before the stakeholders at the executive level having as an ultimate objective counteracting the triple planetary crisis. In this context, human rights are about to reach their limits precisely owing to an excessive instrumentalization. A pragmatic and broad understanding of new climate right encompassing both human and non-human entities such as Nature and artificial intelligence (AI), all unified by a supreme objective to counteract climate change, could be another avenue alleviating instrumental pressure from the human rights area and enabling sharing responsibility. The concept of *converging interests* could be a starting point for this debate. It is true that in order for the construction of climate rights to counteract climate-driven anomalies and enforce State duties in the field of environmental protection, they would potentially have to reach a certain level of uniformity and coherence at the global level in order to address the planetary dimension of a climate change. In the context of this exercise, the concept of climate rights meets responsibilities. As noted by the scholars “with great responsibility sometimes comes great opportunity. If every *environmental* challenge is now also a *human* challenge, it may be that human interests and the interests of the non-human (or, more-than-human) environment are gradually converging (...). If so, then the protection of human rights may afford new opportunities to protect the environment (and vice versa). It remains to be seen whether we are astute enough to recognise those opportunities and take advantage of them.”¹⁴¹

Against this background, at the level of classical, environmental human rights, various studies show already that “protecting environmental rights has increased the

¹⁴⁰ Cf. https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en.

¹⁴¹ W.F. Baber, J.R. May, *Introduction* [in:] *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges*, W.F. Baber, J.R. May (eds), Cambridge 2023, p. 1.

support for protecting nature.”¹⁴² Also, recognition of a human right to a healthy environment is viewed as “a powerful interpretative lens to clarify the minimum content of States’ international environmental obligations, the scope and extent of business due diligence, and the need for effective remedies in environmental law.”¹⁴³ All in all, anthropocentric approach is already considered as “valuable conceptual and political tools for environmental ethics and politics by linking environmental imperatives with those of international humanitarian law and politics, mobilizing legal and political mechanisms that are associated with human rights objectives, and empowering a broader constituency on behalf environmental protection than might otherwise be available through rival normative approaches.”¹⁴⁴ The modern understanding of Anthropocene reflects the intertwined relationship between human and non-human and thus “international community is in need of a new, constitution-type agreement that will redefine the relationship between humans and the rest of the community of life.”¹⁴⁵

3. Is the EU legal order immune to environmental rights?

3.1. The EU’s green agenda and the environmental rights status quo

In recent years, one can denote an intriguing trend in the evolution of EU law, in particular in the field environmental protection and sustainability law. On the one hand, a transformation of environmental protection in the EU legal order in recent decades justifies the assertion of its constitutional status, whereby it permeates the whole of the EU legal order.¹⁴⁶ In parallel, the focus of the European Union translated into the massive efforts of the EU legislator was directed at the concept of the green and fair transition, net zero economy and climate neutrality objectives in the context of the EU Green Deal.¹⁴⁷ In this context, punctual references to access to justice

¹⁴² M. Scobie, *Framing Environmental Human Rights...*, p. 16.

¹⁴³ E. Morgera, *International Environmental Law...*

¹⁴⁴ S. Vanderheiden, *Human Rights...*, p. 302.

¹⁴⁵ O.R. Young et al., *Goal Setting in the Anthropocene: The Ultimate Challenge of Planetary Stewardship* [in:] *Governing through Goals: Sustainable Development Goals as Governance Innovation*, N. Kanie, F. Biermann (eds), Cambridge 2017, pp. 53-74.

¹⁴⁶ A. Sikora, *Constitutionalisation...*

¹⁴⁷ For a recent overview, see E. Chiti, *Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process*, “Common Market Law Review” 2022, vol. 59, no. 1, pp. 19-48; N. de Sadeleer, *Environmental Law in the EU: A Pathway toward the Green Transition* [in:] *Blue Planet Law*, M.G. Garcia, A. Cortès (eds), Cham 2023, pp. 21-33.

and the right to compensation both in the field of classical environmental areas,¹⁴⁸ corporate sustainability,¹⁴⁹ green claims consumer protection,¹⁵⁰ and soil monitoring law¹⁵¹ have been enhanced in EU legislation. More broadly, the Court of Justice of the European Union (CJEU) has contributed and consolidated the “pro-ecological” interpretation of the protective environmental standards established by various EU secondary law measures, thus making scholars refer to the “positivist approach” to rights of Nature in EU law.¹⁵² The *Białowieża case* and the dramatic environmental harm made the Court adopt interim measures which highlight the relevance of compliance with its decisions and the rule of law and protection of nature by stating in its order of 20 November 2017: “The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the *effective application of EU law*, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded.”¹⁵³

