

# Climate Litigation

## *Can a Sustainable Future be a Human Right?*

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*The last decade has seen an increase in the number, specificity and importance of laws codifying national and international responses to climate change. As these laws have recognised new rights and created new obligations, they have led to the initiation of lawsuits challenging either their effectiveness or their concrete application. The aim of these disputes is to force legislators and policy makers to take a more ambitious and thorough approach to climate change. In addition, litigation has continued to fill the gaps left by legislative and regulatory inaction. As a result, the courts are increasingly adjudicating disputes over actions – or inaction – in relation to climate change mitigation and adaptation efforts*

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### **Climate change: a growing international trend?**

Climate litigation is a heterogeneous umbrella term that refers to litigation on a variety of grounds, both in national and international fora, seeking to force the legislator to take missing or insufficiently ambitious mitigation measures, and to establish liability for climate change damages.<sup>2</sup>

### **The legal and regulatory framework for climate action: the “inverted pyramid” theory**

For the implementation of the UN Sustainable Development Goals<sup>3</sup> (SDGs) – and thus for understanding the regulatory system that provides the framework for the disputes that may arise in this area – it is useful to use the analogy of the “inverted pyramid”.

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2 OSOFSKY 2010: 134.

3 United Nations 2018.

## International level

The top level of the pyramid is international law. Treaty law plays a more important role in international environmental law than other areas. The legislators' aim was to create and adopt globally agreed rules that would apply to all states, but this seemed impossible to achieve because of the differences of interest between states.

The international (political) community, and the international law that provides the framework for the functioning of this community, provides guidance at global level through ambitious action plans, such as those established in the framework of various international organisations (e.g. the United Nations). However, for the reasons given above, these guidelines are often not legally binding. The best example of this in the present context is the adoption of the 2030 Sustainable Development Goals (SDGs) framework in a UN General Assembly resolution, which as such is not legally binding.<sup>4</sup> The question is, therefore, how to transform the set of ambitious documents at international level into legally relevant instruments for action.

To overcome regulatory difficulties, the framework convention has become a common regulatory technique in environmental regulation. Such framework conventions deal, for example, with transboundary air pollution, ozone-depleting substances and global warming. One such framework convention is the UN Framework Convention on Climate Change. The parties to these framework conventions enter into concrete and legally enforceable commitments in protocols. The commitments in these protocols are rich in technical detail, for example, they specify the date by which and the extent to which emissions of a pollutant must be reduced relative to emissions at a certain point in time as a baseline. An example is the Kyoto Protocol,<sup>5</sup> which committed signatory developed countries to reduce their greenhouse gas emissions in line with legally binding targets broken down by country. It is also important to mention the Paris Agreement,<sup>6</sup> an international agreement developed by the parties to the 1992 UN Framework Convention on Climate Change<sup>7</sup> in 2015, which is contemporaneous with (and partly influenced by) the SDGs.

## The regional level – the European Union

From the top down, the second level of the pyramid is the area of EU cooperation. The European Union is a very specific entity, as the EU acts as a “quasi-state” in certain areas defined in its founding treaties (e.g. trade policy, or even the single customs policy). The European Union is structured along different lines of competence under the founding treaties, so we can talk about Member States, the EU and shared

4 United Nations 2018.

5 United Nations 1998: 162.

6 United Nations 2016.

7 United Nations 1992.

competences. A review of the SDGs reveals a number of goals and objectives that bring this problem of competence to the surface. On the one hand, there is an expectation from international law to meet the targets, but on the other hand, looking at the steps needed to achieve the goals and targets through the lens of the EU legal system, it is clear that some of these competences are exclusively EU competences, while the rest are Member State competences. Referring to the three-dimensional model of sustainable development (economic, social and environmental objectives), it can be seen that, while the EU has somewhat more room for manoeuvre in the environmental field, the social field, for example, is essentially dominated by the Member States under the founding treaties, and thus consists of 27 almost completely independent and uncoordinated policies.

