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Social welfare considerations in a rights-based approach to countering climate change: lessons for south-east Europe

Abstract

Social welfare is gaining prominence in the pursuit of global aspirations to fight climate change, one of the preeminent collective concerns of our time. A series of recent landmark judicial decisions in countries including Germany, France and the Netherlands testifies to the prevailing concerns as well as to the inadequacy of the existing measures adopted by states in order to attain realistic climate goals. In all these cases, such cardinal dimensions as the social consequences of climate change, social equality and overall social welfare were made the subject of court scrutiny. The underlying aim of this article is to explore and discern the role and importance of social welfare considerations in the emerging institutional discourse about countering climate change and meeting shared global climate ambitions. In this connection, it seeks to portray wider decision-making trends in western European countries which should, in turn, be interpreted as providing a guiding vision as well as indicators for measuring advances in climate change policies within the region of south-east Europe which has yet to feature in such court actions.

Keywords: *social welfare, social equality, climate change, comparative perspectives, courts, south-east Europe*

Introduction

This article looks at various levels of regulatory and institutional operation (global and national) and at many national jurisdictions with regard to the approaches adopted and state practice being formed in relation to climate mitigation strategies. In this mix, the article's main thrust is to locate social factors and social welfare considerations in the practice and discourse that is defining climate change decision-making in practice, primarily that of the courts which are responsible for applying and interpreting the relevant regulatory frameworks.

In doing so, it seeks to contribute to academic debate and policy action among the countries of south-east Europe with regard to their legal and policy choices when it comes to measures relating to climate change ambitions.

Three core cases lie at the heart of our analysis. In a landmark decision on 20 December 2019, the Hoge Raad der Nederlanden (HRN; the Dutch Supreme Court), found in the *Urgenda* climate case that the Dutch government had obligations to reduce emissions urgently and significantly in line with its human rights obligations. In *Neubauer et al. v. Germany*, the Bundesverfassungsgericht (BVerfG; Federal Consti-

tutional Court of Germany) ruled that some provisions of 2019's Bundesklimaschutzgesetz (KSG; Climate Protection Act) were unconstitutional and incompatible with fundamental rights (BVerfG 2021). Likewise, the Tribunal administratif de Paris (TaP; Administrative Court of Paris) ruled, in a judgment from February 2021, that the damage to the environment which was the subject of legal action from several environmental advocacy groups had been proven and that the French state was partially responsible for it.

Our method is essentially comparative. The article also performs a normative function, however, in terms of setting out the parameters for the future operation and understanding of the relationship between climate change and social welfare.

In terms of content, the next section (section 2) depicts the broader global context relating to climate change and identifies the bases of states' obligations to act in order to mitigate climate change. Section 3 investigates another level of operation, the national level, with a focus on the enforcement domain, meaning the manner in which those equipped with authority to apply and interpret the law do so in the face of varying contextual realities. It portrays the many outcomes resulting from these processes and the prevailing discourse, including social welfare considerations, utilised to justify judicial action in pursuit of states' climate goals. Section 4 then seeks to understand and measure the specific role and place of social welfare considerations in the equation of factors that dictate or mobilise climate change action; exploring existing transnational practice. Section 5 presents conclusions.

The wider global context and the bases of states' obligations to mitigate climate change

States have long recognised the puzzle of reconciling climate change mitigation with development concerns, including poverty eradication. This conundrum has been expressed mainly in the context of developing countries. The 1992 UN Framework Convention on Climate Change (UNFCCC) acknowledges that change in the Earth's climate and its adverse effects are a common concern for humanity (Preamble, para. 1). Furthermore, it emphasises protecting the climate system:

> … for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. (Art. 3, para. 1).

In this connection, the UNFCCC proclaims that developed countries should take the lead in combating climate change and its ensuing adverse effects. The Convention thus places the heaviest burden of fighting climate change on industrialised, or 'Annex 1', nations as they are the source of most past and current greenhouse gas (GHG) emissions. Being a framework instrument, it imposes no mandatory limits on GHG emissions, however. Similarly, it contains no enforcement provisions. Perhaps the most crucial feature therefore is that it incorporates the capacity for updates or protocols, such as the Kyoto Protocol, in setting mandatory emission limits for individual states (Qerimi 2021; Qerimi and Sergi 2022).

