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Climate change law and litigation in Sweden with scenarios from Europe

Possibilities for members of the public to challenge the state's responsibility for climate change through litigation

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Writing this thesis has been a long journey entailing in depth reading, long discussions, passionate debates and rowing. My first encounter with the subject of climate change was in 2009 when I had the privilege to attend the fifteenth session of the United Nations Climate Change Conference (COP 15) in Copenhagen. By then, I was a 21 year old student in political science aspiring to become a diplomat. At the conference I had encounters with climate activists, governments and international organisations.

Shortly after the COP 15-event I started taking courses in international law and that further motivated me to pursue law studies at Uppsala University and Utrecht University. During the years as a student I've been working as a research assistant at Stockholm University investigating international organisations' climate change adaptation measures. I've had the privilege to work with people that share my interests in international climate change law and policy. During the same period I have worked as a lecturer at the non-governmental organisation, Folk och Försvar, where I addressed security policy issues with teenagers between the age of 15 to 19. The conversations with young minds has given me different perspectives on how the youth views security policy and its correlation to climate change. In sum, there are numerous of events and encounters that have impacted and motivated me to write about climate change.

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This thesis is dedicated to my 16-year-old brother Anthony and his generation, the Greta Thunberg-generation.

Ana-Sofia

Stockholm, June 2019

Abstract

The Swedish government is legally obliged to conduct climate policy work that will protect nature and humanity from the harmful effects of climate change. Obligations related to the environment arise under Swedish domestic law, European law and international law. This thesis investigates the possibilities for the Swedish public to initiate climate change litigation against the Swedish government due to insufficient climate actions.

I examine three climate change litigation approaches from selected jurisdictions, including Germany, the Netherlands, Norway and the United Kingdom. By transposing the three litigation approaches into the Swedish legal order I seek to discuss the possibilities for the public to challenge the Swedish state's responsibility in climate matters.

This thesis claims that the possibilities for the concerned public to address climate change are restricted. International obligations derived from the European Convention on Human Rights and the Aarhus Convention have given individuals substantive rights and procedural rights in matters related to the environment. However, the implementation of the international obligations are not always enshrined in the national law.

Keywords: climate change law; climate change litigation; Sweden; greenhouse gas emissions; Paris Agreement; European Convention on Human Rights; Aarhus Convention; environmental human rights; tort law; climate policy decisions; permit decisions; judicial review

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List of Abbreviations

CJEU	Court of Justice of the European Union
COP	Conference of the Parties
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ENGO	Environmental Non-governmental Organisations
ESD	Effort Sharing Decision
ESR	Effort Sharing Regulation
ETS	Emissions Trading System
EU	European Union
GHG	Greenhouse gas
IPCC	Intergovernmental Panel on Climate Change
NDC	Nationally Determined Contributions
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNFCCC	United Nations Framework Convention on Climate Change

1 Introduction

1.1 Background

According to the latest scientific report from the Intergovernmental Panel on Climate Change[1] (IPCC) the human-induced warming was 1°C in 2017.[2] This means that the last measured average global temperature is increased by 1°C compared to the pre-industrial temperatures.[3] The one-degree temperature increase affects both regions and seasons across the globe. The mitigation measures required by states to limit temperature rise affects the poor and vulnerable to a larger extent.[4] Notable consequences of global warming are higher temperatures in land and oceans, large-scale melting of glaciers, sea level rise, droughts, floods, species extinction, diminishing natural resources and other irreversible impacts.[5]

International agreements concerning the environment have been negotiated and adopted by members of the European Union (EU) and the United Nations (UN), resulting in, among other, the Paris Agreement. The Paris Agreement is the latest international agreement concerning responses to combat climate change. Parties to the Agreement are committed to limit the average temperature increase to well below 2°C above pre-industrial levels, along making efforts to limit the increase to 1.5°C above pre-industrial levels.[6] The measures and policies to meet the temperature targets differs from state to state. However, all parties are obliged to take measures in the light of the purpose and objective of the Paris Agreement. That is to strengthen the global response against the threat of climate change by limiting the global temperature increase.[7]

In essence, CO_2 emissions need to reach net zero for the global temperature to stabilise.[8] Net zero means that the volume of CO_2 emissions that enters the atmosphere must equal the volume of CO_2 that is removed.[9] Cumulative CO_2 emissions create global warming and an indication from the emissions pathway suggests that if net zero is reached between

[1] The IPCC is an intergovernmental body in the United Nations that assesses the science related to climate change.
[2] IPCC, Climate Change 2018: Special Report on Global Warming of 1.5°C, 2018, p. 51.
[3] IPCC Special Report on Global Warming of 1.5°C is partly building on the IPCC Fifth Assessment Report, and the years 1850-1900 are an approximation of pre-industrial temperature levels.
[4] IPCC, Climate Change 2018: Special Report on Global Warming of 1.5°C, 2018, p. 51.
[5] IPCC, Climate Change 2018: Special Report on Global Warming of 1.5°C, 2018, pp. 177–179.
[6] See Article 2(1)(a) of the Paris Agreement (Dec. 13, 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Jan. 29, 2016) United Nations, FCCC/CP/2015/L.9/Rev.1 (12 December 2015).
[7] See Article 2(1) of the Paris Agreement.
[8] IPCC, Climate Change 2018: Special Report on Global Warming of 1.5°C, 2018, p. 61.
[9] Ibid, p. 161.

2050 and 2070 the temperature increase will be close to 2°C. [10] An aim to stay around 1.5 degrees would require net zero by 2040.[11] With the current pledges under the Paris Agreement the global temperature is expected to surpass 1.5°C.[12]

An increase of the global temperature with 1.5°C will result in climate change-driven impacts, which would distress freedoms that are taken for granted in a democratic society. Such human rights include the right to life, the right to respect for private and family life, the right to health[13] and the right to live in a healthy environment.[14] The global temperature increase is anthropogenic and governments play a big role in addressing the solution. Emissions account for global warming and humans emit them through different activities.[15] One way to work towards limiting the global temperature increase is to set and pursue reduction targets on greenhouse gas (GHG) emissions.

In 2015 more than 150 world leaders agreed to tackle climate change and its impacts by adopting *climate action* as one of the UN Sustainable Development Goals 2030. The term *climate action* means that states need to increase their efforts to reduce GHG emissions along strengthening the resilience and adapting to climate-induced impacts.[16] Greenhouse gas emissions reduction targets is a *climate action* to combat climate change and its impacts.

In 2009 the Swedish parliament adopted an environmental quality objective on the reduction of climate impacts.[17] By 2020 the greenhouse gas emissions are to be reduced by 40 percent in comparison to the levels of 1990. The 40 percent reduction target concerns the sectors not covered by the European Union's Emissions Trading System (EU ETS).[18] In the latest reports concerning Sweden's emissions reduction trajectory, the Swedish Environmental Protection Agency concluded that the reduction was 30 percent.[19] This

[10] Ibid, p. 95.
[11] Ibid, p. 95.
[12] Ibid, p. 95.
[13] See Article 25 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[14] The Hague District Court judgement of 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.74; The Hague Court of Appeal judgement of 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 45; See Preamble, Recital 11 of the Paris Agreement, where the state parties acknowledge the correlation between climate change and human rights.
[15] IPCC, Climate Change 1990: First Assessment Report, 1990, ch. 1, p. 5.
[16] Goal 13 of the UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1 [online].
[17] Environmental quality objective 'Begränsad klimatpåverkan'; Betänkande 2008/09:MJU28 (Committee report); Prop. 2008/09:162, p.1 (Government bill).
[18] The EU Emissions Trading System (EU ETS) covers approximately 45 percent of the total emissions in the EU and the non-emissions trading system stands for 55 percent of the emissions in the EU. For more information on this, see chapter 2.
[19] Swedish Environmental Protection Agency, Underlag till regeringens klimatpolitiska handlingsplan: Redovisning av Naturvårdsverkets regeringsuppdrag, Report 6879, 2019, pp. 65, 151; Swedish Environmental

means that a cut of approximately ten percent of greenhouse gas emissions is needed to meet the Swedish national reduction target for 2020. In April 2019 the Environmental Protection Agency issued a report demonstrating that climate-affecting emissions within Sweden have increased during 2018.[20]

The national legislature and executive are primarily responsible to respectively enact and enforce reduction targets. Courts have an important role in solving disputes with regard to the environment, thus holding the government to account for the implementation of the environmental commitments.[21] National legal systems set the frame for the possibilities to initiate litigation against the government, including both substantive law and procedural law. The possibilities to initiate litigation based on climate change are therefore constrained to the rules under national law.

Due to the emergence of European law and international law numerous states are parties to the same international treaties thus sharing the same obligations on human rights and rights related to the environment.

1.2 Purpose and question

Courts have an unique role in upholding the environmental rule of law through litigation.[22] Climate change litigation is commonly initiated between parties contesting their rights derived from tort, contract or property law, criminal prosecutions, public interest litigation or enforcement of constitutional rights.[23] The litigation process involves two opposing parties and is meant to enforce the laws or defend a legal right. [24] Individuals or environmental non-governmental organisations (ENGO) can initiate litigation to defend a certain legal right when they think that their government is not taking appropriate action.[25] The purpose of this thesis is to investigate how the public can use litigation to demand responsibility for international commitments related to the environment. If the public can

Protection Agency, Fördjupad analys av svensk klimatstatistik 2018, Report 6848, 2018, p. 5; Swedish Environmental Protection Agency, Med de nya svenska klimatmålen i sikte: Gapanalys samt strategier och förutsättningar för att nå etappmålen 2030 med utblick mot 2045, Report 6795, 2017, p. 18. The 30 percent reduction estimates emissions until 2017.

[20] The emissions increased by 0.9 percent in 2018 compared with the previous year, however the statistics are preliminary and the current increase is within the error margin. Swedish Environmental Protection Agency, Kvartals- och preliminära årsvisa växthusgasutsläpp [online].

[21] Carnwatch, Climate Change Adjudication after Paris: A Reflection, 2016, p. 9; Venter and Kotzé, The methodology of environmental constitutional comparison, 2017, p. 254.

[22] UNEP, Judicial Handbook on Environmental Law, 2005, p. 42.

[23] Ibid, pp. 10, 43. The list of litigation is not exhaustive.

[24] Ibid, p. 6.

[25] Ibid, pp. 6, 111.

hold governments accountable for insufficient climate actions, that could pave the way for reducing the effects of climate change.[26]

Other means to halt the effects of climate change are through adaptation and mitigation measures. Adaptation measures includes making adjustments and reducing the vulnerability to the impacts of climate change.[27] Mitigation focuses on one of the causes of climate change, namely emissions, and its reduction.[28] Adaptation and mitigation are two strategies addressing climate change and both are of necessity to address the nexus of climate change. Climate change adaptation and mitigation can be pursued in numerous ways and most commonly through the implementation of policies and measures. Reduction targets concerning greenhouse gas emissions, e.g. the Swedish 40 percent reduction target by 2020, is a mitigation tool. Decisions concerning adaptation and mitigation measures are usually taken by governments. This thesis claims that the public concerned has limited possibilities to affect mitigation.

In recent years there has been a development for climate change litigation initiated by concerned citizens and ENGO's, where one of the goals is to mitigate the effects of the climate. The accessibility for the concerned public to bring a case before a court and initiate a lawsuit against the state has proven to be limited to the legal system of the state concerned. Not all legal systems allow climate change litigation processes to be issued and the rules regarding the procedure are not always easy to comprehend.[29] Judicial access to environmental matters is one of the reasons for the adoption of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[30] By granting the public procedural rights on matters related to the environment the Aarhus Convention aims to strengthen democracy.[31]

In 2015 and 2018 a climate change litigation case in the Netherlands, *Urgenda Foundation v. The Netherlands*, was of importance to the question on the concerned public's possibilities to hold the state accountable for climate change. Both the Hague District Court and the Hague Court of Appeal ruled that the Netherlands are to reduce their GHG emissions by 25

[26] The Hague District Court judgement of 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.74; *Gloucester Resources Limited v. Minister for Planning*, New South Wales Land and Environment Court 7, judgement of 8 February 2019.
[27] IPCC, Climate Change 2018: Special report on Global Warming of 1.5°C, 2018, pp. 51, 542.
[28] Ibid, p. 554.
[29] Stockholm District Court judgement of 30 June 2017, case T 11594-16 et al.
[30] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).
[31] Preamble, Recital 21 of the Aarhus Convention.

percent before the end of 2020. This was the first successful climate change litigation case in the world to order the state to reduce its GHG emissions. Further, the judgements proved that members of the public *can* challenge the state's responsibility for climate change. The Urgenda case has inspired numerous climate lawsuits in Europe, including Sweden.[32]

Can the Swedish public initiate similar cases against the Swedish state? In order to understand the current legal order in Sweden concerning climate change litigation I analyse three litigation approaches that have been conducted in Germany, the Netherlands, Norway and the United Kingdom.

The three litigation approaches are based on tort law, climate policy decisions and permit decisions. Based on these approaches I analyse if the Swedish public can initiate similar cases in Sweden. By exemplifying three different litigation approaches from four states I answer the following research question: *What are the possibilities within the Swedish legal order for the concerned public to initiate climate change litigation against the Swedish government due to insufficient climate actions?*

1.3 Limitations

The climate change litigation cases from Germany, the Netherlands, Norway and the United Kingdom have been categorised into three litigation approaches. First, litigation through *tort law* is exemplified by the Dutch case. Second, *climate policy decisions litigation* is demonstrated by the cases from Germany and the United Kingdom. Third, *permit decisions litigation* is illustrated by the Norwegian case. The climate cases are at different stages in the legal process and while some lawsuits have been filed others are decided by a court.

The reason for selecting cases from the mentioned jurisdictions is because these states are signatories to the same international treaties of concern for this thesis. Like Sweden, they are parties to the Paris Agreement, the European Convention on Human Rights (ECHR)[33] and the Aarhus Convention.[34] Germany, the Netherlands, Sweden and the United Kingdom are members of the EU, not Norway.

[32] Stockholm District Court judgement of 30 June 2017, case T 11594-16 et al; Statement of Claim, Family Farmers and Greenpeace Germany v. Germany, 25 October 2018 [online]. For an overview see Climate Change Litigation Databases, Columbia Law School's Sabin Center for Climate Change Law [online].
[33] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[34] UNECE, Parties to the Aarhus Convention and their dates of ratification [online]; SÖ 2005:28.

Concerning the international sources of law focus will be on the Paris Agreement, the ECHR and the Aarhus Convention. Both the Paris Agreement and the ECHR regulate substantive law provisions and the Aarhus Convention consist of procedural law provisions related to the environment. Given the fact that the above mention countries share the same international obligations related to the environment as Sweden, they make a satisfactory foundation for further analysis.

The aforementioned states have different legal systems including common law and civil law jurisdictions, along monistic and dualistic theories in international law. Signatories to international treaties have different approaches when interpreting the relationship between international law and national law. While monistic states apply international law before national courts, dualistic states have to translate international law into the national law before it can be used in court. In relation to the ECHR, monistic states may rely on international treaty provisions before a court, in comparison to dualistic states where that possibility is more constrained. Even if the monistic and dualistic approaches per se won't be further analysed for the purpose of this thesis, I am aware of the criticism that can arise given the selection of cases from states practising monistic or dualistic theories.