On the environmental dimension, the EU and all Member States have signed and ratified the Paris Agreement and are strongly committed to its implementation. In line with this commitment, EU Member States have agreed to set the EU on a path to become the first climate-neutral economy and society by 2050. The EU is leading the fight against climate change. Ambitious EU policies and actions will make the EU a global standard-setter and drive climate ambition worldwide. As required by the Paris Agreement, the EU has presented its long-term emission reduction strategy and updated climate policy plans before the end of 2020 and committed to reducing EU emissions by at least 55% below 1990 levels by 2030.

In terms of the legal framework for climate action at EU level, the European Green Deal<sup>8</sup> and the so-called “Fit for 55” package of proposals should therefore be examined in more detail. The former is a programme presented by the European Commission in December 2019 to promote resource efficiency, shift to a clean, circular economy, restore biodiversity and reduce pollution, among other things, while the latter is a comprehensive and coherent set of climate change proposals that, if implemented, will allow for a large reduction in greenhouse gas emissions over the next decade.

### *The European Green Deal*

On 11 December 2019, the European Commission published its Communication “A European Green Deal” to address climate and environmental challenges. The agreement’s guiding principle is to achieve climate neutrality in Europe by 2050, i.e. a net zero greenhouse gas emissions reduction. The Communication was followed and is being followed by a series of legislative actions (slightly modified in the light of the pandemic) on a pre-defined timetable covering a wide range of EU policies, including changes to climate targets, energy, transport, environment, agriculture and industrial policy. To achieve the objectives of the ENP, the Commission proposes new measures in eight policy areas. In addition to the new measures, the Commission

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8 European Commission 2021b.

will work with Member States to ensure compliance and implementation of existing legislation and policies.

### *Fit for 55%!*

The EU has set itself a binding target of achieving climate neutrality by 2050 as part of the European Green Deal. This requires a significant reduction in current greenhouse gas emissions in the coming decades. As an intermediate step towards climate neutrality, the EU has stepped up its climate ambition for 2030 and pledged to reduce emissions by at least 55% by 2030. The EU is revising its climate, energy and transport legislation to bring existing legislation into line with the 2030 and 2050 targets as part of the “55% Roadmap”.<sup>9</sup>

The climate change package proposed by the European Commission aims to reduce emissions from industry, buildings, transport and land use. The package will have major implications for all European regions, businesses and citizens, and puts the ‘polluter pays’ principle into practice. A central element is a new approach to carbon pricing, and it is therefore important that it also contributes to territorial cohesion. The package must take into account the needs of all regions and ensure that local and regional authorities have a greater say, share revenues and have direct access to funding for green investments and climate-related social spending, as they are responsible for 90% of climate adaptation measures and 70% of mitigation measures.

At this point, I think it is important to stress, with regard to the legal binding force of climate ambitions at EU level, that the Commission is not a legislative body in itself, as in all cases, and so in this area too, the Parliament and the Council must be involved in order to implement the Commission’s ambitious climate ambitions, since it is only in the light of these actions that we can talk about EU legislation with legal binding force.

### **Sub-regional level**

The third level of the pyramid focuses on regional cooperation opportunities. The question to be examined is to what extent smaller regional cooperation formations between EU Member States (e.g. in our case the V4) provide an appropriate and effective platform for the joint implementation of the sustainable development framework, and as part of this, specifically for climate change efforts, and the intensity of willingness of individual Member States to cooperate in this direction.

Over the past 30 years, Visegrad cooperation between Poland, Hungary, Slovakia and the Czech Republic has been a successful model for regional cooperation.

<sup>9</sup> European Commission 2021a.

The Visegrad Four (Visegrad Group or V4) started out as a community of shared goals and values to help realise common European aspirations for EU and NATO membership. It has proven that the region can not only strengthen relations and dialogue, but also effectively reinforce each other's positions, while addressing challenges together.

The global challenges of climate change, environmental degradation and growing inequalities pose new threats to our way of life, which leads us to strengthen Visegrad cooperation towards sustainability. Regional cooperation, by its very nature, is dominated by declarations of intent by states and the action they lead to in practice, as legally binding provisions will be put in place at national level. However, in general, regional incentives can have a strong potential to shape national policy actions in the countries of a region.