The most significant recent development in the global regulatory arena of countering climate change is the 2015 Paris Agreement. The scope and speed of its worldwide acceptance, as evidenced by the number of signatories (195) and parties (191) to this Agreement, is somewhat unprecedented. It recognises that keeping global temperatures from rising by more than 1.5 degrees Centigrade (2.7 degrees Fahrenheit) above pre-industrial levels would reduce the most undesirable risks and impacts of a changing climate. In the context of social welfare, the Paris Agreement (2015) makes considerable advances, at least in comparison to the UNFCCC, highlighting head-on some of the preeminent social welfare concerns resulting from climate change. In particular, it recognises the elementary priority of 'safeguarding food security and ending hunger', including:

> … the particular vulnerabilities of food production systems to the adverse effects of climate change. (Preamble, para. 9)

The Agreement defines its objective as one that seeks to strengthen the global response to the threat of climate change in the broader context of sustainable development and, more specifically, 'efforts to eradicate poverty' (Art. 2, para. 1; see also Art. 4, para. 1).

The formal recognition of climate change's adverse effects on food security and hunger or, more broadly, on sustainable development needs and aspirations has not always been followed by actual intervention and the implementation of effective policies. While socio-political factors have a role to play in explaining the absence of any more meaningful action, the regulatory framework – partly linked to precisely these socio-political factors and partly dictated by specific political ideologies and the debate about the right balance between environment and economic development – has also lacked any consolidated base to offer a more effective response to climate change.

The field of international environmental law, albeit not *in statu nascendi*, nonetheless belongs to a young and developing discipline. States thus have broad and somewhat flexible international obligations under international environmental treaties to mitigate climate change (Mayer 2021). Therefore, whenever climate litigation takes place and is based on international law, it usually relies on international human rights treaties which impose obligations upon states to respect, protect and fulfil human rights.

Given the global recognition of the adverse effects of climate change on primary means of subsistence such as food and its potential to hinder the enjoyment of various internationally guaranteed human rights, it is plausible to advance arguments in favour of the presence of state obligations to mitigate climate change. This argument gains considerable strength with the support it has received from UN human rights treaty bodies in recent years. For instance, the Committee on Economic, Social and Cultural Rights (CESCR), the treaty body to the International Covenant on Economic, Social and Cultural Rights, has declared that '[i]n order to act consistently with their human rights obligations', states parties should revise the nationally determined contributions to global mitigation action that they have communicated under the

Paris Agreement (CESCR 2018, para. 6; see also Paris Agreement, Art. 4, para. 2). Along this same line of reasoning and action, the Committee on the Elimination of Discrimination against Women has affirmed the existence of a state's obligation:

> … to effectively mitigate and adapt to the adverse effects of climate change, in order to reduce the increased disaster risk... (CEDAW 2018, para. 14)

These two treaty bodies have been joined by three more such bodies, namely the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, to issue a Joint Statement on 'Human rights and climate change' (2019). Addressing the matter of states' obligations under international human rights treaties, the five committees, in their joint statement, adopted the view that:

> In order for States to comply with their human rights obligations and to realise the objectives of the Paris Agreement, *they must adopt and implement policies aimed at reducing emissions*, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate-resilient development. (Para 2 of section on 'States' Human Rights Obligations'; emphasis added).

As far back as 2008, the UN Human Rights Council (2008: Preamble, para. 1) had recognised that:

> … climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights…

Among the many rights that could be affected include civil and political rights (e.g. rights to life, to private and family life and to property); economic, social and cultural rights (e.g. rights to an adequate standard of living and the highest attainable standard of health); and third-generation rights (e.g. rights to a healthy environment and to development).

Developments at national level: fighting climate change in the domestic courts

Beyond the international arena, climate litigation has started to see the light of day at national level. The bases here are formed by quintessentially civil and political rights, however, rather than by any environmental or climate change law. For instance, in its now monumental and pioneering decision, HRN held in the Netherlands in the 2019 *Urgenda* case that the state's obligation to protect the right to life and the right to private and family life under the European Convention on Human Rights (ECHR) implied an obligation to reduce its GHG emissions by at least 25 per cent by the end of 2020 compared with 1990 levels.