On the other hand, in its current state of development and notwithstanding an impressive interpretative environmental edifice of the EU Courts, the EU legal order does not recognise environmental or climate related fundamental rights, notably in view of the limits enshrined in the Charter of Fundamental Rights, in particular its Articles 37¹⁵⁴ and 51, the principle of conferral, as well as the rationale of direct effect of the EU directives. It is however not an isolated *status quo* since, as noted in the scholarship, the doctrine of positive obligations under the Charter is globally limited

¹⁴⁸ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, pp. 206–247; cf. <https://www.consilium.europa.eu/en/press/press-releases/2024/10/14/air-quality-council-gives-final-green-light-to-strengthen-standards-in-the-eu/>.

¹⁴⁹ Article 29 of a directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760.

¹⁵⁰ Cf. <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-substantiating-green-claims>.

¹⁵¹ Cf. <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-healthy-soils>.

¹⁵² Y. Epstein, H. Schoukens, *A Positivist Approach to Rights of Nature in the European Union*, “Journal of Human Rights and the Environment” 2021, vol. 12, no. 2, pp. 205–227.

¹⁵³ Case C-441/17 R, *Commission v Poland (Białowieża Forest)*, CLI:EU:C:2017:877, para. 102.

¹⁵⁴ In accordance with Article 37 of the Charter, a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the European Union and ensured in accordance with the principle of sustainable development.

in the CJEU jurisprudence.¹⁵⁵ Consequently, in order to compensate the lack of substantive environmental rights, some novel ideas such as “compartmentalised environmental rights” (right to air or water)¹⁵⁶ and the non-contractual liability of the Member States to justify the legal architecture of a quasi – right to a healthy environment beyond the Charter have been explored.¹⁵⁷ Rare attempts of climate litigation before the EU Courts and potential breach of the Charter by the EU legislator failed owing to the admissibility criteria of access to justice.¹⁵⁸ It is worth recalling that the line of case law in *Janecek*, *Clientarth and Deutsche Umwelthilfe* where the Court confirmed the right of an individual to enforce EU environmental legislation in case of failure to transpose EU directives, does not amount to recognition of the right to clean air in EU law. In light of the case law, the individuals concerned must be able to require the national authorities, if necessary, by bringing an action before the courts having jurisdiction, to adopt the measures required under those directives.¹⁵⁹ The case law relies on both the direct effect and effectiveness of EU law. The doctrine of direct effect is however a horizontal EU law principle which characterises a relationship between the EU and national law without conferring a specific status to its environmental legislation. As recalled by the Court “The right recognised by the Court, stemming in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation, *does not mean* that the obligations resulting from *EU directives were intended to confer individual rights on interested persons*, and that the breach of those obligations is, in consequence, capable of altering a legal situation which those provisions sought to establish for those persons”. The Court has therefore judged in the famous *JP* case that “EU clean air legislation is “not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member

¹⁵⁵ J. Krommendijk, D. Sanderink, *The Role of Fundamental Rights in the Environmental Case Law of the CJEU*, “European Law Open” 2023, vol. 2, no. 3, pp. 616-635.

¹⁵⁶ D. Misonne, *The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science*, “RECIEL” 2021, vol. 30, no. 1, pp. 34-45; I. Benöhr, *The Right to Water and Sustainable Consumption in EU Law*, “Journal of Consumer Policy” 2023, vol. 46, pp. 53-77. For an overview, see A. Sikora, *Constitutionalisation...*, pp. 255-276.

¹⁵⁷ Case C-61/21, *Ministre de la Transition écologique and Premier ministre (Responsabilité de l’État pour la pollution de l’air)*, ECLI:EU:C:2022:1015. See also in this volume chapter by M. Baran.

¹⁵⁸ Case C-565/19 P...

¹⁵⁹ Case C-404/13, *ClientEarth*, EU:C:2014:2382, para. 56; Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para. 56 is not capable of altering that finding.

State”. Yet, nothing prevents the EU legislator from adopting new acts which “*are intended to confer individual rights on interested persons*”.

