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Editoriale

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Commenti e Note

VEREIN KLIMASENIORINNEN AND OTHERS V. *SWITZERLAND* BETWEEN HUMAN RIGHTS PROTECTION AND HUMAN RIGHTS JUSTIFICATIONS

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1. Introduction

1.1. Setting the Stage: Why Focus on Human Rights Justifications

The recent decision of the European Court of Human Rights (ECtHR) on the case *Verein KlimaSeniorinnen*[1] remarkably innovated its jurisprudence on environmental cases. It indeed underlined the connection between states' inaction, climate change and

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[1] European Court of Human Rights, Grand Chamber, judgment of 9 April 2024, application no. 53600/20, *Verein KlimaSeniorionnen and others v. Switzerland*.

violations of human rights protected by the European Convention on Human Rights (ECHR).

In addition, the ruling has brought to the forefront the particular relationship between domestic and international norms in the Swiss context, all the more peculiar when popular votes have been involved. Notably, the decision sparked prompt negative reactions by political actors and institutions and oppositions to its implementation, with implications that are still to be assessed.

This article maintains that one of the reasons why such tensions have arisen is that an aspect of the Swiss stance in the dispute was overlooked, namely the employment of human rights justifications by the Swiss authorities. With the expression human rights justifications, it is here meant the use of human rights by states to legitimize their actions both at the domestic and international levels.

After a description of the case, special attention is drawn to this aspect of the dispute and the final decision. It is shown that an important element of the Swiss government's defense before the ECtHR (but also in all other phases) has been the justification of its (in)action through (participatory) human rights. Switzerland has indeed claimed that its system of semi-direct democracy – that ensures wide participatory rights – allows individuals and societal groups to participate and be heard in the context of climate change policies, thus giving them sufficient channels of involvement in this area. In turn, this system justifies the limitation of their right to access to a court and the attribution to Switzerland of a wide leeway in the implementation of the ECHR – i.e. a wide margin of appreciation – in designing policies related to climate change. In other terms, part of the Swiss defense has been centered on the use of (participatory) human rights as a means to justify its actions at the domestic and international level and to claim that the ECtHR should respect the principle of subsidiarity, i.e. defer to the state's decisions in the area of climate change.

Besides providing a description of the case, the main goals of this article are to shed light on the mentioned aspect, explain why more attention should have been paid to it in the decision and attempt to suggest what the ECtHR could have done to address it. In a nutshell, the article aims to: demonstrate that the use of participatory human rights as a justification entails a contradiction whereby rights are used to justify Swiss authorities' actions in violation of the ECHR, with this weakening their protection; consequently, urge to address this contradiction; suggest how the court could have dealt with it.

1.2. A First Premise: Wide Participatory Rights in Switzerland

This section aims to clarify the employment of the expression "wide participatory rights" in this work.

The Swiss political system is characterized by some structural elements, namely, consensus institutions and practices[2], a directorial form of government[3], federalism[4], and direct democracy institutions[5].

The present paper focuses on the latter element of the Swiss political system, which is framed in terms of participatory rights, as does the Swiss constitution[6]. The existence and operation of a large set of direct democratic instruments corresponds indeed to a wide set of opportunities to political participation.

Direct democracy in Switzerland takes several forms and is present at the federal, cantonal and municipal levels. At the federal level, a first form of direct democracy is the initiative, which is aimed at proposing a total or partial revision of the constitution[7]. A second form of direct democracy at the federal level is the mandatory referendum, which is held after the adoption of constitutional amendments and important international treaties[8]. The third type of federal popular vote is the optional referendum, which can be proposed by fifty thousand citizens within a hundred days to approve or reject most parliamentary acts or regulations within a hundred days from the publication of the act and is subject to the vote of the people. Lastly, all the cantons regulate forms of cantonal and local direct democracy.

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[2] On this, see A. LIJPHART, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, 2012; W. LINDER, S. MÜLLER, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, Cham, 2021.

[3] On this, see Y. PAPADOPOULOS, F. SAGER, *Federal Government*, in P. EMMENEGGER, F. FOSSATI, S. HÄUSERMAN, Y. PAPADOPOULOS, P. SCIARINI, A. VATTER (eds.), *The Oxford Handbook of Swiss Politics*, Oxford, 2023, pp. 195-213.

[4] On this, see A. VATTER, *Swiss Federalism: The Transformation of a Federal Model*, London-New York, 2018.

[5] On this, see I. STADELMANN-STEFFEN, L. LEEMAN, *Direct Democracy*, in P. EMMENEGGER, F. FOSSATI, S. HÄUSERMAN, Y. PAPADOPOULOS, P. SCIARINI, A. VATTER (eds.), *The Oxford Handbook of Swiss Politics*, cit., pp. 156-173.

[6] Art. 136, Const.: «1. All Swiss citizens over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity, have political rights in federal matters. All citizens have the same political rights and duties. 2. They may participate in elections to the National Council and in federal popular votes, and launch or sign popular initiatives and requests for referendums in federal matters».

[7] According to arts. 138 and 139, Const., one hundred thousand citizens can propose, within 18 months, a total or partial revision of the constitution, which are respectively submitted to the vote of the people and of the people and the cantons. While the former is submitted in the form of a set of principles, the latter can also take the form of an already full-fledged text. In this case, the text is voted by the people and the cantons, but the parliament can oppose a counter-project that is voted simultaneously. In the other case, the principle is either submitted to the vote of the people (in case of rejection by the federal assembly) that will decide whether to pursue the legislative process or (in case of approval by the federal assembly) it is drafted as a legal text and voted by the people and the cantons; on this, see W. LINDER, S. MÜLLER, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, cit., pp. 119-161.

[8] Art. 140, Const.; to be accepted, it must be voted by the majority of the people and the majority the cantons.

1.3. A Second Premise: the Margin of Appreciation and the Principle of Subsidiarity in the ECtHR's Jurisprudence

To complete the introduction, a few words concerning two notions that this work employs – margin of appreciation and principle of subsidiarity – seem needed. These are two interrelated notions that serve similar functions. They are indeed fundamental methods – now enshrined in the preamble of the ECHR[9] – to define the areas of competence between the ECtHR and the state parties.

According to the margin of appreciation doctrine, the implementation of the ECHR should primarily be ensured by the states, which enjoy a significant degree of discretion in the interpretation of the ECHR where no consensus exists among the state parties on the content of a right included in the Convention[10]. Consequently, the court's task is mainly to review states' employment of their margin of appreciation and verify if they have exceeded it[11]. The court has anyhow interpreted the principle in a flexible way and legitimized the restriction of states' margin of appreciation through its doctrine of "evolutive interpretation" and "emerging consensus". The latter are methods that allow the court to interpret convention rights in an evolutionary way, even in partial contrast with the majority view of the states[12].

The principle of subsidiarity, as a method of allocation of power complementary to the doctrine of the margin of appreciation, comprises two dimensions[13]. The negative dimension of the principle of subsidiarity implies that "the international institution shall not arrogate to itself those functions that the institution nearest the people can perform more effectively and appropriately"[14]. The positive dimension entails that the court is legitimized to intervene and exercise its supervision on state action when they depart from a common interpretation of rights or when they prove incapable of providing minimum safeguards of rights protection[15].

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[9] «The High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention».

[10] J. CHRISTOFFERSEN, M. RASK MADSEN (eds.), *The European Court of Human Rights Between Law and Politics*. Oxford, 2013; F. FABBRINI, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, in *iCourts Working Paper Series*, 2015, n. 15, pp. 1-17.

[11] M. IGLESIAS VILA, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, in *International Journal of Constitutional Law*, 2017, n. 15(2), pp. 393-413.

[12] F. FABBRINI, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, cit., pp. 7-13.

[13] K. ENDO, T*he Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, in *Hokkaido Law Review*, 1994, n. 44(6), pp. 553-652; P. CARROZZA, *Subsidiarity as a Structural Principle of International Human Rights Law*, in *American Journal of International Law*, 2003, n. 97(1), pp. 38-79.

[14] M. IGLESIAS VILA, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, cit., p. 403.

[15] M. IGLESIAS VILA, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, cit., p. 403.

The interpretation and the employment of the doctrine of the margin of appreciation and the principle of subsidiarity constitute central issues of the judgement. Switzerland indeed argued for the acknowledgment of a wide margin of appreciation and the limitation of the court's intervention in the area of climate change, also based on the fact that it ensures broad participatory rights in policymaking processes domestically. Contrarily, the court affirmed that the state's margin of appreciation is subject to limitations in this area.

2. The *Verein KlimaSeniorinnen* Case

In 2016, a group of senior women and an association called *Verein KlimaSeniorinnen Schweiz* requested a ruling from the Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC), requesting to stop different alleged omissions concerning climate change and the prevention of its harmful effects by the DETEC itself and other federal authorities on the basis of art. 25a of the Swiss Administrative Procedure Act (APA)[16]. In particular, the applicants claimed that the Swiss authorities are taking insufficient measures regarding climate change – in violation of their domestic and international obligations – and that this insufficient action directly and severely affect their right to life. Indeed, they argued that elderly women are particularly affected by climate change, as the latter increases the occurrence of heat waves, whose major impact on elderly women has been proved scientifically[17].

As the DETEC dismissed their request[18] – since it found that they lacked standing because not directly affected by the alleged omissions – the group of women and the association appealed it at the Federal Administrative Court (FAC). The latter rejected their appeal[19] based on similar conclusions.

In January 2019, the applicants lodged an appeal at the Federal Supreme Court (FSC) against the decision of the FAC, which was again dismissed on the ground that the omissions concerning climate change do not affect them with a particular intensity[20]. In addition, the FSC (and the FAC) qualified the application as an *actio popularis*[21], i.e.

