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The quality of law requirement as a climate litigation tool

Katalin Sulyok

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In the growing body of climate litigation featuring the European Convention of Human Rights (ECHR), applicants, third party interveners, domestic courts and commentators have discussed a wide range of doctrinal questions on how Article 8 (right to private life) of ECHR may apply to States' mitigation obligations. However, the rule of law requirement embedded in this provision has so far gone unnoticed. This paper explores the ways in which the quality of law requirement (QoL requirement), which is a core normative criterion flowing from the rule of law under the ECHR,[2] can serve as a climate litigation tool in ongoing and future proceedings.

Domestic mitigation laws tend to mandate lenient, delayed, and vaguely defined reduction commitments, without addressing the feasibility of the targets or how the measures will be able to limit warming by the end of the century. Finding legal benchmarks to assess the legality of the timing and design of mitigation commitments has been a major challenge for domestic courts. In recent judgments around the world, courts have set requirements for the specificity and transparency of national laws' mitigation targets under constitutional provisions[3] and statutory law.[4] The same dilemma arises under the ECHR too, see cases pending before the European Court of Human Rights (ECtHR), which include an alleged breach of Article 8 among the legal bases,[5] and I argue that the QoL requirement is a potential tool for courts to set similar conditions in climate cases argued on ECHR grounds.

This paper conducts a thought experiment to explore how courts – the ECtHR and domestic fora – can utilize the QoL requirement in 'systemic mitigation cases'[6] featuring

[1] Dr Katalin Sulyok Ph.D., LL.M. (Harvard), Assistant Professor in International Law and Environmental Law, ELTE Eötvös University. ORCID: 0000-0003-1807-8183. The author is very grateful for the comments provided to earlier versions of this manuscript to Eloise Scotford and Ole W Pedersen. All remaining errors are the author's.

[2] For a general overview see: Paul Lemmens, "The Contribution of the European Court of Human Rights to the Rule of Law," in *The Contribution of International and Supranational Courts to the Rule of Law*, by Geert De Baere and Jan Wouters (Edward Elgar Publishing, 2015), 225–41, DOI: https://doi.org/10.4337/9781783476626.00017

[3] Federal Constitutional Court (Germany), Order of the First Senate of 24 March 2021, 1 BvR 2656/18 Neubauer et al. v. Germany (Neubauer case).

[4] *Friends of the Irish Environment CLG v. The Government of Ireland*, Supreme Court of Ireland, Appeal No: 205/19 (31 July 2020).

[5] Duarte Agostinho and Others v. Portugal and Others, App.no. 39371/20; Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application no. 53600/20; Careme v. France, App.no. o. 7189/21. These cases are now pending before the Grand Chamber.

[6] Lucy Maxwell, Sarah Mead, and Dennis van Berkel, "Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases," *Journal of Human Rights and the Environment* 13, no. 1 (2022): 35–63, DOI: https://doi.org/10.4337/jhre.2022.0003

Article 8 ECHR, where plaintiffs challenge the absence or overly lenient nature of domestic GHG reduction commitments. It argues that judicial bodies can build on the ECtHR's case-law concerning the QoL requirement to justify finding a violation of Article 8 whenever domestic law mandates only unambitious, delayed, or vague mitigation targets.

THE QUALITY OF LAW REQUIREMENT UNDER THE ECHR: FROM SECRET SURVEILLANCE TO CLIMATE MITIGATION CASES

The rule of law is mentioned in the ECHR's Preamble, and functions as a general principle and an interpretative tool, which is "inherent in all the Articles"[7] of the Convention, and from which the ECtHR has discerned concrete obligations, even when the parties did not raise the issue of the rule of law explicitly.[8] One such obligation requires that domestic laws meet a certain quality to conform to Article 8. This QoL requirement stems from the wording of Article 8(2) itself, stating that lawful interference with the right must be "in accordance with the law". This expression not only necessitates compliance with domestic law, but also requires national laws to be compatible with the rule of law.[9] The ECtHR repeatedly held in that regard that national laws must be "sufficiently clear and detailed",[10] "accessible" by the persons concerned, and "foreseeable"[11] as to their effects on them. Domestic laws must also be "precise" to prevent undue interference by authorities and third parties,[12] and be "clear" by not leaving authorities too wide a margin of appreciation in interfering with protected rights.[13]

In its previous case-law, the ECtHR for instance found States in breach of the QoL requirement when domestic legislation lacked precision as to the legal basis of the applicant's surveillance by her insurance company.[14] The foreseeability criterion was interpreted as requiring that domestic law give the individuals an adequate indication as to the circumstances in which the authorities are entitled to resort to measures affecting their rights.[15] The ECtHR also stressed that the "in accordance with the law" criterion requires adequate safeguards in the domestic laws to ensure that the individuals' Article 8 rights are respected by third parties, too.[16] The lack of such safeguards in the national

