A Critical Assessment in Light of the ECtHR's Climate Jurisprudence

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The First Italian Climate Judgement and the Separation of Powers

On 26th February 2024, in its *Giudizio Universale* decision, the Tribunal of Rome penned the first Italian climate judgement (already reported also on this blog by Umberto Lattanzi). The Tribunal declined to rule on the applicants' request for an order compelling Italy to upscale its ambition in climate change mitigation, based on the separation of powers. According to the Tribunal, the claim could not be entertained, as it intruded into the *domaine réservé* of 'politics'.

Shortly after, on 9 April 2024, the ECtHR handed down its seminal trio of *KlimaSeniorinnen v. Switzerland*, *Duarte Agostinho v. Portugal and Others*, and *Carême v. France*. In this monumental string of cases, the ECtHR set the new standard for climate litigation in Europe, also regarding separation of powers. This invites a critical assessment of *Giudizio Universale's* stance.

In what follows, we briefly summarise *Giudizio Universale*, as well as the principles concerning separation of powers in climate litigation to be inferred from the ECtHR's decisions. With the assistance of other leading climate cases, we then critically test *Giudizio Universale's* consistency with the ECHR.

The *Giudizio Universale* judgement

The *Giudizio Universale* judgement was delivered in response to a claim submitted in 2021 by a patchwork of environmental activists. In their petition, the claimants argued that:

- International climate law places a 'climate obligation' on the Italian State, which compels Italy to cut GHG emissions to the extent necessary to reach the Paris Agreement's 1,5°C goal (§§ IV.2-IV.21 of the petition);

- According to an NGO Report based on the IPCC's findings and methodology, this concretely requires Italy to reduce emissions by 92% from 1990 levels by 2030 (§§ III.9-III.15);
- Failure to abide by the 'climate obligation' would affect the very core of several domestic and European fundamental rights, such that compliance with it could be demanded under Italian law's general tort provisions (§§ V.1-V.26, VI.1-VI.5);
- Italy failed to adopt the aforementioned emissions reduction target, sticking to a more modest -36% objective by 2030. Consequently, the State could be ordered to bring its climate policy in line with the -92%-by-2030 target (§§ VI.6a-VI.28).

In its ruling, the Tribunal acknowledged that several EU and international acts compel Italy to take climate action (pp. 8-9). The judge subsequently noted, however, that the claimants did not aim at enforcing those legal norms as such; rather, they *de facto* invoked a self-standing and vaguer right to a balanced climate, allegedly derived from the Italian Constitution as well as various sources of international law, including the European Convention on Human Rights (pp. 9-10). According to the Tribunal, such decoupling of the claim from the identification of 'specific unlawful decisions' boiled down to a request for an order which would 'oblige the State to adopt any necessary and suitable measure' to bring about the desired reduction in GHG emissions (p. 10). However, according to the Tribunal:

> 'It cannot be maintained that there exists a private law obligation for the State, amenable to enforcement on the part of individuals, to reduce emissions in the way asked for by the claimants. In this sense, the interest for which the claimants are demanding protection (…) does not form part of the subjective interests protected by the law, *in that the decisions pertaining to the ways and timing in which anthropogenic climate change is to be handled* (…) *fall within the competence of the political organs and cannot be ruled upon in the present case*' (p. 12, emphasis added).

Consequently, the Tribunal dismissed the claim without examining its merits, deeming *any* decision on climate change mitigation to be *ipso facto* immune from judicial scrutiny before ordinary courts.

Separation of powers in climate litigation: insights from the ECtHR

The starting point of our discussion is the ECtHR's finding that the rights to life (Art. 2 ECHR) and to private/family life (Art. 8 ECHR) entail an obligation to pursue climate neutrality (in principle, by 2050), although a wide margin of appreciation exists regarding the means to attain it (*KlimaSeniorinnen*, paras 543-548; here for more detail). States are hence obliged to adopt and effectively implement emissions reduction pathways tailored to that goal, based on the best available science, also incorporating the principle of intergenerational equity (paras 549-550; on intergenerational equity, see here). These obligations apply indistinctly to legislative, executive, and judicial authorities (para 550). In so maintaining, the ECtHR arguably acknowledges the principled legitimacy, at the very least, of judicial orders that

require the political organs to adopt an emissions reduction pathway. Further, the Court seems to suggest that such orders may also enforce, including *vis-à-vis* existing pathways, the legal constraints imposed by the ECHR upon them (i.e. the requirement that the pathway pursue climate neutrality by 2050, and that in so doing it be based on climate science and incorporate the principle of intergenerational equity).

