CURRENT CHALLENGES OF CLIMATE CHANGE LITIGATION IN EUROPE WITH SPECIAL REGARD TO HUMAN RIGHTS CONCERNS

Enikő Krajnyák*

1. Introduction

The adverse effects of climate change gave a rise to a growing number of climate litigation cases all over the globe in the last few years. These cases tend to challenge inadequate state measures to combat climate change – as undertaken in the 2015 Paris Agreement – alleging the violation of human rights as well. Although there is no consensus on the recognition of a substantive right to a healthy environment at the moment, human rights bodies developed numerous ways through which an environmental perspective could prevail in their jurisprudence. Climate litigation cases, however, aim to push the boundaries of this human rights approach even further, by referring to the 'rights' of future generations, extending the scope of victims to the entirety of humankind, and challenging a systemic problem (i.e. climate change) instead of isolated individual cases, which rather seek to find a solution for a specific claim. The contribution attempts to give an overview of the currently evolving case law of climate litigation in the practice of national courts and human rights treaty bodies, with a special focus on the pending cases before the ECtHR.

* PhD student at the Ferenc Deák Doctoral School of Law, University of Miskolc; Scientific Researcher at the Central European Academy, Budapest; e-mail: eniko.krajnyak@centraleuropeanacademy.hu, ORCID: 0009-0003-2457-9491

2. The Legal Framework for Climate Change Litigation in International Law

2.1. The Paris Agreement – a Milestone in Combatting Climate Change

The Paris Agreement, adopted within the frames of the UNFCCC[1] at COP 21 in Paris on 12 December 2015, brought fundamental changes in the climate change legal regime. The Agreement introduced a flexible[2] and extensive bottom-up regime for climate change mitigation, integrating all nations in order to address mitigation, adaptation, loss and damage, finances, technology transfer and capacity-building.[3] In addition to the extensive scope of subject matters covered by the Agreement, its strength lies in its legal nature, i.e. that it is a legally binding instrument,[4] under which the Parties undertake ambitious obligations to mitigate climate change, which are: a) to hold the increase in the global average temperature to well below 2° above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5° above pre-industrial levels; b) to increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and c) to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.[5]

To this end, Parties prepare, communicate and maintain their Nationally Determined Contributions (NDCs), in which they describe the domestic efforts to meet their mitigation commitments for a five-year cycle.[6] The NDC reporting system reflects a bottom-up approach, which enables Parties to determine their

---

1 See: United Nations Framework Convention on Climate Change, UNFCCC, 1992.

2 Contrary to the former approach that characterized the Kyoto Protocol, which differentiated between Annex A and Annex B Parties according to their responsibility and obligations, the Paris Agreement does not provide such a distinction but requires each Party to contribute to the achievement of the goals in its own preferred way. See: Kyoto Protocol to the UNFCCC, 1997.

3 Meinhard Doelle: The Paris Agreement: Historic Breakthrough or High Stakes Experiment? *Climate Law*, Iss. 6/1–2, 2016. 2.

4 Daniel Bodansky: The Paris Climate Change Agreement: A New Hope? *The American Journal of International Law*, Vol. 110, Iss. 2, 2016. 288–319. On the legal nature of the Paris Agreement, see: Sebastian Oberthür – Ralph Bodle: Legal Form and Nature of the Paris Outcome. *Climate Law*, Iss. 6/1–2, 2016. 40–57.

5 Paris Agreement, 2015, Article 2(1).

6 Paris Agreement, 2015, Articles 3–6. For an analysis on the compliance mechanism of the Paris Agreement, see: Alexander Zahar: A Bottom-Up Compliance Mechanism for the Paris Agreement. *Chinese Journal of Environmental Law*, Vol. 1, Iss. 1, 2017. 69–98.

own mitigation goals in light of the specificities of the given countries. The bottom-up approach is considered to be a significant step forward in climate mitigation and serves as an alternative to the top-down approach implemented by the 1997 Kyoto Protocol, whereby targets are imposed from above in the treaty.[7] NDCs also allow Parties to 'contribute' to the realization of the goals by themselves rather than merely complying with obligatory undertakings set out in a treaty. Owing to the paradigm shift offered by the Paris Agreement, the document is considered a historic breakthrough in the international climate change regime,[8] which also provides a starting point for the rise of climate litigation cases and the evolvement of climate change jurisdiction.

