# A Court, Not a Policymaker

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On Wednesday, under the eyes of great public interest, the Grand Chamber of the European Court of Human Rights (ECtHR) opened a chapter to what may become the ECtHR's greatest challenge in the 21st century. The hearings in Klimaseniorinnen v. Switzerland and Carême v. France are the first in the history of the ECtHR to negotiate the impact of climate change on European human rights law. As of the two hearings, three major issues seem to have crystallised: causation, victim status, and the general compatibility of the Convention with the complex, multi-faceted phenomenon of global warming. After a brief summary of the two cases, this blog post reflects on these challenges, offering some modest suggestions for addressing them.

**Klimaseniorinnen v. Switzerland**

According to the applicants – all women above the age of 75 – global warming has a particularly harmful effect on them as elderly women. Swiss climate mitigation targets and implementation measures allegedly failed to effectively counter the risks heat waves present to them. Previously, domestic remedies had remained unsuccessful: In May 2020, the Swiss Federal Supreme Court rejected the appeal, ruling that the Klimaseniorinnen were not affected in an individual and direct way and referring the plaintiffs to political rather than legal means. Subsequently, the Klimaseniorinnen filed an application to the ECtHR, claiming several violations of the Convention [art. 2, art. 6 (1), art. 8, art. 13 in conjunction with art. 2 and art. 8].

**Carême v. France**

In 2019, the municipality of the French town Grande-Synthe and its mayor, acting as both mayor and private person, called on the State Council (*Conseil d'État*) to force the government to implement additional measures to comply with the Paris Agreement target of reducing emissions by 40 % by 2030. While the application as mayor was successful, it was declared inadmissible by the State Council with regard to Carême as a private person by the State Council, since he had no personal interest in the proceedings. The applicant sees this rejection and the alleged inaction to take appropriate steps against the rise of greenhouse gases produced on French territory as a violation of his rights under the Convention (art. 2, art. 8). He expects his home to be subject to flooding by 2040. As came to light during the hearing, the applicant currently lives in Brussels, but may return to Grande-Synthe in the future. This development constitutes a major challenge to the prospects of the case.

**The Problem of Causation**

The impact of climate change on human rights is obvious. However, not every obstruction to enjoying a certain right constitutes a violation of this right. Applicants must demonstrate a causal link between state behaviour and a suffered injury. In

climate cases, an extremely complex network of numerous global emitters unfolds, making the burden of proof even more challenging than in general environmental law matters. According to the Swiss government, Switzerland's historic contribution to global emissions is 0.2 per cent, making it challenging to prove a health risk directly caused by Swiss greenhouse gases. Yet, the applicants relied on principles of shared responsibilities, rooted in international law, such as the "Guiding Principles of Shared Responsibilities" (see here for an analysis of the Guiding Principles with several referalls to climate change). In addition, one could consider "shifting the burden of uncertainty from plaintiffs to state defendants". This, however, would not liberate the ECtHR from a highly complex scientific evaluation.

**Victim Status: A*ctio Popularis* and the "Temporal Gap"**

Moreover, both cases provide fertile ground for discussion on the issue of victim status. In Klimaseniorinnen, hundreds of elderly women have united in a legal body – an association – which serves as applicant in their case. Several articles of the Convention, however, including art. 2 (right to life), do not apply to associations, causing doubts concerning the admissibility of the case. Switzerland as the defendant state regards the application as an *actio popularis*, incompatible with the Court's case law and general mission to offer legal remedies to individual complaints.

In Carême, art. 34 is disputed for different grounds. While the causes of climate change as a scientific phenomenon lie in past and present carbon emissions, its effects will mainly materialise in the future. This temporal dimension of climate litigation constitutes a second major challenge, seeing as art. 34 of the Convention (victim status) does not allow complaints *in abstracto*. Hence, the less the potential harm has occurred in the present and the further its destructive potential may unfold in the future, the more difficulties the ECtHR will have to identify the violation of Convention rights. In general, the ECtHR's case law on future environmental damage may serve as a first guideline (see e.g., here, here, and here). However, as these cases only deal with environmental harm within a discernible geographic area, they have limited instructive value in light of the systemic reasons and ubiquitous effects of climate change. The temporal dimensions will be particularly challenging in Carême v. France since the flooding of the applicant's home would need to be proven a foreseeable reality in the immediate future.

In view of the broad evidence outlining the climate crisis, the gravity of the infringement to be feared, and in accordance with the general human rights principle *in dubio pro libertate et dignitate* (Wewerinke-Singh, p. 138), there are good reasons to bridge the temporal gap. As the Convention was intended to guarantee practical and effective rights, the ECtHR may adapt its standards for "immediacy". The fact that the Court invoked the effectivity formula in some of its most innovative decisions (Nussberger, p. 76) may raise hopes among the applicants. The Klimaseniorinnen, on the other hand, refer to heat waves in present summers that are likely to intensify year by year. In this case, the temporal dimension of art. 34 of the Convention therefore seems less of a hurdle to take.

**Climate Change as a Legal or Political Problem?**

In all of the above, the factor of state approval of the ECtHR must always accompany doctrinal elaborations. Beyond the mere application of the Convention, the ECtHR considers how potential backlash to ambitious interpretation may undermine its legitimacy and thereby the effectiveness of European human rights protection. This is even more true in morally sensitive, scientifically complex, and politically polarised topics. It hence does not surprise that the Court has granted a wide margin of appreciation in environmental law, especially to the legislator. Considering the highly intense political debate on how to tackle climate change and the large number of sectors affected by climate policy, going hand in hand with the requirement to politically prioritise resources, the Court will most likely accept a broad variety of domestic mitigation approaches.

Indeed, no mitigation policy can be decreed by a court decision, it should remain a political and democratic exercise. Notwithstanding, climate science stresses the rapidly closing window of opportunity to somehow stop or decelerate irreversible damage to the planet and all its inhabitants. It is mere happenstance that the hearings coincide with the recent Intergovernmental Panel on Climate Change (IPCC) “synthesis report”. Again, it is a grim read. Over the last years, state reactions to the well-known urgency ranged between remarkable but insufficient mitigation and adaptation efforts and downright paralysis. As the former UN High Commissioner for Human Rights Michelle Bachelet once put it: “The world has never seen a threat of this scope to human rights. This is not a situation where any country, any institution, any policymaker can stand on the sidelines.” Against the backdrop of this call, it appears to be obvious that especially the ECtHR as Europe’s highest authority on the interpretation of human rights law cannot stay silent.

Indeed, combating climate change with judicial means may become a fruitful strategy to nudge inert democratic majorities toward more ambitious climate policies. On this path, it will be crucial for the ECtHR’s acceptance to stick to its nature as a court. The legal challenges in the cases outlined above must be taken seriously – for the sake of both the Court and mankind. In sum, turning to courts in a desperate search for more ambitious climate policies is all too understandable. Nevertheless, sticking to its role as an adjudicative body may prove to be vital for the ECtHR’s future.

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