The ECHR constitutes Swedish law[35] and is ranked higher than 'ordinary' laws, although not hierarchically above the four fundamental laws of the Swedish Constitution. National legislation in general must however not be contrary to the provisions laid down in the ECHR.[36] Sweden is a dualistic state and judges have had a cautious approach towards the ECHR and related case law from the European Court of Human Rights (ECtHR).[37] I have no intention to cover the differences in the monistic and dualistic theories but want to be transparent about its effects. Instead, the method of litigation is of interest. The selected cases are not meant to be exhaustive alternatives for conducting climate change litigation in Sweden and they should rather be seen as tools to cover potential pathways. Solely lawsuits that are initiated against governments are used and the claimants are either individuals or environmental non-governmental organisations.

During the process of writing this thesis I have encountered difficulties with categorising the climate change litigation approaches. Various litigation cases share similar claims and contain similar actions. For example, alleged breaches of provisions in the ECHR

[35] Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (1994:1219).
[36] Chapter 2 Section 19 of the Instrument of Government (Regeringsform, 1974:152).
[37] Wenander, Sweden: European Court of Human Rights Endorsement with Some Reservations, 2016, p. 245.

are common for all four cases. The legal order of the countries concerned naturally affects the outcome of the cases. Even if the litigation approaches, and not national legal orders, are the main area of focus, the transposition into the Swedish legal order has not been uncomplicated. In the end I was able to categorise the litigation approaches accurately.

1.4 Method and material

In order to understand national environmental law a prerequisite is to also comprehend the regional and international nature of it.[38] The national environmental field is interconnected with regional and international obligations and commitments. Therefore, Swedish national law, EU law along international law are the core material for answering the research question of this thesis. This includes domestic legislation, legislative history, case law, doctrine, sources of EU law, international treaties, scientific reports and literature.

When conducting research in environmental law one must take into account both legal and scientific aspects along several fields of law related to the environment. Environmental law can be explained as a "reactive part of legal science"[39] and can therefore not solely rely on an interpretation based on legal dogmatisms.[40] In writing this thesis the *legal dogmatic method*, the *European legal method* and the *collective case studies method* are used. The characteristic features of the legal dogmatic method involves interpretation and systematisation of established legislation.[41] Legislation, legislative history, case law and doctrine are the core material of use in the legal dogmatic method.[42] Further, the method is used to describe how a particular solution can be applied on a specific problem.[43] It helps to bring legal rules into a concrete example given the dispute at question.

Due to the wide scope of legal material required for answering the research question I will first give a background to the EU law and international law sources of concern namely the EU legislation on GHG emissions, the Paris Agreement, the European Convention on Human Rights and the Aarhus Convention. Thus, the legal dogmatic method is therefore introduced in chapter 4 when transposing the three climate litigation approaches into the Swedish legal order.

[38] Ebbesson, Miljörätt, 2015, p. 26.
[39] Kokko, Methods of Environmental Law in Finland, 2014, p. 286.
[40] Ibid, p. 286.
[41] Ibid, p. 286.
[42] Kleinman, Rättsdogmatisk metod, 2013, p. 21.
[43] Ibid. p. 26.

As recognised in Article 38(1)(a) of the Statute of the International Court of Justice[44] one of the primary sources of international law constitutes international treaties. The Paris Agreement, the European Convention on Human Rights and the Aarhus Convention are the international treaties analysed in the thesis. The international treaties are interpreted in conformity with the Vienna Convention on the Law of Treaties.[45] In accordance with the general rules of interpretation a treaty shall be interpreted in good faith in conformity with the ordinary meaning of the terms in the treaty, in their context and in the light of the treaties' object and purpose. [46] In addition to the treaty text, the preamble and annex can be used for interpreting the purpose of the treaty.[47]

The ECHR is a living instrument meaning that it must be interpreted given present-day conditions.[48] When interpreting provisions in the ECHR the European Court of Human Rights has developed the margin of appreciation doctrine.[49] It requires that a minimum level of human rights protection is ensured while allowing the state parties room for manoeuvre depending on the particular jurisdiction of the state in question.[50] It has been argued that the Aarhus Convention also applies the living instrument doctrine. [51]

As previously mentioned sources of EU law, specifically EU decisions and regulations concerning GHG emissions along case law from the Court of Justice of the European Union (CJEU) are analysed. I will therefore exercise the *European legal method* for interpreting the EU law material. Sweden's membership in the European Union obligates domestic courts and state agencies to apply EU law along giving EU law with direct effect precedence in the case of a conflict with Swedish law.[52] EU law can be divided into primary law, secondary law and supplementary sources of law. Primary law constitutes treaties and related amendments establishing the EU. Secondary law is based on the principles and objectives of the treaties and is composed of regulations, directives, decisions, recommendations and opinions. Since primary law constitutes the establishing of the EU it is placed first in the EU legal hierarchy

[44] Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [the Charter], 1055 [ICJ Statute], T.S. No. 993 [ICJ Statute at 25], 3 Bevans 1153 [ICJ Statute at 1179].
[45] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[46] See Article 31(1) Vienna Convention on the Law of Treaties.
[47] Ibid, Article 31(2).
[48] *Tyrer v. The United Kingdom*, Application no. 5856/72, ECtHR (1978), para. 31.
[49] *Greece v United Kingdom*, Application no. 176/56, Decision of the European Commission of Human Eights (1958).
[50] Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, 1996, p. 13.
[51] Sommermann, Transformative Effects of the Aarhus Convention in Europe, 2017, p. 327.
[52] Case 6-64 *Flaminio Costa v. E.N.E.L,* ECLI:EU:C:1964:66; Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

followed by secondary law. In the case if secondary law can be interpreted in different ways, the interpretation that is most coherent with primary law shall be applied. Regulations, directives and decisions constitute binding legislative acts whilst recommendations and opinions are not binding.[53] The supplementary sources of law includes case law developed by the CJEU, general principles of EU law and international law.[54] Supplementary sources of law constitute unwritten-sources of EU law, as opposed to primary law and secondary law. The CJEU has an important role in interpreting EU law and is the ultimate court to ensure that EU law is correctly interpreted and applied.[55] When the primary and secondary legislation does not settle the issue, the supplementary sources of law are vital for the CJEU.

In EU law the principle of direct effect enables individuals to immediately invoke a European provision before a domestic court. If provisions with direct effect are applied they can override domestic law. In order for provisions to have direct effect they have to comply with several conditions. The obligations of concern "must be precise, clear and unconditional and (…) do not call for additional measures, either national or European."[56]

To understand the cases from other jurisdictions the method of *collective case studies* is exercised. The collective case study method helps to outline and visualise common concerns and related experiences of legal obstacles beyond one geographic site.[57] Further, the gathering of several cases can assist in bringing out environmental injustices that exist for the cases. It can reveal problems that commonly arise in the selected cases.[58] Even if states share common environmental challenges the responses are determined by different factors, such as legal cultures and the use of different policy instruments.[59] Therefore one could argue that the method of collective case studies is unable to reveal nationally determined rules that form the responses to legal environmental obstacles. It is my understanding that by collecting and analysing four different litigation cases from four states it aids to understand the scope of the issues often related to climate change litigation. The selection of four jurisdictions goes

[53] See Article 288 in the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2016, OJ C202/1.
[54] EUR-Lex, Sources of European Union law, 2017 [online].
[55] See Article 19 in the European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5, 24 December 2002.
[56] EUR-Lex, The direct effect of European law, 2015 [online]; Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.
[57] Holder and McGillivray, Bringing environmental justice to the centre of environmental law research: developing a collective case study methodology, 2017, p. 187.
[58] Ibid, p. 187.
[59] Kokko, Methods of Environmental Law in Finland, 2014, p. 287.

beyond focusing on one specific legal dispute or one particular environmental problem and it serves to understand the issue from different perspectives.

The climate litigation cases entail official documents consisting of complaints, decisions, judgements, written requests and appeals. Official documents in a language other than English have been translated in Google Translate. To compliment the translation unofficial translated documents have been used from the research databases on Climate Change Litigation from Columbia Law School's Sabin Center for Climate Change Law in collaboration with Arnold & Porter Kaye Scholer LLP[60] and one homepage from an ENGO.[61] All documents concerning the litigation cases have official documents available either online or by request.

1.5 Disposition

The *first chapter* sets the skeleton of the thesis and is intended to be used as the foundation for the posterior chapters. In order to understand climate change litigation, a general introduction to international legislation concerning climate change continues in *chapter two*. *Chapter three* introduces the climate change litigation cases from the chosen jurisdictions. The litigation cases are divided into three sections depending on the climate litigation approach used. Therefore, the three sections are litigation based on tort law, climate policy decisions and permit decisions. *Chapter four* focuses on the Swedish national legislation and transposes the three litigation approaches into the Swedish legal order, thus analysing the possibilities for members of the public to challenge the Swedish state's responsibility for climate change. Lastly, in *chapter five*, the result from the analysis is presented along a final concluding discussion on how current and possible future litigation approaches *de lege ferenda* can be conducted by the public to challenge the Swedish state's responsibility for insufficient climate actions.

[60] For more information see, Climate Change Litigation Databases, Columbia Law School's Sabin Center for Climate Change Law [online].
[61] In the German climate litigation case the following online source from Greenpeace was used: Greenpeace, Greenpeace Germany and Families File Lawsuit Against Government Over Inaction on Climate Change, 2018 [online].

2 Climate change law

2.1 General introduction

The subject of environmental law touches upon a hybrid of fields including, domestic legislation, EU law, international law and science. The field is undergoing development and through the adoption of international agreements numerous states are now bound by the same international obligations concerning the environment. Climate litigation cases have referred to the Kyoto Protocol and the Paris Agreement when denouncing the international willingness and cooperation to combat climate change before a court.[62] This chapter focuses on the climate change legislation on the international level with an emphasis on the commitments under the UNFCCC, EU legislation, European Convention on Human Rights and the Aarhus Convention.

International climate goals have to be concretised and pursued by governments on a national level by different means, most commonly through GHG emissions reduction targets (reduction targets). In this respect states can act in accordance with international commitments or pursue more ambitious targets nationally. This chapter therefore addresses the states' obligations under the Kyoto Protocol and the Paris Agreement, EU's climate policy surrounding GHG emissions, human rights related to the environment under the ECHR along participatory and procedural rights under the Aarhus Convention. Given the amount of countries that have adhered to the Paris Agreement and the fact that it will succeed the Kyoto Protocol, a more thorough introduction is provided.

2.2 Commitments under the UNFCCC

In 1992 the international community gathered in Rio, Brazil in the United Nations Conference on Environment and Development. The conference resulted in the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) and it also paved the way for the Kyoto Protocol and the Paris Agreement. The ultimate objective of the UNFCCC is to stabilise the GHG concentrations in the atmosphere.[63]

[62] For an overview over climate litigation cases referring to the Kyoto Protocol and Paris Agreement visit Climate Change Litigation Databases, Columbia Law School's Sabin Center for Climate Change Law [online].
[63] See Article 2 of the UNFCCC.

2.2.1 Kyoto Protocol and the EU

In 1997 the Kyoto Protocol was adopted under the UNFCCC during the third Conference of the Parties (COP 3).[64] The Kyoto Protocol is divided into two commitment periods from 2008-2012 and 2013-2020. It entered into force in 2005 with the objective to reduce GHG emissions by 5.2 percent during 2008 to 2012, and 18 percent for 2013 to 2020, compared to the emitting levels in 1990.[65]

The EU ratified the Kyoto Protocol in 2002[66] and agreed on GHG emissions reduction targets for two commitment periods from 2008-2012 and 2013-2020. For the first commitment period the EU contribution to the Kyoto Protocol was a reduction target on approximately 8 percent including both the EU ETS sectors and the non ETS sectors. A 20 percent reduction target compared to 1990 levels made up for the second commitment period. Also, the second commitment period of the Kyoto Protocol is part of the EU 2020 Climate and Energy Package.[67] The 2020 Climate and Energy Package entails different legislative measures on GHG emissions reduction, renewable energy and energy efficiency, called the 2020-targets.[68] Emitting sectors of concern for reaching the 2020 Climate and Energy Package targets are from the EU ETS and non-ETS.[69] The State parties to the Kyoto Protocol only covered around 18 percent of the global emissions and is therefore less covering than its successor, the Paris Agreement.

2.2.2 Paris Agreement and the EU

In December 2015 the Paris Agreement was adopted under the 21st Conference of the Parties (COP 21) to the UNFCCC. The objective of the Paris Agreement is to limit global warming to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", see Article 2(1)(a). In order for the signatories to pursue the objective of the Paris Agreement they are committed to

[64] UNFCCC, Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted at COP3 in Kyoto, Japan, on 11 December 1997.
[65] See Article 3(1) of the Kyoto Protocol; Amendment to the Kyoto Protocol by Decision 1/CMP.8, Doha, 8 December 2012.
[66] Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder.
[67] Recital 17 of the Directive 2009/29/EC.
[68] The legislation on the EU 2020 Climate and Energy Package include Directive 2009/29/EC, Directive 2009/28/EC, Directive 2009/31/EC and Decision 406/2009/EC.
[69] SEC (2011) 1151 final Report from the Commission to the European Parliament and the Council - Progress towards achieving the Kyoto objectives (required under Article 5 of Decision 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol), Brussels 7 October 2011, p. 4.

contribute through the Nationally Determined Contributions (NDC).[70] The NDC stipulates the domestic mitigation measures with the highest possible ambition to achieve the commitments under the Paris Agreement.[71] Further, shall the NDC be reviewed every fifth year, and in this respect it is also possible to enhance the level of ambition.[72] By these means the state parties acknowledge the risk and impact that climate change can impose.

There is a shortage of court cases when it comes to the interpretation of the Paris Agreement. Although in some countries ENGO's have referred to the commitments made under the Paris Agreement before a court in climate change litigation cases.[73] Scholars have made interpretations regarding the wording "well below 2 degrees" and "pursuing efforts to limit (…) to 1.5 degrees.", Article 2(1) of the Paris Agreement, suggesting that the wording of the article shouldn't be interpreted as an aim for 2°C, along not disregarding the 1.5°C goal.[74] Meaning that degree limit between 1.5°C and 2°C should be aimed for.

The Paris Agreement was signed through a Council decision on behalf of the EU in April 2016 and later ratified in October 2016.[75] All 28 EU member states are contributing to achieve the temperature goal through the NDC. In 2016 the European Commission made a proposal for a regulation on binding annual greenhouse gas emissions reductions by member states from 2021 to 2030 to meet the requirements under the Paris Agreement.[76] They stressed that the current implemented policies would not sufficiently decrease the greenhouse gas limitations made by the EU. In 2018 the proposal for a regulation, the Effort Sharing Regulation (EU) 2018/842, was adopted making it its contribution to the Paris Agreement. The European Commission argued it would be intact and contribute with the goals of the Paris Agreement. EU's climate policy covering 2021-2030 is therefore adjusted to the new international commitments that arose with the adoption of the Paris Agreement. The Effort Sharing Regulation also forms part of the EU 2030 Climate and Energy Framework where one of the main goals is to cut emissions with at least 40 % by 2030

[70] See Articles 3 and 4(2) of the Paris Agreement.
[71] Ibid, Article 4(2-3).
[72] Ibid, Articles 4(8), 4(9) and 4(11).
[73] *Plan B Earth and others v Secretary of State for Business, Energy and Industrial Strategy,* 2018, EWHC 1892 (Admin), 20 July 2018; Case T-330/18 *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, Action brought on 23 May 2018, note that the case is brought against the EU.
[74] Morseletto et al. Governing by targets: Reductio ad unum and evolution of the two-degree climate target, 2017, p. 667; Ekardt et al. Paris Agreement, Precautionary Principle and Human Rights: Zero Emissions in Two Decades?, 2018, p. 6.
[75] Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.
[76] COM(2016) 482; COM(2016) 482 final Annexes 1 to 4.

compared to 1990 levels. All emitting sectors under the Emission Trading System (EU ETS) and the Effort Sharing legislation are part of the 2030 Climate and Energy Framework.[77]

2.3 EU's climate policy

The EU legislation on greenhouse gas emissions can be divided into two major segments through the Emissions Trading System (EU ETS)[78] and the Effort Sharing Decision (ESD).[79] The Emissions Trading System concerns the emissions deriving from the aviation, power and industry sectors. The ETS sectors account for approximately 45 percent of the total emissions in the EU. There are 31 countries participating in the ETS, including all 28 EU member states and additionally Iceland, Liechtenstein and Norway.[80]

Apart from the ETS, the other segment concerning GHG emissions in the EU is called the Effort Sharing Decision, and from 2021, the Effort Sharing Regulation.[81] The framework on the Effort Sharing Decision and Effort Sharing Regulation is called the Effort Sharing legislation. It covers emissions from transport, waste, agriculture and housing accounting for 55 percent on the emissions in the EU. [82] It is up to the EU member states to decide on the policies and measures that are needed in order to limit the emissions under the Effort Sharing legislation. In sum, the majority of the greenhouse gas emissions in the EU are part of the non ETS sector and is partly regulated in the Effort Sharing legislation. It is therefore crucial that the emissions in this sector are reduced within the timeframe given under the EU legislation.

