

Climate Litigation and Emerging Environmental Dimensions of Human Rights: An Opportunity in Canada

December 13, 2021

Climate Litigation and Emerging Environmental Dimensions of Human Rights: An Opportunity in Canada

By: Larissa Parker

Since December 2019, three landmark judgments were rendered in rights-based climate litigation in Germany, Ireland, and the Netherlands. Given each of these cases are grounded in the rights to life and health, these cases offer insight into how environmental risks can be protected under existing human rights structures. After introducing the climate change and human rights nexus and each of the three decisions, I reflect on whether section 7 of the *Charter of Rights and Freedoms*, which protects the right to life, liberty, and security in accordance with the principles of fundamental justice in Canada, might similarly evolve to address environmental risks, like climate change. My discussion takes inspiration from international human rights law, which the Supreme Court has found to be "relevant and persuasive" in interpreting the scope of the *Charter*.

Introduction

According to the latest IPCC report, which the UN Secretary General called "Code Red for Humanity," States must act quickly (and radically) to change the course of climate change. The world now faces a higher than 50% chance that we will reach the 1.5 ?C target of warming in the next twenty years. Under a high-emissions scenario—one that reflects our current, carbon-intensive reality—the world will reach the 1.5-degree threshold even sooner. Indeed, without deep transformation, global warming is expected to reach 3.3-5.7 degrees higher than pre-industrial levels by the end of the century. The world has not experienced global warming of more than 2.5 degrees ?C for more than 3 million years, and it is predicted to have devastating and fatal consequences. According to the OHCHR (2016), "at its most extreme, climate change kills" (para 8). The World Health Organization (WHO) predicts that 250,000 additional deaths could occur each year between 2030 and 2050 because of the climate crisis (WHO, 2018).

Although the difference between 1.5?C, 2?C, and 3+?C average global warming may sound marginal, the socio-environmental cost of just a few degrees is enormous. Each degree represents a vastly different scenario for the future of our planet. The frequency of disasters, the survival of plants and

animals, and the spread of diseases all hinge on these few degrees.

It is well established that any increase in global warming will negatively affect human health (WHO, 2018). Such consequences include death, injury, and destruction due to an increase in extreme weather events like flooding and fires; the proliferation of vector-borne and waterborne diseases; rising temperatures and associated respiratory diseases; and physical and mental stresses caused by resource insecurity. We are living in what some scholars have called an “era of unlimited harm”: the sources of injury and damage are numerous, dispersed, unpredictable, and often difficult to regulate through traditional means (Kysar & Ewing, 2011, p. 349). The extent and severity of this harm will ultimately depend on whether (and how aggressively) governments take action to reduce their greenhouse gas emissions.

Human Rights and Climate Change

Within the United Nations system, several bodies and special mechanisms are recognizing the importance of human rights for understanding and responding to climate change. Since 2008, the UN Human Rights Council (HRC) has adopted eleven resolutions on human rights and climate change. Most recently, in October 2021, the HRC passed a landmark Resolution, which for the first time, recognized that having a clean, healthy and sustainable environment is a human right (A/HRC/RES/48/13).

The rights to life and health are the most commonly invoked human rights in relation to climate crisis. The Preamble to the *Paris Agreement* states that “parties should, when taking action to address climate change, respect, promote and consider their respective obligations on […] the right to health”, among others. In 2019, Special Rapporteur David Boyd issued a report that laid out the key substantive obligations (in addition to procedural and non-discrimination ones) for States to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights (Boyd, para 52). Specifically, States are required to adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights. These obligations have been derived from a number of human rights, including, in particular, the right to life and the interrelated right to health.

