Verfassungsblog
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The Transformation of European Climate Change Litigation

Introduction to the Blog Symposium

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09.04.2024 doi: 10.59704/6e82d5aac53531fb

In a transformative moment for European and global climate litigation, the European Court of Human Rights (ECtHR) ruled today that the state has a positive duty to adopt, and effectively implement in practice, regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change. In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ("*KlimaSeniorinnen*"), the Court held that by failing to put in place a sufficient domestic regulatory framework for climate change mitigation, the Swiss government violated Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life. With regard to the climate crisis, Article 8 requires "that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (KlimaSeniorinnen, para. 548). Moreover, the Court found a violation of the right of access to court (Article 6 of the ECHR).

The judgment is a milestone for human rights protection. The implications are far-reaching – not only in terms of the positive obligations of the Council of Europe member states regarding climate protection but also for the judicial enforcement of human rights related to the climate crisis by NGOs. The court has demonstrated that the system of European human rights protection is able to respond to arguably the greatest global threat to human rights. The judgment sends an important signal to all member states, in particular those whose climate mitigation measures lag significantly behind the goals of the Paris Agreement.

The *KlimaSeniorinnen* judgment is part of a total of three Grand Chamber cases on climate and human rights. In the other two cases, *Carême v. France* ("*Carême*") and *Duarte Agostinho and Others v. Portugal and 32 Others* ("*Duarte Agostinho*"), the Court has declared the applications inadmissible.

There is a lot to unpack in all three judgments, ranging from questions of victim status, standing, and extraterritoriality to issues of separation of powers, gender, and concrete consequences for the member states. This is why the Verfassungsblog and the Sabin Center for Climate Change Law's Climate Law Blog organized a joint blog symposium at short notice. Starting today, we will first publish articles analyzing the judgments.

Firstly, a few blog posts will provide detailed overviews of the three judgments, delving into their intricacies and implications. Secondly, thematic posts will dissect specific aspects of the rulings, covering topics such as extraterritoriality, victimhood status, remedies, international law's interaction with the Paris Agreement, positive obligations to mitigate or adapt to climate change, vulnerabilities concerning gender, children, youth, and future generations, causation, and standing.

There is no doubt that today's judgments will keep scholars and practitioners of human rights and climate law busy for some time. This collaboration of Verfassungsblog and the Sabin Center aims to provide an initial overview of the numerous and complex questions raised by the judgments.

The Three Climate Rulings

While the three rulings are distinct in their individual circumstances, the cases share a common thread: they all center around governmental frameworks regarding climate change mitigation (i.e., systemic mitigation cases) and challenge the overall inadequacy of states' efforts to mitigate GHG emissions, without prejudice of an underlying question regarding adaptation measures. Specifically, they question a state's ambition and/or implementation of emissions reduction targets (see here). The cases draw inspiration from the landmark *Urgenda* decision but demonstrate a heightened ambition by advocating for broader reductions in GHG emissions and invoking a more extensive array of rights (i.e., access to justice, discrimination, among others), vulnerabilities (i.e., gender, children, and youth), and impacts (flooding, heatwaves, among others). Furthermore, they align with the evolving interpretation of the ECHR in tandem with the principles of the international climate regime and the latest scientific findings. This alignment mirrors the anticipated direction of advisory opinions, thereby reinforcing the synergy between legal frameworks, human rights violations, and scientific imperatives in addressing the climate crisis.

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland

In *KlimaSeniorinnen*, four women and the association of Senior Women for Climate Protection Switzerland took the Swiss government to the ECtHR in 2020 due to the health impacts of heatwaves on older women. The claimants argued that both the inadequately ambitious Swiss climate legislation and its implementation violated their rights under the ECHR. The applicants exhausted domestic remedies, but had their complaints rejected by the Swiss Federal Supreme Court (see here and here).