The European Union and its members states are parties to the Kyoto Protocol and its successor the Paris Agreement, that were adopted under the United Nations Framework Convention on Climate Change (UNFCCC).[83] Accounting for the EU emissions legislation on the EU contribution to the implementation of the commitments under the UNFCCC is the Effort Sharing legislation, i.e. the non-ETS sectors.[84] Until 2020 the Effort Sharing Decision will be in place regulating EU commitments under the Kyoto Protocol, and from

[77] Recital 2 of the Effort Sharing Regulation 2018/842.
[78] EU ETS Directive 2003/87/EC.
[79] Effort Sharing Decision 406/2009/EC.
[80] European Commission, Factsheet, The EU Emissions Trading System, 2016 [online] p. 1.
[81] Effort Sharing Regulation 2018/842.
[82] European Commission, Factsheet, The EU Emissions Trading System, 2016 [online] p. 1.
[83] UN General Assembly, United Nations Framework Convention on Climate Change, 20 January 1994, A/RES/48/189.
[84] Not including the first Kyoto commitment period.

2021 the Effort Sharing Regulation and the Paris Agreement replaces its predecessors (ESD and the Kyoto Protocol).

2.3.1 Effort Sharing legislation

Member states are responsible for the measures to limit emissions from the Effort Sharing legislation sectors. The EU member states have binding annual GHG emissions reduction targets from 2013-2020 under the Effort Sharing Decision.[85] The reduction targets are set with regard to the solidarity principle in the EU[86], taking into account the economic growth, the gross domestic product per capita growth in the member states.[87] There is a range of GHG emissions targets from 20 percent reduction, to 20 percent increase depending on the wealth of the member state.[88] As an example, Sweden is obliged to cut 17 percent, Germany 14 percent, the Netherlands 16 percent, and the United Kingdom 16 percent, compared to 2005 levels.[89]

From 2021 to 2030 the Effort Sharing Regulation will be in force with binding annual reduction targets from a wide range of 0 to 40 percentages compared to 2005 levels.[90] The Effort Sharing Regulation was adopted to pursue efforts in line with the global temperature goal in the Paris Agreement. It further explicitly regulates the exact amount of GHG emissions reduction for the EU member states, as part of the Nationally Determined Contributions under the Paris Agreement. Apart from the national reduction targets within the EU ETS and the Effort Sharing legislation, member states are free to set up more ambitious commitments to cut GHG emissions.

Sweden domestic reduction target, outside the EU, is 40 percent by 2020 compared to 1990 levels. The reference years for comparing the emissions differs in Sweden and the EU. Sweden measures national GHG emissions with the reference year 1990, meaning that the 40 percent reduction target by 2020 shall be compared to the emission levels of 1990. For comparing the emission level the EU legislation concerning the Emission Trading System and the Effort Sharing legislation[91] uses the reference year 2005. This is due to the entry into

[85] Effort Sharing Decision 406/2009/EC.
[86] See Article 80 TFEU.
[87] Recital 8 of the Effort Sharing Decision 406/2009/EC.
[88] Ibid, Recital 8 and Annex II.
[89] Ibid, Article 1 and Annex II.
[90] Recital 2 and Annex I of the Effort Sharing Regulation 2018/842. By 2030 the respective member states are obliged to reduce the GHG emissions with the following percentages, Sweden 40%, Germany 38%, the Netherlands 36%, and the United Kingdom 37%.
[91] Article 3(1) of the Effort Sharing Decision 406/2009/EC; Article 4(1) of the Effort Sharing Regulation 2018/842.

force of the ETS directive in 2005.[92] The Swedish reduction target of 17 percent by 2020 compared to 2005 levels under the Effort Sharing Decision makes up for approximately 33 percent in relation to the national reduction target of 40 percent by 2020 compared to 1990 levels.[93]

2.4 Human rights related to the environment

The right to a healthy environment is not covered by the European Convention of Human Rights (ECHR) and questions concerning the environment are always in relation to the rights of individuals. In this context, the European Court of Human Rights (ECtHR) has stated that the environment can affect numerous rights under the ECHR, namely, the right to life (Article 2)[94], the right to a fair trial and access to court (Article 6)[95], respect for private and family life, home and correspondence (Article 8)[96], the right to receive and impart information and ideas (Article 10)[97], the right to an effective remedy (Article 13)[98], and the enjoyment of one's possession (Article 1 of Protocol No. 1).[99]

In order to live in an environment securing freedom there are certain pre-conditions, for example the right to life. Climate impacts can negatively affect health and cause premature deaths that ultimately affect the right to life. In Sweden alone approximately 7600 lives are lost every year due to air pollution[100] and approximately 8 million deaths are attributed to poor environmental conditions around the world.[101] An environment free from negative environmental impact is therefore a precondition for the enjoyment of human rights.[102]

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92 Swedish Environmental Protection Agency, Klimatmålen i siffror, 2018, p. 1.
93 Ibid, p. 2.
94 Case law related to the environment on Article 2 ECHR: *Kolyadenko and Others v. Russia,* Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, ECtHR (2012) para. 160; *Öneryildiz v. Turkey* [GC] Application no. 48939/99, ECtHR (2005) para. 71; *Budayeva and Others v. Russia,* Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECtHR (2008*)* para. 130.
95 ECtHR case law related to the environment on Article 6 ECHR: *Taşkın and Others v. Turkey*, Application no. 46117/99, ECtHR (2005).
96 ECtHR case law related to the environment on Article 8 ECHR: *López Ostra v. Spain*, Application no. 303-C, ECtHR (1994).
97 ECtHR case law related to the environment on Article 10 ECHR: *Steel and Morris v. the United Kingdom,* Application no. 68416/01, ECtHR (2005).
98 ECtHR case law related to the environment on Article 13 ECHR: *Leander v. Sweden,* Application no. 9248/81, ECtHR (1987), para. 77.
99 ECtHR case law related to the environment on Article 1, Protocol No. 1 to the ECHR: *Taşkın and Others v. Turkey*, Application no. 46117/99, ECtHR (2005).
100 Swedish Environmental Protection Agency, Underlag till regeringens klimatpolitiska handlingsplan: Redovisning av Naturvårdsverkets regeringsuppdrag, Report 6879, 2019, p. 8.
101 Lelieveld et al. Cardiovascular disease burden from ambient air pollution in Europe reassessed using novel hazard ratio functions, 2019.
102 Kobylarz, The European Court of Human Rights, an Underrated Forum for Environmental Litigation, 2018, p. 2.

The state parties to the ECHR have positive and negative obligations to secure the rights under both Article 2[103] and Article 8 ECHR.[104] This means that the contracting state must safeguard the rights and not be involved in activities that obstruct the rights. With regards to Article 2 ECHR the positive obligations include two parts, particularly, 1) the duty of the state to set up a regulatory framework, and, 2) an obligation for the state take preventive operational measures.[105] If the state is knowingly aware of imminent threats under Article 2, precautionary measures to prevent infringement must be taken.[106] At the same time, an impossible or unproportionate burden shall not be put on the state with regard to the measures taken against an infringement.[107] An effective deterrence of any activity being public or not threatening Article 2 ECHR must be taken by the state,[108] including threats coming from industrial risks or other dangerous activities.[109]

Environmental pollution can affect individuals and interfere with Article 8 ECHR according to the ECtHR.[110] The applicant in *López Ostra v. Spain*, lived close to a waste-treatment plant and was subject to pollution from the activities derived from the waste treatment, thus not able to enjoy the conditions under Article 8 ECHR. Specifically, the ECtHR stated that Article 8 ECHR was applicable in the case where "severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".[111] In order for the provision (Article 8 ECHR) to be applicable the act or omission must have an adverse effect on the home and or private life of an individual. Further, the adverse effect must have reached a 'minimum level of disturbance'.[112] Disturbance can include emissions as was demonstrated in *López Ostra v. Spain*. When the ECtHR assesses the minimum level of disturbance they take into account all the relevant circumstances in the case such as the duration and intensity of the nuisance

[103] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] Application no. 47848/08, ECtHR (2014) para. 130.
[104] *López Ostra v. Spain*, Application no. 303-C, ECtHR (1994), para. 51.
[105] ECtHR, Guide on Article 2 of the European Convention on Human Rights: Right to life, 2019, p. 7.
[106] *Kolyadenko and Others v. Russia,* Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, ECtHR (2012) para. 160.
[107] *Kolyadenko and Others v. Russia,* Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, ECtHR (2012) para. 160.
[108] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] Application no. 47848/08, ECtHR (2014) para. 130.
[109] *Öneryildiz v. Turkey* [GC] Application no. 48939/99, ECtHR (2005) para. 71; *Budayeva and Others v. Russia,* Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECtHR (2008) para. 130.
[110] *López Ostra v. Spain,* Application no. 303-C, ECtHR (1994) paras. 51 and 52.
[111] Ibid, paras. 54 and 55.
[112] Ibid, para. 51.

and how it can affect the individuals physical or mental health of an individual in relation to the health and life quality.[113]

In the case *Atanasov v. Bulgaria* concerning a waste-water treatment plant the ECtHR recognised that such an operation could have unpleasant effects on the surroundings, but that does not naturally trigger Article 8 ECHR unless the claimant prove that such an operation has harmful effects on his or her family life.[114]

In the human rights debate civil and political rights are often referred to as the first generation of human rights and economic and social rights constituting the second generation.[115] Making the ECHR an instrument of rights under the first generation.[116] The protection of the environment, or 'environmental protection' is viewed as the third generation of human rights.[117] Making its way from the United Nations Conference on the Human Environment in 1972 establishing the Stockholm Declaration and Principle 1, acknowledging the responsibility to protect and improve the environment for current and future generations. By contrast to the ECHR the Stockholm Declaration is not a legally binding document, however it laid the foundation for the non-legally binding Rio Declaration in 1992, specifically Principle 10, about the access to information, public participation and access to justice in environmental matters.[118] Principle 10 of the Rio Declaration further served as the foundation for the legally binding Aarhus Convention.[119] The link between human rights and environmental protection has therefore been recognized and pursued for generations.[120]

One way to reach the protection of the environment would be by exercising civil and political rights in conjunction with the positive obligations of the state to guarantee rights under the ECHR.[121] For the full enjoyment of substantive rights there needs to be an effective procedural system. Thus, if the rights or freedoms of individuals under the jurisdiction of a contracting state to the ECHR have been violated, they shall have the right

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[113] *Fadeyeva v. Russia,* Application no. 55723, ECtHR (2005) para. 69; Kobylarz, The European Court of Human Rights, an Underrated Forum for Environmental Litigation, 2018, p. 12.
[114] *Atanasov v. Bulgaria,* Application no. 12853/03, ECtHR (2010) paras. 74-76.
[115] Bring, De mänskliga rättigheternas väg: genom historien och litteraturen, 2011, p. 469.
[116] Kobylarz, The European Court of Human Rights, an Underrated Forum for Environmental Litigation, 2018, p. 3.
[117] Ebbesson, Miljörätt, 2015, p. 102.
[118] Ibid, 103.
[119] Preamble, Recital 2 of the Aarhus Convention.
[120] Ibid, Preamble, Recital 6.
[121] Kobylarz, The European Court of Human Rights, an Underrated Forum for Environmental Litigation, 2018, p. 1.

to a fair trial under Article 6 ECHR and an effective remedy before a national authority according to Article 13 ECHR.

2.5 Participatory and procedural rights in environmental matters

The right for the concerned public to get access to information, public participation and justice is of major importance for any question related to the environment. Not only does the access to information and public participation in environmental matters enhance the quality of the decisions taken but it also gives the public the possibility to voice their opinions and concerns in environmental issues. By having a forum for the public to share concerns the public authorities gets the chance to take the public into account. If decisions are taken with transparency and accountability it can strengthen the public support for decision taken related to the environment.[122] Acknowledging that the public and ENGO's can have a legitimate interest in environmental matters by giving them access to justice through legal mechanisms is in line with climate democracy.

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, also called the Aarhus Convention, is designated to safeguard the rights of individuals of today and tomorrow to be able to live in an environment of good health and well-being.[123] A total of 47 parties have adhered to the Aarhus Convention, including the EU and its member states that acceded in 2005.[124] The Aarhus Convention is divided into three pillars containing the access to information (Articles 4-5), public participation in decision-making (Articles 6-9) and access to justice (Article 9). All three pillars are necessary for the public's involvement in climate related questions.

Article 9 of the Aarhus Convention on access to justice stipulates the right for individuals or environmental organisations to bring decisions, acts or omissions from public authorities before a court or court-like body established by law. In order for policymakers, legislators and public authorities to implement the provision of the Aarhus Convention, there is an Aarhus Convention Implementation Guide. The Implementation Guide is not legally-biding and should be rather seen as a reference tool. In the guidelines on the third pillar of the Aarhus Convention, Article 9, the access to justice is divided in three contexts.

[122] See Preamble, Recital 10 of the Aarhus Convention.
[123] Ibid, Article 1.
[124] UNECE, Parties to the Aarhus Convention and their dates of ratification [online]; Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

First, stating that review procedures on information requests shall be made available, see Article 9(1). If a person requires information in an environmental matter, and is not dealt with satisfaction, she or he must be given access to "a review procedure before a court of law or another independent and impartial body established by law".[125]

Second, according to Article 9(2) a person shall have access to a review procedure when it comes to decision-making on projects that are covered by Article 6 of the Aarhus Convention. This means that a person shall be able to appeal the substantive or procedural decision in question.[126] This provision has a slimmer interpretation of the 'public concerned', and requires the appellant to meet the requirements of 'sufficient interest' or 'maintain impairment of a right'.[127]

Last, Article 9(3) pronounces the importance for the public that meets the criteria in their national law to challenge acts or omissions made by public authorities or private persons that would be contrary to provisions in the national law. When acceding the Aarhus Convention the EU made a declaration to Article 9(3) making the members states responsible for the implementation of the obligations arising under the sub-article until the EU adopts legislation on the matter. Through case law the European Court of Justice have stated that the provisions of the Aarhus Convention forms an integral part of the EU legal order.[128] Although, Article 9(3) lacks direct effect, meaning that individuals in a member state cannot invoke the provision before a national court, the member states are required to interpret 'to the fullest extent possible' the national procedural rules in light of the objective of Article 9(3).[129]

2.6 Summary

In this chapter I have introduced the international treaties under the UNFCCC namely the Kyoto Protocol and the Paris Agreement, the EU legislation concerning greenhouse gas emissions, human rights related to the environment under the ECHR, and participatory and procedural rights arising under the Aarhus Convention. Much of the implementation is left to the national level and we find the EU legislation on GHG emissions with more precise substantive provisions for the EU member states. The commitments under the UNFCCC

[125] Aarhus Convention: An Implementation Guide, 2014, p. 188.
[126] Ibid, p. 190.
[127] Ibid, p. 193f.
[128] Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125.
[129] Ibid, para. 52.

agreements are general goals that have to be conducted and pursued by state parties. Additionally, human rights related to the environment are visualised, specifically when it comes to the right to life and right to respect for private and family life under the ECHR. The reduction targets to limit the global temperature increase cannot be fairly pursued without procedural rights involving the concerned public when it comes to being informed, being able to participate in the decision making process and accessing justice in environmental matters.

