Globules or Life-Saving Treatment after all? On the Effect of Climate Lawsuits

A Response to Bernhard Wegener - Homeopathic Globules for Environmental Lawyers

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Prof. Wegener was exemplary in protecting his children in German playgrounds against globules for aches and pains. After all, wanting to believe in something that has no (scientifically proven) effect is a dangerous step towards disinformation, which in turn can prepare the ground for conspiracy myths, fake news and populism. On the other hand, very few parents will not want to give a terminally ill child all the help they can – even if a single drug alone does not provide a cure.

It's a similar story with the climate. Those who feel called to save it are trying various strategies to meet the 1.5°C target. It is certainly illusory to believe that climate lawsuits are a panacea for saving the planet (which neither the plaintiffs nor NGOs usually do). But it is also illusory to believe that a sick climate will recover on its own in a world that is currently heading towards a warming of 2.7°C despite all government promises.

In this respect, going to court is an obvious choice. Even before the climate crisis, apex courts such as the German Federal Constitutional Court (GFCC) were already ruling on cases with political implications. This "judicialization of mega politics" (Hirschl) also has to do with the fact that many people trust neutral courts, staffed by judges who usually do not have to fear for their re-election, with fundamental questions of political and social coexistence than power-oriented politicians dedicated to short-term interests.

Planning on paper or respect for the separation of powers?

Wegener initially criticizes the fact that both the decision of the GFCC and the ruling of the ECtHR are mere "paper planning", as they do not result in any concrete climate protection planning. However, this is not a weak point of the decisions. First of all, the European Court of Human Rights (ECtHR) has already been quite specific: according to it, '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). These measures must lead to a substantial and gradual reduction in greenhouse gas emissions in order to achieve net neutrality within the next three decades (para. 548). However, under the principle of separation of powers, it is not the task of the courts to determine how the other powers should remedy the breach of law. It has often been argued that courts should not make decisions in climate policy processes, as they would exceed their competences and thus engage in prohibited climate policy. Some courts have dismissed climate lawsuits for this reason. In fact, climate change is a polycentric problem – similar to a spider's web, pulling on one thread can have an impact on the entire construction. The courts cannot oversee these effects, but they do not have to. This is because their function – and the ECtHR explicitly emphasizes this once again – is only to determine the breach of law, the "if". This only means that a state must do more to combat climate change – how it chooses to do so is essentially up to the (democratically elected) legislator. The preservation of this discretionary scope is particularly important in the case of positive obligations (para. 541). However, when looking at the case law of the GFCC, it becomes clear that there are certainly possibilities for the court to bring about a specific legal consequence if the legislator does not implement a decision.

According to Wegener, although the Shell ruling entails concrete climate protection planning, it is also 'unjustifiable and highly dangerous', as the company subsequently relocated its headquarters to London, rendering the ruling ineffective. Emission shifting is indeed a problem that the EU is trying to tackle, for example by introducing the Carbon border adjustment system (CBAM). However, it should be borne in mind that Shell is not necessarily 'safe' from climate lawsuits in the UK either. Shareholders are exerting pressure to reduce emissions for fear of further market-damaging lawsuits and climate activist shareholders benefit from more power UK law gives to minority shareholders. In addition, Shell itself has stated that it will take measures to comply with the ruling. Already today, there is no 'safe haven' from climate lawsuits for 'Big Oil'.

China and Russia? The "drop in the ocean" argument

The other criticisms are likewise worthy of discussion. Wegener doubts the effectiveness of climate lawsuits in view of the lack of an independent and sufficiently effective judiciary in the 'most important countries and regions in terms of climate policy' (China, Russia and the Arab world). Wegener's argument is, one the one hand, probably aimed at the ineffectiveness of climate lawsuits, as they are not brought in the countries where they are urgently needed. On the other, it seems that he finds Germany's and Europe's role negligible in a world full of major emitters who all care very little about the climate, as a reduction here (in Europe) would have no effect on the global climate. Both thoughts, however, are wrong.

Firstly, climate lawsuits are also pending in China and Russia. In 2023, China's Supreme People's Court also published a guideline on how to deal with climate lawsuits, which must be applied by all Chinese courts and explicitly welcomes them as a means of achieving climate targets (even if China is hoping for new economic opportunities in particular). However, Wegener's list of important regions in terms of climate policy does not include the EU as the world's third largest emitter. This does not even include the per capita emissions or the net emissions that arise when goods are produced elsewhere (e.g. in China) for their use here in Europe. So, in my opinion, climate lawsuits definitely affect 'the right targets'.

Secondly, the 'drop in the ocean' argument is cited by defendant governments with the same reliability as it is rejected by the courts. This is because, as the Dutch court of first instance already pointed out in Urgenda in 2015 (para. 4.78 ff), every single emission contributes to climate change and must therefore be avoided. The ECtHR has also made it fundamentally clear that every state is obliged to do its part to reduce emissions due to the principle of common but differentiated responsibilities and respective capabilities of the states – regardless of whether other states do the same (para. 442).

Perpetrator/victim reversal? Or a failure to recognize intersectionality?

The 'perpetrator/victim reversal' argument does not convince me either. According to this argument, old, white women in rich Switzerland are not victims, but perpetrators, as their (and our) collective carbon footprint is one of the main causes of climate change. In fact, the Western lifestyle (based on burning fossil fuels) is a major contributor to climate change. However, to deny that the climate seniors are affected because there are others who are even more affected by climate change makes vulnerabilities invisible. These include, above all, vulnerability due to age and especially gender. The UN High Commissioner for Human Rights warned that older women are hit harder by climate change, mainly because they often outlive their partners and are left to fend for themselves (and could be seen as a burden on society). They are more often affected by poverty in old age and have fewer resources overall to protect themselves against climate change (para. 34 ff).