Under international law, the right to life requires State parties to take positive measures that protect “not just life itself, but also the quality of life” (Castleberry, p.196). Governments have “positive obligations” to act to protect the right, and not just a “negative obligation” to refrain from action that would hinder it (Shelton & Gould, 2013). According to the Human Rights Committee, the right to life “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity” (General Comment No. 36, para 3). The right should not be interpreted narrowly and states are expected to “take positive measures to protect the right” (General Comment No. 36, paras 3, 21). Although the Committee has not described in detail the steps required to protect the right to life from environmental harm, other human rights bodies have. In particular, the European Court has held that

States have a primary duty to put in place a legislative and administrative framework that protects against and responds to infringements of the right to life related to natural disasters and of dangerous activities, including the operation of chemical factories and waste-collection sites (Oneryildiz v Turkey).

In addition to being implied within the right to life, the right to health also exists as a freestanding right under the *International Covenant of Economic and Social Rights*, and includes a wide range of "underlying determinants of health" to secure a healthy life. These include safe drinking water and adequate sanitation; food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information; and gender equality (OHCHR, Fact Sheet no. 31, p. 3, 6)

Such obligations stem from Article 12 of the I*nternational Covenant on Economic, Social and Cultural Rights*, which provides that the steps to be taken by States to achieve the full realization of that right "shall include those necessary for… the improvement of all aspects of environmental and industrial hygiene." Interpreting this language in its General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health, the Committee on Economic, Social and Cultural Rights has stated that "the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as… a healthy environment" (para 4). The Committee has interpreted the phrase "the improvement of all aspects of environmental and industrial hygiene" in article 12.2(b) to include "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health" (para 15). To that end, States are required to adopt measures against environmental health hazards, including by formulating and implementing policies "aimed at reducing and eliminating pollution of air, water and soil" (para 36). Similarly, States have obligations to prevent and mitigate the human rights impacts of increased natural disasters and extreme weather due to climate change (CEDAW, General Recommendation No. 37, para 9).

Although rights-based climate change cases are an increasingly important category of litigation, "environmental rights do not fit neatly into any single category or 'generation' of human rights" (Boyle, 2006, p. 471). They can be viewed from at least three perspectives; including i) existing civil and political rights under the International Covenant on Civil and Political Rights; ii) economic and social rights under the International Covenant on Economic and Social Rights; and iii) as a new, collective-type right that would give communities (rather than individuals) a right to determine how their environment and natural resources should be protected and managed. In addition to this list, one might add the recognition of a freestanding individual right to a healthy environment, which scholars like David R Boyd, Special Rapporteur on Human Rights and the Environment, has tenaciously advocated for over the last decade (Boyd, 2012). This uncertainty around where environmental rights might fit has fueled justiciability issues across rights-based climate litigation cases, which have often successfully impeded cases from being heard on the merits (Parker, 2021).

Recent Climate Victories in Court

The intersection between human rights and climate change has led to a “rights turn” in climate litigation (Peel and Osofsky, 2017). Over 100 human rights-focussed cases have been launched globally – 29 of which were filed in 2020 alone. Such cases often invoke a broad range of civil and political, as well as economic and social rights in their claims.

Although success in court was limited at first, a string of wins in the past two years points to increasing success for human rights-based claims. Since December 2019, three cases produced landmark judgments on these rights in Germany, Ireland, and the Netherlands.

Neubauer, et al. v. Germany

In *Neubauer et al. v. Germany*, the plaintiffs, a group of German youth, filed a legal challenge to Germany's Federal Climate Protection Act (“Bundesklimaschutzgesetz”).

The youth plaintiffs argued that the government’s target of reducing greenhouse gases (GHGs) by 55% by 2030 from 1990 levels was insufficient and violated their human rights as protected by the German Constitution. The plaintiffs put forward that by requiring insufficient short and medium term GHG reductions and allowing for the transfer of emission allocations between Germany and other EU Member States – despite the inadequacy of the overall EU emissions reduction target – the Bundesklimaschutzgesetz allowed climate impacts that violate their human rights.

Their claims were grounded in Article 2 of the Constitution, which protects the “right to life and physical integrity;” and Article 20a of the Basic Law, which protects the natural foundations of life in responsibility for future generations.

