

# THE CONCEPT OF “CLIMATE RIGHTS”

ASSESSMENT FRAMEWORKS,  
CLASSIFICATIONS AND  
COUNTRY EXAMPLES



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## Introduction

The concept of “climate rights” has been introduced by DACE project to capture a variety of rights and legal mechanisms, i.e., existing and nascent types/classes of rights at international, EU and national level with relevance to climate change, defined as follows: “all substantive and procedural rights in connection with climate change related matters”. As an operational definition its main purpose is to inform our study of climate rights as vehicles for just and engaging society in which climate justice and protection against the consequences of climate change are high on the agenda for the governments, businesses and the society as a whole. This is a broad and overarching definition which could come across political, social and civil society domains and can be used for engagement of key target groups of the project like climate activists, environmental associations, other interested citizens and local communities, but also bar associations, students, journalists. The climate rights in project’s interpretation include rights in a narrow legal sense, such as human or social rights, but encompass legal mechanisms (e.g., the ombudsman institution) that enable individuals and organisations to protect their rights, to demand climate action or hold governments and businesses accountable.

Even if we don’t claim coining a new concept of the legal doctrine, we could still test its practical application, and stir a debate about it with national and EU stakeholders. While testing the application of the concept, we aim to raise the awareness of target groups and general public of climate rights (in general terms or about specific rights related to or affected by climate change: e.g. right to life, health, home, dignity); to test the readiness of target groups to exercise such climate rights already now, or to explore the existing practice of exercising such rights; and to mobilise target groups’ support for introducing a stronger and more comprehensive system of climate rights that could be also defined as rights to climate protection .

It has long been recognized that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. The latest assessment report from the Intergovernmental Panel on Climate Change (IPCC) describes how observed and predicted changes in climate will adversely affect billions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend. These harmful impacts include sudden-onset events that pose a direct threat to human lives and safety, as well as more gradual forms of environmental degradation that will undermine access to clean water, food, and other key resources that support human life . The accumulated scientific and policy knowledge shows us how to avert the climate change threat, and states’ obligations in this regard have been long-standing and clear. The Geneva Pledge

Climate Action states that under international human rights law, states are required to prevent climate harms by regulating environmental practices, protecting vulnerable communities, holding violators accountable, and ensuring redress where harms are suffered. To meet these obligations would require also stronger laws, more effective regulation of the private sector, incentives to act and measures to protect .

The United Nations Framework Convention on Climate Change (UNFCCC) acknowledges in its Preamble “that change in the Earth's climate and its adverse effects are a common concern of humankind”. The broad spectrum of rights and holders of rights is emphasised in the Paris Agreement’s Preamble, acknowledging that climate change is a common concern of humankind and the Parties should, when taking action, address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

In the next chapters we will explore the assessment framework for climate rights (Chapter II), then review the main types of climate rights and legal mechanisms (Chapter III), present the trends in climate change litigation in Chapter IV, and finally, share some country level cases of national frameworks of climate rights from Austria, Bulgaria and Spain (Chapter V).

## Assessment framework for climate rights

In order to assess rights and legal mechanisms to demand climate action and/or protection against impacts of climate change, one could assess “climate rights” from the following threefold perspective. The first lens of such analysis entails seeing “climate rights” within the scope of (protection of) the right and its relevance to climate change to establish its climate relevance. Here we need to ask ourselves several questions. What does a certain legal norm or standard actually aim to protect? How does this scope of protection interact with climate change? How are the protected interests affected by climate change, how do they impact climate change policies, actions and behaviour?

With the second lens for assessment, we classify climate rights as individual or collective rights or as substantive or procedural rights. The first dichotomy of rights is important to help us identify the societal effect of the climate-related rights considering their holders/subjects. The second one relates to the function of the rights to defend values or conditions important for the

individuals (life, health, property, food, water and sanitation) or to defend the due process or administrative procedures that could enable enjoyment of the substantive rights.

Through the third lens one could look at the climate rights and at the mechanisms for implementing and defending the rights focusing on claiming these rights before international, regional and national courts within climate change litigation. Here we aim to analyse which legal avenues individuals or the public (incl. through rights exercised collectively by NGOs, active citizens and their organisations) might have to demand climate action from decision makers, legal entities and individuals through enforcement of the mentioned legal norms. With climate change leaving ever more obvious traces, individuals and organisations more often than ever resort to enforcing their climate rights in court. This results in an increasing trend of climate change litigation case law as an emerging body of court cases that is set to grow in number and variety of cases. In this respect, the UNEP has identified several emerging trends in climate change litigation by reference to the purpose of the case, including seeking to enforce governments' legislative and policy commitments and establishing liability for failures (or efforts) to adapt to climate change .

Climate change case law can also serve as an example of how individuals have used legal mechanisms that might not have been initially intended for climate protection as the main purpose. Below, we will thus analyse different legal mechanisms with regards to their protective aim, how that scope of protection interacts with climate change, and how the relevant legal norms can be used to demand climate actions presenting examples from recent climate change case law.

Another approach to climate rights' concept entails two key aspects of the concept's nature: the accuracy of the concept in capturing the normative dimension of climate change (reasons to prevent/mitigate/adapt to climate change), and its ability to generate political measures. In addition to this, certain conditions must be satisfied: important human interests should be put at risk or already affected by global climate change; rights-holders and obligation-bearers should be identified; this relationship should be codified in a legitimate formal structure; it should be feasible to claim the rights; an 'enforcement mechanism' (not necessarily of legal character) could strengthen compliance. The normative and practical aspects of climate rights are closely interlinked and must be further studied and this project will contribute to this aim.

# Review of the most relevant climate rights and legal mechanisms

We have listed and analysed below some of the main climate rights and legal mechanisms, with the understanding that all of the presented classes of rights and mechanisms could be closely interrelated and complement each other. They represent legal and practical points of departure for exploration of particular aspects of climate rights as an overarching concept that should facilitate legislative changes, policy improvements and litigation efforts.

## FUNDAMENTAL HUMAN RIGHTS

The constitutional rights related to environmental protection “typically include five different kinds of archetypes: “government’s duty to protect the environment; substantive rights to environmental quality; procedural environmental rights; individual responsibility to protect the environment; and a miscellaneous ‘catch-all’ category of diverse provisions” and such classification could be extended to the rights related to climate change.

A report by the UN Office of the High Commissioner for Human Rights (OHCHR) by the UN lists the rights mostly affected by climate change - the right to life, the right to self-determination, the right to development, the right to food, the right to water and sanitation, the right to health, the right to housing, the right to education, the right to meaningful and informed participation, the rights of those most affected by climate change, the rights of future generations as human rights. Since national constitutional rights vary from legislation to legislation, this chapter will focus on fundamental human rights according to the European Convention on Human Rights (ECHR) and the corresponding case law of the European Court of Human Rights (ECtHR).

Before the ECtHR, usually Art. 2 (right to life and bodily integrity), Art.8 (right to privacy and family) ECHR and Art. 1 of 1st additional protocol to the ECHR (right to property) are invoked.

According to the case law of the ECtHR, states must actively protect the right to life and take "appropriate" measures to protect life as soon as a life-threatening and sufficiently concrete or immediate danger threatens. With regard to protection against environmental hazards, the ECtHR long rejected a reference to Art. 2 ECHR, interpreting it rather restrictively as a right of defence and freedom. It was not until 1998, in the case of Guerra and others vs Spain, that the ECtHR dealt with obligations to protect under Art. 2 ECHR, but did not reach a decision in this

regard, as it initially considered obligations to protect under Art. 8 ECHR to have been violated. Finally, in the L.C.B. case (a father claimed that the British state had a duty to provide information after he had been exposed to radioactive radiation as a soldier during nuclear tests), the ECtHR derived from Art 2 ECHR an obligation of the state to prevent avoidable risks to life. In the Öneriyildiz case, in which people had died in a landslide triggered by an explosion in a landfill, the ECtHR also declared that, in principle, there was a state obligation to prevent life-threatening disasters and to prevent behaviour that increased the risk. Whether the positive obligations were fulfilled depends on the source of the threat or whether the risk could have been reduced to a reasonable minimum. The nation states are relatively free in the exact design of the measures - the suitability of the measure for establishing an effective level of protection and the proportionality of the measure with regard to opposing fundamental rights positions are decisive.

