

FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

—
HFR Lunchtime Webinar



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 2. Fundamental rights and State's duties
 3. A rise in fundamental rights-based environmental litigation: climate change
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1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

- many fundamental rights are dependent on ecological balance; environmental concerns are relevant for many overlapping areas of protection of several fundamental rights

ECtHR case-law on environmental matters is proof of that

- most Constitutions enshrine fundamental rights that are entirely dependent on environmental conditions

Right to life

Right to respect for physical integrity

Right to health

Right to respect for private and family life and home

Right to property

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

- progressive recognition of a fundamental right to a healthy environment: 42 Constitutions worldwide (17 EURO)

International Covenant on Civil and Political Rights: right to life
(Human Rights Committee's General Comment no. 36) (2018)

International Covenant on Economic, Social and Cultural Rights: right to health (Committee on Economic, Social and Cultural Rights' General Comment no. 14) (2000)

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

UN Special Rapporteur on human rights and the environment:

Framework principles on human rights and the environment. The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018)

“When applied by the judiciary, it has helped to provide a safety net to protect against gaps in statutory laws and created opportunities for better access to justice.”

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

Framework principles on human rights and the environment (“FP”)

FP 1: States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.

FP2: States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

interdependence between fundamental rights and
environmental conditions

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

FP 3: States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

environmental conditions and discrimination

FP8: To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

duty to assess

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

FP 10: States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

FP12: States should ensure the effective enforcement of their environmental standards against public and private actors.

FP14: States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

effectiveness

1. FUNDAMENTAL RIGHTS AND THE ENVIRONMENTAL CRISIS

shift of focus from drawing the content of fundamental rights



to requiring effectiveness of those rights by specifying State's duties

this is also clear when analyzing case-law in environmental matters

2. FUNDAMENTAL RIGHTS AND STATE'S DUTIES

Duty to respect: the State is prohibited from creating environmental harm that poses a threat to fundamental rights

Duty to protect: the State is required to allow for the creation of environmental risk that poses a threat to environmental balance

Duty to promote: the State is required to create conditions allowing for the effectiveness of human rights dependent on environmental balance

2. FUNDAMENTAL RIGHTS AND STATE'S DUTIES

- several classifications have been put forth and used: negative and positive duties; duty to respect and duty to protect; duty of care
 - State duties seem to be the most useful perspective on this topic (particularly when there is no recognition of a fundamental right to a healthy environment or similar)
 - however: separation of powers and ensuring a core or the minimal → not an original limitation
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

- rise on climate litigation in several States in diversified legal systems: Australia, Norway, India, USA, Colombia, Brazil, Canada, South Korea, Switzerland, Pakistan, Austria, Philippines, Netherlands, Ireland, France, UK, Germany, Ukraine, New Zealand, Belgium, Spain

[UNEP Global Review on Climate Change Litigation](#)

- many of these cases are grounded on violation of State duties concerning fundamental rights

3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

- The Netherland High Court – 12/20/2019
 - Urgenda (Urgent+Agenda) is a Foundation for the prevention of climate change
 - request: adoption of adequate measures for the prevention of emissions
 - grounds: duty to prevent climate change considering threat to right to life and to respect for private and family life (ECtHR influence)
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

Decision:

- current policy allows for reduction of 19% in 2020
 - according to scientific consensus and international climate policy, a reduction of 25%-40% in developed countries is required to prevent drastic climate change
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

Decision:

- it is undisputed that climate change will be the cause of severe damage to life (extreme weather events, food system disturbance) and to private and family life (displacements, namely caused by sea level rise)
 - the State has an international, European, and national duty to reduce emissions at least by 25%
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

Decision:

- the State has a duty to do more than it is doing in order to prevent imminent threat caused by climate change
 - the State has a duty to protect and enhance ecological balance
 - the State cannot justify insufficient action on the global nature of the problem
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

Decision:

- condemning the State to adopt adequate measures for a reduction of emissions by 25% is not in breach of the principle of separation of powers, because 25% is the minimal
 - Courts also have democratic legitimacy, because they enforce law democratically adopted
 - the Government has full discretion on the means
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.1. The Urgenda case (The Netherlands, 2019)

Decision:

- environmental impact assessment must consider climate impacts
 - the timeframe of reference for impacts is long: sustainable development and intergenerational solidarity require so
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.2. The Climate Ireland Case (Ireland, 2020)

- Irish High Court – 07/31/2020
 - Friends of the Irish Environment is a non-governmental organization for the effectiveness of EU environmental law
 - request: annulment of the National Mitigation Plan
 - grounds: insufficiency of the Plan concerning the Climate Act (2015) and positive State duties concerning right to life, to physical integrity and to respect for private and family life (ECHR+Irish Constitution)
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.2. The Climate Ireland Case (Ireland, 2020)

Decision:

- it is clear the climate change impact on the environment and on people's lives; GHG reductions is paramount for preventing these impacts
 - the Court is not breaching the principle of separation of powers in analyzing public policies as long as it is assessing their compatibility with legal duties
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.2. The Climate Ireland Case (Ireland, 2020)

Decision:

- Climate Act demands a specific climate policy, and the Plan is insufficient in identifying the means for GHG emissions reduction
 - the Court **did not address conformity with fundamental rights**, because it had already struck down the Plan based on non-conformity with the Irish Climate Act
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.3. L’Affaire du Siècle Case (France, 2021)