This reading seems to be reinforced by *Duarte Agostinho*. Here, the ECtHR declared inadmissible, for failure to exhaust local remedies, a claim also grounded (*inter alia*) on Arts. 2 and 8 ECHR. In finding that the case should have first been brought before the Portuguese courts, the ECtHR seems to suggest that said courts would indeed have been competent to issue an order to adopt measures with a view to climate neutrality (see para 226). To a large extent, this is admittedly due to the peculiar features of the Portuguese legal system, which offered ample opportunities for such an order (see paras 218-224). However, the ECtHR also underlines that the exhaustion of local remedies requirement mirrors, in principle, Art. 13 ECHR's obligation to provide effective remedies for Convention rights (para 215). In so doing, the ECtHR may be implying that Art. 13 would require remedies comparable to those available in Portuguese law to also exist in other systems, as a matter of Convention law. Regrettably, however, the Court in *KlimaSeniorinnen* eschews separate analysis of Art. 13 (para 644), such that this question is not explicitly elucidated.

Yet, in *KlimaSeniorinnen*, the ECtHR also provides hints in the opposite direction. In analysing whether Switzerland breached the right of access to court (Art. 6 ECHR) by rejecting the applicants' claim as an *actio popularis* 'judicialising' matters reserved to the political process (paras 22-63), the ECtHR distinguishes two scenarios (paras 631-634):

- The separation of powers can, in principle, justify refusals to adjudicate claims concerning 'issues pertaining to the democratic legislative process'. As such, as a general matter, 'Article 6 cannot be relied upon to institute an action before a court for the purpose of compelling Parliament to enact legislation' (para 609).
- This is not the case, however, for claims aiming at redressing failures to effectively implement targets which have already been set by the political organs.

Therefore, there seems to be a tension between the holdings concerning Arts. 2 and 8 ECHR viewed against the background of Art. 13 ECHR, on the one hand, and Art. 6 ECHR, on the other hand. However, we understand the Court's holdings concerning climate neutrality as a substantive obligation to be crucial in elucidating what the 'democratic legislative process' amounts to the purposes of Art. 6 ECHR. In fact, a holistic reading of this jurisprudence may suggest that the ECHR does not require that domestic judges be able to dictate precise pathways towards climate neutrality. On the other hand, a court merely setting that overall aim could be seen as safeguarding individual fundamental rights, rather than interfering with democracy (as the ECtHR explicitly maintains in analysing its own role *vis-à-vis* the domestic political process: see *KlimaSeniorinnen*, paras 412-413 and 449-450). The same would go, in principle, for a court ordering the revision of a legislated target found to

fall utterly short of science's indications on climate neutrality, or not to comply with intergenerational equity. In our submission, rejecting these possibilities would clearly contradict the ECtHR's acknowledgement of 'the key role which domestic courts have played and will play in climate-change litigation' (*KlimaSeniorinnen*, para 639).

Separation of powers in litigating emission reduction targets: Revisiting the Italian case

The Italian judgement sits uneasily with the principles distilled above (as also suggested here; for a different take, see here). This can be more fully realised by situating the decision in the transnational panorama of climate litigation.

In this context, the question of separation of powers typically arises when emissions reduction targets are challenged. Courts' approaches towards this question can be placed on a spectrum. Two variables are of crucial importance: on the one hand, the extent to which courts deem concrete emissions reduction targets, despite their complex socio-economic implications, to be amenable to being set by the judiciary; on the other hand, the role played by climate science. The variety of possible solutions to this question can be grasped by taking a quick glance at the three leading precedents cited by the Tribunal of Rome itself (*Giudizio Universale*, pp. 7-8):

- The *Urgenda* judgement by the Dutch *Hoge Raad*;
- The judgement of the *Tribunal administratif de Paris* concerning *Oxfam France et autres*; and finally
- The *Neubauer* judgement by the German *Bundesverfassungsgericht* (BVerfG).

