Fundamental Rights and Climate Change

Exploring New Perspectives and Corresponding Remedies

EDITED BY

Alicja Sikora-Kalėda · Inga Kawka

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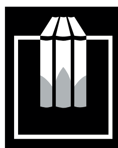

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Introduction

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-Kalėda 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-Kalėda
Inga Kawka

Fundamental Rights and Climate Change – Exploring New Perspectives and Corresponding Remedies
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Nikolas Keckhut[1]

Climate-Induced Migration, a Dangerous Legal Gap in European Asylum Law

Abstract: Climate-induced migration is a contemporary phenomenon that is likely to become massive in the years to come, with up to a billion migrants by 2050 according to some specialists. Nowadays, international displacement is excluded from any refugee definition due to the general and indiscriminate nature of the impacts resulting from climate change. Recent developments in Human rights may suggest an application of the principle of *non-refoulement* on the basis of the right to life. However, it is argued that such a development would trap climate migrants between the impossibility of obtaining an adequate international protection and their protection against any kind of *refoulement*.

This chapter will therefore introduce the decisions of the United Nations Human Rights Committee in relation to climate change-induced and propose an analysis of the reception of the method set out by the UN Committee, using selected examples of cases from European national courts. Indeed, a new extensive interpretation of Article 19 of the EU Charter of Fundamental Rights (*non-refoulement*) in order to avoid the violation of the fundamental rights of non-EU citizens – namely the right to life (Art. 2), the right to the integrity of the person (Art. 3) or the respect of private and family life (Art. 7) – would allow the recognition of a principle of non-removal to such displaced persons in the European framework.

Scholars studying the subject focus mainly on the adoption of a new international convention, which appears not only necessary but urgent. However, in the meantime, an extensive interpretation of Article 19 of the Charter might

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fill the gap. Therefore, this paper will propose the development of an ambitious and modern reading of the Charter of Fundamental Rights while launching the elaboration and adoption of proper European legislation.

Keywords: climate change, climate change-induced migration, European Union, human rights, migration

1. Climate change and migration

At a time when the reports of the Intergovernmental Panel on Climate Change (IPCC) are forcing us to prepare for a world +4°C, it seems essential to target legal studies at the phenomenon of climate migration. Indeed, one clear consequence of the climate crisis will be human mobility, referred to as climate change-induced migration (hereinafter the 'CCIM') or, more simply, climate migration. Despite the numerous forms of migration triggered by climate change, they all have in common the fact that people are forced to leave their place of origin, and in some instances their country, because the land becomes uninhabitable.

What may appear to be an essentially academic topic is in fact a very tangible and major issue. Indeed, according to the most accurate estimates, around 200 million people could be on the streets by 2050.[2]

In reality, predictions are very disparate because of the multitude of triggers of the phenomenon. According to the famous *Kälin* typology,[3] five types of migration can be identified. The first category is the one most often evoked. It concerns people displaced by slow-onset phenomena (desertification, sea level rise). These slow phenomena are particularly representative of the slow and inexorable nature of climate change. The second is displacement because of sudden and extreme events (hurricanes, floods, *etc*.). This typically includes displacements linked to disasters. The increase in the unpredictability, frequency and power of these phenomena fully inscribes them within the framework of climate change. Next is the separate issue of the citizens of small island states, who are confronted to the first two categories, and to whom another problem is added: the fear of the disappearance of their state. In addition, we have persons displaced by government-imposed resettlement, a category that has received little study in the literature because it has little international character. Finally, we have the last category which overlaps with our traditional vision

[2] N. Stern, *The Economics of Climate Change: The Stern Review*, Cambridge 2007; K.K. Rigaud et al., *Groundswell: Preparing for Internal Climate Migration*, Washington, D.C. 2018.

[3] W. Kälin, N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Geneva 2012.

of asylum. These are people displaced by persecution, violence caused by the visible effects of climate change. All these effects can trigger or reinforce migration, through a cumulative push or pull effect.