[7] Amuur v. France, no. 1996/92 (25 June 1996), §50.
[8] Egidijus Küris, "On the Rule of Law and the Quality of the Law: Reflections of the Constitutional-Turned-International Judge," *Teoría y Realidad Constitucional*, no. 42 (January 30, 2019): 156, DOI: https://doi.org/10.5944/trc.42.2018.23654
[9] Big Brother Watch and Others v. the United Kingdom [GC], nos. 58170/13 62322/14 24960/15 (25 May 2021), §332.
[10] Amann v. Switzerland, no. 27798/95 (16 February 2000) §58.
[11] Huvig v. France, no. 11105/84 (24 April 1990) §26.
[12] Di Tommaso v. Italy, no. 43395/09, (23 February 2017), §108.
[13] Labita v. Italy [GC], no. 26772/95, (6 April 2000) §§ 176 and 180–184;
[14] Vukota-Bojić v. Switzerland, no. 61838/10.
[15] Fernández Martínez v. Spain [GC], no. 56030/07 (12 June 2014), § 117
[16] Guide on Article 8 of the Convention – Right to respect for private and family life, para. 19.

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legislation could also amount to a violation of Article 8.[17] This highlights the relevance of meeting the QoL requirement with respect to States' positive obligations.

Originally, these criteria were developed under Article 8 mainly in secret surveillance and censorship cases. However, it is proposed here that courts might apply them to States' climate mitigation obligations too, ruling either that national climate laws directly interfere with Article 8 rights if they do not contain "precise" and "detailed" mitigation commitments, or that such deficient domestic mitigation laws are deemed to be a symptom of States' failure to meet their positive obligations.

This means that, first of all, under the QoL requirement, there must be a basis in national laws for GHG emissions that may interfere with protected rights. This calls for adopting targets in legislation as opposed to non-binding plans that are otherwise sufficient under Article 4 of Paris Agreement to contain States' mitigation efforts as part of their Nationally Determined Contributions.

Second, and more importantly, the QoL requirement can be utilized to set specific criteria for domestic mitigation laws in order to be deemed compliant with the Convention. It can be argued that domestic mitigation laws violate this requirement if they are not "detailed" enough to specify the long-term mitigation trajectory, which is necessary to ascertain that the mitigation measures can avert serious climate risks. If only lenient targets are fixed for the short-term, the law postpones the bulk of the reduction burden to the distant future. The 2022 IPCC report suggests that early GHG reductions have far more cooling effect than postponed emission cuts. It is likely that States can only meet the 1.5^0C temperature goal, the harmful consequences of which are known to be considerably less than that of a 2^0C warming, if global emissions peak by 2025.[18] This necessitates immediate climate action, hence domestic laws delaying deep reduction cuts fail this requirement.

Moreover, the effects of domestic GHG commitments on individuals are arguably not "foreseeable" and the bounds of discretion conferred on public authorities are not "clear" enough – and hence the pathway is incompatible with the QoL requirement – if laws do not explain, with a view to best available climate science, how they safeguard the peaceful enjoyment of rights in the proximate future. Setting long-term mitigation targets, or at least a transparent planning horizon for such a trajectory, in the national laws is also necessary to ensure that lawmakers and the executive in the future will not have the opportunity to further postpone taking effective mitigation measures. As opposed to this, several of the domestic laws in effect today lack specific emission reduction targets that

[17] Söderman v. Sweden [GC], no. 5786/08 (12 November 2013), § 117.
[18] IPCC, WG III report on Climate Change 2022 Mitigation of Climate Change, Summary for Policy-makers, Section C.1. (April 2022), available: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf

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would specify the longer-term mitigation pathway. However, those should be set and made transparent to the public early on to hold the government accountable for placing an undue burden on individuals in a few decades from now. Only this can guard against the arbitrary exercise of governmental powers in tolerating, or even imposing climate harm on vulnerable individuals and groups of society, such as minors or seniors, as required by the rule of law.

Finally, the QoL criterion requires that domestic legislative safeguards be in place to prevent interference with protected rights by third parties. In the context of climate action, this means that States whose domestic climate laws do not curb emissions of the industry effectively, and thereby allow harmful GHG emissions to continue to rise, or which set a less steep reduction pathway for emissions in the immediate future, would fail this requirement.

HOW WOULD THE QUALITY OF LAW REQUIREMENT INFLUENCE THE COURT'S INQUIRY?

The application of the QoL requirement is most straightforward if the court assesses climate laws as part of States' negative obligations under Article 8, that is, if GHG laws are conceptualized as direct interference of public authorities. Factually speaking, it is the GHG emissions that cause climate harm, however, legally speaking, they occur within the bounds, and the basis, of domestic emission laws, and in this sense the interference is *caused* by state authorities.