Although Art. 8 ECHR - like most other Convention rights - is primarily designed as a defensive right, there is now indisputably also a general positive obligation on states to take meaningful and proportionate measures to safeguard the rights guaranteed by Art. 8 ECHR. With regard to environmental hazards such as noise, dust or steam immissions as well as in the case of natural flooding, the ECtHR examined a potential violation of Art 8 ECHR early on. For the first time, in 1980, in the Arrondelle case, it declared an environmental complaint admissible under Art 8 ECHR. The complainant had complained about road and air traffic noise emanating from Gatwick Airport and the associated motorway access road. The ECtHR found that the state was partly responsible for the noise pollution, as the planning and construction of the airport and the motorway fell within its competence. As an amicable settlement was eventually reached with the complainant, it refrained from making a final decision, but declared a violation of the Convention likely due to the State's failure to take noise protection measures.

However, it was not until 1994 that an environmental complaint based on Art. 8 ECHR was successful. In the López Ostra case, neighbours of an industrial plant built with the help of state subsidies were so burdened by smoke, noise and odour immissions that they felt compelled to move away from the danger zone. The state authorities failed to prevent repeated violations of the limit values. The ECtHR therefore assumed a violation of the Convention (i.e., breach of the duty to protect), as the authorities had not fulfilled their obligations to enforce compliance with limit values. Subsequently, Art. 8 ECHR developed into the central "immission protection norm" of the ECHR in the case law of the ECtHR. The protected interests covered by Art 8 ECHR were initially the home (there had to be a sufficient local proximity between the source of the impairment and the home) and the workplace, but later also physical integrity. In this



context, physical and psychological burdens with an illness value were more likely to lead to a violation of the Convention than mere impairments of well-being.

In the context of climate claims, fundamental property rights are usually asserted with the argument that certain property items (mostly real estate) would be restricted in their use due to the impacts of the climate crisis. Since this is not a direct state intervention in private property, it is questionable whether there is a duty on the part of the state to protect private property from environmental impacts. According to Art. 11 CPMR, there is a duty of general respect for property, protection against deprivation of property and the fundamental right guarantee to regulate the use of property. Since the structure of the freedom of property according to Art 11 CCPR does not differ from that of other freedoms, it can be assumed that the state also has duties of guarantee in this area. The exact extent of the duties to protect depends on the individual case, although an obligation of the state exists in any case if there is a direct link between the measures that affected persons could reasonably expect and the exercise of their property rights. Thus, for the first time in *Öneryıldız*, the ECtHR assumed a positive obligation of the state to act in relation to the freedom of property. State authorities had failed to take safety measures for a landfill site. A methane gas explosion eventually occurred at the landfill, resulting in the burning and burial of a neighbouring cottage. The owner here could legitimately have expected action by the authorities to prevent the methane gas explosion and subsequent destruction of her property. In *Kolyadenko*, the ECtHR also assumed such a connection, as the Russian authorities had failed to take adequate measures against a flood that destroyed the complainants' property. The flood in the case was caused by a human-controlled discharge of water from a reservoir. However, it denied a sufficient connection in the *Hadzhiyska* case, which also involved damage caused by flooding, but caused by extreme rain. In this regard, the ECtHR held that Art. 11 CPMR does not require the state to take measures to protect private property in all situations and in all areas affected by natural disasters. Unlike the right to life, which requires state authorities to do their utmost to provide disaster relief, the protection of property is not absolute. The state has leeway here in that it may also decide on the use of resources and the prioritisation of measures. In general, the ECtHR examines restrictions on property rights with a lower level of scrutiny when balancing interests, so that in the case of obligations to act derived from the freedom of property, it can be assumed that there is even greater scope for action.

## Recent examples of environmental/climate cases before the ECHR include:

### **CASE OF PAVLOV AND OTHERS VS. RUSSIA**

In an effort to combat industrial air pollution in Lipetsk, 14 government agencies were taken to court by concerned citizens who alleged that the authorities failed to regulate industrial activity effectively and create "sanitary protection zones" in the area. While the District Court ruled in 2009 that measures had been taken since 2004 to reduce air pollution, the Regional Court upheld the ruling later that year. However, in 2019, a cassation appeal was made by the defendant against the 2009 rulings, which was ultimately rejected by the Supreme Court of the Russian Federation in 2020.

The citizens then brought their complaint to the ECtHR, citing violations of Article 8 of the Convention, which protects the right to respect for private and family life and home. The Court found that the authorities had failed to meet their positive obligation under Article 8 to protect the citizens from the health risks posed by industrial air pollution, as they did not enforce regulations or adopt appropriate measures to prevent or reduce pollution hazards. While measures implemented after 2013 had shown progress in reducing levels of industrial emissions and improving air quality in Lipetsk, the ECtHR found that the pollution had not been sufficiently curbed, and the authorities had failed to strike a fair balance in securing the citizens' right to respect for their private life.

### **DUARTE AGOSTINHO AND OTHERS VS. PORTUGAL AND OTHERS**

Six Portuguese youths lodged a complaint with the European Court of Human Rights on September 2, 2020, accusing 33 countries of violating their human rights due to insufficient action on climate change. They are seeking an order from the court to require these countries to take more ambitious action in addressing climate change. The complaint cites Articles 2, 8, and 14 of the European Convention on Human Rights, which safeguard the right to life, the right to privacy, and the right to not be discriminated against. The complainants contend that the effects of climate change in Portugal, such as forest fires and heatwaves, threaten their right to life and privacy, and as young people, they are particularly vulnerable to the consequences of climate change. The case is brought against the Member States of the EU as well as Norway, Russia, Switzerland, Turkey, Ukraine, and the United Kingdom. The complainants argue that these countries have failed to meet their human rights obligations by not committing to reduce emissions sufficiently to limit the increase in temperature to 1.5

degrees Celsius, as required by the Paris Agreement. On June 30, 2022, the Chamber of the European Court of Human Rights relinquished jurisdiction in favour of the Grand Chamber. The case is now going to be examined by the ECtHR's Grand Chamber of 17 judges on account of the fact that the case raises a serious question affecting the interpretation of the Convention (Art 30 ECHR).

### **VEREIN KLIMASENIORINNEN AND OTHERS VS. SWITZERLAND**

In May 2020, the Swiss Supreme Court communicated its final decision to the parties involved, exhausting all national remedies available. On November 26, 2020, Senior Women for Climate Protection Switzerland, an association of senior women, filed a complaint with the European Court of Human Rights against the Swiss government. They claimed that their health is at risk due to heat waves made worse by the climate crisis and requested that the case be treated under the expedition procedure where the court could prioritise certain cases pursuant to Article 41 of the Rules of the Court. The complaint made three main points: Switzerland's climate policies are inadequate and violate the women's right to life and health under Articles 2 and 8 of the ECHR since especially older women are affected by heatwaves; the Swiss Federal Supreme Court rejected their case on arbitrary grounds, violating the right to a fair trial under Article 6; and the Swiss authorities and courts did not address the substance of their complaints, violating the right to an effective remedy in Article 13. On April 26, 2022, the Chamber of the European Court of Human Rights relinquished jurisdiction in Favor of the Grand Chamber of the Court. The case is now going to be examined by the ECtHR's Grand Chamber of 17 judges on account of the fact that the case raises a serious question affecting the interpretation of the Convention (Art. 30 ECHR).