The Charter continues to perform a telling role in the context of environmental litigation before the EU Courts.¹⁶⁰

First, concepts of sustainable development and high level of protection of the environment is expounded in the case law by relying jointly on the provisions of Article 3 TEU, Article 37 of the Charter, the first subparagraph of Article 191(2) TFEU.¹⁶¹ Driven by a general ambition of addressing and preventing water pollution, in particular in the area of water pollution by nitrates from agricultural sources, in the case *Wasserleitungsverband*, the Court highlighted that under Article 37 of the Charter, Article 3(3) TEU and Article 191(2) TFEU, the EU policy on the environment aims at a high level of protection.¹⁶² In the case *CEZ* the Court interpreted Directive 2010/75, in the light of Article 191 TFEU and Articles 35 and 37 of the Charter, as meaning that “the Member States are required to provide that the prior assessment of the effects of the activity of the installation concerned on the environment and on human health must be an integral part of the procedures for granting or reconsidering a permit to operate such an installation under that directive.”¹⁶³ This joint interpretation has already been denoted in the scholarship as a potential sign of a new, horizontal principle of high level of protection of the environment in EU law, thus going even beyond the EU environmental policy.¹⁶⁴

Secondly, the CJEU explores various links between Articles 35, 37 and 38 of the Charter, which seek to ensure a high level of human health, environmental and consumer protection, respectively and are regularly relied upon, equally jointly with Article 13 TFEU, regarding the protection of animal welfare recognised by the Union as an objective of general interest.¹⁶⁵ Article 37 of the Charter is mostly relied upon in the process of interpretation¹⁶⁶ and sometimes validity control of EU law.¹⁶⁷ Well known examples of such “ecological interpretation” encompass nature conservation, legislation, environmental impact assessment, water pollution, ambient air standards

¹⁶⁰ J. Krommendijk, D. Sanderink, *The Role of Fundamental Rights...*, pp. 616-635.

¹⁶¹ Opinion of A. G. Kokott in case C-444/15, *Associazione Italia Nostra Onlus*, ECLI:EU:C:2016:665.

¹⁶² Case C-197/18, *Wasserleitungsverband Nördliches Burgenland*, EU:C:2019:824, para. 49.

¹⁶³ Case C-626/22, *CZ and others*, EU:C:2024:542, para. 66.

¹⁶⁴ A. Sikora, *Constitutionalisation...*, pp. 158-161.

¹⁶⁵ Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031, para. 63; Case C-13/23, *cdVet Naturprodukte GmbH*, EU:C:2024:175, para. 49.

¹⁶⁶ Ex multis, Case C-197/18...

¹⁶⁷ Case C-444/15...; Case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742.

etc. where the Court often establishes a link between the objectives of environmental EU legislation and Article 37 of the Charter to ground the rationale of its decision-making in the EU constitutional framework, which led commentators to discuss the concept of “ecological rule of law.”¹⁶⁸ In its recent case law, in judgement *One Voice, Ligue pour la protection des oiseaux*, the Court recalled that the Birds Directive “comes within the framework provided for both in Article 3 TEU and in Article 37 of the Charter,”¹⁶⁹ and judged that “that directive must be understood as meaning that it can be satisfied, in the case of a non-lethal method of capture leading to by-catch, only if that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally, for a limited period, and only if those specimens can be released without sustaining harm other than negligible harm.”¹⁷⁰ In the field of environmental impact assessment, in the case *A and Others*, after having recalled that that Directive 2001/42 includes not only the preparation and adoption of ‘plans and programmes’, but also their modifications,¹⁷¹ the Court emphasised that Directive 2001/42 comes within the framework established by Article 37 of the Charter.¹⁷² Likewise, the Court relies jointly on Articles 37 and 35 of the Charter having regard to the link between the protection of the environment and that of well-being and human health. In a recent Grand Chamber judgement in case *CZ and others* concerning the EU legislation in area of industrial emissions the Court highlighted that directive 2010/75 “contributes to protecting the right to live in an environment which is adequate for personal health and well-being.”¹⁷³ The Court interpreted thus directive 2010/75 “as meaning that the Member States are required to provide that the prior assessment of the effects of the activity of the installation concerned on the environment and on human health must be an integral part of the procedures for granting or reconsidering a permit to operate such an installation under that directive.”¹⁷⁴

Regarding Article 47 of the Charter, it is true it was relied upon in a groundbreaking judgement *Deutsche Umwelthilfe* consolidating the pro-ecological interpretation of the EU secondary law measures from the point of view of enforcement and efficiency of the EU law protective environmental standards.¹⁷⁵ However, this

¹⁶⁸ F. Lecomte, *The Contours of Ecological Justice before EU Courts in the Light of Recent Case-Law*, “ERA Forum” 2021, vol. 21, pp. 737-751, referring to K. Bosselmann, *Ökologische Grundrechte*, Baden-Baden 1998, pp. 47-53.