[16] The Federal Council, the Federal Office for the Environment (FOEN) and the Federal Office of Energy (FOE); art. 25 of the APA states that: «1. Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it: a. refrains from, discontinues or revokes unlawful acts; b. rectifies the consequences of unlawful acts; c.confirms the illegality of such acts. 2 The authority shall decide by way of a ruling».

[17] A. SAUCY, M.S. RAGETTI, D.VIENNAU, K. DE HOOGH, L. TANGERMANN, B. SCHÄFFER, J.M. WUNDERLI, N. PROBST-HENSCH, M. RÖÖSLI, *The Role of Extreme Temperature in Cause-Specific Acute Cardiovascular Mortality in Switzerland: A Case-Crossover Study*, in *Science of the Total Environment*, 2021, n. 790, pp. 1-8.

[18] DETEC, Ruling of 25 April 2017 on the Request of 25 November 2016 of the Appellants *Verein KlimaSeniorinnen et al.*, available at www.ainees-climat.ch.

[19] Federal Administrative Court, Judgment of 27 November 2018, A-2992/2017.

[20] BGE 146 I 145 (2020), parr. 4.1. and 5.5.

[21] BGE 146 I 145 (2020), par. 5.5.

a legal action taken in the general public interest by a person of a group who are not directly victims of violations nor represent victims or potential victims[22], which is not admissible in the Swiss legal order.

As all the domestic remedies were exhausted, the applicants filed a complaint before the ECtHR, alleging the violation of their rights to a fair trial and an effective remedy (arts. 6 and 13, ECHR), to life (Art. 2, ECHR), to respect for private and family life (art. 8, ECHR).

As the case concerned "a serious question affecting the interpretation of the Convention or the Protocols thereto"[23], it was relinquished to the Grand Chamber, which issued its ruling on 9 April 2024 finding a violation of art. 6 and art. 8 of the Convention.

3. Novelty of the Case

3.1. As Regards the ECtHR's Jurisprudence

It should be noted that the court has already ruled several times with respect to environmental harm and developed an environmental case law[24], which contemplates not only reparatory measures but also the recourse to positive obligations[25].

However, the environmental cases dealt with by the ECtHR have concerned situations where individuals were affected by a specific source of harm[26], while in this

[22] A. GATTINI, *Actio Popularis*, in H. RUIZ FABRI (ed.), *Max Planck Encyclopedia of International Procedural Law*, Oxford, 2019, available at the following link: https://opil.ouplaw.com/home/MPIL.
[23] Art. 30 ECHR.
[24] K.F. BRAIG, S. PANOV, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a* Hilfssheriff *in Combating Climate Change?*, in *Journal of Environmental Law and Litigation*, 2020, n. 35, pp. 261-298.
[25] G. CATTILAZ, *The KlimaSeniorinnen Case, the ECtHR and the Question of Access to Court in Climate Change Cases*, in E. D'ALESSANDRO, D. CASTAGNO (eds.), *Reports & Essays on Climate Change Litigation*, Torino, 2024, pp. 79-123; see also COUNCIL OF EUROPE, *Manual on Human Rights and the Environment*, Strasbourg, 2012. COUNCIL OF EUROPE/EUROPEAN, COURT OF HUMAN RIGHTS, *Guide to the case-law of the European Court of Human Rights*, Strasbourg, 2022; M. FITZMAURICE, *The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms*, in *Environmental Law Review*, 2011, n. 13(2), pp. 107-114.
[26] See, for instance, European Court of Human Rights, Grand Chamber, judgment of 8 July 2003, application no. 36022/97, *Hatton and others v. UK*; European Court of Human Rights, Fifth Section, judgment of 12 May 2009, application no. 18215/06, *Greenpeace and others v. Germany*; European Court of Human Rights, First Section, judgment of 20 March 2008, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and others v. Russia*; European Court of Human Rights, judgment of 30 November 2004, application no. 48939/99, *Öneryildiz v. Turkey*; European Court of Human Rights, First Section, judgment of 24 January 2019, application no. 54414/13, *Cordella and others v. Italy*; European Court of Human Rights, Judgment of 16 October 2003, application no. 55723/00, *Fadeyeva v. Russia*; European Court of Human Rights, Third Section, judgment of 10 November 2004, application no. 46117/99, *Taşkın and others v. Turkey*; European Court of Human Rights, judgment of 9 December 1994, application no. 16798/90, *López Ostra v. Spain*; on this, see G. CATTILAZ, *The KlimaSeniorinnen Case, the ECtHR and the Question of Access to Court in Climate Change Cases*, cit., p. 79.

case the focus was on the harmful effects of and the related state duties concerning climate change[27]. This has led to a groundbreaking decision that reinforces the connection between climate change and human rights protection[28] recognizing (a violation of the right to access to court and, above all,) that Swiss insufficient action in the area of climate change determined a violation of the right to respect for private family and life (art. 8, ECHR). In particular, the court affirmed that art. 8 encompasses a right to effective protection against serious adverse effects of climate change on life, health, well-being and quality of life[29]. This decision aligned the court's jurisprudence with other domestic[30] and international rulings[31] that had already found breaches in human

[27] O. PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*. Cambridge, 2018, pp. 86-96; S. THEIL, *Towards the Environmental Minimum: Environmental Protection through Human Rights*, Cambridge, 2021; G. CATTILAZ, *The KlimaSeniorinnen Case, the ECtHR and the Question of Access to Court in Climate Change Cases*, cit., pp. 79-123; COUNCIL OF EUROPE, *Manual on Human Rights and the Environment*, Strasbourg, 2022, available at: https://rm.coe.int/manual-environment-3rd-edition/1680a56197; EUROPEAN COURT OF HUMAN RIGHTS, *Factsheet: Environment and the Convention on Human Rights*, Strasbourg, 2023, available at: https://www.echr.coe.int/documents/d/echr/fs_environment_eng.

[28] M. AVERILL, *Linking Climate Litigation and Human Rights*, in *Review of European, Comparative and International Environmental Law*, 2009, n. 18(2), pp. 139-147; A. SAVARESI, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions*, in *Oñati Socio-Legal Series*, 2021, n. 11(1), pp. 231-253.

[29] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 519.

[30] For instance, in the European continent, Supreme Court of the Netherlands, judgment of 20 December 2019, *Urgenda Foundation v. State of Netherland*, ECLI:NL:HR:2019:2006; on this, see A. NOLKAEMPER, L. BURGES, *A Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL: Talk*!, 6 January 2020; Council of State of France, judgment of 1st July 2021, *Commune de Grande-Synthe v. France*, n. 42731/2021; German Constitutional Tribunal, judgment of 24 March 2021, *Neubauer et al. v. Germany*, n. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; on this ruling, see G. WINTER, *The Intergenerational Effects of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection*, in *Journal of Environmental Law*, 2022, n. 34(1), pp. 209-221; P. MINNEROP, *The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, in *Journal of Environmental Law*, 2022, n. 34(1), pp. 135-162; important national courts' decisions have been adopted also regarding the protection of the human rights of the migrants in contexts of environmental degradation: on this, see C.M. PONTECORVO, *The Role of Environmental Severe Degradation in National Asylum Cases: Jurisprudential Wake-Up Calls for the Asleep (EU) Legislator?*, in A. DI STASI, I. CARACCIOLO, G. CELLAMARE, P. GARGIULO (eds.), *International Migration and the Law: Legal Approaches to a Global Challenge*, London-New York-Turin, 2024, pp. 291-306.

[31] See European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 226: in Inter-American Court of Human Rights, judgment of 6 February 2020, *Case of the Indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*, the court held Argentina responsible for violating the indigenous communities' human rights through its failure to recognise and protect their lands; in that case, the Court examined the rights to a healthy environment, adequate food, water, and cultural identity autonomously.

rights determined by states inaction concerning climate change[32] as well as with international soft jurisprudence[33].

The other aspects of novelty of the decision can be summarized as follows[34]. Firstly, the court allowed an association the right to stand in the case, thus innovating its

[32] C.C. BÄHR, U. BRUNNER, C. CASPER, S.H. LUSTIG, *KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation*, in *Journal of Human Rights and the Environment*, 2018, n. 9(2), pp. 194-221; J. SETZER, L.C. VANAHA, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, in *WIREs Climate Change*, 2019, n. 10(3), pp. 1-19; I. ALOGNA, C. BAKKER, J.P. GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, Leiden-Boston, 2021; W. KAHL, M.P. WELLER (eds.), *Climate Change Litigation: A Handbook*, München-Oxford-Baden-Baden, 2021; L. SCHUPISSER, *Judging Climate Change: A Comparative Legal and Political Analysis of the KlimaSeniorinnen Schweiz and the Urgenda Cases*, in *Global Europe – Basel Papers on Europe in a Global Perspective*, 2023, n. 124, pp. 43-64; S. IYENGAR, *Human Rights and Climate Wrongs: Mapping the Landscape of Rights-Based Climate Litigation*, in *Review of European, Comparative and International Environmental Law*, 2023, n. 32(2), pp. 299-309; B. MAYER, H. VAN ASSELT, *The Rise of International Climate Litigation*, in *Review of European, Comparative and International Environmental Law*, 2023, n. 32(2), pp. 175-184; S. ŽATKOVÁ, P. PALŬCHOVÁ, *ECtHR:* Verein KlimaSeniorinnen Schweiz *and Others v. Switzerland (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights*, in *Bratislava Law Review*, 2024, n. 8(1), pp. 227-244; F. SINDICO, K. MCKENZIE, G. MEDICI-COLOMBO, L. WEGENER (eds.), *Research Handbook on Climate Change Litigation*, Cheltenham-Northampton, 2024.