Every state party to the Paris Agreement is obliged to make efforts in line with the objective of limiting the global temperature increase. Not only has the world community gathered 196 signatories to the Paris Agreement but they have also recognised that global response is the most bearing way to tackle global warming. Ways to stop global warming and its effects can be done in numerous ways as this chapter visualises. Starting with the commitments from the Kyoto commitment phases, to the EU legislation on 'sharing the effort' of reducing emissions nationally through the Effort Sharing legislation making even more ambitious commitments with the Paris Agreement. The Aarhus Convention sets out rules on public participation for concerned citizens in environmental matters and in this section the focus has been on the access to justice. All of these international treaties and regional obligations of the EU are interlinked with each other. Because what is the idea of having substantive law on climate related matters without judicial protection? Everybody is part of the solution of global warming although states bear the biggest responsibility given their sovereignty and power.

The procedural rights outlined in Article 9 Aarhus Convention provide options on how citizens and ENGO's can assist in enforcing the law. Citizens and ENGO's shall be empowered in these matters. In sum, the Implementation Guide on Article 9 Aarhus Convention suggests that the concerned public should have the right to 'access information appeals', 'public participation appeals', and access to judicial of administrative procedures to challenge acts or omissions when there has been general violations of environmental law. The Aarhus Convention is an attempt to secure procedural rights related to the environment. Even if the Aarhus Convention is autonomous from other human rights conventions it emphasises the right to a fair trial similar to Article 6 of the European Convention on Human Rights. [130] The Aarhus Convention does not entail any new substantive rights to the environment and focuses on the procedural law.

[130] Aarhus Convention: An Implementation Guide, 2014, p. 188.

3 Climate change litigation

3.1 General introduction

This chapter introduces the litigation approaches from four cases related to climate change. The claimants in the cases use three different litigation approaches to initiate lawsuits against their governments in Germany, the Netherlands, Norway and the United Kingdom. Common claims in the lawsuits are alleged insufficient *climate actions* made by governments. Based on these allegations the claimants use three different processes for conducting climate change litigation. Accordingly, the three climate change litigation approaches are based on tort law, climate policy decisions and permit decisions.

3.2 Climate change litigation based on tort law

Tort law is frequently used in climate change litigation.[131] Common for tort cases is the claim for compensation for damages. The possibilities to access a court through tort proceedings is limited to the legal order of the state concerned. Tort processes are therefore nationally influenced. Problems that can occur in climate change litigation based on tort are related to the timeframe. The negative effects of greenhouse gas emissions can take a lengthy period before appearing. While some jurisdictions acquire the damage to be proven by the time it reaches the court room, other jurisdictions can impose preventive measures to be taken before damages occur.

Freedoms that are taken for granted in a democratic society can be afflicted by negative climate impacts. The European Court of Human Rights (ECtHR) has stated that the environment can affect the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR). For example, the right to life is referred to in the context of climate change. Non-communicable diseases are the primary reasons to deaths according to the World Health Organisation.[132] One of the major factors for non-communicable diseases is attributed to the environment.

3.2.1 Urgenda Foundation v. The Netherlands

In 2015 the Urgenda Foundation and approximately 900 citizens filed a lawsuit against the Dutch government to avert climate change. Primarily, the claimants asked the Court to

[131] UNEP, Judicial Handbook on Environmental Law, 2005, p. 42.
[132] World Health Organization. Global Health Observatory, 2018 [online].

declare that the Dutch government must undertake and reduce its greenhouse gas emissions by 40 percent or at least by 25 percent by 2020 compared to 1990 levels. Alternatively order the government to reduce the GHG emissions with 40 percent by 2030. The failure of the government to reduce the emissions by these percentages would be contrary to the duty of care of the claimants, i.e. the Dutch society. The claimants relied on Article 21 of the Dutch Constitution stipulating the duty of the state to safeguard the habitability of its territory and protect and improve the living environment, and Articles 2 and 8 ECHR concerning the right to life and right to respect for private and family life, home and correspondence. Further, the claimants alleged that insufficient climate mitigation by the state breached its duty of care and a provision of the Dutch Civil Code.[133] When estimating the GHG emissions reduction to a certain percentage the claimants used scientific reports from the IPCC and the Kyoto Protocol that had concluded that emissions reductions between 25 to 40 percent by 2020 are necessary for developed countries.

The Hague District Court divided the claims into three parts, 1) how serious is the problem of climate change, and what is the scope of the declared danger; 2) does the Dutch government have a legal duty towards Urgenda when it comes to the declared danger of climate change and does that involve additional GHG emissions reductions; 3) if question 2 is affirmative, can the case be brought before the Court.

In a judgement, the Hague District Court ruled that there is an imminent threat of climate change and that the Netherlands, as a developed country, must take the lead in reducing emissions.[134] With regard to the limit of reduction of GHG emissions, the Court decided that there is an international norm of reduction from 25 to 40 percent, and that the Netherlands are obliged to reduce it by 25 percent by the end of 2020. By continuing with the current climate policy, the Netherlands would only achieve around a 17 percent reduction by 2020. Moreover, the Court stated that the Netherlands has a duty to avert imminent dangers caused by climate change and that the state is primary responsible for controlling the emission levels. The Court also stated that the costs of the measures needed to be taken to limit the emissions were not unexpectedly high.

In regard to the argument on the applicability of the ECHR by the claimants, the Court decided that Urgenda could not rely on Article 2 or Article 8 ECHR before the Court. The Court argued that it was mainly due to Urgenda acting as a legal person, and thus not a

[133] Book 6 Section 162 of the Dutch Civil Code.
[134] The Hague District Court judgement of 24 June 2015, ECLI:NL:RBDHA:2015:7196.

physical person subject to violations under Article 34 ECHR. Further the Court stated that the general tort clause, Book 6 Section 162 of the Dutch Civil Code, is an open norm that could take into account international obligations, treaty provisions, guidelines by the EU and other principles. The District Court grounded its judgement on the general tort clause in Book 6 Section 162 of the Dutch Civil Code. Lastly, the Court stated that it should not enter into the domain of politics and therefore chose the lower limit reduction (25 percent), from the international norm of 25 to 40 percent emissions reductions.

The government appealed the decision, claiming that the judge should refrain from making decisions in the case because of the trias politica. According to the government the decision implies that it's a political matter not belonging in a Court room. Further, the government argued that the decision by the District Court on reducing Dutch emissions only should be made by legislation adopted by the parliament or other government bodies. Urgenda made a cross appeal concerning the Hague District Court's opinion that Articles 2 and 8 ECHR could not be invoked by Urgenda due to Article 34 ECHR.

In a judgement, the Hague Court of Appeal was of the opinion that the District Court's order for the State to reduce its GHG emissions was not an attempt to create legislation.[135] According to the Court of Appeal it is up to the state to determine how it will comply with the order, thus retaining the complete freedom for manoeuvre. In contrast to the Hague District Court, the Hague Court of Appeal stated that Article 34 ECHR could not hinder Urgenda to rely on Articles 2 and 8 ECHR in the lawsuit. Article 34 ECHR only concerns access to the European Court of Human Rights, and 'public interest actions' are not permitted under the ECtHR. According to the Court the lawsuit falls within the scope of Dutch law and Article 34 ECHR cannot hinder Urgenda to rely on Articles 2 and 8 ECHR. Contrary to the District Court, the Court of Appeal based its decision on the state's duty of care pursuant to Articles 2 and 8 ECHR, and not on the general tort law clause in the Dutch Civil Code. The Court of Appeal further stated that the proceedings in the case constituted an action for order, thus not damages. Adding that the requirement of 'causal link' in tort law was given less importance because damages were not claimed. The fact that there was an imminent threat and real danger, i.e. real risk to the right to life and right to private and family life as protected by the ECHR was enough for the Court to impose an order on the state to act.

[135] The Hague Court of Appeal judgement of 9 October 2018, ECLI:NL:GHDHA:2018:2610.

Individuals under the jurisdiction of a signatory to the ECHR can directly rely on Articles 2 and 8 ECHR if their rights have been infringed. And given, Book 3 Section 305a of the Dutch Civil Code, Urgenda may also rely on ECHR on behalf of the individuals in this case. After assessing if Articles 2 and 8 ECHR can be invoked the Appeal Court stated that both Articles can involve environmental related situations. The right to life Article 2 ECHR can be threatened by events related to the environment, the Appeal Court stated. Further, the Appeal Court added that Article 8 ECHR on the right to private life, family life, home and correspondence, can be violated if acts or omissions have an adverse effect on the home and/or family life of an individual, and if the adverse effect reaches a certain level of severity.

In sum, the Hague Court of Appeal upheld the District Court's judgement concerning the states obligation to limit the GHG emissions to 25 percent by 2020. However adding the state's has positive obligations to protect the life of citizens under its jurisdiction (Article 2 ECHR) and obligations to protect the right to home and private life (Article 8 ECHR). According to the Appeal Court's opinion the Dutch state failed in its duty of care following the obligations under Articles 2 and 8 ECHR by not wanting to limit its emission by at least 25 percent by the end of 2020. Dutch Courts are obliged to apply provisions from treaties that the Netherlands are party, Articles 2 and 8 ECHR, therefore the state defence argument regarding the trias politica was not arguable, according to the Court of Appeal.

In November 2018 the state announced that it will bring the case before the Supreme Court on points of law. In response to the judgement of the Hague Court of Appeal the state wants the Supreme Court to consider the question on how the state's choice of policy is reviewed by the courts. The state further announced that they will make every effort to achieve the 25 percent cut on GHG emissions.[136]

3.2.1.1 First but not the last

The lawsuit *Urgenda Foundation v. The Netherlands* was an attempt to address the mitigation policy of the Dutch government along forcing the government to limit the GHG emissions through a Court decision. In the first judgement the Hague District Court balanced the separation of powers respecting the state's scope for policy making along providing legal

[136] Government of the Netherlands, State to bring cassation proceedings in Urgenda, 16 November 2018 [online].

protection against the state. The District Court pronounced the balance by actively choosing the lower limit (25 percent) of the international reduction norm of 25 to 40 percent.

By invoking Article 34 ECHR (the state defence argument) Urgenda could not rely on Articles 2 and 8 ECHR, in the District Court. By contrast the Hague Court of Appeal stated that Article 34 ECHR did not apply for refusing Urgenda to use Articles 2 and 8 ECHR in the proceedings. The trias politica argument made by the state defence in the Appeal Court, was refuted based on the obligations of the Courts to apply provisions in the ECHR. Not only did the Court of Appeal go one step further than the District Court in determining that the state had done too little in preventing the effects of climate change and thus infringing Articles 2 and 8 ECHR, but the Court also acknowledge that the state cannot hide behind arguments such as the separation of powers between the legislative, executive and judicial branches (trias politica). The state defence argument relied heavily on the fact that the judicial branch had no business in the state's margin to conduct its policy. Based on Articles 2 and 8 ECHR the Court of Appeal considered it to be unlawful not to apply those provisions, since the judicial branch main task is to apply the law.

Interestingly the District Court based its decision on a tort law provision under the Dutch Civil Code, whereas the Court of Appeal grounded its decision on the state's duty of care under Articles 2 and 8 ECHR. The Court of Appeal therefore recognised that the state has an obligation to take *preventive* measures to avert infringements in the right to life and right to private and family life. The Urgenda case was the first in the world to oblige the state to cut GHG emissions and the following cases illustrate that it might not be the last. The tort litigation approach in the Swedish context will be further analysed in chapter 4.

3.3 Climate change litigation based on climate policy decisions

Climate policy frameworks or decisions regulate the policy surrounding the climate. The climate policy of a state can include both mitigation and adaptation measures related to the environment. Some parts of climate policy can be legally binding while other sections are general targets or goal-setting provisions. Greenhouse gas emissions reduction targets are most commonly included in climate policy. Whether the targets or goals are legally binding depends on the state. Climate policies are usually the result of wide political compromises in order to get approved in parliament. If citizens are discontent about the level of ambition on a certain climate policy decision an option would be to address the decision through judicial

review in court. The possibility to initiate litigation based on judicial review is constrained by national legal orders.

Judicial review is a legal process when a court of law reviews the validity of a decision taken by a public body. The court examines the decision through cassation proceedings and decides if the decision is lawful or not. In the examination the court reviews if the decision violates a legal rule. If the court would come to the conclusion that the decision is unlawful the decision gets quashed and sometimes remanded. The procedure is national and depends on the legal order of the state concerned.

3.3.1 Plan B Earth and Others v. The Secretary of State

In 2017 a charity organisation, Plan B Earth (Plan B) and eleven individuals initiated a lawsuit against the United Kingdom before the High Court. They claimed that the Secretary of State of Business, Energy and Industrial Strategy (Secretary of State) failed to act lawfully by not revising the 2050 Carbon Target (2050 Target) under the Climate Change Act 2008 (2008 Act). Based on the 2050 Carbon Target the UK is to reduce its emissions by at least 80 percent of 1990 levels by 2050. According to Section 2 of the 2008 Act the Secretary of State has the authority to revise the 2050 Target in line with the latest science, international law and policy developments.

As reason to not revise the 2050 Target the Secretary of State relied on a recommendation by the Committee on Climate Change (the Committee), an independent body composed of experts established under the Climate Change Act 2008. The Committee has a statutory duty to advise different public bodies in the UK on climate matters related to the 2050 Target and emission targets. Additionally, the Secretary of State is required to take into account the advice given by the Committee before exercising his or her power. According to the Committee's advice no amendments to the 2050 Target were necessary, at that time, in response to the Paris Agreement in 2016. The objective of the 2008 Act is to avoid impacts that could be harmful on human welfare due to the global temperature increase and correlating changes to the climate in other parts of the world.

Based on the alleged failure of the Secretary of State to revise the 2050 Target the claimants applied for judicial review and a declaration relief that the Secretary of State had acted unlawfully. The claimants further asked for a mandatory order for the Secretary of State to revise the 2050 Target in light of the 2008 Act and the objective under the Paris Agreement and in conformity with the precautionary principle. In sum, the claimants alleged

that the 2050 Target consisting of 80 percent emissions reduction target by 2050, did not make an equitable contribution to meet the global temperature goal under the Paris Agreement.