In a landmark decision in April 2020, the Federal Constitutional Court in Germany accepted the youth’s arguments and ordered the government to lay out a clearer strategy towards achieving its climate targets for the period after 2030. The Court accepted that the “right to life and physical integrity” encompasses protection against environmental degradation:

“The protection of life and physical integrity under Art. 2(2) [of the Grundgesetz]… encompasses protection against impairments and degradation of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause… (para 147).”

The Court grounded this decision in jurisprudence interpreting the *European Convention on Human Rights* (ECHR), which imposes positive obligations on the state to protect life and health against risks posed by environmental pollution (p.42): see *Öneryildiz v. Turkey* (Judgment of 30 November 2004, no. 48939/99); *Budayeva and Others v. Russia* (Judgment of 20 March 2008), and *Cordella and Others v. Italy* (Judgment of 24 January 2019, nos. 54414/13 and 54264/15) as examples.

The Court went on to confirm that Article 2 of the Constitution includes a duty to protect life and health against the risks associated with climate change:

"…. In view of the considerable risks that increasingly severe climate change may also entail for the legal interests protected under [Article 2(2)] – for example through heat waves, floods or hurricanes… the state is obliged to afford this protection to the current population and also, in light of objective legal requirements, to future generations. (para 148)"

Overall, according to the court, "adaptation measures on their own would not be enough to sufficiently contain the risks posed to life and health over the long term ([...]). The legislator must therefore protect life and health by, in particular, taking action to stop climate change" (para 157).

Such a ruling from the world's seventh-largest greenhouse-gas emitter is significant to say the least. It is all the more notable that the government embraced the decision and quickly drew up legislation that increased the 2030 reduction target to 65%, and brought forward the government's net energy zero commitment to 2045.

Friends of the Irish Environment v. Ireland

A similar court ruling from July 2020 has compelled the Irish government to increase transparency in its climate mitigation plan and explain how it intends to meet the goal of cutting emissions by 80% (relative to 1990 levels) by 2050.

In *Friends of the Irish Environment v. Ireland*, Friends of the Irish Environment (FIE) grounded its claim in the rights to life and bodily integrity under the Irish Constitution, as well as under the ECHR. In doing so, they argued that the State has an obligation to protect persons against the future risks of climate change. FIE further invoked the government's positive obligation to perform its functions in a manner compatible with the State's obligations under the ECHR.

Notably, FIE also pitched the existence of an "unenumerated constitutional right to an environment consistent with human dignity" (para 5.4).

The Irish Supreme Court, though ultimately finding that FIE lacked standing to bring its claims under the Constitution and the ECHR, quashed the government's national plan to tackle climate change, stating that it was not good enough to achieve the standards of the *Paris Agreement*. The Court found, first, that the Plan lacked the specificity that the Act required; and second, that a Supreme Court found several Irish government policies to be "excessively vague or aspirational" (para 6.4.3). The Court explained, "While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050" (para 6.3). Overall, the court found that the government could no longer make vague promises it would not fulfil and, instead, had a legal obligation to protect citizens from the worst impact of climate change.

The Supreme Court also concluded that FIE had not made a compelling enough case for recognizing an unenumerated right to a healthy environment, separate from the rights expressly conferred by the Irish Constitution (para 7.7).

According to news articles, the Irish government "welcomed the ruling" and committed to "carefully examine the decision."

Urgenda Foundation v. State of the Netherlands

Both of the above cases followed the precedent set by a 2015 decision from the Netherlands. *Urgenda v Netherland*s was filed in 2013 on behalf of an environmental group, the Urgenda Foundation, and close to 900 Dutch citizens. They relied on Articles 2 and 8 of the ECHR to argue that the government was breaching their rights to life and to respect for private and family life.

Both the trial and appellate Courts concluded that the state had a legal duty of care, based on international human rights principles, to take sufficient action to address climate change. According to the Supreme Court, the Dutch government failed to uphold its obligations under the right to life in the ECHR (para 8.3.4).