[33] See European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., parr. 133-272: on 15 November 2017 the Inter-American Court of Human Rights delivered an Advisory Opinion titled "The Environment and Human Rights" in which it derived the right to a healthy environment from article 26 of the American Convention; in January 2023 a new request for an Advisory Opinion was submitted to the Inter-American Court of Human Rights by Colombia and Chile asking it to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law; in May 2024 the International Tribunal for the law of the Sea (ITLOS) delivered an Advisory Opinion on climate change and international law, which has specified the obligations of the state parties of the ITLOS; a request for an advisory opinion is pending at the International Court of Justice (ICJ); see also UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016* of 23 September 2020, CCPR/C/127/D/2728/2016; this connection between human rights and climate change finds also (a limited) recognition in international environmental law: for instance, the preamble of the Paris agreeement affirms that «Acknowledging that climate change is a common concern of mankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity»; on this, see C.M. PONTECORVO, *The Role of Environmental Severe Degradation in National Asylum Cases*, cit., pp. 291-306.

[34] The case has been commented by several authors during its progress, who anticipated the groundbreaking effects of the decision, if taken in favor of the claimants, and the legal and political issues at stake; at the moment of drafting this paper, several prompt but short analyses of the ruling have been published: on this, see M. BÖNNEMANN, M.A. TIGRE (eds.), *The Transformation of Climate Litigation: An Introduction*, Berlin, 2024; A. HÖSLI, M. REHMANN, Verein KlimaSeniorinnen Schweiz *and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change*, in *Climate Law*, 2024, n. 14(3), pp. 1-22; S. ŽATKOVÁ, P. PAL'UCHOVÁ, *ECtHR:* Verein KlimaSeniorinnen Schweiz *and Others v. Switzerland (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights*, cit., pp. 227-244.

jurisprudence on victim status[35] and clarifying the concept of *actio popularis*[36]. Secondly, the ECtHR has maintained that the states parties' margin of appreciation of the European Convention on Human Rights (ECHR) as regard the definition of the goals (but not the concrete measures) to address climate change is narrower than in other areas. This is due to: undertaken international obligations; existence of a direct and scientifically proven causation link between greenhouse gases emission, climate change, environmental harm and state's inaction; urgency and gravity of the situation[37]. Thirdly, and consequently, while not going so far as indicating the measures to put in place, to the court established some precise guidelines Switzerland (and other states) must follow to plan adequate responses to tackle climate change that comply with the Convention[38], with this innovating its jurisprudence in environmental cases[39].

3.2. As Concerns the Possible Consequences at the Domestic Level

As for the consequences of the ruling at the domestic level, the decision of the Grand Chamber of the ECtHR adds to the ongoing legal and political debate on the position of the ECHR (and international human rights law more in general) in the Swiss

[35] J. KROMMENDIJK, *Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation*, in *Review of European, Comparative & International Environmental Law*, 2021, n. 31(1), pp. 60-74.
[36] G. CATTILAZ, *The KlimaSeniorinnen Case, the ECtHR and the Question of Access to Court in Climate Change Cases*, cit., pp. 79-123; S. ŽATKOVÁ, P. PAĽUCHOVÁ, *ECtHR:* Verein KlimaSeniorinnen Schweiz *and Others v. Switzerland (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights*, cit., pp. 227-244.
[37] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., parr. 435 and 519; on this, see C.E. BLATTNER, *Separation of Powers and KlimaSeniorinnen*, in M. BÖNNEMANN, M.A. TIGRE (eds.), *The Transformation of Climate Litigation: An Introduction*, cit., pp. 125-141; J. REICH, *KlimaSeniorinnen and the Choice Between Imperfect Options: ncorporating International Climate Change Law to Maintain the ECHR's Relevance Amid the Climate Crisis*, in M. BÖNNEMANN, M.A. TIGRE (eds.), *The Transformation of Climate Litigation: An Introduction*, cit., pp. 41-52.
[38] J. REICH, *KlimaSeniorinnen and the Choice Between Imperfect Options: ncorporating International Climate Change Law to Maintain the ECHR's Relevance Amid the Climate Crisis*, in M. BÖNNEMANN, M.A. TIGRE (eds.), *The Transformation of Climate Litigation: An Introduction*, cit., pp. 41-52.
[39] On this, see H. KELLER, C. HERI, R. PISKÓTY, *Something Ventured, Nothing Gained? Remedies before the ECtHR and Their Potential for Climate Change Cases*, in *Human Rights Law Review*, 2022, n. 22(1), pp. 1-26; until this case, the court has almost always refused to order so-called "consequential orders" – positive measures aimed at ending or remedying an ECHR's violation – in environmental cases (H. KELLER, C. HERI, R. PISKÓTY, *Something Ventured, Nothing Gained? Remedies before the ECtHR and Their Potential for Climate Change Cases*, cit., pp. 17-19); as indicated by European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 550, to abide by with the Convention, the domestic authorities should have: (a) adopted general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments; (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies; (c) provided evidence showing whether they had duly complied, or were in the process of complying, with the relevant GHG reduction targets; (d) kept the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; (e) acted in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

constitutional order and has engendered foreseeable political reactions against it by several parties. In other terms, the aversion of part of the political forces to the ECtHR's activity is not new nor was it unpredictable[40].

Although the decision concerns well-trodden issues related to the relationships between the constitutional system and international law, some conditions differentiate this from previous cases and may contribute to changing some current consolidated practices in this area.

The framework in which the relationships between domestic federal law and international law unfold is subject to continuous adjustment (and has been object of multiple reform proposals)[41]. The reason of this complexity lies in the fact that the Swiss constitution does not provide much help in clarifying how to solve possible conflicts between domestic and international legal orders[42]. In the absence of precise provisions at the constitutional level, the literature and case law in this area have contributed to clarifying the consequences of possible conflicts between domestic and international law. As a result, some basic principles have consolidated[43].

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[40] See O. AMMANN, *The European Court of Human Rights and Swiss Politics: How Does the Swiss Judge Fit In?*, in M. WIND (ed.), *International Courts and Domestic Politics*, Cambridge, 2018, pp. 262-295; the opposition to international integration is traditionally part of the the right-wing *Schweizerische Volkspartei* (SVP) agenda, while several other parties have shown different degrees of aversion to this; the SVP has consistently launched initiatives – amendments to the constitution directly subjected to popular vote – opposing international integration, such as the one titled 'Accords internationaux: la parole au peuple! ('International Agreements: Let the People Speak!'), rejected on 17 June 2012 and aiming at extending voting rights in the context of the ratification of international agreements by Switzerland; in 2018, an initiative emphatically titled "Swiss law, not foreign judges" was launched to establish that the Constitution should always take precedence over international law; both initiatives were rejected.

[41] On this, see SWISS FEDERAL COUNCIL, *La relation entre droit international et droit interne, Report in response to the postulate 07.3764 and 08.3765*, 2010, available at https://www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/respect-promotion/droit-international-droit-interne.html#:~:text=La%20Constitution%20fédérale%20prescrit%20à,être%20déduite%20de%20la%20Constitution.

[42] Indeed, the constitution is basically silent as regards this issue: art. 5, par. 4, states that "The Confederation and the Cantons shall respect international law". Art. 166 attributes the Federal Assembly the power to approve international treaties, with the exception of those that are concluded by the Federal Council under a statutory provision or an international treaty. Art. 189, on the jurisdiction of the Federal Supreme Court (FSC), affirms that the FSC "hears disputes concerning a. federal law; b. international law […]". Art. 190 stipulates that "The Federal Supreme Court and the other judicial authorities apply the federal acts and international law". Lastly, arts. 193 and 194 uphold that total and partial revisions of the constitution must not violate the mandatory provisions of international law; from this written constitutional framework, one can only infere that the Swiss system has a monist approach to international law, as no ratification process of treaties is provided for by the constitution: on this, see ; on this, see O. AMMANN, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, Leiden-Boston, 2020; SWISS FEDERAL COUNCIL, *La relation entre droit international et droit interne*, cit.; SWISS FEDERAL COUNCIL, *Reply of 15 May 2013 to Interpellation Toni Brunner 'Kündigung der Konvention zum Schutze der Menschenrechte und Grundfreiheiten'*, 2013, available at www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133237; SWISS FEDERAL COUNCIL, *La relation entre droit international et droit interne, Report in response to the postulate 13.3805*, 2015, available at https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-57643.html; H. KELLER, *Rezeption des Völkerrechts*, Heidelberg, 2003.

[43] These principles provide basic guidelines for the definition of possible frictions between Swiss federal law and international law, which is the dimension of their relations on which this paper focuses; however,

Firstly, as long as possible, the conflicts between international law and domestic law are premilinarily avoided by the adoption international treaties only when the internal legal order is no longer in contrast with them[44].

Secondly, the tribunals and, above all, the FSC avoid conflict by interpreting the domestic provisions through the lens of the Swiss international obligations. This is mainly done in cases of possible incompatibility between an internal provision and the European Convention on Human Rights (ECHR) and leads to what has been defined as a consistent interpretation of domestic regulations[45]. This practice allows the FSC to avoid conflict in most cases.

Thirdly, when conflict is unavoidable, the FSC accords priority to the international provisions, especially if they deal with the protection of human rights and stem from the ECHR and the related ECtHR jurisprudence (the so-called "PKK practice")[46], while it accepts that subsequent domestic laws derogate from international law if this is the result of a willful action of the legislator, who takes the political and legal responsibility of this (the so-called "Schubert practice")[47].