## **National level**

The above steps lead us to the fourth level, the question of implementation at the national level, i.e. the extent to which the UN and EU Member States have made progress in implementing the sustainable development framework, in accordance with their legal and, in part, political possibilities arising from their membership of the UN and/or the EU.

As a legally non-binding framework, one of the most crucial issues of the 2030 Agenda for Sustainable Development is the monitoring of the actual implementation of its commitments at national level. The Agenda's monitoring and review mechanisms encourage Member States to regularly and comprehensively measure and report on their progress towards implementing the SDGs at national level. These comprehensive monitoring exercises at national level are expected to form the basis for regular reviews of the high-level policy forum (HLPF) under the auspices of ECOSOC. As foreseen in the 2030 Agenda, these syntheses by the HLPF should be voluntary, involving public leaders and all stakeholders in both developed and developing countries.

The Voluntary National Reviews (VNRs) aim to facilitate the sharing of experiences, including successes, challenges and lessons learned, to accelerate the implementation of the 2030 Agenda. The VNRs also seek to strengthen government policies and institutions and to mobilise multi-stakeholder support and partnerships to achieve the SDGs. Hungary presented its first such report in July 2018 at the UN High-Level Political Forum for the Comprehensive Monitoring of the Implementation of the SDGs in New York.

If we look at the role of national governments in general with regard to the implementation of the SDG framework, including the climate goals, in the Member States, we are in effect looking at the extent of the influence that the Member State exerts on its citizens in this regard and, approaching the same question from the

other direction, on the leaders of the state, both in terms of the number of citizens (and more generally the social and economic set-up of a state).

A growing population and rapid economic growth are significantly increasing the demand for natural resources and infrastructure development. It has become crucial for governments to find effective solutions to meet these growing demands as soon as possible. In this context, one of the key tasks of the state is to develop strategies, to plan strategically and to implement them. In my view, sustainable development is not only a goal to be achieved and desired, but also an instrument for states to use as a strategic tool. The role of the State is to take responsibility for the well-being of its citizens, both for the near and the distant future. Sustainability as a strategic planning tool can help the state (in practice, of course, its leaders) at all levels of government to do just that.

The National Climate and Energy Plan<sup>10</sup> (NEKT) adopted by the Hungarian Government in 2018 can also be described as a kind of strategy. The European Commission published the so-called Energy Winter Package at the end of November 2016, which, along with several new climate and energy policy proposals, requested Member States to develop a National Energy and Climate Plan (NECP), applying a common methodology and with a common content. According to the Commission's position paper, the NREAP could build on existing climate and energy strategies and action plans of Member States, as long as they are compatible with the EU's 2030 climate and energy policy objectives and the greenhouse gas emission reduction commitments under the Paris Agreement.

However, the Hungarian NEKT only sets a 40% emission reduction target. The country had already achieved this in 2013 (mainly due to the collapse of socialist industry), only to see it fall back to 33% again due to rising pollution. The domestic target is far below the EU's 55% and the 60-65% recommended by the scientific community. The question is, therefore, how to force decision-makers to make and keep more ambitious commitments. In a later part of my study, I will address this issue by examining the practices of climate cap-and-trade, which are becoming increasingly common at the international level.

### **Local government level**

Breaking down the national level of our pyramid further, we can distinguish between the government of a state and its activities (state administration) and the territorial level of local government administration. While central government is essentially concerned with macro issues and certain macro policy developments, local government, as the level closest to the population, could usefully incorporate the concept of sustainability into strategic planning at local level.

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<sup>10</sup> ITM 2018.

The 2030 framework is undoubtedly ambitious. Meeting all its goals, targets and indicators is of course not 100% achievable for any nation. However, to achieve the best possible realisation of these goals, it is essential that we take action outside the high-level political fora, at the level closest to the people. This process is called localising the 2030 Sustainable Development Goals.