The claimants relied on the following claims for seeking judicial review of the Secretary of States failure to revise the 2050 Target. Firstly, the claimants alleged that it was ultra vires because it hindered the legislative purpose of the 2008 Act. Secondly, the failure to revise the 2050 Target was based on an error of law on the interpretation of the Paris Agreement. As the third ground they claimed that the global temperature goal of "well below" 2°C and "pursuing efforts to limit" to 1.5°C, the latest scientific data on emissions, along other international law obligations, were deteriorated by not being taken into account or given sufficient meaning. The fourth and fifth grounds regarded violations of the 1998 Human Rights Act and the ECHR in particular Article 2, Article 8, and Article 1 of Protocol 1, and the 2010 Equality Act. The claimants did not argue that the Paris Agreement was directly applicable in domestic law, however, that it should be considered, along scientific knowledge and other international obligations when deciding if the Secretary of State's refusal to amend the 2050 Target was lawful or not.

In a judgement on February 2018 the permission for judicial review was refused on all grounds.[137] Permission was refused because the claims were found unarguable partly because the Secretary of State discretionary judgement when it comes to the revision of the 2050 Target. The Court stated that the claimants did not make an arguable case for the alleged breaches of their human rights under the Human Rights Act 1998, the ECHR, or the Equality Act 2010. The Court stated that the claimants failed to identify any interference on their human rights that the Decision not to amend the 2050 Target would have on them. According to the Court, the claimants claimed that violations to their human rights would arise if the Secretary of State did not take proper preventive measures, meaning an amendment of the 2050 Target. In rejecting the claim the Court stated that the correlation between the Decision of the Secretary of State and general effects on climate change was presumptive.

According to the Court the interpretation by the Secretary of State regarding the Committee recommendations on the Paris Agreement was not erroneous. The Court further stated that it was the claimants that had misread the Committee's recommendations.

[137] High Court of Justice Administrative Court, Queen's Bench Division, Plan B Earth and others v Secretary of State for Business, Energy and Industrial Strategy, 2018, EWHC 1892 (Admin), 20 July 2018.

Moreover, the margin of appreciation on policy issues on this matter gives the UK a wide discretion. The Court declared that the issue before the Court gives the state wide discretion to assess any course of action both nationally and internationally.

In 2018 the claimants renewed the application and were granted oral permission hearing. However, the permission hearing was adjourned and the judge ordered the Committee to bring a statement before the Court. Later in July 2018, after the oral hearing, the Court refuted the claimant's application for permission as unarguable. On January 2019 Plan B appealed the Court decision. The Court of Appeal rejected the appeal.

3.3.1.1 The speed of science

The case, *Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy,* touches upon the alleged non-action by the Secretary of State (the state) to revise the national emissions reduction target due to new scientific knowledge on climate change and developments in international law and policy. Despite the outcome of the case the question regarding the scope for the state to manoeuvre its climate policy is visualised. Even if the environmental commitments made under the Paris Agreement concern an international temperature goal, much is left for the signatories to act and pursue the goal. Here, we see the concerned public attempting to affect the domestic climate policy by seeking judicial review. Focus in the judicial review litigation approach in this case is primarily embedded in the international commitments transposing into national law. One could argue that the speed of science is indeed faster than the speed of law.

In the judgement the Court relied heavily on the statutory discretion of the Secretary of State to assess and decide whether the 2050 Target should be revised. Thus, leaving it to the state to decide if an amendment of the 2050 Target at that time were of necessity given the latest scientific developments including the IPCC's Special Report on Global Warming of 1.5°C and the Paris Agreement. According to the judgement the claimants lacked precision as to what breaches had been made on their human rights. For the claimants to rely on the effects of climate change did not make a sustainable claim. Litigation based on climate policy decision will be addressed in chapter 4.

3.3.2 Family Farmers and Greenpeace Germany v. Germany

In 2018 three families and Greenpeace Germany filed a lawsuit before the Berlin Administrative Court against the German federal government because of insufficient climate

actions to meet the 2020 GHG reduction target.[138] The plaintiff families run organic farms in three different locations in Germany and claimed to be directly affected by negative climate impacts on land crop activities due to weather events such as drought, heavy rains and infestations by insects. Based on the alleged failure of the government to pursue a prominent climate policy the claimants asked the Court to order the government to update or supplement the national 2020 Climate Protection Program (Klimaschutzprogramm 2020). According to the claimants an update or supplement is needed to meet the national 2020 Climate Action Program (Aktionsprogramm Klimaschutz 2020). The national 2020 Climate Action Program includes a 40 percent GHG emissions reduction target by 2020 compared to 1990 levels.

In the first claim the claimants asked the Court to declare that the government is obliged to supplement the 2020 Climate Protection Program to include all necessary measures to reduce its GHG emissions. The claimants also want the state to compensate for surpassing the emissions limit of the 2020 target by 650 million tons of CO_2 from 2007 until today. According to the claimants Germany's failure to meet the 40 percent target by 2020 would breach their right to life and health, occupational freedom and right to property under the constitution.

In the second claim the claimants also asked the Court to declare an obligation to supplement the 2020 Climate Protection Program in accordance with Article 3(1) of the Effort Sharing Decision (ESD), in conjunction with Annex II of the ESD. The ESD sets minimum requirements for emissions reductions for the non EU ETS sector. According to calculations made by the German Ministry of Environment, Germany won't meet the 2020 target to reduce 40 percent by 2020. The claimants gave reference to the IPCC Special Report on Global Warming of 1.5°C and the effects of anthropogenic global warming. Today the lawsuit awaits a Court judgement.

3.3.2.1 EU law in conjunction with science

The claims made in *Family Farmers and Greenpeace Germany v. Germany*, are based on both German constitutional law and EU law. By using the Ministry of Environment's own assessment on the 2020 target the claimants seek justification for the alleged violations they have been subjected to. Right to life and health, property and occupational freedom are the foundations for the lawsuit. The latest scientific report on global warming is also used to

[138] Statement of Claim of 25 October 2018, Family Farmers and Greenpeace Germany v. Germany [online].

substantiate the claims. Not only does the claimants rely on national law but they also involve the Effort Sharing Decision. The ESD stated that Germany must reduce its emissions by 14 percent by the end of 2020. In chapter 4 I will discuss how a similar case would be assessed in Sweden.

3.4 Climate change litigation based on permit decisions

Normally when private companies or governments wish to drill and extract gas and oil a licensing permission has to be granted by a competent licensing authority, most commonly the state. The permit decision includes several requirements. According to an environmental law principle[139] originated from the Rio Declaration in 1992 any decision having potential significant environmental effects shall be subject to an environmental impact assessment (EIA). The EIA entails a consequence analysis of the solicited activities.

3.4.1 Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum

In 2016, two ENGO's demanded a declaratory judgement from the Oslo District Court claiming that the decision by the Ministry of Petroleum on allowing oil and gas licenses at deep sea sites in the Barents Sea was illegal (the Decision).[140] The claimants alleged that the decision was invalid because it breached Article 112 of the Norwegian Constitution. Further they claimed that the decision was contrary to a provision in the Petroleum Act and that the impact assessment leading up to the Decision was inadequate. Article 112 of the Norwegian Constitution stipulates that every person has the right to a healthy environment.

The reasons for demanding a declaratory judgement on the invalidity of the decision are underpinned by two presumptive arguments. First, that the world is facing anthropogenic global warming and that immediate measures need to be taken. Second, the consequences of potential oil spills in the designated drilling area would cause tremendous damage to the ecological system.

The legal grounds were based on constitutional rights, the Petroleum Act and breaches in the case handling rules prior to the decision. As for constitutional rights Article 112 of the Norwegian Constitution mentions the right to a healthy environment, along managing natural resources with long term considerations also having in mind the future generations.

[139] Principle 17, Rio Declaration on Environment and Development. (1992). Envir. Conserv., 19(04), p. 366.
[140] Oslo District Court, People v. Arctic Oil case, 16-166674TVI-OTIR/06, 4 January 2018.

According to the claimants, emissions from the oil and gas exports derived from the Norwegian drilling operations must be taken into account when assessing infringements of Article 112 of the Norwegian Constitution. In conjunction with Article 112 the claimants also proclaimed international obligations, specifically those under the ECHR.

When it comes to the EIA on petroleum activities the Norwegian Petroleum Act states that factors such as trade, industry, environment and potential risks for pollution and economic and social effects shall be taken into consideration *before* licensing. In the assessment for awarding licensing the government was not sure whether the sites would bring economic benefits by finding petroleum. The licensing for drilling was granted prior of knowing if exploitable discoveries would be found. The government referred to new assessments to be made in the future, in the case of new discoveries. Based on the fact that licences were issued before knowing if it would bring economic benefits the claimants argued that the assessment was contrary to Article 112 of the Norwegian Constitution and the Petroleum Act. The claimants argued that the impact assessment did not include all the factors required for an EIA by not knowing if the drillings would bring exploitable discoveries.

While preparing the impact assessment several consultative bodies were asked to conduct assessments of the consequences of the petroleum activities. Two consultative bodies, the Norwegian Polar Institute and the Norwegian Environment Agency discouraged activity in several of the licensing sites. The claimants argued that the government did not assess the climatic effects enough and that the assessment prior to the licensing decision was inadequate.

In January 2018, the Oslo District Court rejected the claims and ruled in favour of the government, stating that the Ministry of Petroleum acted rightfully and fulfilled the duties necessary before issuing the licensing. The Court declared that the emissions produced abroad do not fall under the scope for interpreting a violation of Article 112 of the Norwegian Constitution. Thus, stating that Norway is solely responsible for emissions within its own territory. In rejecting the claim the Court also stated that Article 112 of the Norwegian Constitution is a rights provision, meaning that individuals can invoke the provision before a court. The Court further declared that a certain threshold must be reached when it comes to encroachments on the environment. When the Court assessed the alleged failure of the government to take climate effects into account as a result of the activities they stressed the fact that the government will pursue new impact assessments in the event of developments and new discoveries. The District Court did not consider whether the decision

was contrary to provisions in the ECHR. According to the Court, there was no claim that the decision was in breach of the ECHR and it would therefore be against the disposition principle (*non ultra petita*) to consider arguments based on the ECHR. Accordingly, the Court stated that the question whether Norway is doing enough in its climate policy was beyond what the Court could review. Adding that some of the issues in the case would be best addressed through political processes and not in a court room.

Due to the proclaimed urgency for a judgement in this matter and the ongoing drillings the two ENGO's appealed directly to the Supreme Court. The possibility to appeal directly to the Supreme Court is granted by a procedural rule in the Norwegian legal order. The direct appeal was denied by the Supreme Court and is now awaiting a Court hearing at the Court of Appeal (Borgarting lagmannsrett) in November 2019.

3.4.1.1 A healthy environment is a right

In sum the case *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum* relies on two foundations, namely constitutional rights and the permit decision. The people's right to a healthy environment based on the Norwegian Constitution and legislation concerning an impact assessment are used as the main arguments. In the judgement the District Court acknowledge that Article 112 of the Norwegian Constitution is indeed a rights provision. In chapter 4 I will analyse whether a similar case can be issued in Sweden.

3.5 Summary

In this chapter insufficient climate actions by governments are illustrated in numerous ways. For example, the Dutch court case emphasised the demand by citizens to force the state to cut GHG emissions through a verdict. The lawsuit in the United Kingdom concerned the alleged failure of the Secretary of State to revise the 2050 Carbon Target (80 percent GHG emissions reduction by 2050) in light of the latest scientific developments, the Paris Agreement, among more. In the climate change litigation case from Germany the main issue of dispute was Germany's failure to comply with its national and EU targets on 40 percent GHG emissions reduction by 2020. In Norway the litigation case focused on the process leading to the permit decision for petroleum activities.

These climate change litigation cases demand justice in different areas concerning the environment. First, by cutting emissions (Netherlands), second, through revising an emission target (UK), third, by asking the state to comply with its own reduction targets (Germany),

and last, by addressing wrongful assessments of a permit decision (Norway). All of the above claims similarly allege insufficient climate actions taken by governments and that the current national climate policies need to be addressed or revised. Common for the cases is the aim to address the consequences of governments inactions, the GHG emissions. Greenhouse gas emissions reduction decisions are most commonly the core of national climate policies, since it's one of the main reasons for global warming.

The claimants in the litigation cases use three litigation approaches. In the Dutch case the claimants demanded an action for order by the Court that the state must do more to reduce its greenhouse gas emissions. The Hague District Court went on a general tort clause in the Dutch Civil Code, while the Hague Court of Appeal relied on the Dutch state's duty of care pursuant to Articles 2 and 8 ECHR. The Dutch case was therefore a mix between tort law and obligations arising under the ECHR.

Concerning the decision of the Secretary of State to not revise the 2050 Target on GHG emissions reduction in the United Kingdom, it was the main tool used by the claimants. By seeking a declaration from the court that the Secretary of State acted unlawfully they also demanded a mandatory order to revise the 2050 Target in line with the Paris agreement and more. In the German case the claimants wanted the state to supplement the national 2020 Climate Protection Program so it would include all necessary measures to reduce emissions. Adding that a failure to act would be in breach of the claimants constitutional rights and EU law under the Effort Sharing Decision.

The process leading up to the permit decision for the oil activities in Norway, was wrongful according to the claimants. Prior to awarding licensing to petroleum activities impact assessments must include various factors for considerations. The permit decision was the main issue to be assessed by the Court.

Interestingly the judgements in the Dutch, Norwegian and the United Kingdom cases considered the political dimensions of the cases before them. The Courts made distinctly different interpretations. While the Dutch judgement agreed with the claimants arguments that the Dutch state is obliged to cut GHG emissions regardless of the state defence argument on Dutch Courts interference in domestic policy, the Norwegian and the UK judgements chose another path. The Norwegian Court did indeed rely on the basic principle of *non ultra petita* for not reviewing alleged breaches of the ECHR, however adding that parts of the issues before the Court would be best assessed through political processes. In the UK

case the Court went on the state defence's argument that the Secretary of State has a statutory discretion and that the executive generally has a wider discretion to make assessments.

Based on these three litigation approaches, the next chapter will transpose the approaches into the Swedish legal order to examine if they are possible to conduct given current Swedish law.

4 Transposing the litigation approaches into the Swedish legal order

4.1 General introduction

This chapter addresses the domestic part of climate change law with focus on Sweden. An overview of Sweden's climate policy and climate change related legislation is introduced followed by transposing the three climate change litigation approaches into the Swedish legal order. In this chapter I determine the general rules that are applicable in the Swedish legal order. The general rules are derived from the litigation examples from Germany, the Netherlands, Norway and United Kingdom. In order to compile the litigation approaches I divided the approaches into three overall sections, based on tort law, climate policy decisions and permit decisions. Accordingly, I explain the general rules under the three litigation approaches and their relevance in each context. Thereafter, I describe how the rules should be applied on the three climate change litigation approaches. This chapter will address if the litigation approaches are feasible in Sweden. Here, I will analyse the possibilities for the concerned public to initiate a climate change litigation case against the Swedish government based on insufficient climate actions.

4.2 Sweden's climate policy and legislation

In 2009 the Swedish parliament adopted an environmental quality objective on the reduction of climate impacts entailing a GHG emissions reduction target of 40 percent by 2020. In line with this, a new Swedish Climate Policy Framework was introduced in 2017 involving a new Climate Act (Klimatlag, 2017:720), new climate goals, and a Climate Policy Council. The Climate Act entered into force in 2018 and stipulates that the climate policy of the Swedish government must be based on climate goals.[141] This includes a climate report in the government's annual budget[142] and a climate policy action plan every fourth year[143] that outlines how the reduction goals will be achieved. On top of this, domestic reduction goals for 2030, 2040 and 2045 have been adopted, containing a net zero goal for domestic GHG emissions by 2045. The Climate Policy Council assesses the compatibility of the Swedish government's climate policy with the reduction goals.

