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KlimaSeniorinnen and the Choice Between Imperfect Options

Incorporating International Climate Change Law to Maintain the ECHR's Relevance Amid the Climate Crisis

"Everything could be different – and yet there is almost nothing I can change."[1] This is, as Niklas Luhmann observed, the paradoxical blend that modern democracies impose on citizens, inviting either utopianism or fatalism. Disillusionment with the transformative potential of democracy is indeed widespread in the face of the "rapidly closing window of opportunity to secure a liveable and sustainable future for all"[2] on the one hand, and the often inadequate action[3] taken to reduce anthropogenic greenhouse gases (GHG) emissions on the other.

Fatalism, however, was not something the more than 2,000 Swiss women with an average age of 73 joining together in the Association (German: *Verein*) "*KlimaSeniorinnen Schweiz*", succumbed to. Rather, as part of a strategic litigation effort[4] initiated by "Greenpeace Switzerland", an NGO, *KlimaSeniorinnen* made the case that the Swiss federal executive branch of government's failure to initiate a revision of the existing climate legislation[5] amounted to a violation of the country's positive obligations stemming from the right to life and the right to respect for private and family life enshrined in the European Convention on Human Rights (ECHR). Senior female citizens, they maintained, would be adversely affected by heat waves[6] occurring both more frequently and severely[7] on account of omissions by federal authorities to reduce Switzerland's GHG emissions (see para. 22).

Neither the Swiss Federal Administration nor the Federal Administrative Court nor, as critically appraised[8], the Federal Supreme Court (paras. 43–63) considered the motion of *KlimaSeniorinnen* and four of their members on its merits.

Categorical differences between KlimaSeniorinnen and Court's existing environmental case law

KlimaSeniorinnen had thus exhausted all domestic remedies. This indicates that not only democracy but also litigation to compel governments to reduce GHG emissions is fraught with obstacles. This is mainly due to the interplay of climate physics underpinning climate change and the rationale of the judicial process. Carbon dioxide (CO2) accounts for two-thirds of all GHGs emitted.[9] Multiple lines of evidence indicate a causal and "almost linear relationship between cumulative CO2 emissions and projected global temperature change".[10] Each tonne of CO2 emitted into the atmosphere anywhere on Earth at any given time thus had, has and will have an almost identical effect on the average global temperature. Due to the high heat capacity of the Earth system, an average of 10.2 years elapses between emission of CO2 and its maximum effect in terms of the resulting global warming.[11] Climate change induced by increased atmospheric CO2 concentration "remains largely irreversible for 1,000 years after emissions stop".[12] The rise in the global average temperature is therefore, as the European Court of Human Rights (ECtHR) acknowledged in the *KlimaSeniorinnen* decision (paras. 416–7, 425, 439), essentially determined by the *cumulative* level of all GHG emissions accrued over centuries, to the effect that "[m]ost aspects of climate change will persist for many centuries even if emissions of CO2 are stopped".[13]

By contrast, the ECtHR's existing environmental case law refers to situations in which harm (toxic waste, pollution, etc.) inflicted on applicants can be traced directly to a specific source (e.g., industrial steelworks complex or landfill) located within the jurisdiction of the respondent State. Given this state authorities can take ef-

fective action to reduce the infringement (rf., e.g., *Cordella and Others v. Italy*[14]). In this previous environmental case law, there was, in other words, a direct link "between a source of harm and those affected by the harm", and the measures necessary to alleviate the harm were "identifiable and available to be applied at the source of the harm" (para. 415). Therefore, recourse to "positive obligations"[15] derived from the Convention, especially its Articles 2 and 8 (see paras. 538–540), is essential for the Court to ensure that, in environmental cases as well, the judicial process may serve its main purpose: to provide relief to individuals who have suffered specific, measurable, and unlawful harm at the hands of the party bearing legal responsibility for the infringement.

An institutional dilemma: choosing the best imperfect option

Owing to the interaction between the physics underpinning climate change and the rationale of the judicial process, the "fundamental differences" (para. 422) between *KlimaSeniorinnen* and the existing environmental case law presented the Court with a serious dilemma: the remedy sought by the applicants (i.e. a drastic reduction of GHG emissions; see paras. 22, 319–336) would not have alleviated their harm, despite the "causal relationship between climate change and the enjoyment of Convention rights" (para. 545; see also paras. 431–436). This left the Court with few options – all of them imperfect.