### **CARÊME VS. FRANCE**

The former mayor of Grande-Synthe in France submitted an application seeking to cancel the government's refusal to take additional measures to meet the Paris Agreement's objective of reducing greenhouse gas (GHG) emissions by 40% by 2030. The Council of State declared the application admissible in part, allowing interventions from Paris, Grenoble, and environmental protection associations, but rejected the applicant's claim as an individual. However, on July 1, 2021, the Council of State ruled in favour of the claimants, ordering the government to take additional measures to achieve the goal of reducing GHG emissions by 40% by 2030. The court rejected, however, the application insofar as it was brought by the applicant, on the grounds that he did not show any interest in the case since his claims were limited to the argument that, as an individual, his home was situated in an area likely to be subject to flooding by 2040. The applicant argues that the rejection of his claim violates Article 8 of the ECHR and requests that

his case be joined with other similar cases. On June 7, 2022, the ECtHR's Grand Chamber of 17 judges agreed to examine the case, citing a serious question affecting the interpretation of the Convention.

A connection between climate change and human rights was also established by the Human Rights Council in its Resolution 41/21 on Human rights and climate change, adopted by the UN Human Rights Council on 12 July 2019, in which it recalled that “the Paris Agreement adopted under the United Nations Framework Convention on Climate Change acknowledges that climate change is a common concern of humankind and that parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, the empowerment of women and intergenerational equity.” It also emphasised that climate change has an adverse effect on the enjoyment of said rights and called upon the states to adopt a comprehensive and inclusive approach to climate change adaptation and mitigation policies, for the full and effective enjoyment of human rights for all.

## **SOCIAL RIGHTS AND THE JUST TRANSITION**

“Just transition” is an approach to balance human welfare, jobs and the need for deep decarbonisation (Just Transition Centre, 2017). It was developed by trade unions in the 1970s in order to demand that ecological transformation be undertaken in a socially just way. It is founded upon the belief that environmental and social crises are interrelated: both crises are inherent to the expansionist economic system which is based on discounting the value of nature as well as devaluing the work of societal reproduction (Kreinin, Typologies of “Just Transitions”: Towards Social-Ecological Transformation, Kurswechsel 1/2020). While there is a common understanding that urgent action is needed to address the climate crises, this objective will require significant economic, industrial and technological transformation. Some changes could impact workers considerably when they navigate the new labour opportunities the transition to less carbon intensive industries bring. While for example on the one hand the transition towards sustainable energy will lead to the creation of jobs in this department, it also affects e.g., the rights of people near land that is needed for the upscaling of renewable energy projects. The transitioning out of fossil fuels on the other hand affects the employment of workers in the

mining and fossil fuel industry, who might not have the opportunity to adapt accordingly to the changes in the energy industry (often for lack of education and/or retraining opportunities).

The “just transition” concept has received a high policy recognition in the Guidelines for a just transition towards environmentally sustainable economies and societies for all of the International Labour Organization, which calls for the transition to environmentally sustainable economies and societies and policies respecting rights at work. In the same vein, the Paris Agreement in its Preamble acknowledges “the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities”. The Resolution 41/21 on Human rights and climate change, adopted by the UN Human Rights Council on 12 July 2019 reminds us to take into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities.

At national level the new climate laws contain provisions on just transition like in the Spanish law on climate change and energy transition in Just transition and employment rights (Arts. 27-29), e.g., Article 28: “Just Transition Agreements shall be concluded within the framework of the Just Transition Strategy with the aim of promoting economic activity and its modernisation, as well as the employability of vulnerable workers and groups at risk of exclusion in the transition to a low carbon economy, in particular in cases of closure or conversion of installations.”

A recent 2023 report of the Sabin Center for Climate Change Law to the Columbia Law School approaches the “just transition” as a three-fold concept that encompasses labour, human rights, and the environment. The report outlines the cases observed as grounded on different human rights that relate to these categories such as labour rights, environmental rights, indigenous rights, right to a healthy environment and other human rights. Most cases upon “just transition” rights are based on court practice in South America.

In *Ricardo Castillo Arancibia v. Municipality of Monte Patria* (proceedings took place before the Supreme Court of Chile) the plaintiff’s working contract was terminated (“not renewed”) in December 2021 and he argued that he had been dismissed for political reasons and due to a discriminatory act by the defendant. The municipality on the other hand stated that the termination of the contract was due to a restructuring of the Department of the Environment to address extreme drought and to favour sustainable use of water, which required different planning than the plaintiff had done previously. The plaintiff maintained that the climate crisis had been around for 20 years and that his work focused specifically on water resource optimization, weakening the argument of the municipality. After the claim was rejected by the

District Court and the Court of Appeals, it is now pending before the Supreme Court of Chile. The proceedings set an example for the question whether climate change's impact on the environmental circumstances a legal justification for the termination of an employment contract can be and whether the public hand can be requested to take adaptation measures such as retraining to soften the blow of the changes in the labour market.

## DOMESTIC ENFORCEMENT OF CLIMATE GOALS

Governments at both national and subnational levels express their dedication to reducing the impact of climate change by negotiating and adopting international agreements, laws, rules, and policy declarations. The main international agreement to fight climate change is the United Framework Convention on Climate Change, its Kyoto Protocol and the Paris Agreement. Their obligations have been (more or less) transferred into national law, usually in the form of laws and regulations limiting greenhouse gas emissions in certain economic sectors. However, when they do so, they also expose themselves and their agencies to legal actions that challenge either the commitments themselves or the manner in which they are being implemented (or not). While governments are the most frequently sued parties in such litigation, companies and other organisations have also faced similar lawsuits for not meeting their own climate change objectives and/or lack of real action.

The court case Thomson v. Minister for Climate Change Issues involved the plaintiff's request for an order for the Minister for Climate Change Issues to review New Zealand's 2050 greenhouse gas (GHG) reduction target based on the Climate Change Response Act, which required a review following the publication of an Intergovernmental Panel on Climate Change (IPCC) report, on administrative law grounds. The Court ruled that this order was unnecessary given that the new government had announced it would set a new 2050 target. Second, the plaintiff sought an order declaring that the Minister's Nationally Determined Contribution (NDC) decision was unlawful, on the grounds that the Minister failed to consider: the cost of dealing with the adverse impacts of climate change in a "business as usual" situation; the adverse impacts on citizens living in at risk areas; and the scientific consensus that the combined NDCs of Parties to the Paris Agreement fall short of preventing a dangerous climate system. Third, the plaintiff claimed that the NDC decision lacked a reasonable basis for believing the NDC would strengthen the global climate response and avoid a dangerous climate system. Ruling

on the second and third causes of action, the Court found that the government had followed the international framework and no errors required judicial intervention. The application for judicial review was thereby dismissed.

In PUSH Sweden, Nature and Youth Sweden and Others v. Government of Sweden, the plaintiffs claimed that Sweden's response to climate change did not align with international commitments. However, the court denied this claim as the plaintiffs were not personally affected by the policies. In Greenpeace Nordic Association v. Norway Ministry of Petroleum and Energy, the lower and intermediate courts dismissed the plaintiff's claims, but they have been given permission to appeal to the Norwegian Supreme Court. VZW Klimatzaak v. Kingdom of Belgium is still ongoing after a procedural dispute lasting three years. In Friends of the Irish Environment CLG v. Gov't of Ireland, the plaintiffs argued that Ireland's National Mitigation Plan did not comply with the 2015 Act and violated European Convention on Human Rights and Irish Constitutional rights. Although the lower court denied the claim, the Supreme Court of Ireland quashed the plan, stating that it did not meet the specificity required by the 2015 Act. In Mataatua District Maori Council v. New Zealand, the plaintiffs claimed that New Zealand failed to fulfil its obligations to the Maori by not implementing policies to address climate change. The plaintiffs later amended their claim, arguing that New Zealand's Climate Change Response (Zero Carbon) Amendment Act 2019 did not provide sufficient protection against climate change.