By not taking stronger action on climate change, the Court of Appeal ruled that there was a "risk of irreversible changes to the worldwide ecosystems and liveability of our planet" (para 67). Similarly, the Supreme Court found a "serious risk that the current generations of citizens will be confronted with loss of life and/or disruption of family life […] that the State has a duty to protect against" (para 2.3.2).

Notably, the Court even went so far as to specify what the Dutch state's legal obligation is. It ordered the Dutch government to limit GHG emissions to 25% below 1990 levels by 2020, finding the government's existing pledge to reduce emissions by 17% insufficient to meet the state's fair contribution toward its international commitments.

The *Urgenda decison* has made a significant and precedent setting contribution to climate litigation. In addition to inspiring similar rights-based cases across the globe, it has also been invoked in cases against fossil fuel companies. For example, in *Milieudefensie et al. v. Royal Dutch Shell plc.*, the Hague District Court, mirroring *Urgenda*, established that Shell will have acted unlawfully if it fails to reduce the aggregate volume of carbon emissions by 45 per cent – relative to 2019 emissions levels – by 2030.

Discussion

While many UN bodies have recognized the intrinsic link between the environment and the realization of a range of human rights, such as the right to life and health (see for example, the OHCHR's repository of work), the recognition of rights infringements related to environmental hazards still troubles courts across the globe. There are rarely specific references to environmental rights in domestic and international law, and, although litigation is increasing dramatically in the field of climate law, few decisions have explored the environmental dimensions of existing human rights on the merits (Setzer & Higham, 2021).

Recent success in rights-based climate litigation cases—as demonstrated by the *Neubauer, Friends of the Irish Environment, and Urgenda* cases—illustrate a certain viability for rights-based claims on climate change. In all three cases, courts interpreted existing human rights – and particularly the right to life and integrity of the person – as encompassing protection from environmental risks. Is the same is possible in Canada? In particular, might section 7 of the *Charter* offer the same opportunity? The rest of this article explores that possibility.

Scope of the Right to Life

First, it is important to outline a few key differences between the scope of the right to life internationally – under Article 6 of the ICCPR and Article 2 of the ECHR – and the scope of the right under section 7 of the Charter. Although internationally, the right to life is increasingly understood to include quality of life, the Supreme Court of Canada has interpreted the right to life under section 7 to only be engaged where there is a risk of death posed by a State action. Because section 7 also protects the rights to liberty and security of the person in accordance with the principles of fundamental justice, it is also engaged when State action threatens bodily integrity.

Moreover, the right to health is not explicitly recognized in Canadian law. As the Federal Court – later affirmed by the Federal Court of Appeal – ruled in 2010, "the scope of the international legal right to health" is "contested" and "[d]efining the content of [the] right… is a formidable challenge." (*Toussaint v. Canada*, paras 67, 70). Although cases involving health services have been brought under sections 7 and 15 (equality) of the Charter, the right to health is not directly protected in the *Charter*.

Despite these differences, applications of section 7 have evolved considerably over the last 30 years. The section has been given an "expansive interpretation" to protect people "against an increasingly wide range of risks created by the State" (Chalifour, 2015), including to strike down or amend legislation that restricted access to abortions (*R. v. Morgentaler*), safe injection sites (*Canada (Attorney General) v. PHS Community Services Society*), and physician-assisted suicide (*Carter v. Canada (Attorney General*)). This evolution has prompted scholars like Lynda Collins (2003) to argue that, "the Supreme Court of Canada has clearly held that state conduct posing a significant—even if unquantifiable—risk to health [triggers potential violations of] security of the person."

Beyond risks to the right to life, section 7's liberty interest can also be engaged where state interference affects important life choices (*Blencoe v. British Columbia*, para 49; *Carter*, para 62). For instance, the right to choose where to establish one's home can fall within the scope of the liberty interest since this choice is fundamentally linked to individual dignity and independence (*Godbout v. Longueuil (City)*). Similarly, section 7's security interest is grounded in the idea of personal autonomy and protects both physical and psychological integrity (*Godbout*, para 64). In another context, the Supreme Court acknowledged that the security of the person encompasses the right to be free from prospective harm (*Singh v. Minister of Employment and Immigration*, 207).