In contrast to HRN in *Urgenda*, the Høyesterett (the Supreme Court of Norway) held in the *Natur og Ungdom* (Nature and Youth) case (2020) that the issuing of ten petroleum production licences did not constitute a 'real and immediate' threat to the

right to life under the ECHR. In a relevant passage (para. 168), the Court reasoned that:

> First, it is uncertain whether or to which extent the decision will lead to greenhouse gas emissions. Second, the possible impact on the climate will be discernible in the more distant future. Although the climate threat is confirmed, the decision does not involve, within the meaning of the ECHR, a 'real and immediate' risk of loss of life for citizens in Norway. Thus, no violation of Article 2 of the ECHR is found.

The Høyesterett also considered that the circumstances of the case did not fall within Article 8 of the ECHR on the right to respect for private and family life.

One should note here the specific context that formed the basis for this case, which is linked to the issuing of petroleum production licences rather than the climate change mitigation policies of the state. If this latter aspect had been invoked, the result might not have necessarily been the same. In any event, the court was mindful of, among other things, the social effects of petroleum activities by way of referencing the relevant provisions of the Petroleum Act and their requirement for an impact assessment before a production licence could be awarded. This assessment is made in the context of the commercial and environmental impact of petroleum activities, the possible pollution risk and the economic and social effects of petroleum activities.

When facing the question of national climate goals and policies, courts in other national jurisdictions have essentially followed the path of the *Urgenda* decision. For instance, in Germany, BVerfG in *Neubauer et al. v. Germany* ruled that some provisions of the 2019 KSG were unconstitutional and incompatible with fundamental rights. BVerfG did so as it reasoned that the Act lacked a detailed plan for reducing emissions and since it placed the burden for future climate action on young people. It noted, in addition, the many negative effects of climate change for social life and welfare including the exacerbation of social inequalities, the endangerment of food production and supply, and damage to property and agricultural land as houses or even entire settlements could be rendered uninhabitable due to flooding and rising sea levels.

Other European governments have been subject to court proceedings in respect of their policies. In France, the Tribunal administratif de Paris in February 2021 held that the damage to the environment which had alleged by several environmental advocacy groups was, in part, the responsibility of the French state and that it should hold an investigation to determine the measures that it could enjoin the state to adopt so as to repair the highlighted damage and prevent its aggravation.

Moving a step ahead, another court in the Netherlands, Rechtbank Den Haag (RDH; the District Court of the Hague) went on to apply the *Urgenda* principles to the private sector. More specifically, in *Milieudefensie et al v. Royal Dutch Shell PLC* (2021), RDH ordered Shell to reduce CO_2 emissions by 45 per cent by 2030 relative to 2019 levels. It confirmed that this reduction obligation was one which resulted from the activities of Shell. The claim had been brought by a group of seven Dutch NGOs and more than 17 000 individual claimants. In its reasoning, RDH relied on the unwritten standard of care as the foundational concept that guided its decision but

which also invoked a multiplicity of other sources which gave substance to this standard. Among others, RDH stated that it would:

> … factor in the human rights and the values they embody in its interpretation of the unwritten standard of care. (para. 4.4.9)

In its interpretation of this unwritten standard of care, RDH also followed the UN's Guiding Principles (UNGP) on business and human rights. Although non-binding, the Court noted that the Principles constitute an authoritative and internationally endorsed instrument of 'soft law' setting out the responsibilities of states and businesses in relation to human rights. In developing its position further, RDH observed that, since 2011:

> … the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGP. For this reason, the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care. (para. 4.4.11)

Following the reasoning in *Urgenda*, RDH also recalled that Articles 2 and 8 of the European Convention on Human Rights offered protection against the consequences of dangerous climate change due to global warming induced by CO_2 emissions. Finally, in determining the extent of Shell's CO_2 reduction obligation, RDH relied on the goals of the Paris Agreement, reasoning in terms of a justification of its decision that:

> … the goals of the Paris Agreement represent the best available scientific findings in climate science, which is supported by widespread international consensus. The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change. The court follows this reasoning in its interpretation of the unwritten standard of care. The court assumes that it is generally accepted that global warming must be kept well below 2ºC in 2100, and that a temperature rise of under 1.5ºC should be strived for. (para. 4.4.27)

The composite details of the specific social components involved in these decisions and the significance accorded to them by this and other courts in the plethora of factors that have mobilised judicial bodies to demand state action to mitigate climate change is more closely explored in the following section. Specifically, this explores the relationship between human rights as grounds to invoke climate change protections and social welfare considerations, including more specifically the presence and position of social welfare factors in judicial decision-making processes.