The ECtHR expressly stated that where domestic laws fail to meet the QoL requirement, the "mere existence of the contested legislation amounts in itself to an interference",[19] and can declare a violation of Article 8 without assessing whether the interference pursued a legitimate aim or was necessary in a democratic society.[20] Even though domestic climate laws may allegedly serve to protect the individuals, when they mandate only over-lenient mitigation targets, which is often the case, such laws in fact tolerate, if not directly impose, harmful climate impacts on individuals – and hence they arguably amount to an interference.

Supposedly, the ECtHR may find a violation of the negative obligations more easily for not needing to define substantive benchmarks for appraising the content of States' positive obligations (as argued by an intervener in *Duarte*[21]). Nevertheless, domestic climate (in)action is currently typically challenged by parties, and reviewed by courts, as part of

[19] Roman Zakharov v. Russia [GC], no. 47143/06 (4 December 2015), § 179.
[20] Guide on Article 8 of the Convention – Right to respect for private and family life, para. 21.
[21] Third party intervention of the Climate Action Network Europe, available: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210506_3937120_na-3.pdf

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States' positive obligations, see cases pending before the ECtHR,[22] and previous domestic decisions.[23]

Importantly, the QoL requirement can be relevant in the positive obligation paradigm, too. The ECtHR has already recognized that the applicable principles "are broadly similar"[24] in relation to assessing compliance with the negative and positive obligations, owing to their inextricable linkage, and that the factors listed in Article 8(2) can be of relevance for scrutinizing positive obligations, too.[25] It is also well-established that deficient protection in domestic laws against arbitrary interference of third parties can entail a violation of Article 8.[26] This means that the lack of "clear", "detailed" and "foreseeable" climate mitigation laws can be factored into assessing whether the State has struck a fair balance between the rights of individuals and the economic interests of the community in discharging its positive obligations.

The most significant practical implication of such a judicial inquiry would be that the ECtHR could refer to the QoL requirement as a factor limiting the margin of appreciation of States in assessing compliance with their positive obligations, which has traditionally benefited from a deferential judicial review. Whereas the ECtHR affords a leeway under Article 8(2) as to whether the restriction was necessary in a democratic society, it grants no discretion as to whether it was „in accordance with the law" and met the QoL requirement.[27] This means, arguably, that scrutinizing the QoL requirement with respect to States' climate laws makes it easier for the ECtHR to declare a violation when such laws mandate only too lenient, delayed or vague mitigation targets, as those would fail to be "precise", "detailed" and "foreseeable" in the sense outlined above.

Furthermore, the QoL requirement would enable the ECtHR to devise a remedy, which ensures that States do not comply with its judgment finding a violation only formalistically, by passing weak climate laws with insufficient reduction commitments. Notably, the ECtHR could only bring a declaratory judgment and/or award damages, but it has no power to determine the appropriate mitigation pathway (as was done by Dutch courts in the Urgenda case).[28] The ECtHR could, however, prescribe general measures under Article 46 ECHR for States to prevent similar complaints to arise from the same structural problem. In its judgment finding a violation, the ECtHR could, thus, refer to QoL

[22] Duarte Agostinho and Others v. Portugal and Others, App.no. 39371/20; Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application no. 53600/20; Careme v. France, App.no. o. 7189/21.
[23] French-speaking Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167 (17 June 2021) (Klimatzaak case), and Hoge Raad, *Urgenda Foundation v. The State of the Netherlands,* 19/00135 (20 December 2019). (Urgenda case).
[24] Pavlov and Others v. Russia, no. 31612/09 (11 October 2022), § 75.
[25] Guide on case-law of the Convention – Environment, p. 39.
[26] Guide on Article 8 of the Convention – Right to respect for private and family life, para. 19.
[27] Practical guide on admissibility criteria, para. 306., Roman Zakharov v. Russia [GC], o. 47143/06 (4 December 2015), § 179.
[28] Hoge Raad, *Urgenda Foundation v. The State of the Netherlands,* 19/00135 (20 December 2019).

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requirements as part of the legislative amendments deemed necessary to prevent future human rights complaints rooted in unambitious domestic climate action. Even though the ECtHR respects States' discretion in aligning their domestic laws with the requirements flowing from its judgments, it may provide indications for States about the types of measure needed. Referring to the QoL requirements among such guidelines would ensure that only ambitious and timely mitigation laws with adequate long-term commitments would be deemed compliant with its judgment and, thus, be compatible with the ECHR.

For all these reasons, it is argued here that the QoL argument is worth pursuing as an additional argument in plaintiffs' climate litigation strategy to assist the courts in providing remedy against domestic laws the content of which is materially insufficient to avert climate harm and ensuing interference with human rights.

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