Separation of Powers and KlimaSeniorinnen

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Amid governments' unwillingness to effectively curb climate change, the European Court of Human Rights (ECtHR) has delivered a bold judgment in favor of a viable future for all in the case *KlimaSeniorinnen and Others v. Switzerland* ("KlimaSeniorinnen"). The ruling made judicial history. Many claim for the better, as it's widely hailed as a landmark ruling and a victory for climate justice. However, not all are welcoming this turn of events. The Energy Secretary of the United Kingdom, Claire Coutinho, expressed her concerns about the verdict on X: "How we tackle climate change affects our economic, energy, and national security. Elected politicians are best placed to make those decisions." Similar arguments were brought forward by the eight countries who intervened in the climate seniors case, including Ireland and Norway.

Especially in Switzerland, the ruling has been met with sharp criticism. The rightwing Swiss People's party (Schweizerische Volkspartei, SVP) (predictably) accused the Court of judicial overreach and demanded that Switzerland leave the Council of Europe. Concerns were also expressed in the media. Swiss Radio and Television (Schweizer Radio und Fernsehen, SRF) asked its readership: "Do you think it's good when courts interfere in climate policy?." The Tages-Anzeiger, a Swiss newspaper, spoke of a "dangerous judgment," made by "foreign judges;" the Aargauer Zeitung of democracy being "overridden"; former Judge of the Swiss Federal Court, Ulrich Meyer, in a guest commentary in the NZZ talked of a "crossing of the Rubicon."

Many of these criticisms were published within hours – some within minutes – after the judgment was handed down by the Strasbourg Court on April 9. It's questionable if that gave commentators sufficient time to get an accurate picture of what the 17 judges held in their 261-page long-ruling – and the things they explicitly steered clear from, among others, for reasons of judicial deference. It is thus important to disentangle justified criticism from "opportunistic" criticism, which merely uses the ruling to express general disapproval of the ECtHR and climate lawsuits more broadly.

The ECtHR decision directly addresses separation of powers and the role of the judiciary in adjudicating human rights, specifically in the context of climate change. This post unpacks the decision and argues that concerns about ECtHR overreach are unwarranted. It shows how the judgment forms an integral part of democratic governance (particularly in Switzerland) whilst being conducive to better laws and policies.

Should the Court Hear Climate Change Cases at all?

Before the *KlimaSeniorinnen* case, and the others decided on April 9 (*Duarte Agostinho and Others v. Portugal and Others* and *Carême v. France*), gained traction, many had questioned whether the Court should hear climate change cases at all.

There were two main objections to ECtHR review. First, invoking the principle of subsidiarity and states' margin of appreciation, parties argued that national authorities "are in principle better placed than an international court to evaluate the relevant needs and conditions" and that "[i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight" (*Hatton and Others v. UK*, para. 97). Especially because the parties to the United Nations Convention on Climate Change (UNFCCC) had not established a judicial review mechanism for, e.g., the Paris Agreement, adjudicating climate matters at the ECtHR would mean the Court unduly acts as "the supreme court of environmental or climate disputes" which can "only create tension," according to Switzerland.

Second, there were concerns about separation of powers, à la *Juliana v. United States*. A "judicialization" of climate matters at the international level, according to the Swiss Government, would risk "circumventing the democratic debate and complicating the search for politically acceptable solutions." Judge Eicke forcefully makes this point in his Dissenting Opinion in *KlimaSeniorinnen*. What is more, forcing domestic authorities to assess their regulations and measures, and design and adopt new ones, may well have the opposite effect of strengthening climate protection, as Members States "will now be tied up in litigation" (paras. 69-70; he previously made this argument here).

Tackling Climate Change as the Primary Responsibility of Democratic Decision-Making Processes

The *KlimaSeniorinnen* judgment contains several passages in which the remaining 16 judges, including notably the Swiss judge, addressed these concerns head-on. The judges emphasized that primary responsibility for navigating the complex scientific, policy, economic, and other issues posed by climate change lies with the domestic legislative and executive branches (para. 413). These typically set up the overarching policy frameworks and specific measures in sectoral fields (para. 411), which requires balancing various conflicting interests (para. 421). The Court emphasized that, in a democracy, "which is a fundamental feature of the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared responsibility …, such action thus necessarily depends on democratic decision-making" (para. 411).

In emphasizing the primary responsibility (and thus prerogative) of the domestic democratic legislature and executive, the Court does not, *a contrario*, suggest that the judiciary substitutes them in authority, competence, function, or form at any point in time. On the contrary, it clarifies that "(j)udicial intervention, including by this Court, *cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government*" (para. 412, emphasis added).