The current pace of urban growth is unprecedented. Rapid urbanisation brings with it huge challenges, including increasing air pollution, inadequate basic services and infrastructure, and unplanned urban sprawl, which make cities even more vulnerable to disasters. Our towns and villages need to be clean and safe, with adequate housing and basic services such as water and electricity. We also need efficient transport systems and green spaces. Localising the SDGs includes both looking at how local governments can support the 2030 Agenda through their grassroots action and how the SDGs can provide a framework for local development policy. One of the first steps towards the implementation of the 2030 framework is to ensure that local governments have the right environment and resources to take real action.

The progress made by individual UN member states in implementing the SDGs can be tracked by studying the Voluntary National Reports discussed above. A mechanism is currently being developed to monitor implementation from the perspective of local authorities, in line with the assessment cycles defined by the UN High Level Political Forum. A number of local and regional authorities in countries presenting their country reports have been invited to participate as soon as possible in the reporting process, which will be essential to engage in dialogue among Member States and to be ready to contribute to national reviews.

Of course, the key issue here is also the question of funding. The Addis Ababa Action Plan<sup>11</sup> (AAA), which sets out the financing framework for sustainable development policy actions, is an integral part of the 2030 Sustainable Development Goals framework. In line with the Addis Ababa Action Agenda, local authorities should be recognised as individual partners, on an equal footing with civil society organisations and the private sector, and involved in the monitoring of the framework. The role of local authorities in investing in basic services, resilient urban and territorial infrastructure is key to achieving the sustainable development goals. In high-income countries local authorities are responsible for 50% of public investment, while in low-income countries their contribution is limited to 7%.

A growing number of city leaders are committing to climate action, thanks to the development of municipal climate strategies that focus on local, grassroots issues and problems. The best known example at home is perhaps the capital. Budapest has declared a climate emergency and adopted a separate climate strategy. The aim is to reduce emissions to mitigate the already inevitable effects of climate change. But Budapest is not the only municipality to have adopted an ambitious – but no doubt

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11 UN General Assembly 2015.

necessary – climate strategy. In Hungary, the cities of Balatonfüred, Szentendre, Győr and Békés, among others, have also drawn up climate strategies.

It is worth observing the interaction between the decision-making and action processes of the actors involved (national and urban decision-makers, city residents). It can be shown that the climate strikes carried out by NGOs have greatly contributed to the commitment of the leaders of the municipalities and cities concerned.<sup>12</sup> Subsequently, when a critical mass of municipalities had adopted strategies, targets and programmes for climate neutrality, the time for action at the national level was now ripe. So we can say that local level commitments towards sustainability have indeed helped to accelerate these processes, also at national level.

At any level of government, it is important to emphasise the role of the state in building trust and transparency. Adequate social and economic development can only be achieved if a certain level of trust is established in society towards the leadership and the government. This trust will be the primary guarantee that the public (whether individuals or companies) will be supportive of government initiatives to promote environmental protection and, more broadly, sustainability. It is also the responsibility of governments to ensure that, in addition to the legislative branch, the executive branch (primarily the public administration) has the competence, skills and capacity to implement the necessary reforms, as the expertise of the (central) public administration is essential for the effective implementation of the strategies, action plans and programmes developed by governments.

The question is, however, what tools are available to citizens (or indeed companies) to spur the actors who have made commitments to action. One of these tools is undoubtedly the climate fund, which has recently been gaining in importance and practice.

### **Climate litigation: Against whom are these lawsuits most often brought?**

While climate lawsuits were initially typically brought against public bodies,<sup>13</sup> mostly to force more sustainable economic policies, more recently there has been an increase in cases against large polluting companies, with the aim of seeking compensation for the most affected groups and deterring them from further pollution. These lawsuits are often based on the premise that the big oil companies have been aware of the dangers of fossil fuels since the 1960s at the latest, yet have not tried to mitigate the damage

An important landmark case in this regard was *Kivalina v. ExxonMobil Corp*<sup>14</sup> in which Alaska Natives sued 24 major oil companies, claiming that their villages

<sup>12</sup> INGARUCA 2022.