## **CORPORATE SOCIAL RESPONSIBILITY AND LIABILITY**

While claims against the public hand/lawmakers remain the most common form of climate change litigation, recent years have seen a rise in claims against privates (corporations). With only about 100 enterprises making up for 70% of the global emissions, it is understandable that plaintiffs want to hold corporations responsible for climate damaging actions. With the most common claims being tort law based (nuisance, negligence, strict liability and civil conspiracy come to mind), claims have also been based on the argument of unjust enrichment and consumer protection law. Shareholders are also becoming increasingly important actors and are bringing legal action against the companies in which they hold shares.



## Tort law-based claims

When public nuisance is alleged, claimants refer to an act or omission that interferes with the rights of the community or the public. Oftentimes it is argued that mass production as well as the usage and promotion of fossil fuels contributes to global warming and its impacts, such as the destruction of ecosystems and rising sea levels. In negligence claims, claimants state that corporations have duties to care with relation to global warming. It is often argued that companies have failed to adopt and to pursue an adequate climate policy and therefore violate duties to care towards the claimants and society. Other lawsuits aim to hold corporations responsible for defective products and an omission to warn against risk associated with the product's use. In most of these cases fossil fuels are the "product" and the defect is the impact of emissions as well as safety and health risks. Lastly, in civil conspiracy cases, claimants have argued that corporations plot with other persons to commit an unlawful act or deprive third parties of their rights. In the past, it was claimed that corporations conspire to suppress the awareness of a connection between greenhouse gas emissions and climate change. A common problem claimants encounter with Tort Law claims is proving causality. Even though there is now a consensus that emissions are the main cause of climate change, defining a causal relationship between a particular source of emissions and individual climate change effects remains challenging.

## Unjust enrichment

The doctrine of unjust enrichment prohibits the unjust enrichment of one person at another's expense. This argument is often brought forward in relation to fossil fuels. Claimants allege that corporations receive unjust benefits from the production and sale of fossil fuels, knowing that they have adverse effects on the environment, and have benefitted from not carrying the cost of the reductions of these impacts. This enrichment was made at the expense of the claimants' health, safety and property. Oftentimes compensation payments are requested by the claimants for past and future damages.

## Consumer protection

With regards to consumer protection, claimants argue that corporations engage in deceptive marketing and promotion of their products, oftentimes distributing misleading marketing



materials and making certain products look more environmentally-friendly than they actually are. Claimants also allege the distribution of the companies' own pseudo-scientific theories to prevent consumers from recognizing the risks that certain products pose to the climate (this applies especially to fossil fuels). Claimants thus addressed the common practice of greenwashing, a form of advertising where marketing and PR strategies are deceptively used to convince consumers that a company's products and aims are environmentally friendly.

## Shareholder litigation

When shareholders take legal action against the corporations, they hold shares in, typically argue that the lack of knowledge about climate risks prevents them from exercising their rights as shareholders or that (2) the company's misleading use of knowledge has harmed their interests as shareholders.

### EXAMPLE: RWE CASE

Peruvian farmer Saúl Luciano Lliuya filed a letter of complaint against RWE, a German energy company over the impact of its activities on climate change. He argued that his home in Huaraz, on the flood path of Palcacocha Lake, was threatened by the imminent collapse of two glaciers as an effect of global warming. If the glaciers collapsed into the lake, this would cause major flooding. The farmer accused RWE as a major emitter of greenhouse gases, which are causing glacial retreat, which also increased the risk of flooding in the area around the lake. The claimant demanded RWE to pay £14,250 in damages for its contribution to global warming. This amounts to 0.47% of the estimated repair cost in case of flooding since research estimates that RWE is responsible for 0.47% of global warming emissions from 1751 to 2010. The compensation would be invested in prevention measurements against flooding in the area.

RWE rejected the plaintiff's letter of complaint maintaining that the claims lack a legal basis and the company is therefore not responsible. As a consequence, Lliuya filed a lawsuit against RWE in a German court. It was, however, dismissed because the judge found that the plaintiff had not established that RWE was legally responsible for protecting Huaraz from flooding. The farmer consequently filed an appeal. The case is ongoing.

## RIGHTS TO PROPER CLIMATE ADAPTATION

Such rights could be invoked based on the failure to adapt or on the impacts of adaptation derived from the positive obligation of the States to take the necessary measures to actively safeguard the rights at stake, incl. rights to life, health, to adequate food and housing, all of them possibly impacted negatively by the failure to take necessary adaptation measures.

These rights could be linked also to the wider scope of protection of human rights like they were interpreted by the U.N. Human Rights Committee in the landmark decision in *Daniel Billy and others v Australia*, holding that Australia is violating its human rights obligations to the indigenous Torres Strait Islanders through climate change inaction. The indigenous group challenged Australia's lack of mitigation and adaptation measures, and the Committee recognized that climate change has been currently impacting the claimants' daily lives. It held further that Australia's poor climate record is a violation of their right to family life and right to culture under the International Covenant on Civil and Political Rights .

Some governments and private parties have been undertaking various measures to adapt to the increasingly severe effects of climate change, while others even being aware of those changes and the foreseeable extreme weather events that climate change will bring have not taken actions to adapt or mitigate the risks. Courts are seeing cases challenging each—seeking compensation for adaptation efforts that caused harm or damaged property and seeking injunctive relief for failing to adapt in the face of known climate risks.

Resolution 41/21 on Human rights and climate change, adopted by the UN Human Rights Council on 12 July 2019 addresses the problem with climate adaptation and the burden it poses, particularly on developing countries, “expressing concern that countries lacking the resources to implement their adaptation plans and programmes of action and effective adaptation strategies may suffer from higher exposure to extreme weather events, in both rural and urban areas, particularly in developing countries”.

The obligations of the States to undertake adaptation measures are often prescribed by the law as requirements to prepare and implement strategic adaptation documents. For example, Spain has the National Plan for Adaptation to Climate Change in Spain (Art. 17 of the Law 7/2021, of May 20, on climate change and energy transition) and Bulgaria the National Climate Change Adaptation Strategy and Action Plan to 2030 (Art.9 of the Climate Change Mitigation Act (2014, as amended).

# THE PROCEDURAL RIGHTS AND CLIMATE CHANGE

The importance of procedural rights could not be exaggerated because, in order to claim and enjoy substantive rights, procedural rights provide opportunities to realise them. The procedural dimension of any field of law is essential to realise the substantive one. In terms of legal theory and political theory, entitling people to procedural rights means to enable them to reach the state authorities and institutions. Rights such as the right to information, the right to participation, the right to access judicial procedures are demonstrated by political and legal theory and practice to be essential to guarantee transparency and control of the state's power. Since their scope of application does not depend on a sector or area of law they could be employed in the access to information, decision-making or judicial proceedings also with relevance to climate change .

The existing new and emerging digital technologies provide new avenues for exercising of procedural climate rights and for enhancing the democratic climate governance through their abilities to collect and disseminate information. The procedural rights help to accelerate participation in decision-making and to facilitate administrative and judicial remedies regarding climate change. As a result, a transparent, participatory and accountable climate governance could follow the exercise of procedural environmental rights in the age of information.

