Civil Disobedience on Trial in Switzerland

Jevgeniy Bluwstein 2023-09-29T21:01:11

Since 2018, Swiss courts have become regular sites of criminal trials against climate activists who engage in various forms of non-violent protest to obtain effective climate action from their government and raise public awareness. A considerable portion of non-violent, yet unauthorized activities are being treated as misdemeanors rather than minor offenses, potentially leading to a criminal record. The Swiss Federal Supreme Court had to decide on several occasions whether various forms of protest against the status quo in Swiss climate politics are justified and lawful, or whether such actions constitute a punishable criminal offence under the Swiss Criminal Code (CC). At least one case is also pending at the European Court of Human Rights (ECtHR), with several more likely to follow as activists are determined to take their case to Strasbourg.

Since the autumn of 2018, we have recorded approximately 30 non-violent forms of climate protest and civil disobedience across Switzerland, leading to at least 200 trials in Swiss criminal courts. The repertoire of different forms of protest includes occupations and/or blockades of streets and public places, investment banks and pension funds, oil depots and refineries, shopping centers and shops, forests and opencast mines.

In this contribution, we highlight three themes that have emerged in the trials of climate activists: First, the Federal Supreme Court has closed the door to the use of the necessity defense (codified in Art. 17 of the Swiss Criminal Code) to justify civil disobedience in the name of the climate emergency. Second, at least some Swiss judges and courts are open to considering and applying the case law of the ECtHR, particularly on freedoms of expression and assembly (Art. 10 and 11). Third, the idea of civil disobedience remains deeply contested in the courts, as it is considered by the authorities to be antithetical to the Swiss model of democracy. Taken together, these themes have led to a politicization of Swiss criminal courts in two distinct ways. Climate activists have not only utilized the courts as platforms for political protests advocating for climate justice. More importantly, we argue, that the climate crisis has made the already tensed relationship between politics and law in the courts more explicit.

The Necessity Defense

On November 22, 2018, the group *Lausanne Action Climate (LAC)* occupied a branch of Credit Suisse in Lausanne and staged a tennis match in the bank lobby in order to draw attention to Roger Federer’s role as a brand ambassador for a bank deeply involved in financing fossil fuel projects. To everyone’s surprise (and the

indignation of some law professors), a district judge accepted[1)] the activists' claim that they acted in a state of necessity (as per Art. 17 of the Swiss Criminal Code).

However, the decision has been contested by most legal scholars who argue that it was rightly appealed by the court of second instance. They contend that the necessity defense in the name of the climate emergency, and by extension civil disobedience more broadly, are at odds with the Swiss Criminal Code and challenge several principles of Swiss democracy and the rule of law: An emergency in criminal law must concern private rights, such as the right to health and life, and not collective goods such as climate protection. Moreover, civil disobedience must only be used as a last resort after all other legal avenues, such as petitions, referenda, initiatives, or authorised demonstrations, have been exhausted. In other words, the legalisation of civil disobedience through the affirmation of a criminal state of necessity is to be rejected. Critiques of the necessity defense simultaneously argue against the very idea of civil disobedience in a liberal democracy. In their view, actions by political minorities (like climate activists) should not undermine majority rule in order to be considered democratically legitimate. They assert that the state must intervene in acts of civil disobedience and exercise its monopoly on violence to uphold the rule of law and preserve democracy. In any case, the judge who acquitted the activists in the first instance should be "fired", according to Marcel Niggli, who is arguably Switzerland's most renowned professor of criminal law[2)].

Accordingly, the Federal Supreme Court held that the conditions for applying the necessity defense under Art. 17 CC were not met due to a lack of short-term, immediate danger that could not have been averted otherwise. The Court also found that no individual legal interests were affected, and common goods such as the climate are not for individuals to defend. The defendants could not rely on freedom of expression and assembly under Arts. 10 and 11 of the ECHR, because the (unauthorized) assembly took place within the private space of a bank branch[3)].

In another case, an activist who left red-colored handprints on the facade of a Credit Suisse branch in Geneva in October 2018 was prosecuted for property damage under Article 144 of the Criminal Code. Here, too, Geneva Cantonal Court judges found that the activist had acted in a putative state of necessity under Article 13 or in a state of necessity under Article 17 of the Swiss Criminal Code. However, this verdict was overturned by the Federal Supreme Court[4)], which denied the state of necessity and deemed the alleged "vandalism" to be outside of the protective scope of freedom of expression and assembly.