[141] See Section 3 of the Climate Act.
[142] Ibid, Section 4.
[143] Ibid, Section 5.

Nowhere in the Climate Act or the Act referral[144] is it stated exactly how the provisions are legally binding. Nor does the legal text provide legal consequences if the state fails to fulfil its obligations under the Climate Act. These concerns were raised by the Swedish Council on Legislation who scrutinises draft bills that the Swedish government intends to submit to the Swedish parliament.[145] According to the Council on Legislation different interpretations regarding the state's fulfilment of its obligations under the Climate Act could be made.[146] The law referral does not state a legal order to refer disputes in matters relating to the Climate Act. On the other side, the lack of precision on the legal effects of the Climate Act, perhaps insinuates that legal liability was not intended.[147] In terms of problems often arising when drafting agreements involving many political parties, one could not exclude the fact that more precise legally binding provisions concerning the climate, perhaps would not have been adopted. Hence the Climate Act being broadly formulated without explicit repercussions for the government in the case of non-compliance.

Concerning the emissions in the sectors under the EU Effort Sharing Regulation they are to be cut by at least 63 percent by 2030 and 75 percent by 2040 compared to 1990 levels, not involving sectors from the EU emissions trading system (EU ETS).[148] The obligation to reduce the GHG emissions is due to domestic and international commitments under the EU and the Paris Agreement. Current Swedish domestic reduction targets are more ambitious than the commitments required by the EU.

4.3 Litigation in Sweden based on tort law

This section investigates the possibilities to initiate a climate change litigation case against the Swedish government based on tort law. The litigation case from the Netherlands illustrates how the Hague District Court based the decision on a general tort clause in the Dutch Civil Code whereas the Hague Court of Appeal grounded the decision on the duty of care given Articles 2 and 8 ECHR. Two different interpretations were made by two instances when ordering the state to limit its greenhouse gas emissions. In my view the distinction made by the courts are very interesting. By relying on the duty of care (and not damages) the Hague Court of Appeal pronounced that the causal link between the government's climate

[144] Act referral is called 'remiss' in Swedish.
[145] Prop. 2016/17:146, p. 68.
[146] Ibid, p. 68.
[147] Ibid, p. 68.
[148] Swedish Environmental Protection Agency, Underlag till regeringens klimatpolitiska handlingsplan: Redovisning av Naturvårdsverkets regeringsuppdrag, Report 6879, 2019, p. 11.

policy and negative climate impacts were less of an issue. If the claimants would have claimed damages the causal link would have been more important.

When transposing the Dutch case into the Swedish legal order I have divided the analysis into two parts. First, I will examine if similar climate change litigation against the Swedish government would be possible. Second, I discuss if the right to life and the right to protection of private and family life under Articles 2 and 8 ECHR, along the Swedish constitutional provision for the state to secure the environment for present and future generation, can be used in litigation and if it imposes obligations on the state. Sweden's emissions reduction targets on the national level and EU level under the Effort Sharing Decision are further analysed.

4.3.1 Can Swedish tort law be used in climate change litigation?

The Tort Liability Act (Skadeståndslag, 1972:207) is a framework statute and is meant to regulate some basic provisions related to tort law in Sweden. More detailed provisions can be found in other specific legislation. The area of Swedish tort law is case law developed and several general principles can be derived from unwritten sources.[149] In order to successfully claim damages the basic rule in the Tort Liability Act is that an individual has been subject to personal injury, property damage or pure economic loss, i.e. some type of damage. Liability for damages can only exist if the act or negligence to act caused an actual injury or damage.

Since the 1st of April 2018 there is a new provision in the Swedish Tort Liability Act stating that the state or municipality shall compensate individuals for damages as a result of violations of the rights under the ECHR made by the state or municipality.[150] The provision is available for individuals (not ENGO's) and damages shall only be issued to the extent its necessary to rectify the infringement. Interpretations have been made as to whether the provision will imply stricter responsibility on the state when not doing enough to prevent environmental disruption on individuals in breach of Article 8 ECHR.[151] Additionally, that the ECHR could protect individuals' right to a good environment even if the text does not pronounce such a right.[152]

[149] Hellner and Radetzki, Skadeståndsrätt, 2014, p. 27.
[150] See Chapter 3 section 4 in the Tort Liability Act.
[151] Bengtsson, Skadestånd vid överträdelse av Europakonventionen - den nya lagstiftningen, 2018, p. 103f.
[152] Danelius, Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna, 2015, p. 429.

In Chapter 32 of the Environmental Code (Miljöbalk, 1998:808) specific types of environmental damages are specified. Environmental damages can take place in cases involving personal injury, property damage or pure economic loss.[153] Strict liability covers environmental damages in Chapter 32 of the Environmental Code meaning that the defendant has an obligation to compensate for the damages resulting in the activity that she is strictly liable for. Claims for environmental damages are usually actualised for damages that already have occurred.[154]

In a court case from 2015, *PUSH Sweden, Nature and Youth Sweden and Others v. Government*, two Swedish environmental non-governmental organisations and numerous individuals initiated a climate change litigation case against the Swedish government.[155] The claimants alleged that the state selling of coal-fired power plants to a Czech holding company associated to a German subsidiary would be in breach of the right to life, the right to respect for private and family life under Articles 2 and 8 of the ECHR, compared to the proclaimed duty of care to promote a good environment for present and future generation expressed in Chapter 1, Section 2, paragraph 3 of the Instrument of Government (Regeringsform, 1974:152). The claimants further alleged that there is an imminent and predictable risk that the GHG emissions from the companies purchasing the coal-fire-plant would increase and therefore impact climate change.

In a judgement the Stockholm District Court rejected the claims due to the failure of the claimants to prove damage correlating to the sale of the coal-fired power plants. In rejecting the claims the Court stated that one fundamental principle in Swedish tort law is that the proclaimed act or failure to act must have caused damage. The District Court stated that the mere risk of damage was not enough for liability for damages. Further the Court stated that the applicant's claims were based on a risk analysis of a hypothetical reasoning that the state selling of the coal-fired power plant in Germany would lead to increased emissions.

When it comes to Article 2 ECHR the District Court stated that the right to life provision usually applies when an individual has been killed however adding that the state's positive obligations to protect an individual's life is actualised at an earlier stage (before the killing). In the assessment of an infringement on Article 8 ECHR the District Court examined ECtHR case law related to the environment and concluded that common for the

[153] See Chapter 32 section 1 of the Environmental Code.
[154] Michanek and Zetterberg, Den svenska miljörätten, 2017, p. 471.
[155] Stockholm District Court judgement of 30 June 2017, case T 11594-16 et al.

case law was that environmental disturbances occurred prior to the complaint. Based on the abovementioned, the claimant's right to life (Article 2 ECHR), the right to protection of private and family life (Article 8 ECHR), also taking into consideration Chapter 1, Section 2, paragraph 3 of the Instrument of Government, where not infringed. According to the District Court, the legal position at hand does not support the claimant's action that they have been exposed to a life-threatening situation or any concrete damage at all.

The PUSH case illustrates an example of how a climate change litigation can be pursued in Sweden. In this respect, the claims made by the Swedish claimants were not approved by the Stockholm District Court due to the limited scope of Swedish tort law. In order to successfully file a lawsuit based on damages in Sweden one basic principle is that the damages has occurred. To solely rely on the right to life and the right to protection of private and family life in conjunction with the risk of damage in the future is not successful. The lesson learned from the PUSH case is that Swedish tort law is not a viable way for members of the public to challenge the state's responsibility on climate change in Sweden, unless the damage already occurred and can be proven.

4.3.2 Does Sweden have a duty of care to promote a good environment for present and future generations?

The Swedish Constitution consists of four fundamental laws called the Instrument of Government, the Act of Succession, the Freedom of the Press, and the Fundamental Law on Freedom of Expression. In Chapter 1, Section 2, paragraph 3 of the Instrument of Government, it is stated that public institutions shall promote sustainable development that leads to a good environment for present and future generations. Based on that the Swedish parliament has pronounced the importance of protecting the environment through a general environmental protection rule.[156] According to the legislative history, the provision is not a rights provision for citizens and should rather be seen as a goal-setting provision.[157] Provisions on environmental protection can be found in the Environmental Code. The main purpose of the Environmental Code is "to promote sustainable development which will assure a healthy and sound environment for present and future generations."[158] By this, the

[156] Prop. 2001/02:72 p. 23.
[157] Ibid, pp. 21, 23.
[158] See Chapter 1 Section 1 of the Environmental Code.

legislator announced that future generations also should be ensured the provisions of today.[159]

It remains unclear whether the constitutional provision to promote sustainable development that leads to a good environment for present and future generations could entail any rights for citizens. Although it was not intended to be a rights-provision according to the legislative history, the question whether the provision could imply that the state has a legal duty of care to secure or improve the environment for present and future generation has yet to be examined by a court.

In examining Article 2 ECHR the ECtHR has set up the condition of *imminent threat* for the state to take precautionary measures to prevent an infringement.[160] If the state is aware of an imminent threat they have an obligation to act. The ECtHR has further stated that an effective deterrence of any activity being public or not threatening the right to life (Article 2 ECHR) also includes threats coming from industrial risks or other dangerous activities.[161]

Concerning the right to respect for private and family life the ECtHR has stated that pollution on the environment can affect individuals and violate Article 8 ECHR.[162] Article 8 ECHR can also be applicable if individuals' well-being is being affected by severe environmental pollution thus preventing them from enjoying their homes in terms of not being able to enjoy their private and family life adversely without seriously endangering their health.[163]

Recalling that Swedish law should be interpreted in light of the ECHR one could argue that there is more to the constitutional provision on promoting sustainable development that leads to a good environment for present and future generations. When examining Chapter 1, Section 2, paragraph 3 of the Instrument of Government in conjunction with Articles 2 and 8 ECHR it indicates that individuals have rights. This is further attested by the goals listed in Chapter 1 Section 1 of the Environmental Code. The rights can be attributed the abovementioned ECtHR case law stating that acts or omissions having an adverse effect on the private and family life of an individual can violate Article 8 ECHR, if the adverse effect

[159] Prop. 1997/98:45 Del 2, p. 7.
[160] *Kolyadenko and Others v. Russia,* Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, ECtHR (2012) para. 160.
[161] *Öneryildiz v. Turkey* [GC] Application no. 48939/99, ECtHR (2005) para. 71.
[162] *López Ostra v. Spain,* Application no. 303-C, ECtHR (1994) paras. 51, 52.
[163] Ibid, paras. 54, 55.

reaches a certain level of severity. Additionally, the precautionary measures taken by the state to avert imminent threats.

In the Netherlands, the Court of Appeal stated that the ENGO could directly rely on Articles 2 and 8 ECHR in their claim to prove that the Dutch government had acted unlawfully by not doing more (meet their GHG emissions target) in protecting its citizens against the harmful effects of climate change (duty of care). By not claiming damages the Court of Appeal had less focus on the causal link between the 'culpable' act and the damage suffered. The reason as to why the Dutch Court of Appeal made that interpretation is partly given the positive obligations of the state to protect the right to life and the right to respect of private and family life. Further, ECtHR case law in the area along principles deriving from it were of importance. Therefore, the answer as to why the Dutch Court of Appeal made that interpretation of the ECHR is beyond the monistic and dualistic approaches of international law interpretation.

Opposite from the Hague Court of Appeal, the Stockholm District Court in the case *PUSH Sweden, Nature and Youth Sweden and Others v. Government*, addressed the tort law argument made by the claimants. The Swedish claimants asked the Court to order the state to pay damages because of the state's failure to intervene in the selling of the coal-fired power plant. According to the claimants increased greenhouse gas emissions would be the result of the sale.

The ECHR is a living instrument meaning that it must be interpreted according to today's conditions. According to the margin of appreciation doctrine an impossible or unproportionate burden shall not be put on the state when taking measures against an infringement on Article 2 ECHR. Also for Article 8 ECHR there has to be a fair balance between the competing interest of the claimant alleging violations and of the community as a whole.[164] The state enjoys a certain margin of appreciation concerning Article 8 ECHR.

Article 6 ECHR on the right to a fair trial stipulates that everyone is entitled to a fair trial in determining his or hers 'civil rights and obligations'. In determining the scope of 'civil rights and obligations' it cannot solely be interpreted with reference to national law, according to ECtHR case law.[165] Matters related to environmental issues are also subject to

[164] Ibid, para. 51.
[165] *Georgiadis v. Greece,* Application no. 21522/93, ECtHR (1997) para. 34.

Article 6 ECHR, when disputes involve infringements of Article 2 on the right to life, and the right to health under Article 8 ECHR and a healthy environment.[166]

Given the positive obligations of the state under Articles 2 and 8 ECHR and the constitutional provision to promote sustainable development that leads to a good environment for present and future generations, I would argue that Sweden has a duty to take appropriate preventive measure against an infringement under the abovementioned provisions.

Today, we find ourselves in a situation where 196 states are committed to combat climate change through the Paris Agreement. The Paris Agreement goes beyond the Kyoto Protocol in the global coverage of greenhouse gas emissions. Besides that, scientific reports demonstrate that if states don't enhance their level of ambition on GHG emission cuts it will have irreversible damage for both humanity and nature. The climate policy in Sweden and the EU have never been as ambitious as today, not to say that it stops there. Not only do we have international scientific reports proving correlations between climate policies and climate change, but we also have a national Environmental Protection Agency estimating the emissions trajectory aiding the government to comply with its reduction targets. The advocacy to halt global warming can be derived from an international level, EU level and domestic level, but the actual willingness to conduct the climate policy decided is left to the sole political will of states.

4.4 Litigation in Sweden based on climate policy decisions

In the litigation case *Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy,* the claimants alleged that the current 2050 Target of 80 percent reduction emission reduction by 2050 compared to 1990 levels, does not meet the global temperature goal under the Paris Agreement. Based on the aforementioned the claimants apply for judicial review and seek a declaration relief from the Court that the Secretary of State has acted unlawful in failing to revise the 2050 Target. This case is used as an example for initiating a climate litigation case in Sweden.

[166] *Taşkın and Others v. Turkey*, Application no. 46117/99, ECtHR (2005) paras. 117, 129,

4.4.1 Who takes decisions on climate policy in Sweden?

The climate policy outlined in the Swedish Climate Act is regulated in law and is therefore legally binding.[167] By adopting legislation on climate policy it safeguards the efficient long-term work on the matter, according to the legislators.[168] It further enhances the climate policy work by making governments bound to the law regardless of political compositions. In this respect the Swedish parliament commits the government to conduct climate policy in line with the framework given under the Climate Act.

In a hypothetical scenario the decision not to revise a reduction target for 2050 in line with the Paris Agreement would most likely be taken by the Swedish government with advisory support from the Climate Policy Council and other government agencies. According to Section 3 of the Climate Act the government's climate policy work must be based on the emission targets set by the Swedish parliament. This means that the government must have support from the parliament in order to pursue its climate policy on GHG emissions reductions.

Sweden has emission reduction goals for 2020, 2030, 2040 and 2045, as required by the Climate Act. In the Climate Act there is no reference to the actual reduction percentages. The ambition level for the reduction targets are not addressed in the Climate Act. The content of the long-term emissions reductions targets are therefore set by the parliament in political processes and not specified in law.