Procedural rights include access to environmental information, participation in environmental decision-making and access to justice as defined normatively in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and respectively in the national laws across the UNECE regions, incl. all EU Member States which are Parties to the Convention, as well as the European Union. Art.1 of the Convention states its purpose: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.". It also recognises the substantive right to an adequate environment and this right is recognised by both present and future generations. Such a right is the fundamental assumption and aim of both environmental and climate justice .

Art. 4 and 5 of the Convention refer to the access to, collection and dissemination of environmental information, Art. 6-8 deal with public participation in decisions on specific

activities; concerning plans, programmes, and policies relating to the environment; and public participation during preparation of executive regulations and/or generally applicable legally binding normative instruments, and Art. 9 of the Convention concerns access to justice.

The provisions guaranteeing access to information, and publishing and disseminating information could lead to increased transparency, opportunity to control authorities' activities, and improved legitimacy of decisions and actions. In addition, they allow citizens and NGOs to critically analyse acts of the authorities and potentially to act to prevent measures that are considered unjust or unfair .

Public participation could be a powerful procedural right as a tool to impact the decisions of public administration, comment on relevant online consultation platforms and/or participate in the decision-making processes relevant for climate change demanding actions or preventing backsliding on ambitious climate commitments in case the political and economic circumstances change. Public participation in the information era is reducing the costs of participation but could lead to exclusion of certain social groups less advanced in technologies to impact climate policy issues.

Access to justice is another procedural right with potential for defending substantial climate rights before an independent and impartial court and providing remedies for those who suffer from the climate change impacts who could hold governments and businesses accountable. This is also a right which safeguards the other procedural rights of access to information and of participation.

Some of the provisions of the ECHR contain procedural rights. The European Court of Human Rights has interpreted positive obligations to protect against the risk of environmental damage into Articles 2 and 8 of the ECHR. These obligations also have procedural aspects. Authorities' procedural duties also follow from the freedom of expression and information of Article 10 of the ECHR, as well as the right to a fair trial in Article 6 of the ECHR. It is also worth mentioning that international climate cooperation has promoted procedural rights as key commitments in the fulfilment of climate agreements. For example, Article 12 of the Paris Agreement highlights the need of cooperation among the Parties in taking measures to enhance climate change public awareness, public participation and public access to information, recognizing the importance of these elements for strengthening climate action under the Agreement.

Based on the assumption that Articles 2 and/or 8 of the ECHR apply to the dangerous risks associated with climate change that provide for the positive obligations of the States under these provisions. In accordance with the ECtHR's practice, the positive obligation has both substantive and procedural elements.

ECHR Article 2(1), first sentence: Everyone's right to life shall be protected by law.

ECHR Article 8: Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The procedural element of the positive obligation entails that the ECtHR will review the decision-making process to ensure that sufficient emphasis has been placed on the interests of individuals. The requirements made for the decision-making process are preventive by their nature, and have three components:

the State must conduct the necessary reports and studies "in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights"

information from such reports and studies must be publicly available so that the citizens are able to assess in advance "the danger to which they are exposed";

the citizens must be able to attack the validity of any decision, action or omission at any stage of the process.

## **THE PROCEDURAL RIGHTS IN THE CONTEXT OF ENVIRONMENTAL ASSESSMENT PROCEDURES (E.G. RESULTING FROM EIA AND SEA DIRECTIVES) RELEVANT FOR CLIMATE CHANGE**

According to the UNEP Global Climate Litigation Report "courts are considering cases that challenge specific resource-extraction and resource-dependent projects and that challenge environmental permitting and review processes that plaintiffs allege overlook the projects' climate change implications." In this respect, the procedural rights provided in the EIA Directive

ensure involvement of the public in protecting the environment, incl. the climate, from the harmful impacts of certain projects. The EIA assesses the direct and indirect significant impact of a project based on a wide range of environmental factors, incl. on climate. The EIA Directive provides for ensuring the effective participation of the public concerned in the decision-making procedures (para.6 (b) of Directive 2014/52/EU amending Directive 2011/92/EU) and requires taking into account results of the public participation in decision to grant a development consent, incl. the summary of the results of the consultations and how those results have been incorporated (para.10 of Directive 2014/52/EU).

## The EIA Directive

The nexus of human rights (e.g., right to life and health) and climate change aspects is also projected in the EIA procedures. Art. 3 (1) of the Directive states that “the environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

population and human health;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape.

In Annex III, among the selection criteria referred to in Art. 4(3) (Criteria to determine whether the projects listed in Annex II should be subject to Environmental Impact Assessment), references to climate change are listed:

### Characteristics of projects

The characteristics of projects must be considered, with particular regard to:

(f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;

(g) the risks to human health (for example due to water contamination or air pollution).

In Annex IV Information referred to in Art. 5(1) (Information for the Environmental Impact Assessment Report) climate change is mentioned:

4. A description of the factors specified in Article 3(1) likely to be significantly affected by the project: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example

hydro morphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.

5. A description of the likely significant effects of the project on the environment resulting from, inter alia:

(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change.

## Human rights and climate aspects in the SEA Directive

The Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) has the objective to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment. The Directive sets out a procedure that must be undertaken when assessing plans or programmes which further set a framework for future development consent of projects listed in Annex I and II to the EIA Directive.

The Directive does not contain specific references to climate change e.g., in assessing the impact of the plans or programmes (PP) on climate or of the vulnerability of the PP to climate change (as it is in EIA), however, it requires that the SEA report should take into account the information about the likely significant effects of PP on human health and climatic factors.

According to Art. 5 (1) of the SEA Directive, a SEA environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

In ANNEX I the information to be provided under Article 5(1), subject to Article 5(2) and (3) , is the following:

(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural

heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

Annex II Criteria for determining the likely significance of effects referred to in Article 3(5)

2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to:

the risks to human health or the environment (e.g., due to accidents)

In April 2022, the Chilean Supreme Court ruled that climate change should be considered in environmental assessment in Mejillones Tourist Service Association and others with the Environmental Evaluation Service (SEA) of Antofagasta. The Supreme Court held that the environmental impact assessment (EIA) must include climate change impacts in the review process of the project's environmental permit .

## Climate litigation classification

Recent global studies and reports have shown a growing number of climate cases. An UNEP report identifies the following trends in climate change litigation: (1) climate rights; (2) domestic enforcement; (3) keeping fossil fuels in the ground; (4) corporate liability and responsibility; (5) failure to adapt and the impacts of adaptation; and/or (6) climate disclosures and greenwashing.

The UNEP report observes that recent years have seen an increase in the number and success of actions that assert that insufficient action to mitigate climate change violates plaintiffs' international and constitutional rights to life, health, food, water, liberty, family life, and more—a category of cases it refers to as “climate rights” cases. The report presents a common set of issues that pervades climate cases that include questions about who the appropriate party is to bring the case, what source of climate-related rights or obligations is implicated by the harms they experienced, and whether the tribunal to which they bring their claim is equipped to provide a remedy.

## Standing in court

In *Juliana vs. United States* , 21 youth plaintiffs filed their constitutional lawsuit in 2015 against the U.S. government asking it to develop a plan to phase out fossil fuel emissions and stabilise



the climate system to protect vital resources upon which the plaintiffs depend. They argued that the climate system is critical to their constitutional rights to life, liberty, and property; that the government violated plaintiffs' rights by allowing fossil fuel production, consumption, and combustion at dangerous levels ; and that the government failed to maintain the integrity of public trust resources within the sovereign's jurisdiction for present and future generations. The plaintiffs asked the court to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilise the climate system." The trial court agreed that plaintiffs had standing and could proceed to the substance of their claims. On appeal of that decision, however, a 2-1 majority of the appellate court concluded that plaintiffs did not have standing because they could not show a decision in their favour would remedy their harm. Even accepting that "[t]he record leaves little basis for denying that climate change is occurring at an increasingly rapid pace," and that "[t]he government affirmatively promotes fossil fuel use in a host of ways," the majority expressed scepticism about whether halting U.S. policies promoting fossil fuel use would actually help heal plaintiffs' injuries.

