Why Courts will not Stop Global Warming, but Climate Litigation is Still Useful

Thomas Groß 2024-03-12T19:52:57

Despite the global trend of record temperatures and the increasing number of disasters caused by extreme weather events, the political impetus to combat global warming is weakening all over Europe. Not only far-right forces want to stop ambitious climate policy, but also other political parties tend to neglect this field. To counter those political forces, climate litigation tries to hold national governments accountable to their goals as enshrined in the Paris Agreement. While some fear a “gouvernement des juges” in the field of climate policy, an analysis of the case law shows this to be unfounded: most courts leave the decision of how to act to the discretion of the parliament. Despite much criticism, I argue that this exercise of judicial restraint is not the reason why states fail to meet their climate goals. My thesis is that the core of the problem is the very nature of constitutional law. This is not a plea against climate litigation but a call that effective climate protection policy requires courageous decisions beyond the reach of jurisprudence.

Big Hopes, Little Impact

The tendency of politicians not to implement the necessary measures to tackle global warming is not new. To force governments to engage in more ambitious climate policies, individuals and associations all over the world have resorted to legal action. The number of cases worldwide is enormous and escapes comprehensive analysis. Yet, the overall picture suggests that the impact of climate litigation has been very limited. In the following, I will concentrate on a brief sketch of recent cases in Western European countries where final rulings have been adopted on legislative measures by parliament or government. The nature of these claims varies, targeting either national goals for reducing greenhouse gas emissions or the measures to achieve these goals. The two claims can also be combined.

All claims to force national policymakers to define more ambitious goals have been dismissed. In the British “Plan B” case, the High Court upheld the decision by the Secretary of State for Business, Energy and Industrial Strategy not to revise the 2050 carbon target under the Climate Change Act 2008, which demanded a reduction of 80 % compared to the emissions of 1990. The court rejected this claim asserting that the executive had a wide discretion to assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion.[1)].

In the landmark climate decision of the German Federal Constitutional Court (FCC), internationally known under the name “Neubauer”, the court rejected the claim that

federal legislation's reduction goals did not sufficiently protect human rights. The court did not acknowledge that the legislation significantly fell short of the protection goal, as it was not presently ascertainable that the legislator had exceeded this leeway by taking the Paris target as a basis.[2)] It only conceded that national reduction goals for the decade starting in 2030 have to be defined by parliamentary legislation and not by the government. This is because transparent specifications for the further course of greenhouse gas reduction must be established at an early stage to distribute the opportunities associated with freedom proportionately across generations.

In 2023, the Belgian Court of Appeal of Brussels rendered an important decision in the climate case brought by "Klimaatzaak" against the federal and the three regional governments (see here and here) The court found that the federal authority and the Brussels and Flemish regions' climate action violated Articles 2 and 8 of the ECHR and their duty of care. The court imposed a minimum GHG reduction target of 55 % compared to the levels in 1990 to be reached by Belgian authorities by 2030. However, as the defendants have announced an appeal to the Supreme Court, the decision is not yet final.

More court decisions have been taken on measures to mitigate global warming, with a mixed outcome. Some decisions rejected the claims on procedural grounds or based on the merits, while others have resulted in final decisions favoring the claimants.

In Switzerland, the Federal Court rejected a claim by the group "KlimaSeniorinnen", which demanded that the national government implement all necessary measures to protect the elderly from the adverse effects of global warming. The court ruled that the claimants had no standing. In France, a challenge against the national climate act was introduced by a group of parliament members based on the argument that the measures were insufficient to achieve reduction goals. The Constitutional Council (CC) rejected this challenge, stating that it has no power to issue injunctions against the legislator.

The German FCC also dismissed a claim arguing that the legislative measures adopted so far were insufficient for the protection of human rights. While the court acknowledged that defining reduction goals was not enough and that climate action must be taken, it did not find a violation of human rights, referring to "the fact that the national climate action instruments can still be adjusted in ways that would enable the reduction target specified for 2030 to be achieved".[3)]

Meanwhile, we have three final decisions mandating climate action. In the Dutch "Urgenda" case, the District Court ordered "the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25 % at the end of 2020 compared to the level of the year 1990".[4)] This ruling, upheld by the Court of Appeal and the Supreme Court, was based directly on the duty to protect the rights enshrined in Art. 2 and 8 ECHR. As it became final only in 2019, its temporal impact is yet limited.

In 2020, the Supreme Court of Ireland issued a ruling quashing the National Mitigation Plan.[5)] The Court determined that the Plan lacked the specificity of the measures required by the Climate Action and Low Carbon Development Act, as a reasonable reader would not understand how Ireland will achieve its 2050 goals.

In 2021, the French Council of State in 2021, based on a claim by the "Commune de Grande-Synthe", ordered that the Prime Minister must take all necessary measures to curb greenhouse gas emissions within the national territory in accordance with the goals defined by the French Energy Code and by the EU.