4.4.2 What government decisions can be subject to judicial review?

Some decisions made by the Swedish government can be subject to judicial review according to the Act on Legal Review of Certain Governmental Decisions (Lag om rättsprövning av vissa regeringsbeslut, 2006:304). Individuals including natural and legal persons can request judicial review if the decision by the government involve the individual's rights and obligations under Article 6(1) ECHR, according to Section 1 of the Act on Legal Review of Certain Governmental Decisions. Environmental non-governmental organisations can apply for judicial review of those permit decisions covered by Article 9(2) of the Aarhus Convention.[169] In order for ENGO's to meet the criteria's for judicial review their primary purpose must be to promote nature conservation or environmental protection interests.

[167] Prop. 2016/17:146 p. 44.
[168] Ibid. p. 44.
[169] See Section 2 of the Act on Legal Review of Certain Governmental Decisions.

Further they must be non-profit, have operated in Sweden for at least three years, and have at least 100 members or can prove that their activity has the support of the public.[170]

Questions concerning how the state is governed are not subject to judicial review.[171] Only decisions in individual cases can be reviewed if the decision includes an examination of an individual's civil rights or obligations.[172] ENGO's cannot apply for judicial review in the case where Sweden did not revise its climate policy.

A decision concerning Sweden's climate policy on the matter of revising a national reduction target given new international obligations (the Paris Agreement) would not fall under the scope of "individuals' rights and obligations" under Article 6(1) ECHR. Judicial review presupposes that a decision has been taken in an individual case. Based on the aforementioned a government decision on climate policy is rather general and would most likely be seen as a decision on how the country should be ruled. Judicial review on the government's climate policy decisions would therefore be dismissed.

4.4.3 What if Sweden does not comply with the Effort Sharing Decision?

In the litigation case *Family Farmers and Greenpeace Germany v. Germany* the second claim asks the Court to declare an obligation to supplement the 2020 Climate Protecting Program in accordance with the Effort Sharing Decision on the 17 percent GHG emission reduction by 2020 for Germany compared to 2005 levels. The GHG emissions under the ESD stands for approximately 55 percent of the emission in the EU.

Under the Effort Sharing Decision Sweden is obliged to reduce its GHG emission by 17 percent compared to 2005 levels. The reduction does not include the EU ETS sector. Sweden's national GHG reduction target is 40 percent compared to 1990 levels. When calculating the difference between the Swedish obligation under the ESD of 17 percent compared to 2005 levels and Sweden's national target it makes it a 33 percent reduction. It means that Sweden has to cut its GHG emissions by 33 percent by the end of 2020 in the non EU ETS sector to comply with the ESD. In the latest report on the Swedish emissions trajectory the Environmental Protection Agency reported that Sweden has cut its emissions by 30 percent, meaning that more needs to be done in order to comply with the ESD.

[170] See Chapter 16 Section 13 of the Environmental Code.
[171] RÅ 2009 not 186.
[172] Prop. 2005/06:56, p. 22.

If Sweden, or another EU member state emits more than the quota determined for each country under the ESD, the following options are available. According to Article 3 paragraph 3 ESD an EU member state can carry over parts of its annual emission allocation that are below its GHG emission level to the following year, if they use the flexibilities provisions of Article 3 paragraphs 4 and 5 ESD.[173] In the case where the EU member state exceeds its allocations on emissions it can compensate for its exceeding emissions by buying emission space from another EU member state that has outperformed its emission target.[174] For those EU member states that have outperformed their emissions allocation they can sell their remaining emission allocations to another EU member state after they have utilised the flexibilities paragraphs in Article 3.[175]

I can conclude that the Effort Sharing Decision contains numerous provisions, 'flexibilities', making it possible for EU member states to address current or future situations of exceeded allocations on emissions. Member states can therefore plan for scenarios where they won't comply with the obligations under the Effort sharing Decision. Germany, for example, have set aside 300 million euro to buy the 'emissions' that were not reduced nationally.[176] Sweden could do the same.

4.4.4 What if Sweden does not meet the national reduction target for 2020?

In 2009 the Swedish parliament adopted an environmental quality objective named 'limited climate impact'.[177] It includes a reduction target to cut GHG emissions by 40 percent compared to 1990 levels by 2020. The reduction target involves emissions from the non EU ETS sector. As previously mentioned Sweden has reduced its emissions by 30 percent compared to 1990 levels. In the legislative work it is stated that the emissions for 2020 *shall*[178] be 40 percent lower than the emissions in 1990.[179] There is a difference between the words 'shall' and 'must' where the word 'shall' implies voluntary measures and 'must' compulsory measures. This understanding is further attested by the course of action that the government decided on. The 2020 reduction target was planned to be achieved through national

[173] See Article 3 paragraph 3 of the Effort Sharing Decision 406/2009/EC.
[174] Ibid, Article 3 paragraph 4.
[175] The following report has been used to interpret the flexibilities paragraphs in Effort Sharing Decision 406/2009/EC. Nilsson, EU, Sverige och Klimatpolitiken, En guide för politiker och andra till EUs nya klimatpolitik, 2019, pp. 44-47.
[176] Nilsson, EU, Sverige och Klimatpolitiken, En guide för politiker och andra till EUs nya klimatpolitik, 2019, p. 47.
[177] Miljökvalitetsmålet 'Begränsad klimatpåverkan'.
[178] The direct translation of the word shall, is 'bör' in Swedish.
[179] Prop. 2008/09:162, p. 1; Prop. 2009/10:155, p. 83.

emissions reductions, investments in other EU member states, or through the Clean Development Mechanism under the Kyoto Protocol.[180] The parliament decision per se does not specify how the measures to reduce emissions should be distributed, whether the majority should be reduced domestically or by measures abroad. However, in the government bill, Prop. 2008/2009:162, it is written that two thirds of the reduction distribution should be applied on national reductions measures, whereas one third on measures abroad.[181] Criticism has been raised within parliament over the fact that emissions reductions abroad are included in the Swedish national reduction target.[182] The environmental quality objective is not regulated by law and therefore not legally binding.[183]

It is in this context that I conclude that the 2020 national reduction target is rather an aim to set a general climate policy target. The remaining 10 percent to reach the 40 percent target of GHG emissions can be invested in another EU member state or used in the Clean Development Mechanism. Sweden will comply with its 2020 national reduction target even if the GHG emissions cut originates from another part of the globe.

Taken together, the above mentioned conditions gave the government room for manoeuvring the distribution between measures domestically and abroad. The framework surrounding the national reduction target 2020 it set up in a way that it makes it hard not to comply with. From this vantage point a scenario of non-compliance would not have legal repercussions.

4.5 Litigation in Sweden based on permit decisions

In this section I examine the possibilities to initiate a climate change litigation case in Sweden based on an alleged wrongful permit/licensing decision. For illustration the Norwegian case concerning the state's decision to allow petroleum licenses at deep sea sites in the Barents Sea is used. The main tools in the Norwegian litigation approach was the *Norwegian constitution* on the right to a healthy environment and *breaches in the case handling rules* prior to the permit decision. When analysing the possibilities within the Swedish legal order I will cover the legislation surrounding the permit procedure, including the environmental impact assessment and the possibilities for the public to challenge a permit decision. The constitutional right to a healthy environment has already been covered in section 4.3.2.

[180] Prop. 2008/09:162, p. 31.
[181] Ibid, p. 34.
[182] KU-anmälan 2013/14:15 (Dnr 1181-2013/14) av Matilda Ernkrans (S).
[183] Michanek and Zetterberg, Den svenska miljörätten, 2017, p. 100.

4.5.1 Who takes decisions on oil and gas permits?

Questions related to *exploring* the Swedish continental shelf and *extracting* its natural resources are regulated in the Continental Shelf Act (Lag om kontinentalsockeln, 1966:314).[184] The Continental Shelf Act defines the continental shelf as the sea-bed and its subsoil within Swedish public waters and also the areas outside the sea territory in accordance with the Act on Sweden's sea territory and maritime zones.[185] Natural resources within the continental shelf are defined as minerals and other non-living resources on the sea-bed along living organisms in their development phase.[186] According to Section 2 of the Continental Shelf Act the Swedish state is to decide on the rights concerning exploration of the continental shelf and the extraction of its natural resources. The state can however give permission for someone other than the state for exploring or extraction activities. However, when it comes to operations involving oil and gas the state retains the authority to act.[187] Permit decisions on oil and gas activities can therefore exclusively be taken by the state.

4.5.2 What does the permit procedure on oil and gas activities entail? Does it include an obligation to conduct an environmental impact assessment?

Activities that fall within the scope of the Environmental Code shall take the sustainable development goal into account in accordance with Chapter 1 Section 1 of the Environmental Code.[188] Chapter 1, section 1, second paragraph of the Environmental Code codify five goals that must be achieved when the Environmental Code is applied.[189] The first goal concerns the protection against damage on human health and the environment caused by pollution or other effects. Given the fact that the goal is codified it makes it legally binding and shall therefore be taken into account when the Environmental Code is enforced.[190]

When exploring the continental shelf and extracting its natural resources the provisions in Chapter 2 of the Environmental Code must be applied. Chapter 2 of the Environmental Code lists general consideration rules that must be taken into account when performing activities or measures affecting the aim and purpose of the Code.[191] The general

[184] See Section 1 and 2a of the Continental Shelf Act.
[185] Lag om Sveriges sjöterritorium och maritima zoner, 2017:1272; See Section 1 of the Continental Shelf Act.
[186] See Section 1 of the Continental Shelf Act.
[187] Ibid, Section 3.
[188] See Chapter 1 Section 1 of the Environmental Code.
[189] Michanek and Zetterberg, Den svenska miljörätten, 2017, p. 100.
[190] Ibid, p. 100.
[191] Prop. 1997/98:45 Del 2, p. 13.

consideration rules include requirements of knowledge, protective measures, limitations, other precautions, best available technology and proportionality tests along other requirements.

When it comes to examining the permit to explore or extract natural resources from the continental shelf the licensing authority shall apply the case handling of the Land and Environmental Courts in Chapter 22 Section 13 of the Environmental Code. If the activities and measures that are being examined for permits to extract natural resources through drilling or blasts are likely to have a significant environmental impact its assessed in a separate decision.[192] Then the County Administrative Board determines whether the activity or measure can be assumed to have a significant environmental impact.[193] If the County Administrative Board assesses that the activity or measure can assume having a significant environmental impact a *specific environmental assessment* is required. The decision on whether the activity or measure can be assumed to have a significant environmental impact cannot be appealed.[194] The provisions on the EIA and the general consideration rules in the Environmental Code shall be considered when examining the permit decision to explore and extract.[195] An EIA is required when examining permits for drillings in connection to exploration. The EIA requirement is also applicable for permit decisions on extractions.[196]

The EIA is a procedural requirement that the solicitors must conduct in order to get the activities tried by the licensing authority. At first the solicitor of the requested activities or measures must have an examination consultation with the County Administrative Board, supervisory authority and individuals that can be affected.[197] After the examination consultation the solicitor submits the application together with the EIA to one of the County Administrative Boards or Land and Environmental Courts. If the permit application is complete it gets announced and sent for referral. Activities that have the most effect on the environment must be submitted to the Land and Environmental Court. Applications for activities having less effect on the environment are sent to the Environmental Permit Delegation within the County Administrative Board.

The Environmental Impact Assessment Directive 2014/52/EU amending the EIA Directive 2011/92/EU (EIA Directive) sets requirements for environmental impact

[192] See Section 3(a) of the Continental Shelf Act.
[193] Ibid, Section 3(a)(2).
[194] See Chapter 6 Section 27 of the Environmental Code.
[195] Michanek and Zetterberg, Den svenska miljörätten, 2017, p. 527.
[196] Ibid, p. 527.
[197] Chapter 6 Section 4 of the Environmental Code; Chapter 6 of the Environmental Code; Miljöbedömningsförordning (2017:966); Förordningen om miljöfarlig verksamhet och hälsoskydd (1998:899).

assessments of listed activities having significant effect on the environment. The EIA Directive originates from 1985 having been amended two times in 2011 and 2014.[198] Projects that may have an effect on the environment are divided into two parts, involving projects that must undertake an EIA (annex I-projects), and projects where the EU member state determines if an EIA is required given set up criteria's (annex II-projects). The EIA Directive recognises the damage that climate change can cause to the environment and economic development. It therefore stresses the importance to assess the impact that project may have on the climate, including GHG emissions, and projects vulnerability to climate change.[199] Projects being covered by Annex II may be subject to an EIA based on the discretion of the EU member state in question. Those projects involve the extractive industry including surface industrial installations of petroleum, see Annex II 2(e) EIA Directive.[200]

Sweden does not and has never had any oil or gas extractions at sea however given the above mentioned provisions it is my opinion that the County Administrative Board would decide on a *specific environmental assessment* in the case of petroleum activities. The specific environmental assessment includes an *environmental impact assessment*.

4.5.3 How and to whom can the permit decision be appealed?

The right to explore the continental shelf and explore its natural resources belongs to the state. Individuals can apply for permits to explore the continental shelf or extract its natural resources at the government. Permit decisions by the government can be appealed at the Supreme Administrative Court. The Act on Legal Review of Certain Governmental Decisions regulates matters related to judicial review.

An individual may apply for judicial review if the government decision involves the examination of the individual's civil rights and obligations under Article 6(1) ECHR.[201] Article 6 ECHR regards the right to 'access to court'. The term individuals includes both natural persons and legal persons.[202] For individuals to rely on Article 6 ECHR there has to be a "real and serious dispute" and the dispute should concern a rights provision in the

[198] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 5.7.1985, p. 40); Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
[199] See Recital 13, Directive 2014/52/EU amending Directive 2011/92/EU.
[200] Directive 2014/52/EU amending Directive 2011/92/EU.
[201] See Section 1 of the Act on Legal Review of Certain Governmental Decisions.
[202] RÅ 1999 ref 76.

national law.[203] It is further required that the rights provision can be defined as a civil right.[204] To determine if the government decision has involved an examination of an individual's civil rights and obligations under Article 6 ECHR the following considerations must be taken. First, there has to be a dispute between two individuals, or between an individual and a government agency. Second, the dispute shall involve a rights provision found in the national law.[205] New substantive law shall not be made through the judicial review procedure.[206]

Some environmental organisations may request for judicial review of *permit decisions* taken by the government that fall under Article 9(2) Aarhus Convention.[207] The ENGO's must meet the requirements under Chapter 16 Section 13 of the Environmental Code in order to seek judicial review. According to the requirements the ENGO's must promote nature conservation or environmental interests, be non-profit, have operated in Sweden for at least three years along having at least 100 members or otherwise can prove that their activity has support from the public.

Article 9 of the Aarhus Convention concerns the public's access to justice. Further, Article 9(2) Aarhus Convention states that the right to judicial review concerns decisions falling under Article 6 Aarhus Convention. In turn, Article 6 Aarhus Convention is about the public participation in decisions on specific activities. In section 1 paragraph (a) of Article 6 it is stated that decisions on activities listed in Annex I to the Convention concern the public's participation. Annex I contains a list of decisions on activities (paragraphs 1-19) mostly on industrial installations. Mineral oil and gas refineries in the energy sector are mentioned in the list.[208] The public can participate in decisions even if the decision is not covered in paragraphs 1-19, if the "public participation is provided for under an environmental impact assessment procedure in accordance with national legislation."[209] In the case HFD 2012 not 54, the Supreme Administrative Court stated that the rules on access to legal review in the Aarhus Convention, on permit decisions shall be applied on permit processes if there is a requirement for consultation and an environmental impact assessment.[210]

[203] RÅ 2009 not 197.
[204] Ibid.
[205] Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 203.
[206] Ibid, p. 203.
[207] See Section 2 of the Act on Legal Review of Certain Governmental Decisions.
[208] See Annex I paragraph 1 of the Aarhus Convention.
[209] Ibid, Annex I paragraph 20.
[210] HFD 2012 not 54.