Further, the majority went on to conclude that it lacked the power to grant the relief plaintiffs sought, since doing so would require "a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."

In contrast, the dissenting judge wrote that even a small step toward slowing climate change would help, and plaintiffs could therefore pursue their claim: "The majority portrays any relief we can offer as just a drop in the bucket. . . . But we are perilously close to an overflowing bucket. These final drops matter. A lot." In concluding that the court has a duty to remedy a constitutional harm, the dissenting judge pointed out that courts are often compelled to "fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that [they] instruct the other branches as to the constitutional limitations on their power." UNEP. 2020. Global Climate Litigation Report. 2020 Status Review.

## Statutory or policy causes of action

In many jurisdictions, statutes or national policies have codified climate change obligations for private and public actors, providing a basis for legal actions disputing those obligations' legality, applicability, or implementation. The specific contours of the rights and obligations codified vary significantly across jurisdictions, but statutory causes of action are, by far, the most frequently cited bases for climate litigation.

## Constitutional and human rights

The number of actions that assert that climate inaction violates constitutional and human rights has increased in recent years. Yet, these cases are quantitatively a small proportion of all climate litigation—of nearly 1,600 cases in the Sabin Center’s database, just over 100 are based on constitutional and human rights, and the public trust doctrine.

## Common law/tort theories

In common law jurisdictions plaintiffs have brought actions alleging a government or private actor that contributes to climate change is committing a tort, causing a nuisance, or (particularly where parties have instead failed to act) behaving negligently. Litigation addressing failures to adapt is likely to increase in the coming years, and negligence is a key premise for such suits. As these cases become more frequent, they may become even more common than climate rights cases, though their impact will depend on the scope of remedies courts award. It is important to note that even though the causes of action differ slightly, plaintiffs may have success with comparable claims in civil law jurisdictions. In *Urgenda*, for example, the court recognized that the government owes a duty of care to its citizens under the Dutch code, and that duty was the basis for the *Urgenda* decision. (UNEP (2020) Climate litigation report)

## Domestic enforcement

National and subnational governments articulate commitments to climate change mitigation and adaptation through international agreements, legislation, regulation, and policy statements. As they do, those governments and their agencies become vulnerable to a variety of legal actions challenging either the commitments being made or how those commitments are (or are not) being put into practice. Although governments are the most common defendants in litigation challenging mitigation and adaptation commitments, analogous suits have been brought against corporations and other institutions for failing to meet their own stated climate change goals.

Several more recently filed cases argue that governments have not undertaken sufficiently ambitious national climate mitigation actions in relation to existing legislative and policy commitments. For example, in *Friends of the Irish Environment CLG v. Gov't of Ireland*, plaintiffs brought an action arguing that Ireland's National Mitigation Plan is inconsistent with the Climate Action and Low Carbon Development Act (the 2015 Act) and rights protected by the European Convention on Human Rights and the Irish Constitution. The lower court denied plaintiffs' claim, but in a ruling on 31 July 2020 the Supreme Court of Ireland quashed the plan. The court noted that the plan fell "well short of the level of specificity required to . . . comply with the provisions of the 2015 Act," and rejected the government's argument that by vacating the plan, the court ventured into policymaking, adding that "[w]hat might once have been policy has become law by virtue of the enactment of the 2015 Act."

## Keeping fossil fuels – and carbon sinks – in the ground

Courts are considering cases that challenge specific resource-extraction and resource-dependent projects and that challenge environmental permitting and review processes that plaintiffs allege overlook the projects' climate change implications. All of these cases cite both the long-term, global effect of investing in projects that will produce consumable fossil fuels and the local impacts on water, land use, and air quality associated with mining and drilling activities. Increasingly, these cases allege that proper consideration of a project's impacts should include the extent to which the project facilitates fossil fuel consumption elsewhere in the world and for an extended period into the future. Many of the cases in this category are partially or entirely premised on environmental impact assessment (EIA) and similar planning requirements. These cases often, but not always, challenge project permitting and approval decisions for failing to take climate impacts into account as part of required environmental reviews.

## Corporate liability and responsibility

Despite broad consensus about the nature, seriousness, and causes of climate change, defining the precise causal relationship between a particular source of emissions and individualised climate change harms remains a challenge for litigants. Some key cases have exemplified the problems with legal actions of this kind because the plaintiffs had not yet

successfully established that particular emitters were the proximate cause of the plaintiff's specific injuries, and further noted leading U.S. cases in which courts did not reach the substance of the plaintiffs' claims.

In the U.S., more than a dozen cases are pending against fossil fuel producers seeking to hold them responsible for a share of climate change's impacts. Earlier cases established precedent that plaintiffs cannot pursue common law actions under federal law; as a consequence, plaintiffs have brought claims under state laws in numerous jurisdictions. These include claims that defendant companies are liable for public nuisance due to their production and marketing of fossil fuels, and that the companies are liable for failure to warn the public and consumers about the foreseeable harms their products cause.

Other cases focus on GHG emitters, rather than fossil fuel companies. In *Smith v. Fronterra Co-Operative Group Limited*, the plaintiff sued several major greenhouse-gas emitting facilities in New Zealand, alleging that their emissions amount to a public nuisance, negligence, and breached an inchoate duty to cease contributing to climate change.

## Failure to adapt and impacts of adaptation

Governments and private entities have developed and implemented a variety of measures to adapt to the increasingly severe effects of climate change, but many others, even facing or anticipating extreme weather events that climate change could bring, have not actively undertaken actions to prepare and address the risks and consequences. Courts are seeing cases challenging each—seeking compensation for adaptation efforts that caused harm or damaged property and seeking injunctive relief for failing to adapt in the face of known climate risks. Newer cases against governments have alleged that the governments ignored climate change risk. Indeed, an increasing number of cases challenge environmental impact assessments and planning and permitting decisions for built infrastructure and natural resources management on the basis that governments have failed to adequately account for climate change.

There has also been an increase in lawsuits claiming that government steps to address that risk have harmed or will harm plaintiffs. In *Ambuja Cement v. Rajasthan Electricity Regulatory Commission*, a group of manufacturers challenged commission rules requiring them to purchase some of their power from renewable sources or pay a surcharge for failing to do so. The manufacturers, each of which established their own generation plants to meet their power

needs, argued that they should not be subject to any renewable power purchase obligations under generally applicable energy laws, and that regulations purporting to create that obligation are inconsistent with India's Constitution, Electricity Act of 2003, and National Electricity Policy. The court upheld the regulations citing, among other purposes, their "long lasting impact in protecting [the] environment." The decision was later upheld by the Indian Supreme Court.

There are cases challenging private parties' inaction on physical risk, as well as cases seeking to hold companies or asset managers liable, alleging that those managers' failures to adapt their investment strategies caused financial harm. In a case targeting corporate investment in fossil fuel infrastructure, *ClientEarth v. Enea*, an environmental organisation sued a Polish utility seeking annulment of a resolution consenting to construction of a coal-fired power plant. The plaintiff argued that the investment would harm the economic interests of the company as a result of climate-related financial risks, including rising carbon prices, increased competition from cheaper renewables, and the impact of EU energy reforms on state subsidies for coal power under the capacity market.

## Climate disclosures and greenwashing

As public information about the nature, causes, and impacts of climate change has become increasingly available and well understood, plaintiffs have brought actions challenging what they allege are misleading corporate statements about climate change. These actions involve plaintiffs bringing suits claiming they relied on those statements to make financial decisions, as well as cases brought by governments enforcing securities disclosure and consumer protection laws, and NGOs challenging alleged "greenwashing" campaigns.