¹⁶⁹ Case C-900/19, *One Voice, Ligue pour la protection des oiseaux*, EU:C:2021:211, paras 60-65.

¹⁷⁰ *Ibidem*, para. 65.

¹⁷¹ Case C-24/19, *A and Others*, EU:C:2020:503, paras 43-44.

¹⁷² *Ibidem*, para. 44.

¹⁷³ C-626/22..., para. 72.

¹⁷⁴ *Ibidem*, para. 105.

¹⁷⁵ Case C-752/18...

“*Arm Wrestling around Air Quality*”¹⁷⁶ judgement must be viewed through the lenses of the principle of effective judicial protection and the right to an effective remedy enshrined in Article 9(4) of the Aarhus Convention, notably in the case of the environmental organisations, and did not contemplate substantive environmental rights. Finally, new challenges before the EU Courts regarding the control of validity of the Union’s green agenda measures continue to rise. Recent cases concern notably sustainable finance and the European Commission decision to add aviation and shipping criteria to the EU Taxonomy¹⁷⁷ as well as greenhouse gas emissions allocations under the Effort Sharing Regulation.¹⁷⁸

3.2. The EU Court of Justice under pressure? Lessons learnt from the ECtHR *Klimaseniorinnen*?

The CJEU has not yet directly engaged in environmental rights and classical climate change litigation, including through the derived environmental rights doctrine shaped in the case law of the ECtHR. This judicial attitude is however exposed to the new, legal reality following the recent judgement of the ECHR judgment in case *Klimaseniorinnen*.¹⁷⁹ Indeed, in this groundbreaking case, the ECtHR for the first time established a link between climate change and human rights by stating that “Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life.” *Klimaseniorinnen* forms part of the constitutional, environmental judicial conversations throughout the world regarding both greening human rights and determining positive obligations of States in the era of climate change.¹⁸⁰ In particular, according to its Preamble, the Charter reaffirms the rights as they result in particular from the constitutional traditions and international obligations which are common to the Member States, the European Convention on Human Rights and the case-law of the Court and of the European Court of Human Rights. Thus, claiming relevance of fundamental rights in environmental context is a *way* to make

¹⁷⁶ D. Misonne, *Arm Wrestling around Air Quality and Effective Judicial Protection: Can Arrogant Resistance to EU Law-related Orders Put You in Jail? Judgment of the Court (Grand Chamber) of 19 December 2019 in Case C-752/18 – Deutsche Umwelthilfe eV v Freistaat Bayern*, “Journal for European Environmental & Planning Law” 2020, vol.17, no. 4, pp. 409-425.

¹⁷⁷ See pending Case T- T-449/24, *Dryade and Others v Commission*.

¹⁷⁸ See pending Case T-120/24, *Global Legal Action Network and CAN-Europe v Commission*.

¹⁷⁹ European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz*...

¹⁸⁰ N. de Arriba-Sellier, *Symposium: Climate Protection as a European Fundamental Right under the ECHR and beyond*, 2024, <https://eulawlive.com/symposia/climate-protection-as-a-european-fundamental-right-under-the-echr-and-beyond-demo/>.

environmental protection become a new constitutional paradigm of the Union or, at least, a way to demonstrate a constitutional dimension of environmental protection in EU law. In particular, whilst Article 37 of the Charter does not enshrine a substantive right to healthy environment, paradoxically, the Charter contains this environmental provision which is absent in the European Convention of Human Rights. The CJEU could therefore draw an inspiration from the ECHR case law of derived environmental rights by relying on an added value on Article 37 in conjunction with other provisions of the Charter such as right to life and respect for private and family life. Against this background, Article 37 of the Charter should be seen beyond the Charter based dichotomy between rights and principles. Article 37 of the Charter can equally contribute to the consolidation of the principles and duties in EU law going beyond fundamental rights area and going beyond the EU environmental policy measures.