- Administrative Court of Paris (01/03/2021)
 - several non-governmental environmental organizations
 - request: condemning the State on adopting the necessary measures for avoiding damage resulting of climate change
 - grounds: violation of international and EU law obligations on GHG emissions reductions; of ECHR and of Environment Charter
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.3. L’Affaire du Siècle Case (France, 2021)

Decision:

- France has surpassed its emissions budget for each year
 - climate change damage to life and health of citizens has been demonstrated
 - the State has assumed international, European, and national (environmental law and fundamental rights) legal obligations on urgent and effective measures and is in breach of its legal duties
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.3. L’Affaire du Siècle Case (France, 2021)

Decision:

- the State’s actions are insufficient, and the State is liable for resulting damages
- France is condemned to pay symbolic compensation to the environmental organizations

The reasoning of **the Court did not address at all fundamental rights breach claims**

3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

- Federal Constitutional Court (03/24/2021)
 - several persons (mostly underaged) living in Germany, Bangladesh and Nepal
 - constitutional complaint against Federal Climate Change Act for failing to introduce a legal framework sufficient for swift reduction of GHG
 - grounds: violation of duty to protect concerning right to life, to physical integrity, and to property; a right to a future (based on human dignity and an ecological minimum standard of living)
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the protection of life and physical integrity includes protection against damage to fundamental rights by environmental pollution, irrespective of by whom and by what circumstances they threaten.
 - the state's duty to protect also includes the obligation to protect life and health from the dangers of climate change; and establishes an objective legal obligation to protect also with regard to future generations;
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- considering the positive nature of the duties, there is a wide margin of discretion by the legislative power
 - unconstitutionality demands total omission, inadequate measures, or measures significantly below the protective goal;
 - this is not the case: mitigation measures up to 2030+adaptive measures
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- duty to protect persons living outside of Germany is not excluded; however, this duty is not equal to that concerning persons living in Germany, because national sovereignty does not allow for the adoption of all protective measures
 - in this case, there is a duty to mitigate, but not to for adaptive measures, because it is beyond the State's territorial control
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- State's duty to ensure ecological balance includes climate balance, which means climate neutrality
 - this duty does not have unconditional priority over other matters, but it must be brought into balance with other constitutional interests and principles
 - the weight of climate protection increases in the context of advancing climate change
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- there is scientific uncertainty about environmentally relevant causal relationships
 - but the special duty of care for the benefit of future generations includes already reliable indications of the possibility of serious or irreversible impairments
-

3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the national climate protection obligation does not conflict with the fact that the global character of climate and global warming excludes a solution to the problems of climate change by one state alone
 - the state cannot evade its responsibility by referring to greenhouse gas emissions in other states
 - in fact, this creates a duty for international cooperation
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the norm imposing on the State a duty to protect the environment is a justiciable legal norm
 - the duty to protect environmental balance binds the political process in favor of ecological concerns with a view to future generations
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the German Constitution obliges the State to secure freedom protected by fundamental rights over time and to distribute freedom opportunities proportionally over the generations
 - the objective legal protection of the environment also includes the need to handle the natural foundations of life so carefully and to leave them for posterity in such a state that subsequent generations can keep them without radical abstinence
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- test of proportionality: balancing current CO₂-dependent freedom with future CO₂-dependent freedom: the regulation is unconstitutional if it allow for the remaining budget to be consumed in a way that future loss of freedom is inevitable because there would be no time for mitigating climate change
-

3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the protection of future freedom also requires the transition to climate neutrality to be initiated in good time
 - specifically, this requires that transparent measures for the further development of GHG reduction be formulated at an early stage, providing orientation for the necessary development and implementation processes
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- this protection is dynamic: as new reliable knowledge is obtained, it may be necessary to define a different goal
 - the Constitution creates a permanent duty to adapt environmental law to the latest developments in science
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3. A RISE IN FUNDAMENTAL RIGHTS-BASED ENVIRONMENTAL LITIGATION: CLIMATE CHANGE

3.4. Bundes-Klimaschutzgesetz Case (Germany; 2021)

Decision:

- the Climate Change Act is unconstitutional in the part that does not foresee reduction targets for periods after 2030
 - these provisions remain applicable, but the legislative powers must update the reduction targets for periods after 2030
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4. FINAL THOUGHTS

- growing scientific recognition on the severe impacts that the environmental crisis will have on the effective enjoyment of fundamental rights
 - this recognition grounds judicial reasoning on the duties of the State in preventing harm to fundamental rights caused by the environmental crisis
 - the duty to protect the right to life, physical integrity, health, property and respect for family life and home therefore entails a duty to reduce GHG emissions
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4. FINAL THOUGHTS

- state discretion regards the means, but not the objectives and, to a minimal degree, the timing
 - balancing interests and rights must consider the urgency and proof already obtained concerning the impact of the environmental crisis on fundamental rights;
 - this includes not only immediate impact, but also that which will mostly affect future generations
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4. FINAL THOUGHTS

- the global nature of the problem does not allow for insufficient national protection of fundamental rights
 - this only creates a duty to seek solutions at an international level
 - the problem is dynamic; therefore the solutions are too: this has an influence in the State's duties concerning the relevant fundamental rights
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4. FINAL THOUGHTS

Discretion only applies to the choice of measures applied to reach this goal (the “how”) – but no longer to the “what and why”.

[Voigt, 2021](#)

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Thank you!



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