The meaning of carbon budget within a wide margin of appreciation: the ECtHR's KlimaSeniorinnen judgment

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This article belongs to the debate » The Transformation of European Climate Litigation
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The Meaning of Carbon Budget within a Wide Margin of Appreciation

The much-awaited European Court of Human Rights (ECtHR) Grand Chamber rulings in three key climate cases have arrived, with two ruled inadmissible (*Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 Others*) and one, brought by senior Swiss women, successful on the merits (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* – "*KlimaSeniorinnen*"). An introduction to the blog symposium can be found here.

Although the *KlimaSeniorinnen* judgment discusses a number of rights of the European Convention on Human Rights (ECHR), including Article 6 (right of access to a court), Article 2 (right to life), and Article 13 (right to an effective remedy), the focus of this blog post is on its discussion of Article 8 (right to private, home and family life). The question raised by that discussion is whether the judgment is one that will "frighten the horses" and lead to oppositional cries of judicial overreach around the separation of powers, or if it is more an unexceptional case of "move on, nothing to see here." My argument is that the judgment is mostly the latter but that it has what, in computer gaming terms, is known as an "Easter egg" – a hidden element included by the developers to surprise and reward those who look carefully. That could turn out to be more controversial.

Article 8 and climate targets

The main treatment of Article 8 in *KlimaSeniorinnen* comes in relation to the applicants' core claim, which was that the Swiss Government's policy action on climate change was inadequate for the purposes of protecting their human rights, especially given their vulnerability to heatwaves associated with climate change. This inadequacy was largely centered around the Swiss government's failures in both setting binding climate mitigation targets and putting in place sufficient policy measures to achieve them.

Conscious of the "subsidiary" role of the ECtHR and the need to respect democratic decision-making by states in line with the separation of powers, the Court emphasized the discretion or "margin of appreciation" enjoyed by state governments (paras. 449, 457).

However, it allowed for a reduced margin of appreciation in relation to the setting of state targets on climate change, and a wide one for the policy measures then used to implement and meet those targets (paras. 543, 549).

First, the Court held in discretionary language that states must set targets "*with a view to* reaching carbon neutrality *within, in principle*, the next three decades" (para. 548, emphasis added). What followed (para. 550) was more prescriptive. According to the Court, these targets must be accompanied by carbon budgets (or an equivalent), which quantify how much emissions room or space the state has during that timeframe. States must also have adequate *intermediate* greenhouse gas (GHG) emissions reduction targets and pathways (e.g., sectoral) showing how the longer term goals will be met. States are obliged to use due diligence to keep their GHG reduction targets updated in accordance with appropriate scientific evidence. Finally, states must be able to provide evidence to show that they are complying with the relevant targets and act in good time, both in setting legislative targets and implementing relevant measures to meet them.

Two further points are also noteworthy on these target principles. First, the Court stated that it will conduct an "overall" assessment of whether a state has fulfilled these requirements rather than a "tick the box" approach, which means that a shortcoming in one will not necessarily lead to a conclusion that a state has exceeded its margin of appreciation (para. 551). Second, the Court drew attention to the need for all relevant competent domestic authorities, including the legislature, executive, and judiciary, to have "due regard to the need" to respect these target principles (para. 550). Mention of the judiciary there is instructive, because it gives a baton to Council of Europe member court judges to use these principles in climate change litigation cases in national courts.

Applying the above principles to the Swiss case (paras. 555-574), the Court held that the government had not adopted a comprehensive set of legally binding climate targets covering the relevant time span, did not have a relevant carbon budget in place, and did not act in good time. That meant it was in breach of Article 8.

Carbon budgets

In many ways there is nothing controversial about the above aspect of the judgment. The Court is merely saying that, to fulfil their human rights obligations, states must, procedurally, have in place a rigorous regulatory framework on climate mitigation (and also adaptation) (paras. 418, 547, 549, 552). It does not substantively dictate what the ambition of that climate policy action should look like (beyond an uncontroversial, mid-century net-neutral destination). Or does it? The most ambiguous and potentially contentious part of the ruling relates to the Court's discussion of "carbon budgets" (paras. 550, 569-573).

