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Between Activism and Complacency: International Law Perspectives on European Climate Litigation

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Humankind is on a budget - a carbon budget - and domestic courts are its watchdogs, or so it would appear to those who have paid attention to the wave of strategic climate litigation in European courts.[1] The Dutch *Hoge Raad* found a positive and specific state obligation to reduce greenhouse gas (GHG) emissions which it grounded in European human rights law and in Intergovernmental Panel on Climate Change (IPCC) targets as endorsed by the Conference of Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC).[2] Germany's *Bundesverfassungsgericht* required the federal government to adopt more ambitious and specific GHG emission reduction objectives, based on the government's obligation to safeguard rights and freedoms of future generations.[3] The *Tribunal Administratif de Paris* applied a civil liability provision for ecological damages to climate change and found the French government responsible for not having put in place measures that were concrete enough to meet its commitments under domestic, EU and international climate change law. Similarly, the Irish Supreme Court found that the national climate change mitigation plan was not specific enough to meet national transparency and accountability standards.[4] These judgments are only a small part

of the wave of climate litigation, which will certainly continue to attract the interest of international law scholars. Many recent opinion pieces written on this recent phenomenon in the European legal landscape highlight climate litigation's potential for progress in the exasperatingly frustrating fight against climate change and celebrate both the role of judicial law-making as well as the role of international law in the legal reasoning of these cases.[5]

While sharing these opinion pieces' enthusiasm about successful climate litigation, this Reflection worries about the unintended consequences of celebrating these decisions as instances in which progress in the fight against climate change was achieved through judicial law-making. As Skouteris notes, diagnosing progress is first and foremost a rhetorical move and a powerful political strategy and should therefore be employed with care.[6] Among many other things, diagnosing progress invites satisfaction – an emotion that inhibits further change. When applied to our appraisals of climate litigation, Skouteris' observations invite careful consideration of what we can, or rather should, celebrate as progress as well as to whom we should ascribe it. Firstly, because in the battle against climate change, we simply cannot afford the stagnation that comes hand in hand with satisfaction and secondly, because (over-)emphasizing the role of courts risks losing sight of the responsibilities of other actors to set the course for further transformative change.

This Reflection draws on Bourdieu's and Benvenisti's insights to suggest that, rather than being instances of judicial law-making, European courts have, so far, merely been exercising their regular judicial functions. It also accepts Riles' invitation to put 'architects of globalization' at the heart of comparative legal studies in order to suggest that viewing climate change as an artifact of globalization permits us to aptly scrutinize European climate litigation for the distributive outcomes.

Tackling Climate Change in the Judicial Field

As noted by Peel and Lin, climate litigation in the Global North, i.e. in North America, Australia and Europe, is often geared towards the adoption of more stringent climate regulations rather than towards the enforcement of existing ones.[7] Indeed, all the decisions mentioned earlier require more specific or ambitious climate policies from their governments. In light of this pattern, one naturally gets the impression of a divide between climate-friendly courts on the one side and reluctant governments on the other.[8]

From Bourdieu, however, we learn that the judicial field achieves its effectiveness by limiting its own autonomy, namely by presenting decisions as the necessary outcome of principled legal interpretation. It does so, among other things, by limiting divergences and by removing norms from

contextual contingency through processes of formalizing and systematizing to create exemplary reasoning which are meant to be replicated.[9] If we apply this to climate litigation, this permits us to shift our focus from the divide between courts on the one side and governments on the other side to the alignment within the (European) judicial field as a technique for constructing legal authority.[10] In the absence of a formalized system of precedent, this explains the extensive practice of cross-referencing among the courts.[11]

Benvenisti's work on domestic courts further supports this interpretation of courts' behavior and draws attention to the possibility of an unsuspected alliance between courts and governments. Based *i.a.* on the rich environmental jurisprudence of South Asian courts, he argues that transnational judicial cross-referencing is a technique of supporting one another and one's own government to defend common interests against the pressures exercised by powerful interest groups.[12] When Benvenisti's arguments about the motivation of judicial cooperation in environmental matters by South Asian courts are transferred to European courts' behavior in the field of climate change, their decisions can be read not so much as a challenge to their governments' climate objectives but as a defense of them. Almost all successful European climate cases so far have challenged the extent to which newly adopted national climate laws or action plans meet constitutionally or internationally agreed upon climate objectives. They have therefore not imposed new or radically different policy objectives but amplified existing ones in accordance with set legal standards. When viewed in this way, their judicial behavior can hardly be described as activist.[13] Instead, what we are perceiving as progressive climate action in the judicial field may in fact be attributable to courts being sensitive to the increased environmental consciousness of European constituencies, which national legislators have responded to through the adoption of environmental and climate laws and policies, despite fierce push-backs by certain industrial sectors (e.g. the automobile sector in Germany or energy companies in France).