E.g., investors have filed suit alleging that public disclosures relating to climate risk were misleading or fraudulent, both in relation to the risk that a transition away from fossil fuels poses to their business or investment assets and the risk of physical impacts to infrastructure, operations and supply chains associated with climate change. In *City of Birmingham Retirement and Relief System v. Tillerson*, stockholders filed a suit against Exxon claiming that the company had misled stockholders about climate-related risks to its business. The plaintiffs allege both that Exxon knew but failed to disclose the "catastrophic risk that climate change presents to its business," and that the company actively engaged in a misinformation campaign to muddy its own scientists' conclusions about climate change.

On the physical risk side, in York County v. Rambo bond investors allege that the utility Pacific Gas and Electric Company (PG&E) stated in offering documents for more than \$4 billion worth of bonds that the utility had taken appropriate precautions to address climate change risks, including wildfire risks, but failed to disclose “the heightened risk caused by PG&E’s own conduct and failure to comply with applicable regulations governing the maintenance of electrical lines, and the hundreds of fires that were already being ignited annually by the Company’s equipment.”

## TRENDS AND CATEGORIES OF CLIMATE CASES

The litigation has expanded the content of traditional categories of legal claims and causes of action and the circumstances in which these categories of claims and causes of action are applied. The first and most important category is the expansion of the right to life or right to dignity to include a right to a clean and healthy environment capable of sustaining a quality life. The second category is the expansion of the right not to be deprived of life, liberty or property without due process of law to include a substantive right to a stable climate. The third category is the expansion of the communal natural resources held under public trust to include the atmosphere and the expansion of the government’s fiduciary duties to include the duty to protect the atmosphere from climate change. In these ways, climate change litigation is leading to an evolution in rights-based litigation. Rights-based climate change litigation is also having a globalisation effect. Claims and arguments made in one jurisdiction are being adapted and applied in other jurisdictions. There is a geographical spreading of rights-based climate change litigation.

# The Evolving Role of Environmental Rights in Climate Change Litigation

## Country examples

### Austria

#### HUMAN RIGHTS

Unfortunately, Austrian constitutional law does not contain a right to a healthy environment. The only constitutional provision that explicitly relates to the environment is § 3 Federal Constitutional Law on Sustainability that states that “the Republic of Austria is committed to comprehensive environmental protection. Comprehensive environmental protection is the preservation of the natural environment as the basis of human life against harmful effects. Comprehensive environmental protection consists in particular of measures to keep the air, water and soil clean and to avoid disturbance by noise.” However, according to unanimous opinion, no individual rights can be derived from this provision. The legislator must observe the so-called state objective provision when enacting laws. However, due to the lawmaker’s great leeway in legislation, it is rarely possible to assert a violation of this state objective provision before the Constitutional Court.

Austria, on the other hand, is the only European state in which the ECHR has direct constitutional status and the ECHR is the main national catalogue of fundamental rights since the national constitutional law doesn't contain many. In Austria, the ECHR is part of the constitution and thus not only applicable, but also takes precedence over all other ordinary law. Individuals can therefore directly invoke the rights of the ECHR. The case law of the ECtHR is therefore of great importance for the case law of the Constitutional Court and it can be assumed that rights that have already been successfully asserted before the ECtHR as climate rights could also be asserted before the Constitutional Court. An attempt to do so happened with the first Austrian climate litigation case in 2020, which unfortunately failed due to the admissibility requirements. Another case was recently brought before the constitutional court based upon the Federal Constitutional Law on the Rights of the Child. The almost ineffective Climate

Protection Act of 2011 violates these children's rights. Due to serious shortcomings, it does not lead to a decrease in greenhouse gas emissions and is not able to protect children from the life-threatening consequences of the climate crisis. Thus, the Climate Protection Act is unconstitutional, the children argue.

Unfortunately, the admissibility requirements of the Constitutional Court are quite restrictive, so even though it is to be assumed that some human rights could be materially instrumentalized as climate rights, it is difficult to obtain a substantive decision as climate claims are often dismissed as inadmissible. This is why no Austrian jurisprudence exists so far on the use of human rights as climate rights. Some scholars thus doubt if article 13 of the ECHR is implemented correctly, since there is - in some cases - no way to invoke human rights in relation to climate change.

## **AARHUS RIGHTS**

Access to information in environmental matters, in the sense of the Aarhus Convention, is ensured with the Environmental Information Act. It enables persons to obtain information on the environment within the meaning of Art 2 para 3 of the Aarhus Convention. If the authority is unable to provide the information, it must issue a negative decision on the application, which can be contested on appeal. Unfortunately, these regulations are not always respected by the authorities, or they default or only release heavily redacted documents.

With regard to access to justice in the sense of the Aarhus Convention, this is unfortunately implemented only sluggishly. Environmental law is a cross-sectional matter and the protection of environmental goods such as forests, water, air, biodiversity, etc. is spread across a large number of federal and state laws. Access to justice, especially for CSOs, is really only implemented in the specific laws when a decision of the CJEU forces the Austrian legislator to do so. Since 2010, proceedings have been ongoing before the ACCC due to the inadequate implementation of the Aarhus Convention.

## **NATIONAL IMPLEMENTATION OF CLIMATE LAWS**

Austria has both signed the Paris Agreement and is - as a member state of the European Union - obligated to implement the European Effort Sharing Regulation. However, the emission limits in the Austrian Climate Protection Act have not been adapted since 2011. While this is a clear violation of international obligations, it is difficult to assert this violation before the national



courts. Even if a claim was declared admissible before the Constitutional Court, it is only entitled to repeal existing laws. In the case of omissions, this is obviously very difficult. Thus, if the lawmaker does not take climate action at all, there is a clear deficit in legal protection for individuals.

## Bulgaria

It seems like a justified approach to begin the study of climate rights with the disclosure of the substantial and procedural rights according to the current regulations related to climate change, with the possibility of a more precise classification later.

### INTRODUCTION

Climate change is the subject of legal regulation in Bulgaria in fulfilment of the obligations assumed by international legal acts and EU law. Amendments have been made to existing provisions of the Environmental Protection Act (EPA) and new legislation has been adopted such as the Climate Change Mitigation Act (2014) and the Carbon Dioxide Storage Act (2012). These Acts regulate specific rules such as trading of greenhouse gas emissions or the conditions for the construction of carbon dioxide storage facilities, but they do not have the importance of an overall legal framework and do not provide for specialization by subject in deviation from the already existing environmental rights of citizens.

### FUNDAMENTAL RIGHTS ENSHRINED IN THE NATIONAL CONSTITUTION

The right to a healthy and favourable environment is recognized as a fundamental right of citizens according to Art. 55 of the Bulgarian Constitution: "Art. 55. Citizens have the right to a healthy and favourable environment in accordance with established standards and regulations. They have a duty to protect the environment."

The legal guarantees for the realization of this right are related to the possibility of citizens to demand from the state to ensure compliance with the established norms and standards, including by imposing their implementation by third parties, by means of measures to bear administrative or other types of responsibility in case of non-compliance.

## **RIGHTS OF THE PUBLIC CONCERNED**

The fundamental right to a healthy and favourable environment, as well as rights in national laws, are regulated as subjective rights of citizens (anthropocentric approach). Pursuant to paragraph 1, items 24 and 25 of the Supplementary Provisions of the Environmental Protection Act, the legal standing of the public concerned, including environmental organizations, is recognized in environmental matters, including compliance with regimes for the natural protection of territories, waters or biodiversity, regardless of the existence of direct legal interest of the legal entity.