Complementary Role of the Judiciary not Outside, but as an Indispensable Part of the Democratic Order

Does that mean climate law and policy are outside the remit of judicial oversight? By no means. If Montesquieu and Madison are to be believed, such means of checks and balances are foundational for a democracy (and conducive to better policies and laws, if that's something we're still concerned about). Conversely, separation of powers would, in fact, be breached if the executive or legislature deprived the judiciary of its capacity to check the others.

The Court clarified that "democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes" (para. 412). The task of the judiciary has always been – and continues to be in an age of climate change – to ensure the necessary oversight of compliance with legal requirements. This oversight is no less, but all the more important, if we consider the complex time horizons of governing climate change. Especially from an intergenerational perspective, there is a "risk inherent in the (…) political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making" and this, the Court stated, "add(s) justification for the possibility of judicial review" (para. 420).

Looking specifically at Switzerland, this risk is certainly not hypothetical. Some 15 years ago, in 2009, the Federal Council, in its dispatch, acknowledged the need for an "at least" -40% reduction of greenhouse gas (GHG) emissions among developed countries until 2020 (compared to 1990 levels) to keep global warming at a safe level but explicitly decided against it, as doing so would "entail the risk of an excessive burden on the Swiss economy." As a nod to the principle of subsidiarity, the Court reiterated that democratic decision-making processes should be the first to grapple

with these conflicts, whose processes and outcomes are in complementary fashion reviewed through judicial oversight on the domestic level, and only subsequently by engaging the ECtHR (paras. 412, 421).

Competence of Court

Switzerland voluntarily accepted the jurisdiction of the Court as a last resort in this long cascade of review (remember the *KlimaSeniorinnen* case is now in its 9th year) by ratifying the ECHR in 1974. This adds a vertical dimension to the separation of powers and checks and balances (sometimes known as "vertical separation of powers").

Review by the Strasbourg Court, or – to be more precise – review of ECHR rights is all the more important in Switzerland, where the "immunity clause" for federal laws (Art. 190 Const.) limits judicial review. The ECHR rights require the Court, as well as domestic courts, to establish a violation and remedy it – Art. 190 Const notwithstanding. Therefore, "the Court's competence in the context of climate-change litigation cannot, as a matter of principle, be excluded" (para. 451).

The Court reiterates that if complaints are raised before it that relate to State policy with respect to an issue affecting the ECHR rights of an individual or group of individuals, this is "no longer merely an issue of politics or policy but *also a matter of law having a bearing on the interpretation and application of the Convention*" (para. 450, emphasis added). So, where violation of Convention rights stands to question, "the Court cannot ignore … its role as a judicial body tasked with the enforcement of human rights" (para. 413).

Judicial review of the ECtHR is, however, significantly narrower than on the domestic level (para. 412). Art. 19 ECHR limits the exercise of its competence to ensure that the Convention is complied with (para. 411). The Court is mindful that doing so in the context of climate change may mean that there is an overlap of human rights and climate change law and policy, but it emphasizes that it "does not have the authority to ensure compliance with international treaties or obligations other than the Convention" (para. 454). The Court's competence is not only limited in scope but also in terms of the depth of review. While determining "the proportionality of general measures adopted by the domestic legislature" (para. 412), the Court pays "substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts" (para. 450).

A Differentiated Margin of Appreciation

This deference is key to the functioning (and legitimacy) of the ECtHR, but it does not go as far as rendering the Court's review of the conformity of State acts with ECHR rights a mere formality or, more cynically put, a rubber-stamp exercise. The margin of appreciation is a central doctrine (admittedly one of the most debated ones) of the ECtHR, by which it seeks to strike a balance between deference and jurisprudence. With a view to climate change impacting Convention rights, the Court developed a differentiated margin of appreciation.

States' margin of discretion is narrow when it comes to "State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives" (para. 543). The Court justifies this with reference to the nature and gravity of the threat of climate change, the general consensus as to the stakes involved, and the parties' commitments to achieve carbon neutrality. The margin of appreciation remains wide, by contrast, regarding the means to achieve those objectives, including operational choices and policies (para. 543). This seems to suggest that the question of ambition in climate mitigation, i.e., the level of protection of rights holders from adverse effects of climate change, is reviewable by the Court, while the modalities of said level of protection remain largely outside its remit.