Some other conditions affect the operation of the mentioned rules. One of them is the role of the judiciary in Switzerland, which is considered rather deferent to the political institutions and (direct democratic) decision-making processes than in other

this is not the only one, as another contentious area concerns the relations between Swiss constitutional law and international law.

[44] E.M. BELSER, R. OLESCHAK-PILLAI, *Engagement of Swiss Courts with International Law*, in A. NOLLKAEMPER, Y. SHANY, A. TZANAKOPOULOS (eds.), *The Engagement of Domestic Courts with International Law Comparative Perspectives*, Oxford, 2024, pp. 271-290.

[45] O. AMMANN, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, Leiden-Boston, 2021; E.M. BELSER, R. OLESCHAK-PILLAI, *Engagement of Swiss Courts with International Law*, cit., pp. 280-283; INTERNATIONAL LAW ASSOCIATION, *Mapping the Engagement of Domestic Courts with International Law*, Johannesburg, 2016, p. 11; see, for instance, BGE 126 IV 236 (2010); it must be noted that such a reading may sometimes hide what has been referred to as "affirmative avoidance" of international law, i.e. cases in which the courts "considers the application of international law but explicitly rejects it, as this is, in the court's view, the appropriate position under domestic law" (INTERNATIONAL LAW ASSOCIATION, *Mapping the Engagement of Domestic Courts with International Law*, cit., p. 17), which may be also achieved through some interpretative techniques, such as affirming the non-justiciability or non-self-execution of international norms; see the following rulings: BGE 6B_894/2021 (on provisions of the Swiss Civil Code favouring the male member for the family), BGE 125 III 185 (on the limitation of free speech), BGE 134 II 120 (on the rules on television advertisements and limitation of political advertisements); in all these cases, the FSC interpreted internal provisions as consistent with the ECHR, while the ECtHR found violations of human rights protected by the convention.

[46] See BGE 125 II 417; notably, if Switzerland is found responsible of breaches of the ECHR concerning some provisions that were considered consistent with international law by the FSC or other tribunal, the FSC tends to follow the ECtHR decision; however, exceptions exist, such as, for instance BGE 6B_894/2021 where the FSC did not change its jurisprudence endorsing domestic provisions that favoured the male member of the family even though Switzerland was found in breach of the ECHR, until the regulation was changed by the Parliament; on this, see *Domestic Courts and the Interpretation of International Law*, cit.

[47] See BGE 99 Ib 39; BGE 139 I 16 (2012); O. AMMANN, *The European Court of Human Rights and Swiss Politics: How Does the Swiss Judge Fit In?*, cit., pp. 262-295.

states[48]. This aspect is related to another essential element of the Swiss system, which is the cultural-constitutional approach to democracy that gives a strong centrality to political institutions and direct democratic means in decision-making processes[49]. Together, such conditions imply that the FSC's (and the other tribunals') activity can be significantly affected by the political atmosphere and be sensitive to political pressure in some areas more than others, i.e. those that have been object of popular votes at a constitutional or federal level.[50] In other areas, the FSC has shown changing approaches, from "hyper-alignment" to international law to "affirmative avoidance"[51].

The consistent reading of domestic law and the PKK practice concerning the ECHR and the ECtHR's jurisprudence are much established, and as seen, the latter is rarely used as the interpretative activity of the FSC allows it to avoid several potential conflicts. However, the *KlimaSeniorinnen* case concerns a particular situation, in which the entire federal regulatory framework – more precisely omissions related to this framework – was found in breach of international human rights law and especially the ECHR[52]. In addition, such a framework has been object of two popular votes held between 2021 and 2023. Furthermore, the decision has prompted immediate reactions from the Parliament and the Federal Council, all condemning to different extents a supposed excessive limitation of the country's margin of appreciation by the European court, all the more as the population has been involved in the process of adopting these regulations through

[48] Although this statement should be relativized: in some periods of the Swiss constitutional history, the role of the FSC was critical; for instance, during the second half of the XX[th] century, under the constitution of 1874 that had a very limited catalogue of rights, the FSC developed a very innovative jurisprudence on unwritten constitutional rights, also relying on the ECHR and the ECtHR jurisprudence: on this, see G. BIAGGINI, *Constitutional Adjudication in Switzerland*, in A. VON BOGDANDY, P.M. HUBER, C. GRABENWARTER (eds.), *The Max Planck Handbooks in European Public Law*, Oxford, 2020, pp. 779-839; see also O. AMMANN, *The European Court of Human Rights and Swiss Politics: How Does the Swiss Judge Fit In?*, cit., pp. 262-295.

[49] W. LINDER, S. MÜLLER, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, cit., pp. 119-161.

[50] For instance, in the sector of migration law, the FSC (and other tribunals') jurisprudence has often been deferent to the legislator's choices even when those presented elements in contrast to international law (also to the ECHR); see a recent case: European Court of Human Rights, Third Section, judgement of 4 July 2023, applications no. 13258/18, 15500/18, 57303/18 and 9078/20, *B.F. and Others v. Switzerland*.

[51] See INTERNATIONAL LAW ASSOCIATION, *Mapping the Engagement of Domestic Courts with International Law*, cit., p. 17; this has been the case with the application of the Agreement on the Free Movement of Persons (AFMP) (E.M. BELSER, R. OLESCHAK-PILLAI, *Engagement of Swiss Courts with International Law*, cit., pp. 285-289); for instance, recently the FSC has ruled against its previous jurisprudence concerning the Agreement on the Free Movement of Persons (AFMP) – until that moment generally upholding the primacy of the international agreement – by affirming that, in case of possible incompatibility in the area of migration law, the judge should apply the "more familiar" domestic law: see BGE 6B 235/2018.

[52] The effects of this ruling may be very broad and concern several areas of the Swiss system – such as international trade, climate adaptation, access to documents – as well as numerous actors, among which the federal institutions, the cantons, the municipalities and private actors; on this, see A. FLÜCKIGER, *L'arrêt KlimaSeniorinnen c. Suisse: un nouveau standard de qualité légistique pour la législation finalisée*, in *LeGes*, 2024, n. 35(2), pp. 1-7.

direct democracy[53]. Such stances resonate with the decisions of the FAT and the FSC in this case, as will be shown below[54].

All these elements contribute to creating a tense socio-political atmosphere that may affect future – not only political, but also – jurisdictional developments in Switzerland. In other words, the democratic and political pressure that characterizes the debate and policymaking about climate change may engender a more protective approach by the FSC in possible future disputes concerning the protection of human rights in the environmental realm, i.e. more deference to the domestic legislator regardless of the ECtHR's decision[55].

4. A (Partially) Neglected Aspect of the Controversy: (Participatory) Human Rights Justifications and the Consequences of their Overlooking

As seen, the *Verein KlimaSeniorinnen* case presents several innovative aspects. Nonetheless, (the analyses of the case and) the court seems to have underestimated a critical element of the dispute and might have contributed to the immediate escalation in the reactions by the political institutions in Switzerland. The innovative stance taken by the ECtHR as regards the connection between human rights and climate change and the states' margin of appreciation in the realm of climate change has been rightly underlined and commended. However, the court appears to have neglected to focus on the meaning that this has in a semi-direct democracy such as Switzerland. In turn, this approach has led to downplaying the Swiss defense concerning its political system and the wide participatory rights it ensures, which was used to justify its actions in the climate change policy area.

In the next sections, it is argued that addressing what it is here referred to as the country's human rights justification of its actions in the *KlimaSeniorinnen* case – i.e. the employment of (participatory) human rights to justify the omissions concerning climate change – would have allowed the court to better contextualize the decision. Consequently, this would have probably eased its implementation or at least anticipated possible subsequent grounds for opposition to the ruling.

4.1. Human Rights Justifications as an Overlooked Practice and its Use by Swiss Authorities in the *KlimaSeniorinnen* Case

Human rights have been developed and operationalized as instruments in possession of individuals (and, sometimes, groups) against the action and possible abuses of public

[53] See the next sections of the article.
[54] See the next sections of the article.
[55] As is in the area of migration law.

powers and/or requiring the state to ensure them[56]. They have been one of the foundational pillars of constitutionalism together with the separation of powers[57] and witnessed a progressive evolution from being political claims ensured by the liberal state through the implementation of the principle of legality, to constitutional and international law guaranteed positions increasingly jurisdictionally protected in liberal-democratic settings[58].

While this dimension of human rights still represents their core meaning, it has been highlighted that contemporary practice of human rights is not limited to this. It is indeed possible to observe an increasing use of human rights by states to justify their actions – oftentimes themselves to different extents in violation of human rights – at the domestic and international level[59]. In other words, human rights have been used as governance instruments to legitimize not only international but also domestic state action in breach of international and constitutional human rights guarantees[60]. Using human rights as a justification mechanism for state action poses new challenges to their protection. It indeed requires revising their traditional reading and design political and legal answers able to circumvent what at times is a distortion of their meaning and function[61]. Thus, legal and political arguments are needed to address and rebut the reasoning behind the described practice to avoid legitimizing such actions through human rights and the contradictions it leads to.

In order to do this, and for international (and constitutional) human rights law to keep their function, taking this employment of human rights seriously seems therefore necessary.

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[56] C. SÄGESSER, *Les droits de l'homme*, in *Dossiers du CRISP*, 2009, n. 73(2), pp. 9-96; S. GARDBAUM, *The Structure and the Scope of Constitutional Rights*, in T. GINSBURG, R. DIXON (eds.), *Comparative Constitutional Law*, Cheltenham-Northampton, 2011, pp. 387-406; D. GRIMM, *Constitutionalism: Past Present and Future*, Oxford, 2016.