<sup>13</sup> SÚLYOK 2020.

<sup>14</sup> *Native Vill. Of Kivalina v. ExxonMobile Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).



had been rendered uninhabitable by climate change-induced flooding. The trial judge then concluded that the companies could not be held liable because the government had passed laws to reduce emissions. However, one of the defendants, the giant company AES, asked its insurer to reimburse its legal costs – but the insurance company Steadfast refused, saying the case concerned issues that were “natural and likely consequences” of the energy company’s activities. The court agreed with this argument, which climate campaigners say was a clear sign of hope. The so-called Carbon Boomerang report<sup>15</sup> of 2017 had already suggested that not only fossil fuel companies could be sued, but also banks financing coal-fired power plants<sup>16</sup> and private pension funds investing in fossil fuels. What’s more, for some time now, several oil companies have been mentioning in their annual financial reports that various climate risks could seriously affect their future profitability.

At the same time, there are still plenty of examples of national governments being condemned. In February 2021, the French government<sup>17</sup> was condemned by a Paris court for failing to do enough to reduce emissions as it had committed to do. In April 2021, the German Federal Constitutional Court<sup>18</sup> ruled that the German climate protection law was unconstitutional because it did not sufficiently curb carbon emissions, jeopardising the freedoms of future generations. Perhaps even better known is the Dutch example of Shell, an oil giant, which was condemned by the court, ordering the company to bring its activities into line with the Paris climate targets. Last September, in Indonesia,<sup>19</sup> the president and other politicians were convicted of failing to reduce air pollution sufficiently. In most of these cases, one or more NGOs representing citizens are on the other side of the case.

Most notably, in the case of Urgenda Foundation v. Dutch State,<sup>20</sup> brought by an environmental group and nearly 900 Dutch citizens in 2015, the Dutch Supreme Court ordered the government to reduce greenhouse gas emissions by 25% by the end of 2020 compared to 1990 levels to protect its citizens from the effects of global warming.

## Causality

Whether it is litigation to remedy legislative and regulatory inaction, or to compensate for climate damage, the common element in all these proceedings is the need to address the difference between the operating principles of law and science.

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15 MinterEllison 2017.

16 *Abrahams v. Commonwealth Bank of Australia* (2021).

17 *Notre Affaire à Tous and Others v. France*.

18 *Neubauer et al. v. Germany* case.

19 *Citizen air pollution case* (374/PDT.G/LH/2019/PN.JKT.PST.).

20 *Urgenda Foundation v. The State of the Netherlands* (Ministry of Infrastructure and the Environment), First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court.

The innovative nature of natural science is sometimes difficult to understand within the framework of centuries of legal dogmatics. The two sciences, for example, have different views on causation and the process of proof. In legal terms, is global climate change caused by a country with relatively low global emissions? If so, to what extent? And what is required if the court answers yes to the above questions?

The issue of causality arises not only in climate damage actions for compensation for damages between the damage caused and the conduct, but also in actions to enforce climate change regulation. In the latter cases, too, the legislator may be obliged to act against risks and conduct that are capable of infringing certain rights that are intended to be protected, in other words, that are causally linked to the scope and content of the protection of those rights. The methodology of natural science and the randomness of natural processes, as well as the complexity of the systems under investigation, make it impossible to achieve absolute certainty.<sup>21</sup>

Climate change attribution science – which investigates the causal links between human activities, global climate change and the impacts of climate change – plays a central role in many of these lawsuits. Attribution science is evolving rapidly, both in terms of attributing impacts and extreme events to climate change and in terms of attributing greenhouse gas emissions to specific actors. Armed with mounting evidence linking increases in atmospheric greenhouse gas concentrations to specific adverse effects, plaintiffs are launching more ambitious claims against governments and emitters for their contribution to or failure to act on climate change.<sup>22</sup>

The growing trend of climate change-related litigation is also true for the EU, which is a tiered system with an integrated system of legal protection involving the European Court of Justice and national courts. An analysis of one of the leading recent cases, *Carvalho*,<sup>23</sup> shows that the scope for judicial review of the validity of EU acts by private individuals is very limited, both in the way the rules [Article 263(4) TFEU] are drafted and in the interpretation given by the courts. This conservative approach in case-law is in stark contrast to the active and progressive nature of EU environmental legislation and the gradual emergence of case-law protecting fundamental rights relating to the environment in the various national legal systems.