In light of this, one would expect the Court to determine what maximum level of global warming still secures ECHR rights and by what year net neutrality should be achieved to limit warming to that level, to set interim targets and percentage reductions for GHG emissions, and lay down modalities for review. Opponents of the judgment at least implicitly suggest this, when they claim that the Court essentially "made climate policy." So what did the Court do, in fact?

Margin of Appreciation in Action

The Court held that "the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (para. 545). Reminding us that the ECHR "must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory" (para. 545), the Court found that "the Contracting States need to put in place the necessary regulations and measures aimed at *preventing an increase in GHG concentrations* in the Earth's atmosphere and a rise in global average temperature *beyond levels capable of producing serious and irreversible adverse effects on human rights*, notably the right to private and family life and home under Article 8 of the Convention" (para. 546, emphasis added). As such, with a view to climate change impacts on human rights guarantees, we shouldn't get to the point of no return, not even to the point of last return.

No Human Right to Climate Protection

Does that mean there is now a right to climate protection, as some have claimed? The Court clarified that this is not the case. It emphasized that "no Article of the Convention is specifically designed to provide general protection of the environment as such" (para. 445). Its ruling is about "the existence of a harmful effect on a person and not simply the general deterioration of the environment" (para. 446). This is why, among others, *actio popularis* complaints are still not tolerated in the Convention system.

Substantive and Procedural Standards of Due Diligence

The Court then drilled down on what this qualitative standard means, more specifically, with a 5-pronged test in the much-discussed para. 555. States should set out a timetable and targets for achieving carbon neutrality (using carbon budgets), as well as pathways and interim targets to reduce their GHG emissions. These must be implemented in a timely, appropriate, and consistent manner. And governments must provide evidence showing whether they have complied with targets or not, and update targets regularly. These elements are evaluated in an overall assessment and depend on adaptation measures (paras. 551-552).

These criteria are rather conservative. The Court steered clear of determining timetables, long-term objectives, interim targets and pathways, or specific years for reductions. Instead, it determined, on a broader level, that "effective respect for the rights protected by Article 8" requires "substantial and progressive reduction" of GHG emissions (para. 548); that "immediate action needs to be taken and adequate intermediate reduction goals must be set" (para. 549); and that to this end, measures should be incorporated into "a binding regulatory framework at the national level" (para. 549). In doing so, the Court has, as Reich has argued, endeavored to find a reasonable middle way.

Elsewhere in the judgment, there is an interesting and far less conservative note on the scope of GHG emissions. In assessing the scope of the complaint, the Court declared "embedded emissions" (i.e., emissions from Switzerland's import of goods for household consumption) relevant for its assessment (paras. 283, 287), however, "without prejudice" to the examination of state responsibility (para. 283). Judge Eicke, in his Dissenting Opinion, seems to suggest that the state duties formulated by the Court under Article 8, with a view to climate mitigation, cover both domestic and embedded emissions (Dissenting Opinion of Judge Eicke, para. 4). This point will surely prompt and require further scholarly discussion.

Less controversial, and in addition to the above five elements, as part of the procedural limb of Art. 8, the Court determined that states must observe two procedural requirements, namely provide adequate information about climate regulations and measures (or the absence thereof) to the public, in particular to the people most affected; and have procedures in place through which their views about the regulations and measures can be taken into account in the decision-making process (para. 554).

This is the minimum substantive and procedural due diligence states must show in the context of

climate change mitigation to respect Convention rights.

… Applied to Switzerland

The Court then applied those standards to Switzerland. It found that Switzerland does not have a sufficient regulatory framework in place to "provide, and effectively apply in practice effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health" (para. 567). Switzerland also failed to quantify its GHG budget and observe its own targets in the past, which led the Court to find a violation of Article 8. In its finding, the Grand Chamber considered the latest legislative amendments and proposals and found that "the new legislation is not sufficient to remedy the shortcomings identified in the legal framework applicable so far" (para. 568).

Toward Human-Rights-Proofing Swiss Climate Law and Policy

It is now up to Switzerland to carefully study the judgment and determine the steps that must be taken by each branch of government – executive, legislative, judiciary – and at each level of government – federal, cantonal, and municipal – for its climate law and policy to be aligned with human rights. Rather than rejecting the ruling, Switzerland could take an example from the Netherlands and Germany and embrace the judicial clarification that it is doing too little (which, as shown above, it knew all along). It is to be hoped that Switzerland will move away from questioning the judgment and the Court's legitimacy, to finally – 32 years after signing the UNFCCC – initiate a qualified, informed, substantive, and open debate on how it can decisively reduce its emissions and thereby prevent serious harm not only to the climate seniors, but for the benefit of all.

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