[57] French Declaration of the Rights of the Man and the Citizens, 1789, art. 16: «Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution».

[58] M. FIORAVANTI, *Il principio di eguaglianza nella storia del costituzionalismo moderno*, in *Contemporanea*, 1999, n. 2(4), pp. 609-630; D. GRIMM, *Constitutionalism: Past Present and Future*, cit.

[59] R. FORST, *Justification and Critique: Towards a Critical Theory of Politics*, Cambridge, 2011; J. DONNELLY, *Universal Human Rights in Theory and Practice*, Ithaca and London, 2013; E. HERLIN-KARNELL M. KLATT, Z. MORALES (eds.), *Constitutionalism Justified: Rainer Forst in Discourse*, Oxford, 2020; F. CRISTANI, E. FORNALÉ, *Human Rights and Justifications in Climate Litigation: A First Attempt at Conceptualization*, in E. FORNALÉ (ed.), *Sea Level Rise and Human Rights Implications*, Cham, forthcoming 2025; a EU Horizon project, in the framework of which this article is written, specifically focuses on these issues and will provide detailed findings on this practice at the national and international level: on this, see https://hrjust.wordpress.com and https://hrjust-intersect-observatory.eu.

[60] Not always this "discursive use" of human rights to justify state action is considered illegitimate: humanitarian interventions are based on such an employment of human rights as justifications to support third states' intervention in domestic situations where gross violations of rights are taking place; however, while this use of human rights as governance tools for humanitarian intervention may be more (morally and/or legally) justifiable, it nonetheless may engender abuses, when humanitarian motives are mixed with strategic ones: on this, among others, see C.R. BEITZ, *The Idea of Human Rights*, Oxford, 2009; A. ETINSON (ed.) *Human Rights: Moral or Political?*, Oxford, 2018.

[61] F. CRISTANI and E. FORNALÉ, *Human Rights and Justifications in Climate Litigation: A First Attempt at Conceptualization*, cit.

While this particular use of human rights may be more evident in situations of gross violations of human rights or conflicts[62], the human rights justifications lens appears of use also in this case. This perspective allows focusing on overlooked issues of the dispute that may have significant consequences on the implementation of the judgment and the European human rights system's legitimacy.

By applying this lens, it is possible to ascertain that Switzerland has employed, to some extent, (participatory) human rights to justify its conduct that was finally judged in violation of the ECHR. This strategy has some similarities with today's relatively diffused contestation of the ECtHR's activity based on the use of democracy "as a normative standpoint to criticize the court's adjudication"[63] and sovereignty and separation of powers arguments[64]. Nevertheless, the Swiss position in this case has its own peculiarity, as much emphasis has been put on the role of its very wide participatory rights – exercised through direct democratic processes – in legitimizing its (in)action in the area of climate change. Such a stance reminds of the "exceptionalism" narrative that still to a certain extent characterizes the Swiss political and institutional arenas[65].

The use of what it is here referred to as human rights justifications has been done by Swiss authorities both at the domestic and international levels and in different phases of the dispute. Respectively, the Swiss administration, courts, and government have indeed referred to the existence of far-reaching democratic participation rights that are guaranteed to Swiss nationals; based on this, they have argued that participation in decision-making processes rather than litigation should be the most appropriate way to influence policymaking in this area.

To begin with, the DETEC's executive order dismissing the association's request stated, at par. 1.2., that the applicants' requests are "aimed at the enactment of general abstract regulations and notifications. […] Citizens entitled to vote can influence legislation, in particular by exercising their political rights in accordance with the Federal Act of December 17, 1976 on Political Rights. The participation of citizens in political decision-making processes is also made possible by the consultation procedure provided for by law, which explicitly aims to involve the cantons, political parties and interested parties in opinion-forming and decision-making at federal level (Art. 2 of the Federal Act on the Consultation Procedure)"[66].

Subsequently, the FSC, which was appealed after the rejection of the association's requests by the FAC, more explicitly added that the appellants' claims "have the

[62] For instance, the very invasion of Ukraine by Russia was justified by the President of the Russian Federation's declared goal to "protect people who have been subjected to abuse and genocide" by the Ukrainian government.
[63] A. ZYSSET, *Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society'*, in *Global Constitutionalism*, 2016, n. 5(1), pp. 16-47.
[64] R. SPANO, *The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law*, in *Human Rights Law Review*, 2018, n. 18(3), pp. 473-494.
[65] See next sections.
[66] Unofficial translation of the ruling offered by the website of the KlimaSeniorinnen association, available at: https://www.klimaseniorinnen.ch.

character of preparatory work for legal provisions at the level of laws or ordinances. According to Swiss constitutional law, proposals for shaping current policy areas can in principle be submitted by way of democratic participation. To this end, political rights, which also include the election of the Parliament, are available in terms of Art. 34 and 136 Const. These include in particular the right to take a popular initiative for a total or partial revision of the Federal Constitution (Art. 138 et seq. Const.). In addition, the right of petition in terms of Art. 33 Const. provides the opportunity to approach the authorities and be noticed by them with practically no formality and without disadvantage"[67]. At par. 5.5., the FSC confirms its stance by affirming that: "Such matters are to be advanced not by legal action, but by political means, for which purpose the Swiss system with its democratic instruments opens up sufficient opportunities".

Moving the focus to the dispute before the ECtHR, the Swiss government's position in the case resonates with the domestic decisions. Furthermore, it connects its (participatory) human rights justification to a formal reading of constitutional principles, such as the separation of powers, by stating that a jurisdictional ruling on a matter that is supposed to be regulated through democratic processes in Switzerland would imply a circumvention of the internal democratic decision-making processes. The wide participatory rights ensured domestically would thus justify a wide margin of appreciation to the Swiss authorities and, consequently, allow for a restrictive interpretation of the principle of subsidiarity. i.e. a limitation of the ECtHR power to intervene in this area. In the government's words, "The Swiss political system, with its democratic mechanisms, offers sufficient options for accommodating such demands. A "legalisation" of these processes, in which decisions of an international court would prescribe higher targets or stronger measures for the government, parliament or even the Swiss people in the context of a referendum, […], could only create tensions from the perspective of the separation of powers and the principle of subsidiarity. It would also run the risk of circumventing the democratic debate and complicating the search for politically acceptable solutions"[68]. Such a position was also reiterated during the public hearing before the ECtHR[69].

[67] Unofficial translation of the ruling offered by the website of the KlimaSeniorinnen association.
[68] Unofficial translation of the ruling offered by the website of the KlimaSeniorinnen association: section I, par. 4.
[69] The transcript is available at the following link: https://ainees-climat.ch/wp-content/uploads/2023/05/Transcript-Hearing-29-March-2023-final.pdf ; in particular, see p. 2. «En vérité, seule une action résolue de l'ensemble des Etats, qui implique en particulier les grands émetteurs, associée à des changements en profondeur des comportements des entreprises et de l'ensemble des citoyens permettront de trouver des solutions globales et durables. Les mesures d'atténuation ne pourront porter leurs fruits qu'avec l'adhésion de celles et ceux qui y sont soumis. Or, de tels changements ne se décrètent pas par une décision de justice. L'élaboration des politiques climatiques, énergétiques et environnementales demeurera un exercice essentiellement politique et démocratique» and p. 9 «La politique climatique de la Suisse intègre une pesée de nombreux intérêts en jeu et combine la protection des différents droits de l'Homme qui peuvent, parfois, s'opposer. La recherche du meilleur équilibre passe également par la *participation du peuple au moyen des instruments de la démocratie directe*. Mais si le peuple a rejeté, en 2021, la révision de la Loi sur le CO2, cela n'empêche pas la Suisse de développer des mesures plus consensuelles pour atteindre ses objectifs climatiques».

Lastly, the immediate official reactions to the ECtHR's ruling by the political institutions in Switzerland echo the (participatory) human rights arguments presented below. In June 2024, the two chambers of the Parliament indeed adopted an identical – quite drastic – declaration unequivocally titled "For an effective protection of fundamental rights by international courts rather than judicial activism". In this declaration, they "note with concern" that "the judgment, that results from the ECtHR's method of interpretation of the ECHR as a "living instrument", exceeds the limits of dynamic interpretation; in so doing, the Court overstepped the limits of the development of law by an international court; by interpreting the ECHR in this way, the Court exposes itself to the accusation of exercising inappropriate and inadmissible judicial activism; the Court thus accepts that its legitimacy will be called into question not only by the community of Council of Europe States, but also by national political actors in the States parties; a weakening of the Court's legitimacy could lead to a weakening of the effective protection of human rights in Europe". In addition, they invite the ECtHR to "Respect the principle of subsidiarity enshrined in the Convention; pay renewed attention to the text of the convention and the historical circumstances of its drafting; give State sovereignty and the principle of consensus in international law the importance they still have today; respect the democratic processes of the States Parties". Lastly, they invite the Federal Council to, among other things, inform the ECtHR that the Swiss regulations on climate change were accepted by the population through direct democracy[70].

The mentioned parliamentary declarations have solicited a reaction by the Federal Council, which took a position on the case in its official meeting on 28 August 2024[71]. Besides maintaining that the European court has not taken into account recent developments in the Swiss domestic regulations and that these should be seen as sufficient domestic developments as regards climate change, the government criticized the extension of the rights enshrined in the Convention and the creative jurisprudence of the ECtHR. By critically addressing the jurisdictional power of the European judges, the government's position thus indirectly referred to the issue of the separation of powers, claiming for a limitation of the role of judges in this policy area. Furthermore, it implicitly defended the Swiss model of democracy and its processes. Both elements have thus been resorted to as legitimate limits to the action of the ECtHR and the implementations of its rulings.

