A Human Right to Climate Protection as “Life-Saving Treatment”?

Bernhard Wegener 2024-05-03T08:54:11

Manuela Niehaus defends the human rights-based climate jurisprudence – especially of the ECtHR– against my criticism. In her eyes, it is not “Homeophatic Globules for Environmental Lawyers”, but a potentially life-saving medicine that – in combination with other means – can make a significant contribution to climate protection.

I’m sure many people see it the same way, which is why I’m grateful for Niehaus’ arguments and for her gentle mockery. Her mockery hits me rightly, but her arguments only convince me very partially.

The “Judicialization of Mega Politics”

Niehaus believes, with reference to Hirschl, that the judicialization of central political decision-making areas such as climate protection is nothing new and stems from the fact that people are more likely to entrust “neutral courts […] with fundamental questions of political and social coexistence than power-oriented politicians dedicated to short-term interests”.

I agree with that in fact, but is it right? Isn’t the juridification of “megapolitics” more of a problem than a solution? For reasons that I have tried to make clear, I am sceptical about the institutional capacity of courts in this respect. As I see it, “fundamental questions of political and social coexistence” should continue to be negotiated and decided democratically and not by a small number of judges according to the vague standards of human rights law. Incidentally, courts can also be power-orientated. And the current example of the US Supreme Court may illustrate that issues such as environmental and climate protection are not always in good hands, even in the highest courts.

Dangers of the Shell judgement

Niehaus misunderstands me when she says that I consider the Shell judgement to be unjustifiable because the company could evade the judgement by moving to London. I consider the judgement to be highly dangerous because it undermines the rule of law and the constitutional separation of powers at the same time. Here, a company operating within the law is being prohibited from carrying out its legal activities on the basis of vague human rights standards. The judgement is therefore an attack not only on the freedom of the company, but also on the legal decision-making power of the democratically legitimised legislature, which has expressly permitted precisely this entrepreneurial activity.

Niehaus herself shows where this can lead when she states that there should be no “safe haven” for companies like Shell in which they are protected from climate lawsuits. This term, familiar from the field of counterterrorism, accurately describes the ambition of some climate plaintiffs. For the legal system and for me, however, oil companies are not terrorist organisations, but service providers that operate within and in line with the existing legal framework. Restricting their currently still indispensable activities in the interests of climate protection can only be a matter for the legislator, not for an individual judge operating on the basis of the fundamental right to family life under Article 8 of the ECHR.

A human right to climate protection in China, Russia and the Arab world?

Niehaus criticises my statement that a human right to climate protection would be of no help in China, Russia or the Arab world, because corresponding lawsuits could not be filed there anyway. According to Niehaus my statement is wrong simply because climate lawsuits are pending in China and Russia.

If one follows the source linked by Niehaus as evidence, however, it is noticeable that the one (!) lawsuit mentioned there for Russia was not accepted for judgement by the court called upon. The fact that there are some very few courageous climate plaintiffs in Russia makes the effective judicial enforcement of a human right to climate protection in Russia not really likely. The same logic could be used to claim that there is freedom of expression and freedom of assembly in Russia because desperate, courageous people repeatedly dare to protest against the government there.

The cited source also lists no more than three cases for China as a whole (two of which are part of a series), which, according to the information provided there, relate solely to the enforcement of the applicable Chinese ordinary law and do not argue in terms of human rights. This also applies to the guidance of the Supreme People’s Court of China cited by Niehaus, which calls on a state supervisory authority to pay more attention to the judicial enforcement of applicable climate protection law. Despite all the caution required in a legal comparison, I therefore remain sceptical about the significance of a specific human rights-based climate protection strategy for China.

On the “victim” status of the “Klimaseniorinnen”

Niehaus misunderstands my criticism of the victim status of the “Klimaseniorinnen” when she claims that I doubt “that older people actually suffer from heat”. I don’t doubt that. I only consider the statistical “excess mortality” argument to be misleading. Although it looks at real excess mortality in hot months, it ignores the positive effects of mild winters on excess mortality. Incidentally, the one-sidedness of this argument is not specific to this particular complaint. I have gone to great lengths to find studies that compare the positive and negative effects of rising temperatures on mortality rates in regions such as Switzerland. They are hard to find (see here).

Apart from that, I reject the completely unfounded accusation that I am trying to play one group of victims off against another. The ECtHR, in agreement with the Swiss federal court, has also denied the victim status of the “Klimaseniorinnen” within the meaning of Art. 34 ECHR. In view of the real climate victims, especially in the global South, I merely feel uneasy when rich, old, white Swiss women, of all people, seek to elevate themselves to the status of specifically affected climate victims. This unease is also shared by other authors who are more in favour of human rights-based climate protection (Milanovic: “I’ve always found the argument that little old ladies in Switzerland are somehow especially affected by climate change to be entirely bogus.”).

On the new human rights action of associations

I stand by my criticism of the ECtHR’s newly invented human rights action of associations. Contrary to what Niehaus and the ECtHR itself try to portray, this is not an evolutionary development, but a genuine revolutionary leap. Unlike other established elements of legal standing, there is no point of reference for this form of representative action in the text of the Convention or in previous case law – as Judge Tim Eicke rightly pointed out in his partly concurring and partly dissenting opinion. Nor am I aware of any decision in comparative law in which a supreme court has simply pulled a human rights representative action “out of the hat” as the ECtHR has now done.

But regardless of the question of the legitimisation of this judicial self-empowerment, the ECtHR’s concept also seems to me to be unfortunate in terms of its content. The Court wrongly invokes the good example of the Aarhus Convention. It is true that this convention introduces a right of action for NGOs under environmental law. On the one hand, however, this is based on an explicit legislative decision and foundation that has been democratically legitimised. On the other hand, the Aarhus Convention only authorises actions to enforce environmental protection provisions under ordinary law. The introduction of a new type of representative action to enforce highly undefined and potentially all-encompassing human rights provisions is something completely different.

Niehaus’ objection that the new representative action is “limited” by the fact that the associations must “comply with certain principles” does not hold up against these concerns either. These principles established by the Court (para. 502) are not able to effectively limit the new actions. The relevant associations must merely (a) be legally established, (b) be committed to climate protection and (c) be sufficiently representative of the interests of their members or other persons potentially affected by climate change. As the ECtHR expressly emphasises, the associations do not even have to claim to represent actual victims of climate change. All in all, hardly anything could be easier than setting up such associations.

Consequences

The consequences of this new human rights class action for the legal systems of the member states of the Council of Europe cannot yet be foreseen. Because Switzerland does not recognise a corresponding type of action, the ECtHR found it guilty not only of a violation of the new climate protection right under Art. 8 ECHR, but also of a violation of the right to effective legal protection under Art. 6 ECHR (para. 615 et seq.). However, the same accusation can probably be levelled at all other national legal systems that do not recognise a human rights representative action (and aren't that all?). This certainly applies to Germany, where the Federal Constitutional Court recently rejected such collective actions as inadmissible in its climate decision (see para. 136 et seq.). It seems little consolation when the ECtHR announces that it will consider whether at least individual plaintiffs have been admitted before condemning the States Parties for not admitting human rights collective actions (para. 503).

It is also worth asking why the new human rights NGO-action should actually be limited to climate protection. Other concerns also have a supra-individual character and other political interests can also easily be "charged" with human rights. I therefore maintain my fear that this is the culmination of a development in which the protection of individual human rights is almost completely detached from the individual and the violation of his or her rights and thus shifted into the abstract and fictional. I can hardly imagine the potential consequences of these abstractions.