The application listed three main grievances: (i) inadequate climate policies violating the right to life and health (Articles 2 and 8 of the ECHR); (ii) the Federal Supreme Court's arbitrary rejection violating the right of access to court (Article 6); and (iii) authorities' failure to address their complaints, violating the right to an effective remedy (Article 13).

The court ruled the complaint brought by the four individual women inadmissible due to the lack of victim status and maintained its strict requirements under Article 34 of the Convention. For human rights violations in the climate change context, the court establishes two core criteria: (i) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, and (ii) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm (para. 487). None of the four individual applicants, the Court held, fulfills these criteria.

However, in a significant expansion of the standing of non-governmental organizations (NGOs) under Article 34, the Court granted *locus standi* to the applicants' association of Senior Women for Climate Protection Switzerland (for the purpose of Article 8). The Court highlighted, among other factors, the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing as a reason to grant standing to the applicant's association. Although this openness of the court is still not fully aligned with the Aarhus Convention, it still marks a major breakthrough in the case-law of the ECtHR. This is a welcome and much-needed development (although not granting standing to the four individuals while broadening standing requirements regarding the NGO might not take into account that NGOs cannot be established everywhere as easily as in Switzerland, as pointed out by Evelyne Schmid).

On the merits, the court has ruled that Article 8 entails a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being, and quality of life (para. 519, 544). The State, therefore, has a positive obligation to ensure such protection, in this case, "to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change." This is undoubtedly the most significant finding of the

judgment as the Court specifies that each Contracting State must undertake measures for the substantial and progressive reduction of their respective greenhouse gas (GHG) emission levels, with a view to reaching net neutrality within, in principle, the next three decades (para. 543). The Court developed a five-step test to assess whether the state has remained within its margin of appreciation. In a nutshell, when assessing the adequacy of state's mitigation measures, the Court considers whether the state (i) adopted general targets for achieving carbon neutrality within a specified timeline, in line with national and global climate mitigation commitments; (ii) defined intermediate GHG reduction goals and pathways; (iii) demonstrated compliance or efforts toward meeting GHG reduction targets; (iv) regularly updated targets with due diligence; and (v) acted in good time and in an appropriate and consistent manner when developing and implementing relevant legislation and measures.

Applying these principles to the regulatory framework of Switzerland, the Court found that there were critical gaps in the Swiss authorities' establishment of the necessary domestic regulatory framework, including a failure by the authorities to quantify national GHG emissions limitations, either through a carbon budget or alternative means.

Carême v. France

In *Carême*, the former mayor of Grande-Synthe, France, filed an application in 2021 against the French government concerning flooding in the seaside town near Dunkirk. While the domestic case (*Commune de Grande-Synthe v. France*) was successful in calling for national emission reduction targets of 40% by 2030, the applicant's individual claims made in the domestic case were rejected for lack of interest. The Council of State rejected, however, the application insofar as it was brought by the applicant on the grounds that he did not show any interest in the case since his claims were limited to the argument that, as an individual, his home was situated in an area likely to be subject to flooding by 2040 (for an assessment of the Câreme case in the light of ECtHR Environmental case law, see here).

In his application to the ECtHR, Carême, as a resident and mayor of Grande-Synthe, argued that exposure to climate risks, including coastal erosion, floods, and coastal flooding, violated his right to private and family life (Article 8 of the ECHR) and the right to life (Article 2 of the ECHR). However, at the hearing, the applicant noted that he no longer lived in France. Therefore, the ECtHR found that, since the applicant no longer resided (or owned or rented property) in Grande-Synthe, he could not claim victim status under the Convention (para. 84). In this analysis, the ECtHR referred to the general principles of victim status established in *KlimaSeniorinnen*. Furthermore, the ECtHR held that the applicant could not complain to the Court as a mayor of Grande-Synthe, since the municipalities, considered "governmental organizations," have no standing to make an application to the Court.