A permit decision on oil or gas explorations and extractions would require a consultation and an environmental impact assessment. ENGO's meeting the requirements in the Environmental Act and Continental Shelf Act can therefore seek for judicial review. The government decision on permits to explore the continental shelf or extract its natural resources can thus be examined by the Supreme Administrative Court.

An appeal concerning permit decisions taken by the government is taken under the Act on Legal Review of Certain Governmental Decisions. The Supreme Administrative Court examines applications for judicial review on government decisions taken under the Continental Shelf Act.[211] If the licensing authority grants permission for the solicited activities it is possible to *appeal the permit decision*. However the considerations to the EIA cannot in itself be appealed as previously mentioned.[212] The state has no obligation to inform individuals about the possibility to request judicial review.[213]

In the case RÅ 2009 not 164 an oil prospecting company applied for permission to renew an exploration permit and permission to conduct test drillings for oil on the continental shelf in the Baltic Sea. The Swedish government had granted license permits to the company from 1969 to 1999. In 1999 the company applied for a renewed license. After numerous reviews and meetings between the company and the Ministry of Industry the government rejected the application.

The government claimed that the environmental situation in the Baltic Sea had deteriorated involving serious consequences for the marine ecosystem. They also referred to the development of both national and international environmental legislation. Further the government argued that permit decision for oil drillings must be assessed together with potential oil discoveries.

The prospecting company applied for judicial review before the Supreme Administrative Court and asked the Court to annul the government's decision and remand the case back to the government for further dealing. Further the prospect company claimed that the government based its rejection on the potential effects of possible future oil extractions and the transport of the oil in the Baltic Sea. An extension of the current exploration permit and test drillings where the only permits being applied for, thus not future

[211] See Section 3 of the Act on Legal Review of Certain Governmental Decisions.
[212] Ebbesson, Miljörätt, 2015, p. 99.
[213] Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 188.

oil extractions and oil transports. Based on that the prospect company asked for judicial review of the decision.

In a judgement the Supreme Administrative Court stated that the government's decision stands. The Supreme Administrative Court went through the Continental Shelf Act, recalling that the state is to decide on permits concerning natural resources on the continental shelf. Additionally, the Court also recalled the general consideration rules in Chapter 2 of the Environmental Act, specifically the precautionary principle and the balance between the benefits of the protective measures (of oil activities) and other precautions and the costs of such measures. The Court further stated that activities or measures likely to cause damage or inconvenience of essential importance to human health. The Court declared that if an activity or measure is likely to cause damage or inconvenience of essential importance to human health or the environment, the activity or measure can only be allowed if the government finds special reasons. Even if protective measures and other precautions are taken as required by the Environmental Code. If there is a risk for the environment to be considerably deteriorated by the activity or measure then it cannot be conducted.

The Supreme Administrative Court further stated that the provisions concerning the Continental Shelf Act at that time were general and gives the government a relatively wide margin of discretion for assessments. Prone to the wide margin of discretion the Court assessed whether the government's decision fits within the discretion and then complies with the requirements of proportionality between the public interest and the company's interest. According to the Supreme Administrative Court there was nothing in the case that led to the conclusion that the government in the decision making had misjudged the facts or exceeded the margin of discretion to act under the Continental Shelf Act. Overall, the Court did not find that the government's decision was contrary to any rule of law.

Environmental non-governmental organisations meeting the requirements in Chapter 16 Section 13 of the Environmental Code have standing in cases involving the government decisions taken under the Continental Shelf Act. In order for individuals to have standing the dispute must be real and serious involving a rights provision in the national law.

4.5.4 What can be reviewed by the court?

The Supreme Court has first to decide if the government decision can be qualified under the Act of Legal Review of Certain Governmental Decisions. As a procedural requirement, the Supreme Administrative Court has to receive an application for judicial review pursuant to

Sections 1 or 2 of the Act of Legal Review of Certain Governmental Decisions no later than 3 months from the date of the decision.[214] When the aforementioned is dealt with the Court considers if the government decision is contrary to any rule of law.[215] The claimant must clarify the illegality claims in the application by specifying the rule that the decision is contrary to. Circumstances substantiating the claim should also be invoked.[216]

The Supreme Administrative Court can overrule the decision if the decision is contrary to the rule of law in the way that the applicant indicated or as evident from the circumstances.[217] If the error of the decision is of no importance the decision stands. The judicial review includes a cassation proceeding. That means that the Supreme Administrative Court can affirm or quash the decisions and not adjust it. If the government decision is quashed in cassation, the Supreme Administrative Court can, if needed, refer the case back to the government.[218] The government should then reconsider the decision along taking into account the judgement from the Supreme Administrative Court.

When examining an application for judicial review there are several matters that the Supreme Administrative Court reviews. The review includes an interpretation of the law and questions concerning factual assessments and evidence evaluations. Further the Court examines whether the decision is contrary to the requirements of objectivity, impartiality and the equality of all persons before the law[219] as required by Chapter 1 Section 9 of the Instrument of Government. The examination also includes whether the case handling procedure was wrong and might have affected the decision. Some law provisions admits discretion in the decision. If the government decision has wide discretion given the rule of law then the judicial review assesses whether the decision falls within the scope of discretion.[220] The discretion limit can extend to the requirements of objectivity, impartiality and the equality of all persons before the law.[221]

As has been considered in RÅ 2009 not 164 the Supreme Administrative Court ruled that the state holds a wide margin of discretion when assessing some provisions under the Continental Shelf Act. The provisions regarding the permit examination according to the

[214] See Section 4 paragraph 1 of the Act on Legal Review of Certain Governmental Decisions.
[215] Ibid, Section 7.
[216] Ibid, Section 4 paragraph 3.
[217] Ibid, Section 7.
[218] Ibid, Section 7.
[219] The requirements of objectivity, impartiality and the equality of all persons before the law derives from Chapter 1 Section 9 of the Instrument of Government.
[220] Prop. 1987/88:69, pp. 23, 234; Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 216ff.
[221] Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 218.

Continental Shelf Act, at that time, were formulated in a general manner and therefore gave the government a wide margin of discretion for assessments.

However, according to case law the examination is more extensive.[222] The scope of the judicial review varies depending on the type of case.[223] Depending on the case, it has been interpreted that the Administrative Supreme Court make more stringent interpretations when the case involves other than typical cases.[224]

The marine environment and the fact that the Baltic Sea is environmentally exposed would be taken into consideration when assessing state decisions on explorations and extractions in the continental shelf.[225] However, since 2015 there is a prohibition of extraction of oil and gas in Swedish waters.[226] The prohibition was invoked when Sweden implemented provisions from the EU Offshore Safety Directive.[227] Permit decisions to explore the continental shelf and extract oil and gas are not possible given the current legislation.

4.6 Summary

In this chapter I have transposed the litigation approaches into the Swedish legal order. Tort law, climate policy decision and permit decisions constituted the litigation approaches. The three litigation approaches demonstrate that climate change litigation is limited to the legal order of concern. While the litigation process in the Dutch case was successful, in the sense that the state had a duty to take actions against the negative effects of climate change, the Swedish tort law litigation case (Push) took another turn. In the Dutch case the Court of Appeal balanced the state's room for manoeuvring its climate policy by stating that it was up to the state to decide the course of action to set the domestic emission reduction targets. The Court of Appeal firstly stated that the state has a duty of care given Articles 2 and 8 ECHR to reduce its GHG emissions by 25 percent by the end of 2020, and secondly that the state is free to choose how it will reduce its GHG emissions, i.e. that the state has room for

[222] HFD 2012 not 27; HFD 2014-10-29 in the cases 7425-7427-13; HFD 2016 ref. 21; For legal discussions on the matter see Darpö, Karin och Susannes glädje, Lars-Anders sorg? En sen betraktelse över regeringsbeslut och rättsprövning på miljöområdet, 2016, and Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 219f.
[223] Warnling-Nerep, Rättsmedel, om- & överprövning av förvaltningsbeslut, 2015, p. 216.
[224] Darpö, Karin och Susannes glädje, Lars-Anders sorg? En sen betraktelse över regeringsbeslut och rättsprövning på miljöområdet, 2016, p. 87.
[225] e.g. the reasoning of the state in the Supreme Administrative Court in RÅ 2009 not 164.
[226] See Section 3 Continental Shelf Act.
[227] Prop. 2014/15:64 pp. 1, 33; Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

manoeuvre. This is a quite interesting interpretation by the Court of Appeal, on the state's margin of discretion, according to my opinion. The state defence interpreted the District Court judgement as an intervention by the courts in the political sphere and withheld that opinion all the way to the Supreme Court.

While tort law did not serve as a base for climate litigation in Sweden the question regarding the duty of care pursuant to Articles 2 and 8 ECHR is of interest. In comparison to Dutch law, Sweden does not have a general provision allowing class actions to access national courts.[228] Against this background, I don't see how an individual or an ENGO can bring a case before a Swedish court with claims involving precautionary measures to avert the real and imminent threat of climate change. However, the substantive rights exist, but are not enshrined in the procedural provisions.

The Swedish government withholds a wide margin of discretion when assessing its climate policy. This was demonstrated in the analysis of litigation based on climate policy decisions. The possibilities of the public concerned to address the current national climate policy are restricted if not absent. Government decisions concerning reduction targets cannot be brought before a court, neither by tort law, judicial review or the Climate Act.

Both individuals and ENGO's can challenge government decisions on permits to explore the continental shelf or extract its natural resources. This development was partly brought from the European Convention on Human Rights and the Aarhus Convention.

[228] Book 3 Section 305a of the Dutch Civil Code.

5 Concluding remarks

This thesis has reviewed the possibilities to initiate climate change litigation in Sweden exemplified through approaches in European states. The litigation approaches have demonstrated that states have extensive discretionary power in matters related to climate change. This applies to climate change law and policies and the possibilities for members of the public to challenge states climate inactions.

Sweden's climate change legislation needs more precise regulatory action. The current provisions in the Climate Act are broadly formulated and vague on the legal implications that non-compliance would bring. Instead of codifying the content of the national reduction targets in the law text those are found in policy documents. The course of action to meet the national reduction targets are also specified in other sources than law. The implications are non-legally binding reduction targets.

According to the Instrument of Government and the European Convention on Human Rights the environment has no 'right' to be protected. The purpose of the Environmental Code is to promote sustainable development to assure a healthy and sound environment for present and future generations. However, the legislative history indicates that individuals do not have rights under the purpose provision. In the Norwegian Petroleum case the Court stated that the Norwegian constitutional provision on every person's right to a healthy environment constituted a right and could be invoked before a Court. In my view, pursuant to Articles 2 and 2 ECHR, Sweden has a duty of care to promote a good environment for present and future generation. This includes precautionary measures to prevent infringement of the rights under Article 2 and 8. Environmental protection is therefore put in relation to the rights of individuals, i.e. human rights.

The complexity in climate change law can be attributed to greenhouse gas emissions. Negative effects due to emissions can take a lengthy period before appearing and given the current Swedish tort legislation preventive measures cannot be decided by a court. The litigation approach on tort law demonstrates that science related to climate change is one step ahead of the legislation.

Common arguments made by states are the political dimensions of climate policy. The legislation on judicial review in Sweden is rather locked when it comes to climate policy targets of concern. It does not provide a liable option for the concerned public to challenge the state's inactions when the matter relates to the climate.

However, the public concerned would be able to challenge a government decision related to oil or gas extractions. This is partly because of the implementation of the Aarhus Convention and EU law. The current prohibition of extraction of oil and gas in Swedish waters would however restrict the possibilities to even examine a permit decision. Legislation can rapidly change, especially when it comes to the climate.

Domestic legislation, thus obligations concerning the environment are not solely restricted to the nation state. Interestingly Sweden includes emission cuts from other parts of the world to meet their national 2020 reduction target. However, emissions originating from somewhere else than the state are not taken into account when estimating the emitting levels. External emissions are only taken into account in the calculation of emissions reductions when they are bought or invested. The same course of action is visualised in the EU Effort Sharing Legislation. The EU legislation concerning greenhouse gas emissions include flexibilities that could be regarded as escape clauses.

Emissions account for global warming regardless of where they are emitted in the world. While this explanation is true and valid states hold the primary responsibility for controlling the emission levels under its territory. In doing so, citizens need to able to rely on their governments through democratic processes as judicial protection.

As been shown in the three litigation approaches the Swedish state holds a wide margin of discretion in determining its climate policy. Climate change mitigation decisions, e.g. reduction targets, are made by the government and the concerned public has limited possibilities to challenge those decisions before a court. The level of ambition and the course of action for reduction targets are made through political decisions, most commonly through compromises between several political parties and later passed through parliament. International scientific reports on global warming and its effects are not necessarily mirrored in the national ambition targets. The national targets are set lower than recommendations. Sweden made more ambitious reduction targets than required by the EU. These are however not pursued rapidly enough as indicated by reports from the Swedish Environmental Protection Agency.

The litigation approaches in this thesis unite in making political dimensions visible. The balance between the legislature, executive, and judiciary branches must be respected. That argument applies equally to the three branches. In the one hand I value the fact that political decisions are made by elected politicians and pursued without necessary interference from the judiciary (if decisions are lawful). If I would be discontent with the current policy I

would vote differently in the next elections, hoping that 'my' party or coalition would get the majority votes. At the same time I also value the judiciary system and the fact that it can 'protect' me against political decisions affecting me negatively.

Environmental law is a developing field and that also applies to climate change. Politicians are aware of the real and imminent threat of climate change and are obliged to reduce greenhouse gas emissions to a level where it no longer poses a threat (net-zero level). Whether the legal obligation originates from constitutional law, domestic tort law, the European Convention on Human Rights or the Aarhus Convention should not make a difference as long as actions are being taken. However today, we see that states make different interpretations on the pre-emptive measures needed to be taken in order to meet the reduction targets. Since the scientific underpinning urges states to enhance their level of ambition on emissions reductions action needs to be taken now.

Numerous scientific IPCC reports have been issued on climate change and its effects and 196 states are obligated to pursue efforts to limit the global temperature to 1.5°C. The likelihood of limiting the global temperature increase to 1.5 degrees is very small due to current climate policies. Prone to the insufficient climate actions made by states current and future generations are already facing and will face more irreversible impacts on nature and humanity. Globally, states are conducting climate policies jeopardising human rights. Assuming responsibility, the public should have the right to bring the state's climate inactions before a court of law.

Several states in Europe (and around the globe) have recently initiated litigation cases against their governments due to the inactions of states related to climate change. In my view the question whether to address reduction targets as 'policy decisions' or as 'rights' is political in itself. Currently states are addressing reduction targets as an aim for climate policy, with no legal obligations. Until now, no lawsuit related to the obligations of the state to reduce its greenhouse gas emissions pursuant to the right to life and the right to respect for private and family life has been brought before the European Court of Human Rights. It will be a matter of time before this happens.

The findings in this thesis visualise the existence of unclear substantive provisions and procedural litigation rules related to climate change in the Swedish legal order. The unclarity results in an unforeseeable access to justice in climate change matters. It can be spelled out as a democratic dilemma due to the unclarity that it could bring for the public concerned and most importantly, the earth.

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