The problem is often referred to by the general public as 'climate refugees', and even some academics defend the use of this term.[4] However, the concept has been considered for long as a misnomer by legal scholars[5] as there is currently no legal definition of these *climate refugees* and no asylum law takes account of climate change-induced migration. The traditional definition provided by the Geneva Convention[6] cannot be applied as it was modelled in the immediate post-war period on the situation of people fleeing their persecuting state.[7] In the case of climate migration there is no identifiable persecution, therefore, no State that can be held responsible for migration.

This is reflected in the European Union (hereinafter 'EU') law. While Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter')[8] reaffirms the right to asylum as defined by international law, this right is set out in detail in the Qualification Directive. However, neither the definition of refugee,[9] which is based on the definition given in international law, nor subsidiary protection as defined by the EU,[10] nor temporary protection[11] provide a legal framework for the protection of climate migrants.

In these conditions, it appears that the adoption of a proper legislation would be necessary someday. However, it is to be noted that on a global scale, the adoption of

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4 F. Gemenne, *The Refugees of the Anthropocene* [in:] *Research Handbook on Climate Change, Migration and the Law*, B. Mayer, F. Crépeau (eds), Cheltenham 2017.

5 C. Cournil, *The Inadequacy of International Refugee Law in Response to Environmental Migration* [in:] *Research Handbook on Climate Change, Migration and the Law*, B. Mayer, F. Crépeau (eds), Cheltenham 2017.

6 United Nations, *Convention Relating to the Status of Refugees*, 1951, art. 1(A)2.

7 D. Alland, C. Teitgen-Colly, *Traité du droit de l'asile*, Paris 2002, p. 75; A. Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)*, Geneva 1997.

8 *Charter of Fundamental Rights of the European Union*, "Official Journal of the European Union" 2000, C 364/01.

9 *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, "Official Journal of the European Union" 2011, L 337/9, art. 9.

10 *Ibidem*, art. 15.

11 *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, "Official Journal of the European Union" 2001, L 212.

a new convention appears not only difficult but also jeopardizing the current protection refugees can enjoy under the Geneva Convention instrument.[12] The adoption of a legislation at the European Union level, through an *ad hoc* instrument or by an amendment to the subsidiary protection appears to be a good compromise. Indeed, several academic studies[13] have suggested amending subsidiary protection to cover climatic migration. For example, it has been proposed to develop a fourth subsidiary protection for "serious group threats" or more directly for situations of natural or man-made disaster. This was attempted by several MEPs during the revision of the Qualification Directive (2017-2024),[14] but these proposals never got beyond the stage of trialogue negotiations. Therefore, the final text, voted on in spring 2024, contains no progress on the issue.

Nevertheless, the absence of new instruments does not prevent the problem from arising in practice. It is therefore a question of seeing how the law in force enables the national courts of the Member States of the European Union to respond, even if only partially, to the challenge.

2. The global rise of a dispute within the UN Human Rights Committee

In response to the major challenge posed by climate change, the courts with jurisdiction over human rights have witnessed the emergence of litigation based on human rights and climate change.

This is particularly the case in international law, where the States' actions – or inaction – have been challenged on several occasions before the UN Human Rights Committee (UN HRC). The latter has, through a few decisions, developed an integrated human rights-based approach to climate change issues. This has been achieved

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12 C. Vlassopoulou, *Les migrations environnementales entre secteurs d'action publique*, "Revue. Asylon(s)" 2008, no. 6.

13 E. Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, "Columbia Journal of European Law" 2017, https://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/ (8.07.2023); E. Delval, *From the U.N. Human Rights Committee to European Courts: Which Protection for Climate-Induced Displaced Persons under European Law?*, 8 April 2020, https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/ (8.07.2023).

14 N. Keckhut, *Climate Change and Migration: The Development of a European Legal Approach between International Protection and Human Rights*, Master's thesis, Strasbourg 2024 [thesis for the master degree], pp. 119-145.

through decisions relating to pollution issues such as *Portillo Cáceres v. Paraguay*[15] and *Benito Oliveira Pereira v. Paraguay*.[16]

In this context of emerging litigation, the UN Human Rights Committee was quickly confronted with the issue of climate migration. In the *Ioane Teitiota v. New Zealand* decision,[17] a Kiribati citizen who was denied asylum in New Zealand brought his case before the UN Committee on the grounds of an alleged violation of his right to life. Ioane Teitiota and his legal counselor argued that his deportation, and the one of his family, is threatening his right to life because of the lack of resources, especially drinkable water, and of the progressive sinking of his island. First of all, the Committee recalled the obligation of States parties not to extradite, deport, expel or otherwise transfer a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).[18] The Committee very clearly linked the right to life to the issue of dignity.[19] Although the Committee did not recognize a violation of the right to life in this case, it did admit that this could be the case in situations of climate migration where the danger appeared to be more real and more personal.