The role and place of social welfare considerations in climate change actions

Despite all its advances, the Paris Agreement does not contain a mechanism to review the adequacy of states' individual contributions to global mitigation efforts. In compensation, national and regional courts are being asked to consider whether the actions pledged by a state are adequate (Rajamani et al. 2021). As a result, there is a proliferation of judicial cases, some of which have now been decided, while a number of others are still ongoing and pending a decision. Those ongoing cases are,

in the main, cases which have been unsuccessful in domestic courts but which have been subsequently referred to the European Court of Human Rights for adjudication and which are now awaiting its decision.

Most relevant to this article and to the issue of climate change litigation, they include:

- Duarte Agostinho and Others v. Portugal and Others, application no. 39371/20 (European Court of Human Rights 2020a)
- Verein KlimaSeniorinnen Schweiz and others v. Switzerland, application no. 53600/20 (European Court of Human Rights 2020b)
- Mex M. v. Austria, application filed on 25 March 2021 (European Court of Human Rights 2021).

It is against this formative context that we now consider the landmark *Urgenda* decision and the more recent one in *Neubauer et al.* as well as the others discussed in this paper.

In the *Urgenda* case, HRN concluded that the obligation of the Netherlands to take preventive action to reduce its GHG emissions by at least 25 per cent by the end of 2020 could be grounded in human rights law; more specifically, that climate change was covered by the rights to life and to respect for private and family life (Nollkaemper and Burgers 2020). The case as such does not make any specific reference to social welfare considerations in reaching its conclusions, but HRN's decision was grounded in human rights.

The same basis, complemented with the goals of the Paris Agreement and the UN Guidelines on business and human rights – given the corporate element involved – led to the decision of RDH in *Milieudefensie et al v. Royal Dutch Shell PLC* which established that private corporations are also responsible for the environment and can be held accountable for their actions, or inactions, vis-à-vis climate change.

Human rights grounds are especially significant given their relationship with social development and social welfare considerations more broadly. For instance, when adopting Agenda 2030 for Sustainable Development, the UN General Assembly (2015, Preamble and paras. 3, 8, 9, 10, 33, 35 and 67) recognised that the scope of human rights depends on achieving the three dimensions of sustainable development: the economic; the social; and the environmental. This interrelationship dates back to the pioneering Stockholm Declaration on the Human Environment (1972), which proclaimed that:

> … economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. (Principle 8)

Furthermore, it comprehended the need to balance development with the protection of the human environment. Twenty years later, the Rio Declaration on Environment and Development (1992) acknowledged that 'human beings are at the centre of concerns for sustainable development' (Principle 1) and stipulated that:

> … in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process. (Principle 4)

Following these authoritative proclamations, the Johannesburg Declaration on Sustainable Development (2002) established three pillars of sustainable development, namely economic development, social development and environmental protection (para. 5).

The linkages between these critical considerations have now gained prominence not only in the sphere of solemn and authoritative international declarations but also in the actual practice of regional and national institutions across the globe.

In Europe, the European Court of Human Rights has acknowledged that severe environmental degradation may affect the wellbeing of the individual and, as a result, give rise to violations of human rights, such as:

- the right to life (European Court of Human Rights 2004a; European Court of Human Rights 2008a; European Court of Human Rights 2015)
- the right to respect for private and family life (European Court of Human Rights 1994; European Court of Human Rights 1998; European Court of Human Rights 2003a; European Court of Human Rights 2004b; European Court of Human Rights 2005a; European Court of Human Rights 2005b; European Court of Human Rights 2006; European Court of Human Rights 2009; European Court of Human Rights 2012)
- the right to property (European Court of Human Rights 2003b; European Court of Human Rights 2004a; European Court of Human Rights 2008b).

Outside Europe, the African Commission on Human and Peoples' Rights (2001) has established that the right to 'satisfactory living conditions and development' is:

> … closely linked to economic and social rights insofar as the environment affects the quality of life and the safety of the individual. (para. 51)

Meanwhile, in the Americas, the Inter-American Commission on Human Rights (2009) has underlined that:

> … several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources. (para. 190).