Notably, a mention of the role of direct democracy in Switzerland as a further element that should justify a wide margin of appreciation in favor of the states was also made by the dissenting opinion of the ECtHR ruling. Judge Eicke indeed stated that "as the principles of subsidiarity and the margin of appreciation […] make clear that, in relation to questions of social and economic policy requiring the careful weighing up of competing rights and interests […], in a functioning democracy as envisaged by the

[70] Https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=64937#votum111; check also other parliamentary intitiatives that are still ongoing.

[71] Https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-102244.html.

Convention, this Court (and the courts more generally) take a subsidiary role to the democratically legitimated legislature and executive (or, in the context of an international treaty, the authorities of the Contracting Parties)" and that "This latter point is […] of particular relevance in the present case where the most recent 2020 (Third) CO2 Act, though adopted by Parliament, was expressly rejected by a popular vote in the course of a referendum in June 2021 […]. It seems to me that great care is required in such a context not to be perceived to be relying (at least in part) on this very expression of the democratic will of the people of Switzerland as a basis for finding a violation of Article 8". The dissenting opinion put a strong emphasis on the existence of a wide margin of appreciation for the Swiss authorities, which is even more justifiable as popular votes were held on this matter. Most importantly, the judge considered the decision not only as simply interfering with internal democratic processes, but as illegitimately questioning the democratic will in its purest expression.

4.2. Focusing on Human Rights Justifications to Counter Non-Compliance with Human Rights Mechanisms

The selection of passages has shown that Switzerland has consistently – albeit not exclusively – relied on a human rights discourse to justify its actions related to climate change. In a nutshell, almost all the authorities involved in the dispute have pointed to the fact that the Swiss political system provides sufficient political channels to influence policies in this area and that "opening" to litigation would contrast with the Swiss constitutional principles and the semi-direct form of democracy.

In particular, they have, to different extents, argued for a wide margin of appreciation of the state – and consequently limited intervention of the ECtHR based on the principle of subsidiarity – in dealing with climate change issues. This position has been considered more compelling as the Swiss political system ensures numerous channels of democratic participation compared to other countries. In other words, the Swiss defense has strictly connected the principles of separation of powers[72] and the doctrine of the margin of appreciation as regards matters of general policy[73] to the wide participatory rights guaranteed domestically. The latter have indeed been considered as a reinforcing element of the Swiss position aiming to oppose the applicants' claims and, subsequently, the implementation of the decision. Interestingly, as mentioned before, this argument also recalls – and somewhat reproduces in the litigation – the so-called

[72] Adopting a critical stance against the power of (international) judges and judicialization of democracy that is also paralleled by a strand of political-legal literature; for an overview, see C. GUARNIERI, P. PEDERZOLI, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford, 2002; Y. PAPADOPOULOS, *Democracy in Crisis: Politics, Governance and Policy*, London, 2013.

[73] Developed by the court in several rulings: see for instance, European Court of Human Rights, judgement of 21 February 1986, application no. 8793/79, *James and Others v. the United Kingdom*; European Court of Human Rights, Grand Chamber, judgment of 8 July 2003, application no. 36022/97, *Hatton and Others v. the United Kingdom*; European Court of Human Rights, Second Section, judgment of 17 December 2002, application no. 35373/97, *A. v. the United Kingdom*.

Sonderfall rhetoric, still a significant element of Swiss political culture[74]. According to the *Sonderfall* narrative, Switzerland is an "exceptional case"[75] that is "more prosperous, more harmonious, more democratic, more self-reliant, more able to solve its problems and more moral than most other states"[76].

This leads to the contradiction of using (participatory) human rights to justify practices that are in possible conflict with other rights[77]. Such a use of human rights may put at risk advancements in this area especially if the Swiss opposition to the judgement will be taken as a model to counter the legitimacy of the ECtHR by other states.

This element of the Swiss defensive stance creates a tension between the domestic and international legal orders. The guarantee of domestic participatory rights is discursively employed to justify the (alleged and then assessed) violations of the rights enshrined in the ECHR, as interpreted by the ECtHR, and the non-compliance with the latter's ruling.

Notably, the Swiss stance in this case also resonates with the disputes related to the counter-limits doctrine originally elaborated by the German and the Italian constitutional courts with regard to the application of EU law[78] and, successively, the implementation of the ECtHR's rulings[79]. Such an approach has then also been reproduced by several

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[74] C.H. CHURCH, *The Politics and Government of Switzerland*, Cham, 2004; C.H. CHURCH, *Political Change in Switzerland: From Stability to Uncertainty*, London-New-York, 2016; this rhetoric has been employed in the political arena especially in relation to Swiss international and European integration; see C.H. CHURCH, *The Politics and Government of Switzerland*, cit.; C.H. CHURCH, R.H. HEAD, *A Concise History of Switzerland*, Cambridge, 2016; in addition, references to the so-called "Swiss exceptionalism" have been made in numerous political and legal studies on the Swiss political system: on this, see R. FREIBURGHAUS, A. VATTER, *Switzerland: Real Federalism at Work*, in J. KINCAID, J. LECKRONE (eds.), *Teaching Federalism: Multidimensional Approaches*, Cheltenham-Northampton, 2023, pp. 254-264.

[75] FREIBURGHAUS, A. VATTER, *Switzerland: Real Federalism at Work*, cit., pp. 254-264.

[76] C.H. CHURCH, R.H. HEAD, *A Concise History of Switzerland*, cit., p. 227.

[77] On this, see E. FORNALÉ (ed.), *Sea Level Rise and Human Rights Implications*, cit.

[78] This doctrine was conceived by German Constitutional Tribunal, judgment of 29 May 1974, n. 2 BvL 52/71, *Solange I*; Italian Constitutional Court, judgment of 18 December 1973, n. 183/1973; as for the relationships between domestic legal order and the ECHR, see German Constitutional Tribunal, judgment of 14 October 2004, n. 2 BvR 1481/04 and Italian Constitutional Court, judgement of 24 October 2004, n. 348/2007 and judgment of 24 October 2004, n. 349/2007.

[79] On the existence of a counter-limits doctrine with regard to both EU law and the ECHR, and for several examples, see G. MARTINICO, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *European Journal of International Law*, 2012, n. 23(2), pp. 401-422; N. KRISCH, *The Open Architecture of European Human Rights Law*, in *The Modern Law Review*, 2008, n. 71(2), pp. 183-216; C.C. MURPHY, *Human Rights Law and the Perils of Explicit Judicial Dialogue*, *Jean Monnet Working Paper*, 2011, n. 10/12, pp. 1-32; N. BRATZA, *The Relationship between the UK Courts and Strasbourg*, in *European Human Rights Law Review*, 2011, n. 5, pp. 505-512; E. BJORGE, *National Supreme Courts and the Development of ECHR Rights*, in *International Journal of Constitutional Law*, 2011, n. 9(11), pp. 5-31; G. MARTINICO, O. POLLICINO (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, Groningen, 2010; F.B. BIONDI DAL MONTE, F. FONTANELLI, *The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System*, in *German Law Journal*, 2008, 9(7), pp. 889-932; O. POLLICINO, *The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007*, in *European Constitutional Law Review*, n. 4(2), pp. 363-382.

other courts in Europe[80]. According to the counter-limits doctrine, some fundamental domestic principles and rights that form the national constitutional identity of the states are employed by courts as barriers to the full application of EU law or the full infiltration of the ECHR in the domestic legal systems[81]. The affirmation of the need to respect these foundational elements of the constitutional systems has thus justified the threat to withdraw from the UE treaties or the claim that the state authorities will not be bound by the ECHR as interpreted by the ECtHR in situations of unresolvable conflict between the domestic regulations, EU law and ECtHR's decisions.

It should be noted that, despite the disruptive potential of this doctrine, the latter has proved an important mechanism to encourage (or even, sometimes, force) a productive dialogue among international, supranational, and national courts and the better definition of relationships between these legal orders[82]. Such a dialogue – even if sometimes activated using the conflictual counter-limits discourse – has generally led to mutual accommodation rather than unsolvable frictions[83].

These experiences demonstrate that addressing rather than avoiding complex and potentially conflicting issues related to the international protection of human rights and the constitutional identities of the states involved likely leads to a better reciprocal understanding between courts (and other actors) and a cooperative redefinition of the relations between legal orders[84]. Conflict has indeed often contributed to fostering

[80] For instance, see French Council of State, judgement of 30 October 1998, *Sarran*; French Court of Cassation, judgment 2 June 2000, *Fraisse*; French Council of State, judgment 3 December 2001, *SNIP*; see also French Constitutional council, judgement of 10 June 2004, n. 2004-496 DC; French Constitutional council, judgement of 1 July 2004, n. 2004-497 DC; French Constitutional council, judgement of 29 July 2004, n. 2004-498 DC; French Constitutional council, judgement of 29 July 2004, n. 2004-499 DC; French Constitutional council, judgement of 19 November 2004, n. 2004-505 DC; Tribunal Constitucional, declaracìon 1/2004; McWhirter and Gouriet v. Secretary of State for Foreign Affairs [2003] EWCA Civ 384; Polish constitutional tribunal, judgment of 27 April 2005, n. P 1/05; Cypriot Supreme court, judgment of 7 November 2005, n. 294/2005; Czech Constitutional court, judgment of 3 May 2006, n. Pl. ÚS 66/04.

[81] M.P. MADURO, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in J.L. DUNOFF, J. P. TRACHTMAN (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge, 2009, pp. 356-380.