Understanding recent climate decisions of European courts not as instances of judicial law-making but as exercises of well-established judicial functions, most importantly that of reviewing state action for its compliance with constitutional and international law, does not diminish the significance of the role of courts in the fight against climate change but simply highlights that there are limits to the change that can be effected through courts. Can we designate such change as progress? It depends. The degree to which we can perceive climate litigation as progress depends on whether or not we are satisfied with perceiving it as such. To put it differently, when we as legal experts consider these decisions as progress, we are not just articulating a scientific finding, we are also intervening in a highly politicized space in which our determination of progress, or of judicial law-making, might inadvertently make these decisions more susceptible to attempts at delegitimization. Drawing again on Skouteris, it is important to note that progress narratives are by definition non-objective and

compete with other progress narratives that are motivated by a different set of politics.[14] So, given the precarious nature of ascribing progress, where does this leave us in terms of the scope of our inquiries as legal scholars? One possible line of inquiry that has not been sufficiently pursued so far is to evaluate the validity of legal arguments made in these climate decisions.[15] Such reviews may sometimes appear somewhat anti-climactic, but they are nonetheless important in light of the growing number of climate cases currently pending before European courts.

Artifacts of Globalization

Another point of emphasis in the international law grey literature on European climate litigation has been the role of international law in the reasoning of these decisions. This emphasis can easily be explained by international law being used as a legal basis in some decisions and to interpret domestic legal norms in others. Yet, while analyzing the role of international law is perfectly reasonable and certainly productive, it can be very tempting to evaluate climate litigation by the degree to which it uses international law. Emphasizing the role of international law in this manner comes with certain risks. Firstly, this tells us little about the validity of a court's legal reasoning as such, simply because the extent to which international law can add to that validity is circumstantial and context-specific. For example, the decision by the Irish Supreme Court could have drawn on the European Convention of Human Rights to support the existence of a right to a healthy environment but chose not to do so. It is not clear whether a reasoning, which would have relied more heavily on international law, would have been more valid or would have led to a better outcome than the reasoning that the Court choose, which was built on constitutional rights.

Secondly, this risks overhasty revisions of previous assessments of the progressive potential of international law. Take for instance the Paris Agreement and its objective of keeping the global average temperature to well below 2°C above pre-industrial levels. This objective has been used as a reference point in many European climate judgments. Whereas the fact that it is referenced by domestic courts testifies to the relevance of the Paris Agreement, this should not lead us to forget that, in the past, this agreement has commonly been characterized as less being more, at least sometimes.[16]

Riles proposes one approach which can help to side-step these risks. She suggests exploring the operation of artifacts of globalization, which she defines as creatures of globalization that are both local and global in nature and thus so elusive that they continuously seem to slip away from regulatory grip.[17] Climate change meets her definition of such an artifact of globalization. Think about it. One message common to all announcements of new domestic regulations is that one state alone cannot

tackle climate change but that this requires all states to make an effort. The elusiveness of climate change re-emphasized by such messages collectivizes responsibilities to the extent that it allows us to valorize almost any domestic action, irrespective of historical responsibilities.[18]

This can be illustrated by the reception of the widely celebrated decision of the *Bundesverfassungsgericht*. Though acknowledging that Germany has been responsible for 4.6% of global CO_2 emissions since the start of industrialization and currently emits almost twice as much *per capita* as the global average, the decision is also quick to point out that Germany was not alone in bearing such responsibilities. The decision emphasized that industrialized nations accounted for more than half of global CO_2 emissions, that economies in transition have increased their emissions significantly in recent years, and that the USA, the EU, China, Russia and India were responsible for most of currently emitted CO_2 emissions.[19] It is this framing of climate change as an artifact of globalization that leads us to overlook the fact that Germany's contemporary carbon budget does not take into account the fact that Germany has emitted significantly more emissions than most other countries in the past.