To find the alleged omissions outside the scope of the guarantees of the Convention would not only have risked neglecting the link between climate change and the severe consequences for many aspects of human life[16], which are closely intertwined with some guarantees of the Convention, but would also have rendered both the Convention and the Court – the "Conscience of Europe"[17] –

largely irrelevant with regard to "one of the most pressing issues of our times" (para. 410). However, maintaining the relevance of both the Convention and the Court is fraught with considerable peril for the institution, especially at a time when human rights law in general and the ECHR in particular have come under mounting scrutiny.[18]

What the ECtHR thus refers to as a "tailored approach" (paras. 422, 434 & 436) amounts, at least partly, to the Court's attempt to maintain both the Convention's and its own relevance in the midst of one of the most pressing challenges facing humanity, while at the same time carefully seeking to respect the realm of politics with regard to concrete "measures to be implemented" (para. 657).

A "tailored approach": incorporating international climate change law

This "tailored approach" (para. 422) essentially consists of incorporating objectives, obligations, and aspirations of international climate change law under the UNFCCC, including the Paris Agreement, to define the scope of the positive obligations deriving from Article 8 of the Convention (see paras. 541–549). The Court also prescribed a comprehensive set of criteria for States to fulfil in order to comply with the Convention (see paras. 550–554).

The Court derives its approach from the positive obligation of States to protect individuals from "adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm" (para. 544; see also para. 435) and from a "harmonious and evolutive interpretation of the Convention in the light of the developing rules and principles

of international environmental law" (para. 453). This doctrine has been established in previous case law on the basis of Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties.[19]

With respect to Articles 6 and 8 ECHR, the Court granted the applicant association (KlimaSeniorinnen) *locus standi* (paras. 526, 623, 625), while holding that the four individual applicants failed to satisfy the criteria for victim status (paras. 535, 624, 625). This is consistent with the fact that, for the reasons rooted in climate physics noted above, it is local adaptation measures, such as free home visits by medical professionals during heatwaves, or "reasonable measures of personal adaptation" (para. 533), rather than the GHG emission reductions requested by the applicants (see paras. 22, 319–336), that can mitigate the adverse impacts of climate change for individual applicants.

The Court, while finding Switzerland in violation of both Articles 6 and 8 of the Convention (paras. 574 & 640), shied away from prescribing any concrete "measures to be implemented in order to effectively comply" with its judgment. The Court deemed "the respondent State, with the assistance of the Committee of Ministers" to be "better placed than the Court to assess the specific measures to be taken" instead (para. 657).

Emphasizing the collective dimension - an administrative turn

The Court's approach highlights the collective dimensions of climate change,[20] while seeking to account for the threats posed by the effects of anthropogenic GHG emissions to the values protected by the Convention's rights. The stringent criteria for associations to have standing (see paras. 502–503) are likely to ensure that only well-founded applications reach the Court. Given the Court's reluctance to prescribe specific measures to be implemen-

ted by the respondent state (para. 657), the "tailored approach" (para. 422) risks transforming applications to the ECtHR to compel states to reduce their GHG emissions into a hybrid form of weak public interest litigation, akin to supervisory complaints in administrative law.

Excessively "harmonious": turning "Paris" upside down

The Paris Agreement, which the Court in part incorporates to define the scope of the positive obligations deriving from ECHR's Article 8, "contains provisions spread across the spectrum of legal character"[21]. The Treaty's provisions on "loss and damage" are mere "soft obligations" that "recommend" but (do not require) certain actions,[22] not least due to the United States' stance at COP 21 that any stricter provision would "kill the deal".[23] The Paris Agreement's core provision, Article 4 (2) on "Nationally Determined Contributions" (para. 136), states an obligation ("shall") of conduct ("intends to achieve") rather than one of result.[24] This deliberate shift away from the Kyoto Protocol's binding reduction commitments is often referred to as a transition from a "top-down" to a "bottom-up" approach.[25, 26]

Despite these crucial nuances in the "terms of the treaty", the Court refers to the UNFCCC and the Paris Agreement as "international commitments undertaken by the member States" (para. 546) when determining the scope of States' positive obligations. There are, to be sure, legitimate policy considerations to call for a much more robust and effective mechanism for states to effectively reduce their GHG emissions. However, deriving not only such obligations of result but a judicial supervisory mechanism (paras. 550–554) from the meticulously negotiated and crafted "terms" of the Paris Agreement tends to turn its "'bottom-up' approach" on its

head and is likely to go well beyond what a "harmonious (…) interpretation" (para. 453) allows for.