2.2. Human Rights and Climate Change – a Special Focus on Rights-Based Litigation

While the fact that climate change severely impacts various human rights issues – e.g. the right to life, self-determination, development, food, health, water, sanitation and housing[9] –, the first explicit mention of human rights in an international environmental agreement appeared only in 2015 in the Paris Agreement.[10] The statement that *"Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights"*[11] is declared in the preamble, which somewhat questions the

[7] Laurence Boisson de Chazurnes: Editorial on Paris Agreement. *European Journal of International Law*, Vol. 27, Iss. 2, 2017. 253–254.; 253–256.

[8] Doelle op. cit. 20. It shall also be noted that the Paris Agreement has also been criticised mainly for two reasons. First, while it is generally accepted that the legal nature of NDCs is binding, the achievement of the targets set out in them is not explicitly provided, which may render the process of climate change mitigation less effective. See: Benoit Mayer: International Law Obligations Arising in relation to Nationally Determined Contributions. *Transnational Environmental Law*, Vol. 7, Iss. 2, 2018. 251–275. Second, in addition to States and individuals, non-state actors, especially multinational companies, also have a huge impact on generating climate change and the Paris Agreement does not seem to address them proportionately with their role. For a proposal on the formalized engagement of non-state actors in climate mitigation, see: Charlotte Streck: Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links between Transnational Partnerships and Treaty Implementation. *Transnational Environmental Law*, Vol. 10, Iss. 3, 2021. 493–515.

[9] See: Human Rights Council Resolution 41/21 (A/HRC/RES/41/21), 2019.

[10] John H. Knox: The Paris Agreement as a Human Rights Treaty. In: Dapo Akande et al. (eds.): *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*. Oxford, Oxford University Press, 2018.

[11] Paris Agreement, recital 12.

effectivity of such a provision, given that it may not be capable of creating rights or obligations on its own. Yet, the preamble determines the interpretation of the operative provisions, meaning that Parties should recognize an obligation to comply with their respective human rights obligations when carrying out climate-change-related actions under the Paris Agreement.[12]

Recognizing the human rights implications of climate change is particularly important because it provides a chance for litigants to bring climate-related claims before human rights courts, which developed sophisticated mechanisms even for environmental issues.[13] Furthermore, international environmental law does not provide specific judicial forums where environmental claims could be raised – environment-related cases could be found in the practice of different international forums, such as the CJEU, the ICC, the ICJ, the ITLOS, the WTO dispute settlement bodies, arbitration tribunals and universal human rights forums.[14]

Therefore, the use of human rights law as a 'gap-filler' to provide remedies where other areas of law do not, is increasing in climate change lawsuits.[15]

3. Climate Change Litigation – Possibilities and Prospects

3.1. A Brief Introduction to Climate Change Litigation

Climate change litigation provides a means to enforce climate commitments and hold states and non-state actors liable for their share in contributing to the negative impacts of climate change.[16] However, climate cases constitute a comprehensive category, including strategic and non-strategic cases. The present study focuses on strategic climate litigation, given that the impacts of these cases are aimed at extending beyond the individual case and producing systemic changes by the consciously and carefully designed argumentation.

12 Benoit Mayer: Human Rights in the Paris Agreement. *Climate Law,* Iss. 6, 2016. 113–114.

13 Linda Hajjar Leib: *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*. Leiden, Brill, 2010. 1–3.

14 Raisz, Anikó: Az önálló nemzetközi környezetjogi bíráskodás létjogosultságáról. *Miskolci Jogi Szemle,* 12. évf. (klsz). 2017. 449–455.; 450–451.