The *Billy* decision[20] was handed down on 22 September 2022, just one day before a wave of climate protests around the world. It does not directly concern international climate displacement. However, it is often seen as a logical continuation of the approach described by *Teitiota*. Firstly, it should be noted that the Committee declared admissible the complaints of the applicants, indigenous Australian citizens of the Ocean Islands, under Articles 6 (right to life), 17 (right to respect for private life, family and home), 24 (1) (necessary measures of protection for children) and 27 (right to enjoy one's own culture) of the International Covenant on Civil and Political Rights. Concerning the right to life (Article 6), the Committee reiterated much of its previous case law, already summarized in the *Teitiota* judgment. It quotes directly from the judgment, stressing the need to interpret the right to life broadly and stating that this

[15] United Nations Human Rights Committee, *Portillo Cáceres et al. v. Paraguay*, 20 September 2019, CCPR/C/126/D/2751/2016.

[16] United Nations Human Rights Committee, *Benito Oliveira Pereira et al. v. Paraguay*, 12 October 2021, CCPR/C/132/D/2552/2015.

[17] United Nations Human Rights Committee, *Ioane Teitiota v. New Zealand*, 7 January 2020, CCPR/C/127/D/2728/2016.

[18] *Ibidem*, para. 9.3.

[19] *Ibidem*, para. 9.4.

[20] United Nations Human Rights Committee, *Daniel Billy v. Australia*, 22 September 2022, CCPR/C/135/D/3624/2019.

right 'requires States parties to adopt positive measures to protect the right to life'.[21] With regard to the right to privacy, family, home or correspondence (Article 17), the Committee is more innovative. In the Committee's view, the applicants' traditional way of life and their connection with the land and sea bring these elements within the scope of protection of Article 17 of the Covenant.[22] Strikingly, in the *Billy* case, delays in building infrastructure to prevent environmental damage led the Committee to consider that Article 17 of the International Covenant on Civil and Political Rights had been violated.

The combined reading of *Billy* and *Teitiota* suggests that a *non-refoulement* obligation for environmental displaced persons would exist in theory for the right to life, but also in a much more tangible way for the right to private and family life.

3. The europeanization of the litigation: developing a human rights-based approach

In Europe, the main instruments concerning human rights are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union. Interestingly, the rights referred to by the UN HRC Committee in the *Teitiota* and *Billy* cases are rights that have equivalents in European human rights law. Indeed, the right to life, provided for in Article 6 of the ICCPR, is also provided for in Article 2 of the ECHR and Article 3 of the Charter. Similarly, the prohibition of torture and inhuman treatment is laid down in Article 7 of the ICCPR, Article 3 of the ECHR and Article 4 of the Charter. Finally, the right to private and family life, provided for in Article 17 of the ICCPR is set out in Article 8 of the ECHR and Article 7 of the Charter.

Furthermore, just as the Committee recognized in the *Teitiota* case that there is indirect protection from removal[23] if that removal constitutes a serious violation of a human right guaranteed by the Covenant,[24] the European Court of Human Rights (ECtHR) has acknowledged this since the 1980s with the *Soering* case.[25]

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21 *Ibidem*, para. 8.3.

22 *Ibidem*, para. 8.10.

23 Removal is defined as the "act of a state in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain".

24 United Nations Human Rights Committee, *Ioane Teitiota…*; United Nations Human Rights Committee, *Benito Oliveira…*, para. 9.3.

25 European Court of Human Rights; *Case of Soering v. The United Kingdom*, Strasbourg 1989, no. 14038/88, no. 8319/07 and no. 11449/07.