[82] G. MARTINICO, *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, in *International Journal of Constitutional Law*, 2012, n. 10(3), pp. 871-896; at p. 891, the author observed that the use of the counter-limits argument "can function as a gun on the table in order to put pressure on the ECJ"; on the importance of judicial dialogue for EU integration and the ECHR's system, see, for instance, A. DYEVRE, M. GLAVINA, A. ATANASOVA, *Who refers most? Institutional incentives and judicial participation in the preliminary ruling system*, in *Journal of European Public Policy*, n. 27(6), pp. 912-930; A. MÜLLER, H. E. KJOS (eds.), *Judicial Dialogue and Human Rights*, Cambridge, 2017, esp. Part II; N. KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, 2011.

[83] N. KRISCH, *The Open Architecture of European Human Rights Law*, cit., pp. 183-216.

[84] This is in line with a more relational approach to the role of the judiciary in democracy, which accepts the intervention of judges as a reality in democratic systems and is more interested in the effects of the judicial power on the political process rather than on the role of judges in itself: on this, see A. STONE SWEET, *Judicialization and the Construction of Governance*, in *Comparative Political Studies*, 1999, n. 32(2), pp. 147-184; A. STONE SWEET, *Constitutional Courts and Parliamentary Democracy*, in *West European Politics*, 2002, n. 25(1), pp. 77-100; A. STONE SWEET, *Governing with Judges. Constitutional Politics in Europe*, Oxford, 2002; M. SHAPIRO, A. STONE SWEET, *On Law, Politics and Judicialization*,

cooperation in the international arena, within and beyond the area of human rights[85]. Conflict and cooperation have been described as both being physiological and intertwined parts of international law's functioning[86]. In other terms, international law – as is clear in the area of human rights – enables conflict (over the interpretation of rights) but at the same time limits it as it creates a set of common rules that international actors are bound to follow to avoid the use of force. If these rules are followed, then often conflict reveals even necessary to reach cooperation[87].

If the above holds true, focusing on the Swiss defensive arguments based on participatory human rights could have thus enriched the existing dialogue and cooperation between the ECtHR and the Swiss courts (and other authorities)[88] and possibly contributed to easing the tensions among the two legal orders.

Although the ECtHR does not need to adapt its decisions to the contexts where they are applied – as it aims to ensure equal standard protection of the rights protected by the ECHR – and a wide margin of appreciation is left to states to implement its rulings, dedicating some more detailed considerations on the alleged link between direct democracy instruments, the related wide participatory rights, and the scope of the margin of appreciation could have been beneficial.

The court's rationale may be considered sufficiently developed to explain and justify its role and the legitimacy of its intervention in the area of climate change. Anyhow, it is here argued that for "strategical" reasons it could have lingered more on the issue of direct democracy processes and their relationships with the ECHR human rights system. A focus on the democratic argument adopted by the Swiss authorities and an effort to refute it could have had positive effects especially as regards the phase of implementation of the decision. Indeed, overlooking the remarks related to democracy and participation rights in the Swiss system has contributed to determining a strong backlash by the Swiss authorities, and the risk of instrumentalization of the judgment is high today. As already mentioned, such a political pressure can affect the FSC in possible future cases concerning these issues. Moreover, the political institutions have already showed that they do not intend to act in the sense prescribed by the decision, regardless of their obligations under art. 46 of the ECHR and the decision of the

Oxford, 2002; H. RAYNER, B. VOUTAT, *Judicialisation and Direct Democracy in Switzerland: Switzerland's Ban on Minarets Construction*, in *Revue Française de Science Politique*, 2014, n. 64(4), pp. 59-80.

[85] On the symbiotic dimension of conflict and cooperation in international law, see M. HAKIMI, *The Work of International Law*, in *Harvard International Law Journal*, 2017, n. 58(1), pp. 1-46; on this, within a comprehensive theory of conflict and the role of law, also with regard to the issue of rights protection, see S. BESSON, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford-Portland, 2005.

[86] M. HAKIMI, *The Work of International Law*, cit., pp. 26-45.

[87] M. HAKIMI, *The Work of International Law*, cit., esp. at 31.

[88] M. HERTIG RANDALL, *Le dialogue entre le juge suisse et le juge européen*, in F. BELLANGER, J. DE WERRA, (eds.), *Genève au confluent du droit interne et du droit international: Mélanges offerts par la Faculté de droit de l'Université de Genève à la Société suisse des juristes à l'occasion du congrès 2012*, Cham, pp. 19-59.

Committee of Ministers to follow the implementation under the enhanced procedure[89]. This seems confirmed by the Action Report recently sent to the Committee of the Ministers, which reproduces the mentioned official statements of the Swiss political institutions and basically describes the measures that had already been taken (or had already been planned) by Switzerland in the period after the adoption of the ruling and were not considered by the court[90]. Notably, the Action Report states that the measures already planned and put forward by Switzerland are considered sufficient to comply with the ruling[91].

A more thorough evaluation of this aspect of the Swiss defense might have, first, contributed to easing the successive phases in offering a reading of the issues at stake that would have perhaps looked more acceptable to the Swiss authorities. Secondly (and more realistically) it may have at least anticipated an argument through which the Swiss institutions would have justified the non-implementation of the decision. And, consequently, it would have obliged them to a more complex reaction to the decision that could have not resorted to a broad democracy-related discourse and rhetorical reference to (participatory) human rights to justify state's omissions.

Lastly, this sort of reasoning – which implies the recognition of a country's internal particularities and their examination – is not unknown to the court. It has indeed been demonstrated that the court has adopted different decisions and even developed different "local" interpretations of the Convention on similar issues based on the domestic legal and factual context under scrutiny[92]. Furthermore, the court has also developed a substantial jurisprudence evaluating the quality of domestic democratic procedures to define the scope of the principle of subsidiarity and the margin of appreciation[93].

[89] Https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680b04a00%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}.

[90] The Action Report is available at the following link: https://ainees-climat.ch/wp-content/uploads/2024/10/Bilan-d-Action-Suisse.pdf.

[91] Such a position reproduces the Swiss stance during the controversy; as regards the violation of art. 8 of the Convention, the Action Report do not address thoroughly the guidelines provided by the court; and, as for the violation of art. 6 ECHR, the document states that the government has mandated the federal department of justice to write a report on the impact of the ruling on the *locus standi* of associations.

[92] M. ESMARK, H. PALMER OLSEN, M. SMED LARSEN, W. HAMILTON BYRNE, *Adjudicating National contexts – Domestic Particularity in the Practices of the European Court of Human Rights?*, in *German Law Journal*, 2022, n. 23, pp. 465-492; the authors of the publication have shown that on several occasions the court has dealt with cases where the domestic legal and factual circumstances cannot convincingly be subsumed under any overarching strategy or principle, which, in turn, leads the Court to develop a more "local" approach to its legal argumentation. This approach respects that the pragmatic effects of the ECHR only deploy at the national levels, and is therefore more closely aligned, and ultimately aimed at the local conditions that exist within the specific member state in question. This finding not only coheres with the ECtHR doctrine of subsidiarity, but also with the overall framework of the ECHR legal order (p. 471).

[93] On this, see A. DONALD, P. LEACH, *Parliaments and the European Court of Human Rights*, Oxford, 2016; R. SPANO, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, in *Human Rights Law Review*, 2014, n. 14(3), pp. 487-502; R. SPANO, *The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law*, cit.; J. GERARDS, E. BREMS (eds.), *Procedural Review in European Fundamental Rights Cases*, Cambridge, 2017.

5. What the Court Has and Could Have Strategically Said About Human Rights Justifications for Climate Change Inaction

It must be noticed that the ECtHR did partially address the Swiss defense's arguments referring to its political system.

It did so, firstly, by emphasizing that "(j)udicial intervention […] cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government"[94] and that weighing up the various conflicts involved in responding to climate change falls primarily within the democratic decision-making processes. At the same time, it affirmed that these processes are integrated by judicial oversight by domestic courts and the ECtHR and that "democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes"[95]. All the more so as political decision-making processes carry the risk that "short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making"[96]. The European court thus proposed a reading of the concept of democracy that rightly – and consistently with its jurisprudence[97] – attributes to judicial oversight a central role as part of the checks and balances that characterize every democratic system that rests on the principle of the rule of law[98]. While the court is expected to grant deference to the contracting states in matters of general policies in accordance to the principle of subsidiarity, the decision made clear that the margin of appreciation is anyhow not unlimited, especially when the states fail to provide a minimum standard of protection of rights[99].

However, as seen, the Swiss position in the dispute has (also) relied on (participatory) human rights to strengthen its stance and argue for a wide margin of appreciation as regards climate change policies. Apart from a limited mention of the fact that its assessment must be conducted "irrespective of the way in which the legislative

[94] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 412.
[95] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 412.
[96] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 420.
[97] G. LAUTENBACH, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013.
[98] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 412; on the concept of rule of law and the role of the ECtHR and courts in general, see C. MÖLLERS, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford, 2013; J.R. PRESTON, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 2016, n. 28(1), pp. 11-17; E. CAROLAN, *Balance of Powers*, in A.F. LANG, A. WIENER (eds.), *Handbook on Global Constitutionalism*, Cheltenham-Northampton, 2023, pp. 308-317; D. GRIMM, *Rule of Law and Democracy*, in G. AMATO, B. BARBISAN, C. PINELLI (eds.), *Rule of Law vs Majoritarian Democracy*, Oxford, 2021, pp. 43-62.
[99] F. FABBRINI, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, cit., pp. 7-13; M. IGLESIAS VILA, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, cit., p. 403; G. CATTILAZ, *The KlimaSeniorinnen Case, the ECtHR and the Question of Access to Court in Climate Change Cases*, cit., pp. 84-97.

process is organized from the domestic constitutional point of view"[100], such specific point has not directly been addressed by the court. In turn, and consequently, after the judgement, the Swiss authorities have insisted on this, directly opposing the legitimacy of the ECtHR as compared to the (direct) democratic processes that have led to the existing Swiss regulatory framework[101].