Even if Wegener doubts that older people actually suffer from heat and are not more likely to die from cold, the facts on excess mortality, which the ECtHR cites for the five hottest summers between 2003 and 2022 in Switzerland, speak a different language (para. 73 f.). There is no question that extreme cold is also a

problem for older people. However, this does not change the fact that the real death rate and the loss of actual lives due to climate change-related heat has increased.

The severity and frequency of human rights violations in the Global South are likely to be more serious, especially as many countries do not have the financial resources for comprehensive adaptation measures like Switzerland. Nevertheless, climate change also represents a real threat to the human rights of the plaintiffs – and not "a form of cultural or climate policy appropriation" of a victim status. In any case, the question arises as to who Wegener would consider to be the better victims – and this accusation is reminiscent of strategies in which one vulnerable group is played off against another (such as the well-being of homeless people and women is often used against refugees).

The Eurocentric perspective (or the lack of reference to the Global South both in the ruling and in the statutes of the senior women's association, for example) can certainly be viewed critically. However – and Wegener also addresses this point – strategic litigation also involves presenting the best legal argument. Proceedings before the ECtHR are not about generally imposed climate protection measures 'from above', but about establishing a violation of the Convention. How could the women have asserted the interests of people from the Global South without already failing at the hurdle of having victim status under Article 34 ECHR?

Impact beyond the borders of Switzerland

Moreover, the ECtHR ruling, which formally only recognizes the violation of represented women's human rights, has effects far beyond Switzerland, as the Court also emphasizes in para. 479. In contrast to local adaptation measures, the reduction of greenhouse gases ultimately benefits everyone. In this respect, the ruling also helps people who do not have the opportunity to take legal action in Europe.

Symbolic nature?

The ruling is by no means merely symbolic. Although it is questionable whether Switzerland will actually implement it, even influential think tanks such as Avenir Suisse are considering how Switzerland can "make the most of the ruling". This lawsuit should therefore also help to reopen the closed discussion following the failure of the CO2 Act.

Furthermore, the judgment contributes to the constantly growing body of case law in national and international courts. The ECtHR's reasoning can have a leverage effect in future lawsuits and lead to the further development of the law in national legal systems. One only has to think of the GFCC's rejection of a violation of the positive obligation to protect the right to life with the argument that Germany has ratified international agreements and adopted an (albeit underambitious) climate protection act (para. 154 ff). The ECtHR has now clarified that this alone is not sufficient to satisfy the state's positive obligations under Article 8 ECHR (para. 547 ff).

(Too) far-reaching further development of ECtHR case law?

Wegener then criticizes the new approach of the ECtHR with regard to the extension of standing to the association, although the individual victim status of the climate seniors had previously been rejected. This approach cannot be inferred from the Convention text. However, this applies in principle to all the other provisions that the ECtHR has developed over the decades with regard to legal standing. In this respect, Judge Eicke criticizes in his partly concurring and partly dissenting opinion above all the approach of the ECtHR on the level of legal methodology and the lack of consistency of the new approach to previous case law. However, the supposed contradiction that the applicants as such are not considered to be 'directly' affected, but the association is entitled to bring an action without having to prove that its members are individually affected, is not a contradiction at all. This is because the ECtHR does not want to allow popular lawsuits (*actio popularis*), but it does not want to completely close the door to lawsuits that address climate change as a violation of human rights (para. 484). However, it would be impossible to get through this door if associations had to prove that their members could overcome the high hurdles of

being 'victims'. Then there would be no need for this possibility at all. This is limited by the fact that associations must comply with certain requirements, in particular that they must specifically advocate for human rights threatened by climate change (para. 502).

Climate lawsuits as a distraction?

The idea that climate litigation is just 'abstract' human rights protection distracting from 'brutally real' human rights violations must also be questioned. After all, the human rights violations must feel very real to those affected – just ask the people who are already suffering from the consequences of climate change, such as forest fires, rising sea levels or flooding. Against this backdrop, I am surprised by Wegener's call for lawyers to devote themselves instead to 'formulating and implementing a rational climate protection policy worldwide'. After all, there is no global government that could make such a global formulation binding or a world court that could enforce it. Rather, the Paris Agreement recognizes the need for action by a wide range of actors at all levels, especially national actors (Art. 4 (2)), to tackle the "glocal" problem of climate change. Domestic courts play an important role in this.

Climate litigation is an important tool for civil society

Europe is currently warming twice as fast as other continents. In 2018, Germany was one of the three countries most affected by climate change and, at the latest since the Ahr Valley floods, most people here are also aware of what the climate crisis means for their everyday lives. However, the consistent fight against climate change is more uncertain than ever. An expected shift to the right in the 2024 EU parliamentary elections could jeopardize the European Green Deal and lead to important implementation measures being blocked. The ECtHR has now made it clear that climate protection is also human rights protection. Climate lawsuits are certainly not a panacea in the fight against climate change, especially if states are unwilling to implement the decisions. But this is not a danger that is exclusive to climate decisions. More importantly, however, the German and other legislators around the world have taken action following successful climate lawsuits (e.g. in the Netherlands, Colombia, Pakistan). Climate experts therefore list climate lawsuits as one of 10 social drivers that support deep decarbonization, the UN Environmental Programme names it a 'key mechanism'. They are therefore an important and effective instrument in the hands of civil society – alongside petitions and initiatives, climate strikes and civil disobedience. Not everything that tastes sweet is ineffective homeopathy.

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