This *Klimaseniorinnen* judgement is crucial for the Union since by virtue of Article 52(3) of the Charter, rights in the Charter which correspond to rights guaranteed by the European Convention on Human Rights should be given the same meaning and scope as those laid down in the Convention. Also, the Union's accession to the Convention seems to progress.¹⁸¹ In this context it is worth recalling the jurisprudential *Bosphorus principle* relying on a presumption that the EU Member States' actions that comply with EU law cannot be considered as breach of the Convention. Protecting environmental fundamental rights in the Union is therefore of utmost importance to consider that an equivalent level of protection is established in the Union's law. What matters most, however, is the *constitutional entrenchment of environmental* considerations at the level of the Union, both in its autonomous dimension and based on the common constitutional traditions of the Member States. A preliminary ruling asking for the consequences of the *Klimaseniorinnen* for the EU legal order is to come. Leveraging Article 37 of the Charter of Fundamental Rights, in conjunction with derived environmental rights established under the European Convention on Human Rights, offers a promising pathway to align EU jurisprudence with emerging global standards. *Klimaseniorinnen* could however also trigger novel EU secondary law measures or ultimately an amendment of the EU primary law. Indeed, it boils down to the question of whether the CJEU should, one more time, bear the responsibility of judicial creativity, this time in the field of greening the EU fundamental rights? Counting on the EU Courts to fill a tangible gap in relation to the substantive right to the healthy environment may trigger serious consequences

¹⁸¹ F.R. Agerbeek, *EU Accession to the European Convention on Human Rights: A New Hope*, "European Papers" 2024, vol. 9, no. 2, pp. 695-713.

and critics against its role in the EU legal order, including from the principle of conferral angle. Also, this creation is not formally required by the future Union's accession to the ECHR. As noted in the introductory part of this chapter, challenging existing legal and philosophical *status quo* in the era of climate change implies reinventing foundational reasoning underpinning rights in a broad sense including understanding their purpose, scope and feasibility. The *Klimaseniorinnen* judgement could be perfectly relied upon in a constitutional context leading to the novel legal instruments addressing climate change in EU law.

4. Conclusions

In the changing reality of the modern politics and economy, one should not disregard conflicting trends in order to situate both environmental rights and climate change discourse. The green agenda is constantly under stress in many respects and the same fluctuation concerns reliance on existing human rights in a climate change debate. The discourse on environmental (human) rights in the context of climate change reveals a dynamic interplay between evolving legal principles and the pressing demands of a global ecological crisis. This chapter has explored the conceptual, judicial, and normative dimensions of environmental (human) rights, emphasising their current evolution into instruments of pressure against states and corporate actors. Human rights have emerged as pivotal tools for driving climate action. The progressive operationalisation of these rights underscores their dual nature: they are rooted in ethical and philosophical principles while simultaneously serving pragmatic objectives in climate litigation. Judicial interpretations, particularly those linking environmental degradation to fundamental rights such as life and health, highlight the growing importance of these rights in reshaping legal and policy frameworks. Yet, climate driven legal instruments are at a critical juncture, including the core of their theoretical and legal architecture. While significant strides have been made in their normative and judicial expressions, their potential should be further explored in fully addressing the challenges of the Anthropocene. At the theoretical level, addressing the planetary crisis requires a holistic approach that transcends traditional anthropocentric paradigms. Concepts such as dignity and responsibility offer a normative foundation for integrating human and non-human rights into the new area of new legal instruments. By framing climate rights as expressions of collective responsibility, legal systems can better address the interconnectedness of ecological and social justice.

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For many years legal thought and practice focused on the general concept of environmental rights as a legal tool meant to enforce the human right to a healthy and sustainable environment. Whilst there is an undeniable link between human rights and climate change, as illustrated notably by the global phenomenon of the climate change litigation, this monograph focuses on the growing role of potential, sectoral fundamental rights and tailored remedies available in the EU legal order in absence of a substantive fundamental right to a healthy environment in EU law. Against the background of the European Green Deal and its ambitious climate-neutrality goal by 2050, the book echoes the sustainability-based approach and its limits.

Contributors analyse two interrelated perspectives. On the one hand, authors explore the procedural dimension by discussing the climate litigation and the limits of the concept of human environmental rights, state liability for loss and damage caused to individuals as a result of breaches of EU law, national remedies available in case of bad condition of the environment as well as the limits of the public interest litigation and challenges related to climate claims against private actors in national law. On the other hand, contributors discuss substantive aspects from a global perspective of food insecurity, soil monitoring and resilience as well as digitalisation, green skills and climate-induced migration. With insights from leading experts, this work highlights the evolving tensions and expectations within the EU legal framework.

Essential for legal practitioners, policymakers, academics, and students of law and administration, this book offers a comprehensive exploration of the intersection between sustainability, climate action, and the protection of fundamental rights in EU law.



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