Duarte Agostinho and Others v. Portugal and 32 Others

In 2020, six Portuguese children and youth lodged a complaint with the ECtHR against Portugal and 32 other respondent States for insufficient action on climate change. They alleged violations of Articles 2, 8, and 14 of the ECHR, citing threats to their right to life due to climate impacts like forest fires, infringement upon their right to privacy by heatwaves, and discrimination as young people disproportionately affected by climate change. Notably, they did not exhaust domestic remedies before reaching the ECtHR.

Regarding the extraterritorial jurisdiction of the 32 respondent States other than Portugal, the Court found that there were no grounds in the Convention for the extension of their extraterritorial jurisdiction in the manner requested by the applicants. This interpretation is despite the acknowledgment that (i) States had control over GHG emitting activities based on their territories, had undertaken international commitments, and developed domestic laws and policies under the Paris Agreement (para. 192), (ii) there is a (complex and multi-layered) causal relationship between GHG emitting activities in a State's territory and the adverse impact on the rights and well-being of people residing outside the borders of that State (para.

193), and (iii) climate change is a problem of an existential nature for humankind, setting it apart from other cause-and-effect situations (para. 194). Overall, the Court found that extending extraterritorial jurisdiction would lead to an "untenable level of uncertainty for States" and entail an unlimited expansion of jurisdiction under the Convention towards people "practically anywhere in the world" (para. 208). As such, territorial jurisdiction was only established with respect to Portugal.

Despite Portugal's territorial jurisdiction, the complaint against Portugal was also found inadmissible since the applicants failed to exhaust domestic remedies (para. 216). The Court noted that Portugal's domestic legal system had sufficient legal avenues and remedies available for the applicants to pursue a domestic case. As such, there were no special reasons for exempting the applicants from the requirement to exhaust domestic remedies. The Court recalled the principle of subsidiarity and noted that it was not a court of first instance and lacked the capacity to adjudicate the number of cases that would undoubtedly derive from such an exemption.

Outlook

The rulings from the ECtHR have far-reaching implications for global climate litigation at the regional and domestic levels. Firstly, it will directly impact other climate cases before the ECtHR that were adjourned pending these rulings (see the ECtHR's factsheet on climate change here). For example, two other cases (*De Conto v. Italy and 32 other States* and *Uricchio v. Itay and 32 other States*) might face similar admissibility challenges as *Duarte Agostinho* as they were similarly filed against 33 States. Furthermore, there is now a direct interpretation of how the ECHR applies in climate cases that will be followed in applications against Germany, Norway, and Austria, among others.

Secondly, the precedent set by the ECtHR on the interpretation of Article 8 under the ECHR – that Article 8 encompasses a right for individuals to effective protection by State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life – will be followed by domestic courts in countries that have ratified the ECHR. For example, this decision will likely impact several pending framework cases against governments challenging inadequate or insufficient measures to address climate change (see, e.g., examples in Belgium, Germany, Poland, and Portugal). Furthermore, it provides an opportunity for applicants in unsuccessful systemic mitigation cases to bring a complaint to the ECtHR on this basis, or for further systemic mitigation cases to be brought across Europe. Additionally, the possibility of civil society organizations to now apply directly to the Court further opens possibilities for other climate claims.

Finally, the rulings have ramifications beyond the European context. With the growing influence of comparative law in climate litigation and cross-referencing between courts in different jurisdictions in landmark cases, it is likely that the *Klimaseniorinnen* decision will have an impact on pending and forthcoming litigation in other jurisdictions as well. Similarly, the pending advisory opinion requests before the International Court of Justice, the International Tribunal for the Law of the Seas, and the Inter-American Court of Human Rights (see here for background) will likely look at the decision for inspiration and consistency of interpretation across international and regional courts and tribunals.

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SUGGESTED CITATION

Bönnemann, Maxim; Tigre, Maria Antonia: The Transformation of European Climate Change Litigation: Introduction to the Blog Symposium, Verfassungsblog, 09.04.2024, doi: 10.59704/6e82d5aac53531fb.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240411-103621-0.