## **DOMESTIC ENFORCEMENT OF CLIMATE GOALS**

The domestic enforcement of climate goals is conditioned by the common goals, stages and means for the climate change mitigation and adaptation agreed at the EU level. The determination of the specific measures to achieve them remains within the scope of the strategic planning provided for by law - National Climate Change Action Plan, National Adaptation Strategy and Action Plan to it, Recovery and Resilience Plan (RRP), as well as territorial schemes. A very recent development in this respect should be noted. At the moment, by a Decision of the National Assembly of 12.01.2023 (SG, No. 6/2023), the Council of Ministers is obliged to undertake a review of the RRP in the part of energy decarbonization measures.

## **CORPORATE SOCIAL RESPONSIBILITY AND LIABILITY**

The requirements for the publication of non-financial information are subject to the Accounting Act, transposing the requirements of the Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

## **PROCEDURAL RIGHTS – CLIMATE CONSIDERATIONS IN EIA, SEA AND OTHER ASSESSMENTS**

With the amendment of the EPA of 2022, for the purposes of determining the significance of the impact of the plan/program in view of the assessment of the competent authority for carrying out environmental assessment, among the selective criteria of Art. 85(4), item 4 was added,

with which both, the impact on and the vulnerability of the plan or program to climate change are explicitly indicated as a criterion:

"Art. 85. (4) The Minister of the Environment and Waters or the director of the relevant RIEW assesses with a decision the necessity of the environmental assessment for a proposed plan and program or for their amendment according to the procedure determined by the regulation under Art. 90, according to the following criteria for determining the significance of their impact:

4. (new - SG No. 42 of 2022, in force from 07.06.2022) the impact of the plan or program on the climate and the vulnerability of the plan or program to climate change."

## Spain

Below you could find a very general analysis of the rights that could be categorised as "climate rights" under Spain's legal order.

Right to a healthy environment - guiding principle for social and economic policy under art.45 of the Spanish Constitution.

"1. Everyone has the right to enjoy an environment fit for the development of the individual and the duty to preserve it.

2. The public authorities shall ensure the rational use of all natural resources in order to protect and improve the quality of life and to defend and restore the environment, relying on the indispensable collective solidarity."

Fundamental rights to life, health, housing and water sanitation - recognized under Spanish Constitution.

Aarhus rights recognized under Spanish Law 27/2006 incorporating the Aarhus Convention obligations - rights on access to environmental information, public participation, and access to justice in environmental matters.

In May 2021 Spain enacted its first law on climate change and energy transition, which contains several provisions relevant for the purpose of the recognition of climate rights. See below some examples:

The climate rights derived from binding climate mitigation targets for 2030 and 2050, and adaptation commitments adopted under Spanish Climate Change Law and developed in its NECP (2021-2030) and the 2030 Spain's Climate Adaptation Plan. The implementation of the

climate law must be done in line with a list of guiding principles relevant for this purpose, including:

a) Sustainable development, b) Decarbonization of the Spanish economy, understood as the achievement of a socio-economic model without greenhouse gas emissions, c) Environmental protection, preservation of biodiversity, and application of the "polluter pays" principle, f) Protection and promotion of public health, g) Universal accessibility, i) Equality between women and men, n) Quality and security of energy supply, l) Non-regression and, h) Protection of vulnerable groups, with special consideration for children, among others.

The Spanish climate law also includes specific legal provisions linking climate change with the protection of other relevant rights such as:

Public health (Art.23):

Article 23. Consideration of climate change in public health.

1. Public Administrations shall encourage the improvement of knowledge on the effects of climate change on public health and on initiatives aimed at its prevention.
2. Furthermore, within the framework of the National Plan for Adaptation to Climate Change, the specific strategic objectives, associated indicators and adaptation measures aimed at reducing or avoiding the risks to public health associated with climate change, including emerging risks, shall be designed and included.

Food security (Art.22):

Article 22. Consideration of climate change in food security and diet.

1. The Public Administrations shall encourage the improvement of knowledge on the effects of climate change on food security and diet, as well as the design of actions aimed at mitigating and adapting to them.
2. Specific strategic objectives, associated indicators and adaptation measures aimed at mitigating the food security risks associated with climate change, including the appearance of emerging food risks, shall be designed and included in the National Plan for Adaptation to Climate Change.
3. With the aim of increasing resilience, while reducing the carbon footprint and promoting quality food, in the specific administrative clause specifications corresponding to public contracts whose purpose is to provide services requiring the purchase of food, when these contracts are to be entered into by the General State Administration, and by the bodies and

entities dependent on or linked to the same, special performance conditions may be established that give priority to fresh or seasonal food, and with a short distribution cycle, provided that this is in accordance with the provisions of Article 202 of Law 9/2017, of 8 November, on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014 and with Community law.

Just transition and employment rights (Arts. 27-29):

Article 27. Just Transition Strategy.

1. The Just Transition Strategy constitutes the state-level instrument aimed at optimising opportunities in activity and employment in the transition to an economy low in greenhouse gas emissions and at identifying and adopting measures that guarantee equitable and supportive treatment for workers and territories in this transition. Every five years, the Government will approve, by means of a Council of Ministers Agreement, Just Transition Strategies, at the joint proposal of the Ministers for Ecological Transition and the Demographic Challenge; of Employment and the Social Economy; of Industry, Trade and Tourism; of Agriculture, Fisheries and Food; of Transport, Mobility and the Urban Agenda; and of Science and Innovation, with the participation of the Autonomous Communities and the social agents. (...)

Article 28. Just Transition Agreements.

1. Just Transition Agreements shall be concluded within the framework of the Just Transition Strategy with the aim of promoting economic activity and its modernisation, as well as the employability of vulnerable workers and groups at risk of exclusion in the transition to a low carbon economy, in particular in cases of closure or conversion of installations.

Education and social awareness (Art.35):

Article 35. Climate change education and training.

1. The Spanish education system shall promote the involvement of Spanish society in responses to climate change, reinforcing knowledge about climate change and its implications, training for low-carbon and climate-resilient technical and professional activity and the acquisition of the necessary personal and social responsibility.

2. The Government shall review the treatment of climate change and sustainability in the basic curriculum of the teachings that form part of the Education System in a cross-cutting manner, including the necessary elements to make education for sustainable development a reality. Likewise, the Government, within the scope of its powers, shall promote actions to guarantee adequate teacher training in this area.

Public participation rights on climate action (Art.39):

Article 39. Public participation.

1. The plans, programmes, strategies, instruments and provisions of a general nature adopted in the fight against climate change and the energy transition towards a low-carbon economy shall be carried out under open formulas and accessible channels that guarantee the participation of the social and economic agents concerned and of the public in general, through the channels of communication, information and dissemination, under the terms provided for in Act 27/2006, of 18 July, regulating the rights of access to information, public participation and access to justice in environmental matters. For the preparation of these, and without prejudice to other formulas for participation and deliberation, the Government will reinforce the already existing participation mechanisms and will guarantee in a structured manner citizen participation in the decision-making process on climate change through the establishment of a Citizen Assembly on Climate Change at the national level and will recommend the establishment of regional assemblies and municipal assemblies. (...)

Access to information rights regarding climate risks from financial institutions, and climate mitigation plans adopted by certain companies and publicly available (art. 32 and Twelfth Final Provision):

Twelfth final provision. Carbon footprint and greenhouse gas emission reduction plans of companies.

1. The Government, following agreement by the Government Delegate Commission for Economic Affairs, shall establish, within a period of one year from the entry into force of this Act, the type of companies operating in the national territory that must calculate and publish their carbon footprint, as well as the initial terms from which this obligation shall be enforceable, its periodicity and any other elements necessary for the configuration of the obligation.

2. Likewise, companies which, in accordance with the provisions of the previous section, are obliged to calculate their carbon footprint, must draw up and publish a plan for the reduction of greenhouse gas emissions.

## Contact information

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