However, a sober look at the outcome of those cases reveals that even the decisions in favour of the claimants had limited impact on actual emissions. A new reduction goal was defined only by the Belgian court, but it is identical to the goal already agreed on within the European Union. The German FCC ordered that future goals be defined by parliament, but these have no relevance for current public debates or political decisions. Supreme courts in the Netherlands, Ireland, and France have even ordered that new measures must be defined by the governments, but they did not specify what these this could be. None of the decisions had an immediate effect on the quantity of emissions. Contrary to popular criticism, these rulings have not transgressed the limits of legitimate judicial power.

The Petrifying Logics of Constitutional Law

The real problem lies in the limited impact that litigation has had on national efforts to effectively and expeditiously curb greenhouse gas emissions. This is a consequence of the very nature of constitutional law.

Constitutions are a set of fundamental rules defined at a certain moment in history. They are assembled in a document intended to construct a useful and functional order of a polity, based on the experiences of a more or less distant past. The founding fathers of the US Constitution even looked back to the institutions of ancient Athens and Rome. Thomas Jefferson famously warned that no generation should bind the next one. However, this warning has not been heard – the US Constitution has now been in force for more than 230 years.

There are two primary techniques to adapt these old rules to contemporary problems: amendments and interpretation. The amendment process is intentionally designed to be difficult to ensure the fundamental character of the rules. It is thus mainly up to the courts to apply constitutional provisions to present-day problems through the tools of interpretation. However, the judiciary must be cautious not to cross the boundary between constitutional interpretation and amendments. It tends to lean towards the past while defending basic principles of state organisation and human rights against encroachments by the present majority. Another expression of this fundamental idea is the prerogative of constitutional courts to overturn legislation not compatible with the primary law of the constitution, as it has the effect of restoring the earlier law.

It would be an overstatement to speak of a general assumption that old law trumps new law, as this underestimates the necessary flexibility of democratic law-making within the rule of law. Yet it is also evident that modern constitutions rarely demand changes in the legal or economic system of a country. Constitutional courts normally cannot compel the legislator to act using the instrument known as an injunction in Anglo-Saxon legal systems, as this would conflict with the democratic prerogative of elected parliaments. The French CC has expressly seen this as a general limit of its powers. The German FCC is not as reluctant, but in most cases gives some leeway to parliamentary decision-making when it is necessary to correct unconstitutional law.

If it is true that constitutions are oriented towards the past, it is unsurprising that they offer no solutions for handling global warming, a problem of an entirely new magnitude. Scientists predict that the rising average temperature will lead to extreme weather events and disasters of an unprecedented scale and range. The adverse effects have been described in numerous reports.[6)]

It would be inappropriate to criticise the authors of the German constitution for their failure to acknowledge this danger in 1949 and to provide special constitutional protection, although the basic physical greenhouse effect was already known. Whereas in 1992, when the duty to protect the environment was incorporated as Art. 20a of the Basic Law, the scientific expertise was much more precise. However, the provision was intentionally drafted to prevent courts from prioritizing environmental protection over economic interests.[7)] Therefore, it is no surprise that it had almost no relevance before the Neubauer decision, and even then, the conclusion was that it had not been violated.[8)]

The challenge of decarbonising the world needs swift and rigorous action, especially in the European Union, one of the biggest CO_2 emitters. An unprecedented transformation of all sectors is necessary. Hundreds of legal provisions that affect the use of fossil fuels or renewable energy need revision. However, no court is able to develop a comprehensive program for this decarbonisation by interpreting the constitution or other human rights texts.

What Climate Litigation Can Do

The purpose of this analysis is not to plead against climate litigation. Rather, I want to emphasize that effective climate protection requires courageous decisions by parliaments and governments beyond the reach of jurisprudence. Courts can play a limited but important role in reminding politicians of their binding obligations arising from constitutions, international instruments, and (supra)national legislation. As such, courts can serve as a counterbalance to the powerful economic forces striving to maintain existing fossil structures.

The main role of courts should be to review new legislation and administrative decisions as to whether they are compatible with reduction goals. As such, subsidies introduced to further the use of fossil fuels should be scrutinized more closely.

If courts are to take the unprecedented dangers of the climate crisis seriously, justifying new projects that will inevitably increase greenhouse gas emissions will be very challenging.

Courts represent one of the arenas in the struggle for climate protection. However, the battle is ultimately won or lost in the legislative arena.

References

- https://www.bailii.org/ew/cases/EWHC/Admin/2018/1892.html, para 49.
- https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=8273487E150ADE50A1A051DD3E2F3AC9.intern para 163.
- Footnote 2, para no. 170.
- https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&showbutton=true&keyword=C%2f09%2f456689 , no. 5.1.
- https://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/
- Cf., e.g., the Synthesis Report Climate Change 2023 of the IPCC https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf
- Schulze-Fielitz, in Dreier (Hrsg.), GG, Bd. 2, 3. Aufl. 2015, Art. 20a Rn. 7.
- Footnote 2, margin no. 230.