## **The European Union's climate litigation perspectives**

Climate litigation has become a permanent feature of climate change law and policy. Across jurisdictions, climate litigation takes different forms, based on administrative, civil or criminal proceedings. Human rights are increasingly being incorporated into

<sup>21</sup> SÜLYÖK 2013.

<sup>22</sup> LOYD-SHEPHERD 2021.

<sup>23</sup> *Carvalho and Others v. Parliament and Council* Case T-330/18.

more and more cases, leading, *inter alia*, to courts imposing more stringent mitigation obligations on governments and private actors in light of human rights provisions.

Within the European Union, two human rights instruments have played a central role in the development of this jurisprudence: the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights<sup>24</sup>. The ECHR is one of the oldest and most influential human rights instruments, having entered into force in 1953 under the Council of Europe. In addition to the EU Member States, its membership includes countries such as Albania, Turkey and Russia. Compared to the ECHR, the Charter is a relatively young instrument. The Charter was introduced as part of the latest EU treaty reforms, which entered into force in 2009.

A number of landmark cases in this area originate from European jurisdictions and have been argued on the basis of both the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union. An analysis of case law from European Member States shows that the emerging picture is that the Charter plays a secondary role to the ECHR.

Since the 2010s, human rights claims have played an increasingly important role in climate-related litigation.<sup>25</sup> The use of human rights in environmental protection has been primarily through the “greening” of existing human rights law<sup>26</sup> and the various human rights regimes, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (AmCHR), and the African Charter on Human and Peoples’ Rights (AfCHPR), there is a marked convergence and cross-fertilisation of related case law.

In many ways, the application of human rights in climate-related litigation is a logical extension of the application of human rights in the more general context of environmental protection.<sup>27</sup> This development has been problematised in its own particular ways, most prominently the objection that human rights-based protection of the environment reflects a deeply anthropological approach to environmental degradation that fails to reflect the intrinsic importance of the environment in and beyond its relationship to human well-being.<sup>28</sup> Pragmatically, human rights have

24 Charter of Fundamental Rights of the European Union.

25 For developments up to 2018; See also MACCHI 2020.

26 BOYLE 2012: 613–614.

27 The UN Human Rights Council resolution recognising access to a healthy and sustainable environment as a universal right was a watershed moment in this movement.

28 See e.g. BORRÁS 2016; BRUCKERHOFF 2008. In parallel, there has been a call for the elaboration of rights to nature; the creation of “human” rights for ecosystems and species. See, e.g. What is Rights of Nature, global alliance for the rights of nature (yarn), [www.therightsofnature.org/what-is-rights-of-nature/](http://www.therightsofnature.org/what-is-rights-of-nature/) (last visited 13 Oct. 2021). Similar arguments have been made for extending other rights, such as the right to property, the right to statehood and even citizenship to non-human animals. See, accordingly, BRADSHAW 2020; ABATE 2019; STAKER 2017.

proven to be one of the most promising tools for environmental protection in the absence of regulation or in the face of regulation deemed inadequate.

In recent European cases – including the Urgenda case law, particularly in appeals, *Milieudefensie v. Royal Dutch Shell* and the judgment against the German Federal Climate Change Act –, plaintiffs have successfully invoked domestic and international human rights to secure more ambitious public and private climate action.

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- Citizen air pollution case (374/PDT.G/LH/2019/PN.JKT.PST.)
- Native Vill. Of Kivalina v. ExxonMobile Corp., 696 F.3d 849, 853 (9th Cir. 2012)
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