Carbon budgets are used in two senses in the climate law and policy world. First, they can, like the United Kingdom's carbon budgets simply lay out a cap or maximum level that GHG emissions must be brought below in order to meet the climate targets that a state has set. Examples of this sort of carbon budget are found in the United Kingdom's Climate Change Act 2008, and the European Union's European Climate Law (Regulation (EU) 2021/1119). In both of those instruments, the cap on emissions is reduced over subsequent budget periods, and accompanied by a demonstration of how the various policy measures adopted by the UK/EU will enable them to keep within that reducing cap.

Second, and more controversially, a global carbon budget can be devised and used to show how much carbon the earth as a whole can afford to allow into the atmosphere to keep within the Paris Agreement's 1.5 degrees Celsius temperature goal (although Paris speaks of keeping well below 2 degrees and pursuing efforts at 1.5, Switzerland had accepted 1.5, and the Court emphasized that 1.5 posed less of a risk to human rights). This global budget is then divided up between states, in line with "fair shares." The budgets that the Swiss government might set for itself in order to meet its intermediate and 2050 climate targets are not necessarily the same as a fair share budget of the latter type advocated by third parties like Climate Action Tracker, cited in the applicants' submissions (para. 78). Of course, the Swiss are obliged under Article 4(3) of the Paris Agreement to consider the principle of fairness (common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, CBDR-RC-NC) in setting their successive Nationally Determined Contributions (NDC), but it is up to them to decide what that fair share is. That is both a weakness of the Paris Agreement but also, some would say, its strength. Attempts to create a top-down budget allocation did not work in the past – that is why the Paris Agreement went for the bottom-up NDC approach (see more here).

Precisely what the ECtHR meant on carbon budgets in its judgment is therefore important. Is it a gaming-style Easter egg that might be used by courts in the future to hold states substantively to more ambitious climate targets in line with their "fair share" of global budgets? Or did the Court intend the idea of a carbon budget to have a more "vanilla," procedural incarnation, with states still the masters of their own climate target ambition and the carbon budget simply helping them to account for whatever goals they have set for themselves? The answer is likely the latter, because the Court associates the issue of budget setting with a wide margin of appreciation.

The applicants were arguing for a particular, progressive "fair share" approach. While the Court did not tell Switzerland what fairness methodology, if any, it should adopt in setting its carbon budget, it arguably leant more towards a less progressive "equal per capita emissions" quantification approach as a basis for determining what the Swiss fair global share of remaining GHG emissions might look like (para. 569). The applicants regarded this per capita approach as falling short of what Switzerland's fair share should be (para. 77), based on other elements such as historical responsibility and capability.

Conclusion

In the end then, the judgment leaves a number of unanswered questions. It is clear that member states must now adopt carbon budgets. But is *how* these budgets are determined a matter for the courts? In this case, all the Court ruled was that Switzerland was in breach of Article 8 in not having a budget at all. What if a state has one but has determined it simply by reference, for example, to its climate target, rather than setting both that target and the associated budget with reference to a global fairness-based methodology? Would that be a basis for a court to intervene on human rights grounds? What if a state has used a fairness methodology but that methodology is based on current equal per capita emissions rather than a fair share calculation based on historical emissions already used up and on capabilities? Would a court intervene then? Not having a budget at all is clearly manifestly unreasonable. However, the others look more like something for a state's margin of appreciation, especially because the Paris Agreement adopts a bottom up approach that was intended to afford states flexibility.

In what is otherwise an admirably clear judgment, uncertainty around this carbon budgets point seems likely to be picked up by applicants in national courts and may need to be revisited in future cases heard by the ECtHR. In that respect, it may even have been an intentional Easter egg, with the Court keeping the option open to progressively develop its views on carbon budgets in future judgments.

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