In *Urgenda* the court ventures farthest by imposing a concrete target exclusively drawn from climate science, in the absence of a target set by the domestic legislature (for a critical retrospective, see here). At the opposite end of the spectrum, in *Oxfam*, the court merely found that the government had not complied with its legal obligation to attain a previously legislated reduction target**,** and requested a second target to be adjusted accordingly (see here and here). Finally, with *Neubauer,* the BVerfG positioned itself somewhat midway, by holding on to the legislature's own overall target (the Paris Agreement's temperature target and climate neutrality by 2050). However, based on climate science's calculation of the carbon budget remaining for that target to be concretely attainable, the court reviewed whether the legislature's reduction pathway comported with intergenerational equity. Concluding in the negative, the BVerfG ordered that the legislature revise its pathway, distributing equitably the burden of mitigation between generations (see, critically, here). This palette of approaches shows that separation of powers can translate into practice in a variety of forms. Even assuming that any deliberation on reduction targets entails inherently 'political' decisions, this fact alone does not exhaust the complexities of the science-law-politics nexus.

This has now also been underlined by the ECtHR. Based on the principles elicited above, all of the aforementioned solutions can be deemed compliant with the ECHR. In fact:

- *Urgenda*'s target-setting in light of climate science seems to go even farther than *KlimaSeniorinnen*'s reading of Arts. 2 and 8, by directly setting an interim reduction target;
- *Neubauer*'s order on the equitable reduction pathway based on climate science appears to align most closely with *KlimaSeniorinnen*'s stance on Arts. 2 and 8, including their intergenerational equity component;
- *Oxfam* seemingly comports with *KlimaSeniorinnen*'s stance on the implications of Art. 6 for the enforcement of existing targets.

This casts a new light on *Giudizio Universale*. In fact, the claimants here were pursuing a case lying somewhere between *Urgenda* and *Neubauer*. Whereas Italy already had an emissions reduction target (as in *Neubauer*), the claimants sought to have it substituted by another, specific and more ambitious one decided by the court, based on climate science (as in *Urgenda*). However, the authority for this deference to science was derived, in turn, from the incorporation of the Paris Agreement's temperature goal into democratically legitimised legal acts (as in *Neubauer*). The Tribunal's decision, by contrast, falls even far beyond *Oxfam*, deeming politically-deliberated emission reduction targets to be completely immune from judicial scrutiny (rather resembling US climate litigation).

However, such a complete immunisation seems not to be ECHR-compliant. In fact, if States must pursue climate neutrality through the setting of emissions reduction targets under Arts. 2 and 8, then Art. 13 implies the possibility for claimants to rely on an effective remedy for such targets to be put in place. This seems to be the case not only in the *Urgenda*-like scenario where such a target is completely absent, but also when, like in the Italian case and *Neubauer*, an existing target does not stand scientific scrutiny (or, for that matter, does not respect intergenerational equity). Further, considering Italy's juridification of the Paris temperature target, *KlimaSeniorinnen*'s take on Art. 6 might further buttress such science-based reviewability of politically-backed targets, against the background of the overarching legal commitment to the temperature goal.

Admittedly, the ECtHR's pronouncements left many questions open. Still, what claimants can request in climate litigation is becoming clearer. In this light, the Italian applicants' demand for a concrete reduction target appears unnecessarily daring. In fact, the model resulting from the transnational case law (now backed by the ECtHR) entails courts mostly overseeing the obligation for political organs to come up with legally-constrained mitigation pathways. However, what equally emerges from the ECtHR's jurisprudence is the unacceptability of the Tribunal of Rome's 'all-in' understanding of separation of powers, and more generally of its take on the science-law-politics nexus (also underlined in the Italian debate: see here, here, and here).

In fact, by failing to acknowledge this complex interrelationship, the Italian judgement stands for an almost complete retreat of litigation from global climate governance. This, however, is currently untenable, conceptually no less than empirically. The hope is thus that, in the appeal against *Giudizio Universale*, the new ECHR-backing for such untenability will allow for more careful analysis of this question. In fact, Italian political institutions only recently started timid attempts at introducing a 'framework climate law' (more detail here). The enduring absence of such legislation appears to fall short of compliance with the ECHR, as interpreted in *KlimaSeniorinnen*. The judiciary's impetus might thus prove crucial in discharging the obligations placed by the ECtHR's climate jurisprudence on the ensemble of Italian authorities.

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