It has also highlighted that:

> Both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights reflect a priority concern with the preservation of individual health and welfare, legal interests which are protected by the interrelation between the rights to life, security of person, physical, psychological and moral integrity, and health, and thereby refer to the right to a healthy environment. (para. 191)

In a more elaborate Advisory Opinion of 2018 (OC-23/17), the Inter-American Court of Human Rights addressed at length the relationship between human rights and the environment and those human rights which are affected by any degradation of the environment, including the right to a healthy environment. In this Opinion, the Court clarified that the right to a healthy environment is a fundamental human right

and that the degradation of the environment, including the adverse impacts caused by climate change, affects the enjoyment of the right to a healthy environment and other rights. This being the case, the Court considered that states are under an obligation to ensure that their actions do not cause harm to the environment and hence do not adversely affect the enjoyment of these rights. It also noted that, in line with the UN Guiding Principles on business and human rights:

> … business enterprises should also respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities. (para. 155)

The Inter-American Court of Human Rights underlined that health required certain essential elements to be in place as a means to deliver a healthy life. This encompasses access to food and water, which could be adversely and also significantly influenced by climate change; or, as stated by the Court:

> Access to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality. (para. 111)

In this regard, the Court further indicated that:

> … health is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity. Thus, environmental pollution may affect an individual's health. (para. 110)

Returning to Europe, domestic courts such as BVerfG in the case of *Neubauer et al. v. Germany* (BVerfG 2021) have scrutinised in more detail the consequences of climate change. Referring to such climate-related extreme events as heatwaves, droughts, heavy rainfall, floods, hurricanes and wildfires, BVerfG depicted the many disruptions that could emerge, from food production to water supply, from damage to infrastructure and settlements to illnesses and deaths, and the consequences that these might have for people's mental health and wellbeing. It observed that the main threat posed by climate change is indeed to human health. As it stated:

> Changes in weather and climate patterns can lead to increases in infectious diseases and non-communicable diseases such as allergies. They can also lead to an intensification of symptoms related to cardio-vascular and respiratory complaints. Extreme events such as storms, floods, avalanches or landslides pose immediate risks to life and limb. Moreover, they can increase social and psychological pressures and trigger disorders such as stress, anxiety attacks and depression. (BVerfG 2021: para.23)

In addition to the adverse impacts on health, BVerfG noted the specific negative consequences for food production and supply, and with regard to the increased risk of famine. A further social implication of climate change is its potential to exacerbate social inequalities which carries:

> the potential risk of violent conflict as competition for water, food and grazing land intensifies. (BVerfG 2021: para. 28)

These social factors were clearly part of the analysis, as a means of identifying the scale and seriousness of the problem which, in turn, was decisive in evaluating the adequacy or proportionality of the designed measures. These measures, as laid down in the KSG in 2019, were deemed to be insufficient and the KSG itself at least partly unconstitutional insofar as it lacked:

> … provisions that satisfy the requirements of fundamental rights … on the updating of reduction targets from 2031 until the point when climate neutrality is reached... (BVerfG 2021: para. 266)

Conclusions

This article has sought to explore and identify the presence and role of social welfare considerations in the discourse and decision-making pertaining to climate change policies and action, with an emphasis on the practice of national and regional judicial institutions. It investigates the most contemporary global trends in finding ways to identify and implement just and effective climate policies. Relevant judicial practice so far comes predominantly from select western European countries, but also influential regional bodies such as the European Court of Human Rights. These trends will continue to spur and inform legal processes in other regions too, notably in this case the south-east Europe region.

In the absence of strict and sound international environmental obligations to impose clear measures to mitigate climate change effects and events, citizens, groups of citizens and other entities (especially non-governmental organisations) have turned to the courts, grounding their claims in existing human rights obligations, in order to hold states accountable for their climate actions or inactions. What this article has revealed, therefore, is the presence of a new, emerging actor – mobilising states to act and to do so more effectively – which is the courts: both national, regional and international. In shaping the boundaries of this framework of action, courts have based their decisions on fundamental human rights given that these provide a more solid basis for states' obligations.

However, new narratives have also emerged to establish a link between more traditional human rights and the more recently recognised climate change emergency. It is in this connection that a special relationship between social, development and environmental factors is being formed and which is emerging also in the actual practice of authoritative decision-makers and not only in their formal, solemn declarations. This new discourse appears to be cognisant of social welfare considerations and these have therefore found expression in many decision processes.

Social welfare considerations have clearly played a role in the range of inescapable factors which, first, measure the magnitude of the effects of climate change; and, second, assess the adequacy of states' measures and realistic targets to reduce and prevent such climate change effects up to the point at which climate neutrality is attained.

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