Understanding climate change as an artifact of globalization also permits further exploration of the reasons for the earlier mentioned inter-judicial cooperation, which has been a striking feature of climate litigation in general and of European litigation in particular. It would also be worth exploring whether the widespread public scrutiny these decisions are exposed to and the nature of climate change as an artifact of globalization plays a role in how courts cooperate with one another, namely through explicit referencing and the use of similar legal reasoning.[20]

Conclusion

It is not a co-incidence that climate change is often mentioned in the same breath as terrorism or humanitarian disasters. It requires urgent action and at the same time leaves little room for complacency or error. In reflecting on climate litigation, which is unquestionably an important component in taking legal action against climate change, this piece has suggested several lines of inquiry for us as international lawyers. Most importantly, however, it is meant as a reminder that, especially when faced with urgency, we should continue to give expression to our critical voice.[21]

[1] Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2020 snapshot,' (Centre for Climate Change Economics and Policy; Grantham Research Institute on Climate Change and the

Environment; Sabin Center for Climate Change Law, 2020); Rupert F Stuart-Smith et al., 'Filling the evidentiary gap in climate litigation,' *Nature Climate Change* (2021), at 2.

[2] *Netherlands vs. Stichtig Urgenda* (2019) Supreme Court of the Netherlands ECLI:NL:HR:2019:2006

[3] *BVerfG, Beschluss des Ersten Senats vom 24. März 2021* Bundesverfassungsgericht 1 BvR 2656/18 -, Rn. 1-270.

[4] *Notre affaire á tous et al. v. France* (2021) Tribunal Administratif de Paris 1904967-1904968-1904972-1904976.; *Friends of the Irish Environment vs. Government of Ireland* (2020) Supreme Court of Ireland Appeal No: 205/19.

[5] André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case,' *EJIL: Talk!* (2020); Jelena Bäumler, 'Sustainable Development made justiciable: The German Constitutional Court's climate ruling on intra- and inter-generational equity,' *EJIL:Talk!*(2021); Matthias Goldmann, 'Judges for Future: The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?,' *Verfassungsblog* (2021).

[6] Thomas Skouteris, *The Notion of Progress in International Law Discourse* (2010).

[7] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South,' 113 *American Journal of International Law* (2019), at 685.

[8] It should be noted at this point that there are of course also instances where judges have not sided with climate activists. See for instance *Verein KlimaSeniorinnen Schweiz et al. vs. Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation, Generalsekretariat* (2020) Bundesgericht 1C_37/2019.

[9] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field Essay,' 38 *Hastings Law Journal* (1986), at pp. 818, 845.

[10] The Irish climate judgment for example starts by emphasizing that the Court was confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws required. See para. 1.1 *Friends of the Irish Environment vs. Government of Ireland*.

[11] A good example of this technique are the extensive references of the *Bundesverfassungsgericht* to the interpretation of the Hoge Raad of state obligations under human rights law in light of climate change. See paras. 121, 157, 161, 203 *BVerfG, Beschluss des Ersten Senats vom 24. März 2021* (2021) Bundesverfassungsgericht 1 BvR 2656/18 -, Rn. 1-270.

[12] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts,' 102 *American Journal of International Law* (2008).

[13] For more in the concept of judicial activism, see Fuad Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis,' 3 *Journal of International Dispute Settlement* (2012).

[14] Skouteris.

[15] Ingo Venzke, 'What Makes for a Valid Legal Argument?' 27 *Leiden Journal of International Law* (2014).

[16] Jorge E. Viñuales, 'The Paris Climate Agreement: An Initial Examination (Part I of III),' *EJIL: Talk!* (2016).This references the famous first line of Vinuales' post.

[17] Annelise Riles, 'Wigmore's Treasure Box: Comparative Law in the Era of Information,' 40 *Harvard International Law Journal* (1999).

[18] On the role of fear, see Andrea Bianchi and Anne Saab, 'Fear and international law-making: An exploratory inquiry,' 32 *Leiden Journal of International Law* (2019).

[19] para. 29 *BVerfG, Beschluss des Ersten Senats vom 24. März 2021*.

[20] Peel and Lin, at 725; Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law,' 20 *European Journal of International Law* (2009).

[21] This phenomenon was also observed in the turn to international law in the context of the 2003 invasion of Iraq. See Matthew Craven et al., 'We are Teachers of International Law,' 17 *Leiden Journal of International Law* (2004).

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