These applications of section 7 indicate a progression in which the section is increasingly applied to broader matters of social policy. They imply a certain viability for future extensions to environmental matters, like those relating to climate change, when they engage similar questions.

Indeed, all three section 7 interests—whether life, liberty, or security—are engaged by climate change. This has led many scholars, like Lynda Collins and David Boyd, to make compelling arguments that section 7 could safeguard environmental rights and thus, may be available to strike down laws that allow pollution at levels that interfere with human health and well-being (Collins, 2009; Boyd, 2011).This conclusion has been recognized by at least one Canadian Court. Last year, the Ontario Superior Court acknowledged the justiciability of a section 7 climate change-related claim that engaged all three interests under section 7 (*Mathur v. Ontario*, paras 153, 156, 159). Mathur is now proceeding to be heard on its merits, which will require the Court to engage deeply on the issues raised in this article.

Positive Obligations

Another key question is whether Canadian courts are ready to impose positive duties on governments to respond to climate change, as did the highest courts in Germany, Ireland, and the Netherlands. Or will Canadian courts restrict climate litigation be restricted to negative rights? Although all three decisions invoke positive obligations to mitigate and protect against climate change, these obligations stem, in large part, from the ECHR. Common law jurisdictions are much more reluctant to recognize freestanding positive obligations.

Despite this reluctance, there is reason to believe that the door is not entirely closed on positive obligations under s. 7. The Supreme Court of Canada explicitly left the door open to recognizing positive rights under section 7 in its 2002 decision in *Gosselin v. Québec (Attorney General)*. Although two decades have passed since the ruling in *Gosselin*, many legal commentators have been waiting for years for the right case to push the door open a little further (Sheppard, 2015). As Justice Rennie of the Federal Court of Appeal stated in 2019:

“[S]ection 7 is not frozen in time, nor is its content exhaustively defined, […] it may, some day, evolve to encompass positive obligations – possibly in the domain of social, economic, health or climate rights (*Kreishan v. Canada (Citizenship and Immigration), para 139*).”

Conclusion

While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether – and to what extent, such effects can be qualified as human rights violations in a strict legal sense. Recent climate cases in Germany, Ireland and the Netherlands suggest that the right to life and the right to health can be avenues for holding States accountable for their failures to take sufficient action to tackle climate change. Whether this trend is adopted in Canada will be up to the courts.

Currently, Canada has four climate change-related rights-based cases that are at various stages of appeal (*Mathur v. Ontario*, *La Rose v. Her Majesty the Queen*, *Lho'imggin et al. v. Her Majesty the Queen*, *ENVironnement JEUnesse v. Procureur General du Canada*). These offer Canadian judges a real opportunity to not only extend Charter protections to environmental issues, but also to follow in the footsteps of Germany, Ireland, and the Netherlands to prompt stronger climate action from Canadian governments. By ordering governments to accelerate ambition in their climate policies to keep global warming below 1.5 degrees, the judiciary can play a crucial – and perhaps, life-saving – role in responding to today's Code Red for Humanity.

Suggested citation: Larissa Parker,"Climate Litigation and Emerging Environmental Dimensions of Human Rights: An Opportunity in Canada" (2021), 5 PKI Global Justice Journal 42.

About the author

Larissa ParkerLarissa Parker, BCL/JD, is currently articling in the Environmental Group at Gowling WLG's Toronto office. She graduated from the McGill Faculty of Law with the David L. Johnston Medal, the Nathan Cotler Prize in Human Rights Law, the Paul Smith Memorial Award in Administrative Law, and the CBA "In the Public Interest" Award. Larissa is passionate about environmental questions in the fields of administrative and constitutional law, and an outspoken advocate for increased action, accountability, and redress on climate change and environmental inequality. She also holds a Master's degree from the University of Oxford and an undergraduate degree from the University of Toronto.

Image: Maylim/Shutterstock.com