15 Annalisa Savaresi – Juan Auz: Climate Change Litigation and Human Rights: Pushing the Boundaries. *Climate Law*, Iss. 9/3, 2019. 245–246.

16 See: Jacqueline Peel – Hari M. Osofsky: Climate Change Litigation. *Annual Review of Law and Social Science,* Vol. 16, Iss. 1, 2020.

On the other hand, non-strategic climate cases merely focus on the given legal problem and seek to find a solution thereof.

As pointed out above, the number of climate litigation cases is increasing since the adoption of the Paris Agreement,[17] which may enable the academia to draw some early conclusions about what makes a strategic climate case successful. Such characteristics encompass various aspects of the litigation: the plaintiffs and the defendants themselves, the legal argumentation, and the remedies sought.[18] The group of plaintiffs tends to be carefully selected, integrating different societal groups who are particularly vulnerable to the harmful consequences of climate change, such as women, elderly people, or young generations. Defendants, on the contrary, may include states or non-state actors who are generally considered responsible for their share in climate change. All States could be addressed on the basis of the commitments undertaken in international treaties, mainly in the Paris Agreement, while the role of developed States is even more accentuated in the climate change legal framework.[19] In the case of non-state actors (corporations), the claim of significantly contributing to climate change may also arise, although their liability for pollution may not be assessed on the basis of the Paris Agreement, given that the Parties to the Agreement are States.[20]

Strategic climate cases introduce innovative legal arguments, which are, inter alia, the use of human rights law and human rights tools to challenge environmental policies and to identify climate change as a factor that violates certain human rights. The vast majority of these cases refer to the goals undertaken in the Paris Agreement, which could not be classified as a human rights document. Nevertheless, the link between the protection of the environment and human rights, and the threat environmental harms may pose

---

17 Joana Setzer – Catherine Higham: *Global trends in climate litigation: 2021 snapshot*. London, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy – London School of Economics and Political Science, 2021. 10–11.

18 Jacqueline Peel – Rebekkah Markley-Towler: Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases. *German Law Journal*, Vol. 22, Iss. 8, 2021. 1486–1487.

19 See: UNFCCC, 1992, article 3(1). The concept of the Parties' 'fair share' of global GHG emissions – on the basis of the principle of equity – further emphasizes the importance for developed countries to take the lead in combating climate change. See: Lavanya Rajamani et. al.: National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law. *Climate Policy*, Vol. 21, Iss. 8, 2021.

20 It shall be noted, however, that the Paris Agreement recognizes the importance of various actors, including companies and investors according to the Lima-Paris Action Agenda adopted at COP20 in 2014.

to the enjoyment of human rights have been recognized in the practice of human rights courts, namely, the European Court of Human Rights (ECtHR) has a well-established case law in this field.[21] The Court, however, has not yet ruled on the issue of climate change and its impacts.

A further key point in analyzing climate litigation lies in the remedies put forward by the plaintiffs, which is inherent in the nature of strategic litigation: as mentioned before, these claims aim at producing systemic impacts in climate policy-making, namely to provide legislative action to reduce emission in line with the goal of limiting global warming to 1.5 °C according to the Paris Agreement.[22] Therefore, as one may conclude, the influence of these cases is expected to extend beyond the bounds of individuals who initiated the procedure but to the entirety of the citizens of the given State(s): in the ground-breaking case of *Urgenda*, for instance, the Supreme Court of the Netherlands ordered the Dutch state to limit greenhouse gas emissions to 25% below 1990 levels by 2020, finding the existing domestic pledge to reduce emissions by 17% insufficient within the frames of the Paris Agreement.[23] Therefore, the impact of this decision and the obligation arising thereof will certainly extend beyond the interest of the litigants.