While the ECtHR has not yet had to deal with situations of climate migration, national courts have been obliged to take a stance on this emerging legal issue. The Italian Supreme Court of Cassation, for example, has fully acknowledged the Committee's reasoning. Indeed, in 2021, a foreigner from Niger was seeking to overturn an Italian tribunal's rejection of his request for international and humanitarian protection. The *Corte suprema di cassazione* recognized that humanitarian protection should have been granted when the situation in the country of origin did not allow a 'minimum essential limit of guarantee' for the individual's right to life. What is particularly key in this ruling is that the Court specifically referred to the *Teitiota* finding, reproducing part of its interpretation.[26] The general atmosphere in which Italian law is evolving on this issue has paved the way for the Court of Cassation's decision. Indeed, interpretation has already gone in this direction, without going as far. In a ruling handed down by the *Tribunale di L'Aquila* on 18 February 2018,[27] the Italian court had already granted the humanitarian protection to a Bangladeshi citizen who had declared himself hopelessly in debt after losing his farmland to flooding.

An even older practice exists in Austria concerning migration in the context of natural disasters related to the right to life and dignity. Indeed, since 2005, the Asylum Act has made direct reference to Articles 2 and 3 of the European Convention on Human Rights.[28] In cases where the removal of the foreign national to his or her country of origin constitute a real risk of violation of Article 2 or Article 3 of the ECHR, subsidiary protection shall be granted. This led to the development of consistent Austrian case law, which has fully integrated natural disasters into the assessment of the 'real risk' of inhuman or degrading treatment. This was even the subject of a constitutional judgment, in which the Constitutional Court held that failure to take sufficient account of country-of-origin information leads to a violation of Article 3 of the ECHR.[29]

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[26] The Supreme Court of Cassation of Italy, Second Civil Section, *I.L. v. Italian Ministry of the Interior and Attorney General*, 24 February 2021, no. 5022/21, no. 19/00135, para. 8.

[27] Court of L'Aquila, Italy, *X v. Ministry of the Interior*, 18 February 2018, no. 1522/17, no. 19/00135.

[28] 100/2005 Federal Asylum Act (Austria), no. 2005:716, part 2, section 4, article 8.

[29] See Constitutional Court (VfGH) (Austria), 19 September 2011, U256/11; Constitutional Court (VfGH) (Austria), 12 December 2019, E1170/2019.

4. The human rights-based approach applied to the case of sick foreign nationals

The case law established by the Strasbourg Court on the possible violation of the right to life or the prohibition of inhuman or degrading treatment in cases of certain *refoulement* has made its way into EU law. The Charter of Fundamental Rights of the EU, adopted in 2000, ten years after the *Soering* case, incorporates the case law in its Article 19(2). While the contours of this article remain unclear, as do the cases in which it would lead to a violation, there is one area where it is very well embodied, and that is in the case of seriously ill foreign nationals. In EU law, it is incarnated in Article 5 of the so-called 'Return Directive,'[30] which states that 'when implementing this Directive, Member States shall take due account of: c) the state of health of the third-country national concerned'.

Transposed, not without difficulty, into the law of the Member States, the situation was ruled by the CJEU in 2022 in *X v State Secretary for Justice and Security*[31] in the context of a Russian national who developed a rare form of blood cancer is currently receiving treatment in the Netherlands and was refused asylum. The Court prevented any return decision if there is a real risk of a significant, irreversible and rapid increase in the applicant's pain, should he return. This decision fully incorporates the case law well established by the ECtHR between 1997 and 2016.[32]

What is particularly interesting is that this article, inherited from the case law of the ECtHR, was used by a French court to recognize what some have called the 'first French climate refugee.'[33]

This case challenged on the grounds of *ultra vires* an order requiring a Bangladeshi national, named *Sheel* in the French press, to leave French territory. The applicant suf-

[30] *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, "Official Journal of the European Union" 2008, L 348/98, art. 5.

[31] Judgment of the Court (Grand Chamber) of 22 November 2022, *X v. Staatssecretaris van Justitie en Veiligheid*, Case C-69/21, no. C-285/12.