From the *Necessity Defense* to *Freedoms of Expression and Assembly*

Since the two "state of necessity" decisions by the Supreme Court have effectively closed the path to acquittal under Article 17 of the Criminal Code, activists and their lawyers have increasingly relied on Arts. 10 and 11 of the ECHR, with growing success:

Activists were acquitted on the basis of the ECHR case law on freedom of assembly (Art. 11) for participating in an unauthorized sit-in during the global Climate Strike on 15.3.2019 in Geneva[5)]. This decision was upheld by all three instances of the Swiss judiciary.

During an occupation of a UBS branch in Basel in July 2019, several activists were arrested, identified, and had their DNA samples taken. They were initially acquitted of various charges under the Criminal Code (damage to property, coercion, unlawful entry, obstruction of an official act). In addition, the Supreme Court questioned the legality of identification and DNA sampling during peaceful assemblies and emphasized the protection of freedom of expression and assembly[6)]

In another action in front of a branch of Credit Suisse in Geneva in September 2019, the Cantonal Court of Geneva relied on Art.11 (ECHR) to acquit the activists of charges related to disguise and participation in an unauthorized demonstration[7)].

In November 2019, Extinction Rebellion activists blocked one of several entrances to a shopping center in Fribourg and were acquitted by the second instance on charges of coercion (Art. 181 CC) and participation in an unauthorized demonstration[8)]. Again, the judges explicitly invoked the right to freedom of assembly and freedom of expression under Articles 11 and 10 of the ECHR.

In June 2020, approximately 250 people were kettled by the police in an unauthorized Extinction Rebellion demonstration in Zürich. The public prosecutor's office issued summary penalty orders for coercion (Art. 181 CC) and disruption of public transport (Art. 239 CC). To date, most of the activists who have gone to trial have been convicted. However, two acquittals by a district judge, Judge Harris, have garnered attention.[9)] The judge explicitly referred to the case law of the ECHR and the freedom of expression and assembly under Arts. 10 and 11. What is more, the Judge announced his intention to judge all future activists in related climate cases on the basis of the ECHR. In an unprecedented move, the chief prosecutor filed a request for the recusal of the judge, which was granted by the Zürich Cantonal Court[10)].

Is civil disobedience justified in a direct democracy?

The acquittal of *Lausanne Action Climat* has sparked a significant debate, both in the legal sphere and in the court of public opinion, about the Swiss model of direct democracy. Somewhat paradoxically, the comparatively extensive democratic liberties inherent to the Swiss model – particularly the right of Swiss citizens to launch an initiative or a referendum and thereby directly influence politics – are often used as an argument against climate activists who engage in civil disobedience. This is due to the presumption that citizens should have more legal avenues to voice their opinions compared to those in states lacking such instruments of direct democracy. Moreover, sceptics of civil disobedience in Switzerland may also point out that unlike Article 20, Paragraph 4, of Germany's Grundgesetz, for instance,

there is no constitutional “right to resist” in Switzerland. When climate activists are on trial (literally in court and metaphorically in public), the Swiss model of democracy is often weaponized against them, not only by centrist and right-leaning political parties, but also by many judges[11)], prosecutors, and even by some law professors. A typical commentary by a judge would be to highlight – in direct reference to the Swiss model of direct democracy – that as long as all legally available political avenues have not been exhausted, civil disobedience is not justified. In response, climate activists often argue that while they personally may not have exhausted all legal options (although some probably have), others have tried and failed. They point out that due to structural inequalities, influencing the political debate is not as straightforward as simply launching an initiative and succeeding. They insist that having scientific backing or a just cause is not enough to win “legally”. It also takes significant financial resources which determine the success rate when utilizing legal instruments available in a direct democracy. Furthermore, they argue that they are facing criminal charges precisely because all other attempts to influence politics in the past have been unsuccessful. These exchanges, which are not uncommon in courtrooms, reveal more than just the judges’ lack of understanding about how climate activism works in Switzerland. They also reveal a somewhat contradictory position of the judges vis-à-vis civil disobedience. On the one hand, it is rejected due to the Swiss model of direct democracy. On the other hand, judges ask activists to first engage in “legal politics”, and therefore turn to more institutionalized means of democracy, before they break the law.

Beyond various convictions and some acquittals, climate activism through civil disobedience has thus generated a lively debate inside and outside the courtroom about the nature of Swiss democracy in the age of the climate crisis.

Law and/vs politics in the age of the climate crisis

In the context of an unabated and escalating climate crisis, respecting or rejecting the principle of civil disobedience, or recognizing or denying the right to act in a state of necessity, are deeply political positions, regardless of who holds them (politicians, judges, law professors, etc), and irrespective of how these issues are codified in law. Similarly, when judges prioritize individual property rights over freedom of expression[12)], or when they refuse to allow expert witnesses and deny activists to discuss the state of climate science in the court (a common practice in the Swiss courts and elsewhere, which posits that climate change is a “well-known fact” that requires no further discussion in the courts), judges are engaging in a political act.