3.2. Climate Litigation before the European Court of Human Rights – an Overview

As mentioned above, the ECtHR has not ruled on climate change-related cases before. However, at the time of the conclusion of the present study, there are several pending cases before the Court which are considered climate litigation: as of June 2023, three cases are pending before the Grand Chamber of the Court, namely, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Carême v. France, and Duarte Agostinho and Others v. 32 Other States; and at least

[21] Major decisions include Öneryildiz v. Turkey, Budayeva and Others v. Russia, López Ostra v. Spain, Guerra v. Italy. For a further analysis, see: Anikó Raisz – Enikő Krajnyák: Protection of the Environment in the European Human Rights Framework: A Central European Perspective. In: János Ede Szilágyi (ed.): *Constitutional Protection of the Environment and Future Generations – Legislation and Practice in Certain Central European Countries.* Budapest–Miskolc, Central European Academic Publishing, 2022. 73–125.

[22] Helen Keller – Corina Heri: The Future is Now: Climate Cases Before the ECtHR. *Nordic Journal of Human Rights*, Vol. 40, Iss. 1, 2022. 171–172.

[23] State of the Netherlands v. Urgenda Foundation, Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2006.

six cases were adjourned, including Uricchiov v. Italy and 31 Other States and De Conto v. Italy and 32 Other States, Müllner v. Austria, Greenpeace Nordic and Others v. Norway, The Norwegian Grandparents' Climate Campaign and Others v. Norway, Soubeste and four other applications v. Austria and 11 Other States, and Engels v. Germany. Furthermore, two cases have been declared inadmissible so far: Humane Being and Others v. the United Kingdom and Plan B. Earth and Others v. the United Kingdom.[24] This contribution focuses on the three cases pending before the Grand Chamber, given that the Chamber already had a procedural meeting in these cases, and the oral hearings are already scheduled for March 2023" helyett "the oral hearing was held on 29 March 2023 in two cases *(Verein KlimaSeniorinnen and Carême).* Thus, one may observe that these cases are at a later stage of evaluation and therefore, there is more information at one's disposal on the procession of these litigations.

The strategic nature of these cases could be observed in light of the general characteristics presented above. First, the plaintiffs in all these cases are carefully selected, given that they all represent different groups of society that are affected by climate change. In *Verein KlimaSeniorinnen*, the elderly female applicants argue that the heat waves resulting from climate change undermine their living conditions and contribute to the deterioration of their health.[25] The fact that women and elderly people are particularly vulnerable to climate change is also recognized by the preamble of the Paris Agreement, which expressly provides that *"Parties should, when taking action to address climate change, respect, promote and consider their respective obligations to 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 *Carême*, the applicant is a private person, who, as a mayor of the municipality of Grande-Synthe,[26] represents the whole community, including all age groups and genders living in the territory. The protection of local communities also appears expressis verbis in the above-cited recital of the Paris Agreement, thus, one may conclude that the applicant's choice to act in the name of the community could also be regarded as a strategic step.

---

24 See: Factsheet on Climate change, European Court of Human Rights, February 2023.

25 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (53600/20).

26 Carême v. France, 7189/21.

Furthermore, *Duarte Agostinho* – or the Portuguese Youth Climate Case – was initiated by six young people from Portugal, who argue that they will be more exposed to the negative impacts of climate change in the future than older generations.[27] The argumentation of youth-led cases, including this one, is based on the principle of intergenerational equity,[28] claiming that climate laws unlawfully prioritize present generations over future generations. The applicants' selection is certainly a strategic step[29] that may contribute to the success of climate cases: courts seem to be open to considering children as members of future generations, while they tend to be reluctant to recognize the rights of people not yet born and thus question the legal standing of future generations.[30]

The innovative nature of the legal arguments used in the analyzed cases is generally based on the same grounds: addressing States for their non-compliance with the undertakings of the Paris Agreement, and claiming the violation of their human rights recognized by the ECHR arising from the alleged insufficiency of state measures for climate change mitigation. Recognizing climate change as a threat to human rights, and extending the scope of practice of ECtHR to climate cases could be a challenge for the Court. Considering that the ECHR does not declare any environmental rights, nor does it have any disposition whatsoever on the environment, adjudication on climate change mitigation would certainly extend the scope of the Court's practice. Even though climate change litigation under human rights law seems an innovative and creative way to hold States liable for their climate policies, the human rights systems also have their limits: the liability of non-state actors, the protection of entire groups of society (young and elderly generations, women, etc.), and the question of extraterritoriality may pose serious challenges for the litigants.