[32] European Court of Human Rights; *Case of Soering…*, note 21; European Court of Human Rights, *D. v. The United Kingdom*, 2 May 1997, no. 30240/96; European Court of Human Rights, *Case of N. v. The United Kingdom*, Strasbourg 2008, no. 26565/05; European Court of Human Rights, *Case of Paposhvili v. Belgium*, Strasbourg 2016, no. 41738/10, no. 30696/09.

[33] E. Dourel, *Toulouse : Pourquoi « Sheel », un Bengali asthmatique, est-il sans doute le premier réfugié climatique en France ?*, 7 January 2021, https://www.20minutes.fr/planete/2946631-20210107-toulouse-pourquoi-sheel-bengali-asthmatique-doute-premier-refugie-climatique-france (8.07.2023); L. Lenoir, *La France a-t-elle accueilli son premier «réfugié climatique» ?*, 8 January 2021, https://www.lefigaro.fr/faits-divers/la-france-a-t-elle-accueilli-son-premier-refugie-climatique-20210108 (8.07.2023).

fered from a chronic respiratory pathology combining severe allergic asthma treated daily, and severe sleep apnea syndrome requiring the use of an electric ventilation device every night, which requires biennial maintenance and monthly replacement of his mask, filters and tubes. The Bordeaux Administrative Court of Appeal confirmed the ruling of the Toulouse Administrative Court, ruling at first instance, by adopting an innovative and detailed reasoning based on data relating to air quality in Bangladesh, as the applicant 'would find himself confronted in his country of origin with both an aggravation of his respiratory pathology due to atmospheric pollution.'[34] It would appear that the Court was directly inspired by the approach developed by the United Nations Human Rights Committee as seems to have adopted the Committee's General Comment 36 on the right to life.[35] Paragraph 26 of the latter states that 'the duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.'[36]

This approach was too innovative for the *Conseil d'État* that quashed the decision. According to France's highest administrative court, the administrative court of appeal made an error of law as it had to confine itself to 'ascertaining, having regard to the pathology of the person concerned, the existence of appropriate treatment and its availability under conditions allowing access to it.'[37] It remains to be seen whether a reversal of the case law is possible, and whether the administrative jurisdictions of other Member States will go along with the Bordeaux judges.

Conclusion

While national courts navigate the complex field of environmental migration litigation, with mixed results, EU legislation is needed. As a report from the European Parliament explains: 'EU support for a legal framework for "climate refugees" could make a difference.'[38] While the Charter was a step in the right direction, it needs precise legislative instruments to be implemented. Yet, the current European political

[34] Cour administrative d'appel de Bordeaux, 2ème chambre, *M.A (Sheel) v. Préfet de Haute Garonne*, 18 December 2020, no. 20BX02193, *Lebon*.

[35] United Nations Human Rights Committee, *General Comment No. 36 – Article 6: Right to Life*, 3 September 2019, CCPR/C/GC/36.

[36] *Ibidem*, para. 26.

[37] *Ibidem*.

[38] E. Noonan, A. Rusu, *The Future of Climate Migration*, Strasburg 2022.

climate offers little prospect and the recent failure during the revision of the Qualification Directive is a case in point.

In the absence of legislation, anticipation mounts for the reactions of the ECtHR and the CJEU. With climate litigation gaining momentum across Europe, invoking Article 3 of the Convention or Article 4 of the Charter to contest refusals of residence permits or deportation orders due to environmental concerns seems inevitable. Indeed, as the public rapporteur on what has been called 'France's first climate migration' case explains, if a removal order must be annulled in a climate context, it should be done based on 'article 3 of the ECHR, which must be established with sufficient certainty and personal character to be taken into account.'[39] Amidst the prevailing confusion exacerbated by UN Human Rights Committee ruling, a European jurisprudence that would unify the matter would be most welcome. This would allow European litigation to develop along clear lines and avoid differences in treatment that would jeopardize the coherence of the Common European Asylum System.

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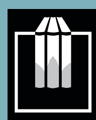
For many years legal thought and practice focused on the general concept of environmental rights as a legal tool meant to enforce the human right to a healthy and sustainable environment. Whilst there is an undeniable link between human rights and climate change, as illustrated notably by the global 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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