The political nature of trials and the everyday micro- (Moor 2005) and macropolitics (Demay and Favre 2021) of law contrast with how judges and the prosecution perceive and frame criminal proceedings in courts. Despite the significant differences in facts, procedural history, legal prosecution, and defense among various cases and trials, a common thread from the perspective of the prosecution and judges is the ostensibly apolitical nature of how the criminal code is applied to adjudicate civil disobedience in Swiss courts.

However, climate activism inevitably forces judges to take positions on politically important issues, thereby revealing the complex relationship of the judiciary to politics and democracy. On the one hand, many judges resist the efforts of activists to politicize the courts as part of climate politics. Rather, following a strict doctrine of the separation of powers, they insist that politics has no place in the courts and should be addressed in parliament, through elections, initiatives, and referendums. Such an understanding of democracy associates it with majoritarian politics and leaves no room for contesting the law through civil disobedience. However, democracy with a small d cannot be reduced to majoritarian politics alone but must also include protections of minorities. As is well known and does not need to be rehearsed here again, civil disobedience has historically played a key part in ensuring this balance of powers in a democracy (see for instance the contributions to this blog debate by Akbarin, Höffler, and Herbers). It is thus only logical that judges who do not recognize the principle of civil disobedience should also insist on the strict separation of law and politics. Such a separation of law and politics into two hermetically sealed spheres collapses if civil disobedience is to have a place in society.

On the other hand, even in trials where judges insist on a strict separation of law and politics, they often make political choices in their reasoning, as we briefly illustrated above. In this sense, judges who adopt a positivist approach to law – which remains a hegemonic philosophical approach to law in Switzerland – struggle to reconcile the political claims of activists before the courts with the profession of a judge who ought to mechanically apply the “law” (Falcòn 2004).

It is precisely this separation between law and politics, and the question of what constitutes law itself, that is called into question by the climate movement in Switzerland and around the world. As a result, judges inevitably play a political role by insisting on this rigid separation in order to insulate the courts from the political demands of the activists. In this way, climate trials serve an important social purpose by enlightening the public about the judiciary’s blind spots and the limits of a positivist approach to law in democratic societies grappling with effective responses to the climate crisis.

References

Demay Clémence and Favre Brian, 2021. *De l’état de nécessité à la désobéissance civile environnementale*. In: Bourg Dominique, Demay Clémence, Favre Brian: *Désobéir pour la Terre*. Humensis, Paris, 249ff

Falcòn Y. Tella Maria José 2004. *Civil Disobedience*, Brill.

Kolmar, M., and B. Schindler. 2021. „Tolerierbarer Rechtsbruch in der Klimakrise?“ NZZ, 29.6.2021.

Moor Pierre, 2005. *Pour une théorie micropolitique du droit*. PUF, Paris

References

- Tribunal de police vaudois, PE19.000742, 13.1.2020
- https://www.aargauerzeitung.ch/schweiz/strafrechtsprofessor-kritisiert-den-freispruch-der-klimaaktivisten-diesen-richter-musste-man-entlassen-ld.1186350
- BGE 147 IV 297
- TF 6B_1298/2020 & 6B_1310/2020, 28.9.2021
- TF 6B_246/2022, 12.12.2022
- TF 1B_286/2020 & 1B_294/2020, 1B_287/2020 & 1B_293/2020, 1B_285/2020, 22.4.2021.
- Cour de justice de Genève, AARP/410/2021, 17.12.2021.
- Tribunal de la Sarine du canton de Fribourg, 501 2021 89 & 501 2021 90, 30.11.2022.
- Bezirksgericht Zurich, GB220099, 30.8.2022; GB220026, 31.8.2022.
- Obergericht Zurich, UA220042, UA220043, 14.11.2022; SB220594, 11.4.2023; SB220583, 13.4.2023.
- See for instance the following decisions: Tribunal de police de La Côte, 20 décembre 2018, PE18.005962 ; Tribunal de police de Lausanne, 11 décembre 2020, PE19.005999 .
- As happened in the Geneva case which we introduced above: after the Supreme Court overturned the acquittal of the second instance, where the judges accepted the activist's claim to have acted in a putative state of necessity, the second instance court had to decide once again on the sanction of the defendant. The court thus convicted the activist to a symbolically small fine due to a "honorable motive" of the activist. The prosecutor challenged the "honorable motive" justification at the Supreme Court which accepted the appeal. To the Federal judges, there can be no politically motivated justifications to commit acts of property damage, however honorable the motivations may be.