Third, the remedies sought in these cases aim to produce a systemic impact that extends beyond the individual applicants. In *Verein KlimaSeniorinnen*, the applicants claim that their State did not respect the goals set out in the Paris Agreement and therefore, demand the correction of Swiss climate policy

---

27 Duarte Agostinho and Others v. Portugal and Others, 39371/20.

28 On the principle of intergenerational equity, see: Edith Brown Weiss: Climate Change, Intergenerational Equity, and International Law. *Vermont Journal of Environmental Law*, 2008/9. 615–627.

29 Peel – Markey-Towler op.cit. 1487–1488. Nincs előzmény!!

30 Donger 2022, op. cit. 272–274. Nincs előzmény!!Children were considered as part of future generations in the *Neubauer case* or the *Colombian Amazonas case*, while addressing the legal standing of future generations was avoided—for instance, in *Juliana v. the United States*.

to limit global warming to a safe level. If the Court decides in favor of the applicants, the expected impact on the State's climate policy would affect all people living in the country, especially taking into account the fact that their claims were rejected by the domestic instances at three levels of jurisdiction. In comparison to this, in the domestic proceedings of *Carême*, the Council of State ruled in favor of the applicant, ordering the French government to take additional measures in order to achieve the goal of reducing emissions according to the Paris Agreement. Nevertheless, the domestic forum failed to consider the interest of the applicant in the proceedings, thus, the ECtHR may recognize the victimhood of the applicant and the link between the violation of the right to private and family life and the insufficient government action.

In terms of remedies and the expected impact, *Duarte Agostinho* aims to reach even beyond: the applicants initiated the proceeding not only against their country but against 32 other countries,[31] who, according to the applicants, contribute the most to global warming and did not take sufficient mitigation measures. However, the high number of respondent states raises the questions of non-exhaustion and extraterritoriality.[32] The applicants did not make use of any domestic remedies, claiming that the exhaustion rule is ill-suited to climate claims, especially when children are concerned. On the one hand, the exhaustion of domestic remedies in all respondent states would undoubtedly decelerate the proceeding, which could represent an unreasonable impediment to such a time-sensitive issue as climate change. On the other hand, the recognition of this argumentation may shape future case law, and the Court shall consider the consequences of such a step, whether to provide a potential encouragement of such (more theoretical) cases in the future.

4. Concluding remarks

Climate ligation serves as a tool to address the negative impacts of climate change by the means of law. The present study focused on human-rights-based litigation, given that the case law of this field is rapidly evolving since the

[31] The case was brought against Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Denmark, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Switzerland, Sweden, Turkey, Ukraine and the United Kingdom. The case was also filed against Russia but its membership of the Council of Europe was terminated on 16 March 2022.

[32] See: Keller–Heri op. cit. 6–7.

adoption of the Paris Agreement. Climate litigation, however, poses serious legal challenges for the different human rights bodies, and the ECtHR is not an exception to this. It is indeed the first time that the Court was asked to rule on cases that could be classified as climate change litigation cases on the basis of their strategic nature, such as the composition of the applicants, the legal argumentation, and the remedies sought with the aim of providing a comprehensive solution for climate change mitigation.

However, the interpretation of the Court and human rights mechanisms, in general, may also have their limits, which lie in the strategic nature of these cases. Although the Court has dealt with such issues before (potential victimhood, extraterritoriality, non-exhaustion of remedies, etc.), these issues accumulate in climate cases. For this reason, the author argues that the evaluation of climate cases would require the development of a different approach from the Court, given that climate change requires immediate action, which should be taken into account in the assessment process.