Conclusion: reiterating the prerogative of politics

In a seemingly paradoxical way, *KlimaSeniorinnen* reaffirms the prerogative of politics: while member States' of the Council of Europe climate policies must, according to the ECtHR, comply with a detailed set of criteria in order to be in accordance with the Convention (see paras. 550–554) the Court still refrained from prescribing concrete "measures to be implemented" (para. 657). Hence, only in hindsight will we be able to tell whether *KlimaSeniorinnen*, on which the Court has expended considerable political capital, turned out to be as "transformative"[27] as one hopes for. The "owl of Minerva", after all, "begins its flight only with the falling of dusk".[28]

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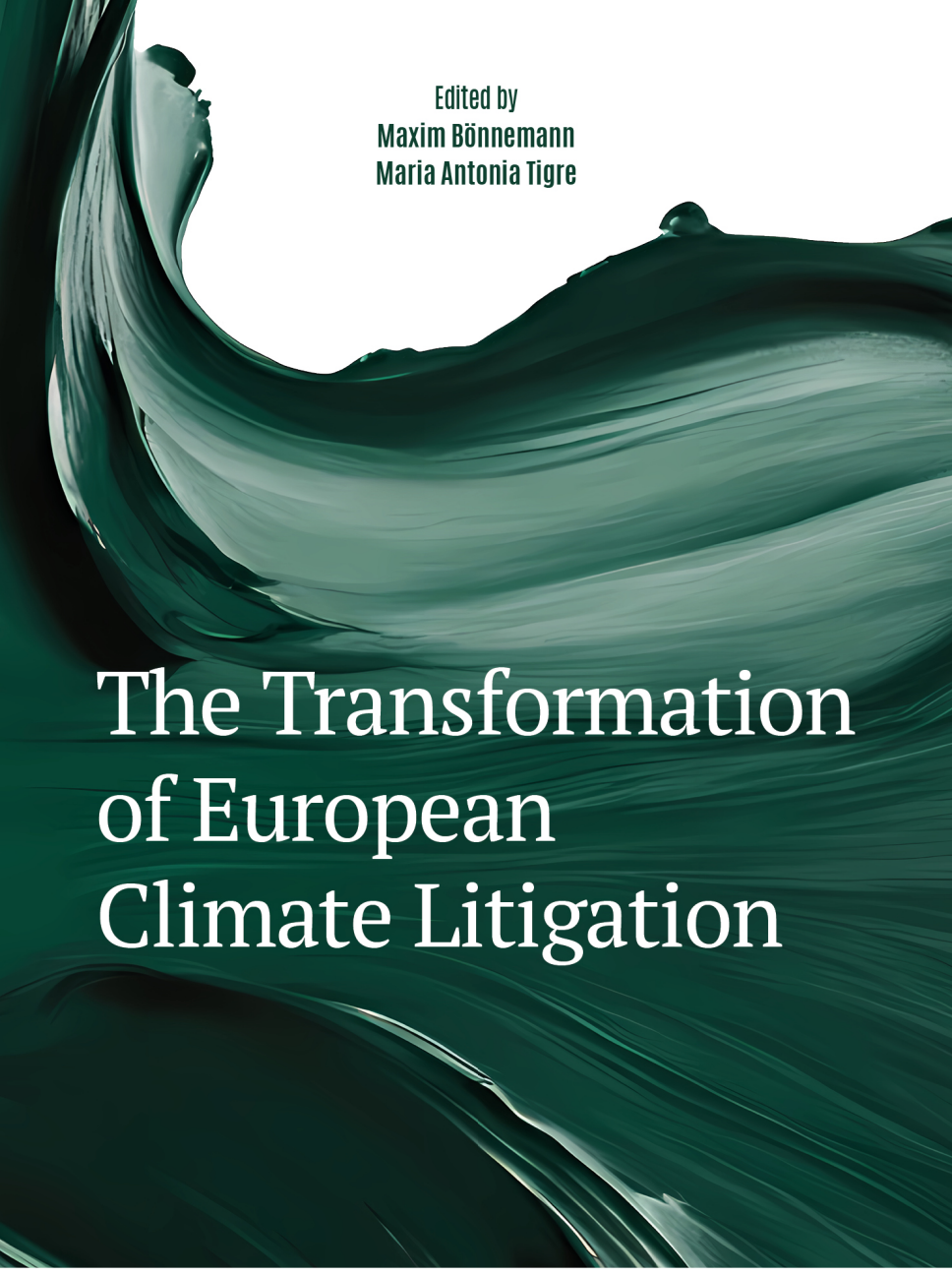

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DOI 10.17176/20241023-105634-0
ISBN 978-3-818708-57-3

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The Transformation of European Climate Litigation

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Content

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