Therefore, the court may have missed the opportunity of clarifying this issue and, in turn, downplaying the employment of (participatory) human rights as a defensive tool.

In this regard, the ECtHR could have referred to the fact that, under art. 25 of the Vienna Convention, every treaty must be performed in good faith by states. In addition, it could have mentioned, as was done in other cases[102], that art. 27 of the Vienna Convention prohibits states to invoke internal law as justification for its failure to perform a treaty[103]. In other terms, the domestic legal framework concerning the decision-making processes and, in particular, the guarantee of wide participatory human rights, cannot be employed to justify a violation of the obligations deriving from the ECHR.

Furthermore, it has been pointed out that the connection between the existence of wide participatory rights, broad margin of appreciation, and respect of the international obligations concerning climate change is flawed[104]. This is, first, because the (optional and mandatory) referenda do not ensure *a priori* the achievement of the degree of protection of rights to which Switzerland has committed by ratifying the ECHR (and other relevant treaties). Secondly, the existence of the right to propose a popular initiative cannot guarantee this result either. Besides, even if a directly voted constitutional amendment was adopted that enshrines principles in line with the obligations stemming from the ECHR concerning climate change, this would need implementation by way of legislation. In turn, legislation (again, adopted also through processes that involve direct votes) may as well be enacted in contrast to constitutional provisions, due to the "immunity clause" under art. 190 of the Swiss constitution[105]. Put differently, none of the direct democratic tools provided for by the Swiss constitution

[100] European Court of Human Rights, Grand Chamber, *Verein KlimaSeniorinnen*, cit., par. 561.

[101] https://www.reuters.com/world/europe/swiss-environment-minister-plays-down-impact-european-climate-ruling-2024-04-20/;

[102] For instance, see European Court of Human Rights, Grand Chamber, judgement of 13 February 2020, applications no. 8675/15 and 8697/15, *N.D. and N.T. v. Spain* 2020, parr. 109-110.

[103] On this, see EVELYNE SCHMID and VÉRONIQUE BOILLET's third party intervention in the *KlimaSeniorinnen* case, available at https://ainees-climat.ch/wp-content/uploads/2023/01/53600_20_GC_OBS_P3_Universite_de_Lausanne__Mmes_Schmidt_et_Boillet__25_11_22.pdf, p. 9.

[104] V. BOILLET, *Direct Democracy or Climate Litigation? On the Swiss Right of Initiative as a Tool Against Climate Change*, in *Verfassungsblog*, 2022, available at https://verfassungsblog.de/direct-democracy-or-climate-litigation/.

[105] Art. 190, Const. obliges courts to apply federal acts and international law: this article limits the scope of judicial review thus immunizing federal acts and international law; in other words, the courts are obliged to apply federal acts (and international law, although the debate in this area is still ongoing) that violate the Constitution; on this, see M. BELSER, R. OLESCHAK-PILLAI, *Engagement of Swiss Courts with International Law*, cit., p. 276; D. MOECKLI, *Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights*, in *Human Rights Law Review*, 2011, n. 11(4), pp. 774-794.

assure that Switzerland respects the international obligations to which it has committed[106]. As indicated by Mr. Willers at the ECtHR's public hearing in the *KlimaSeniorinnen* case, "Contracting States are not subject to different Convention obligations depending on the technical operation of their democratic system"[107].

Lastly, it has also been maintained that the practice of reviewing state actions (and legislation) regardless of the type of democratic processes that have led to their adoption is not unknown to Switzerland. It is indeed ordinary practice of the FSC when it reviews cantonal legislation and its compatibility with the constitution[108].

Such considerations demonstrate that the employment of human (participatory) rights to justify the Swiss can be refuted from a legal perspective, with this reinforcing the legitimacy of the ECtHR and complementing the mentioned arguments offered by the European court. Together, they strengthen the ECtHR's reading of the concept rule of law and dismiss superficial calls for democracy and popular sovereignty that cannot find place in a mature debate on constitutionalism and democracy.

6. Conclusion: Human Rights Justifications and the Impact of the Judgement

The present article has proposed to analyze the *KlimaSeniorinnen* decision from the less trodden perspective of human rights justifications. This has shed the light on the fact that the Swiss authorities have significantly relied (also) upon a particular type of human rights discourse – related to its wide participatory rights and direct democratic processes – to justify the country's climate (in)action. What this work has attempted to show is that such a justification implies a contradictory use of human rights as governance tools to justify the non-compliance with international human rights obligations. Based on this, the article has suggested that the ECtHR could have exploited the conflictual situation to addres this defensive stance more in depth and favor better understanding and cooperation. By limitedly addressing the mentioned argument, the court may have instead reinforced the risk of escalation of the conflict among the two legal orders.

The importance of the *KlimaSeniorinnen* case on climate litigation in the European continent and beyond is without question. As other cases have been filed before the

[106] EVELYNE SCHMID and VÉRONIQUE BOILLET's third party intervention in the *KlimaSeniorinnen* case, pp. 9-10; this is shown also by the ruling BGE 139 I 16, on the exclusion of direct applicability of constitutional amendments following an initiative on the expulsion of migrants from Switzerland.
[107] Mr. Willers was one of the attorneys representing the applicants.
[108] INTERNATIONAL COMMISSION OF JURISTS (ICJ)-SWISS SECTION, *Prise de position du Conseil fédéral à l'égard du Comité des Ministres du Conseil de l'Europe concernant l'arrêt de la Cour européenne des droits de l'homme dans l'affaire* Verein KlimaSeniorinnen Schweiz *et autres contre Suisse (requête no 53600/20)*, 2024, available at the following link: https://icj-ch.org/fr/downloads/stellungnahmen/eingabe-zur-stellungnahme-br-urteil-egmr-klimaseniorinnen.pdf.

ECtHR[109], and many other domestic and international courts are going to be called on to intervene in this area[110], this decision will unequivocally play a paradigmatic role.

The impact of this case is not limited to these – generally commended – issues. A risk is concealed behind the innovativeness of the judgement, which lies in the institutional backlash experienced in Switzerland, based (also) on (participatory) human rights justifications for non-implementation. Just as the case can contribute to strengthening human rights protection in such a delicate area (harm caused by climate change) and greatly condition future developments in the same direction, a similar impact may be made by threatening the legitimacy of the court in the different phases of the case. The enforcement of an ECtHR's decisions is a complex process that requires a high degree of cooperation, especially concerning cases in which the court requires general measures to be put in place[111]. Forcing an oppositional stance may contribute to encouraging the increasingly numerous skeptical political positions on the role of the ECtHR[112] and non-compliance with its judgements[113], which is already an issue of concern especially if one considers the implementation of leading cases[114]. This, in turn,

[109] See *Greenpeace Nordic and Others v. Norway*, application no. 34068/21; *Uricchio v. Italy and 32 other States*, application no. 14615/21; *De Conto v. Italy and 32 other States*, application no. 14620/21; *Mullner v. Austria*, application no. 18859/21; *Soubeste and four other applications v. Austria and 11 Other States* applications no. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22; *Engels v. Germany*, application no. 46906/22.

[110] Notably, the International Court of Justice (ICJ) will give an advisory opinion relating to international law obligations of states aimed at ensuring protection from climate change for present as well as future generations, as requested by UN General Assembly: the opinion is expected to be delivered in 2025; the Inter-American Court of Human Rights (IACtHR), will soon issue an advisory opinion on climate change and state human rights obligations.

[111] H. KELLER, V. GURASH, "*Upping the Ante": Rethinking the Execution of Judgments of the European Court of Human Rights*, in *European Human Rights Law Review*, 2023, n. 23(2), pp. 149-155.

[112] M.R. MADSEN, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, in *Journal of International Dispute Settlement*, 2018, n. 9(2), pp. 199-222.

[113] E. YILDRIM, M.F. SERT, B. KARTAL, Ş. ÇALIŞ, *Non-Compliance of the European Court of Human Rights Decisions: A Machine Learning Analysis*, in *International Review of Law and Economics*, 2023, n. 76, pp. 1-20; M.R. MADSEN, P. CEBULAK, M. WIEBUSCH, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, in *International Journal of Law in Context*, 2018, n. 14(2), pp. 197-220.

[114] It has been pointed out that, while the level of compliance of the ECtHR's is relatively high; on this, see F. DE LONDRAS, K. DZEHTSIAROU, *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in The European Court of Human Rights*, in *International and Comparative Law Quarterly*, 2017, n. 66(2), pp. 467-490; the court does anyhow go through a problem of non-compliance, also because states often choose a minimalist pattern of implementation of the rulings: see R. GROTE, M.M. ANTONIAZZI, D. PARIS, *Conclusion: Moving Beyond Compliance Without Neglecting Compliance in International Human Rights Law*, in R. GROTE, M.M. ANTONIAZZI, D. PARIS (eds.), *Research Handbook on Compliance in International Human Rights Law*, Cheltenham-Northampton, 2021, pp. 510-522; in addition, when it comes to leading cases, i.e. cases dealing with systemic or structural human rights issues, non-compliance has consistently increased: pending leading cases arose from 120 in 2011 to 1300 in 2021, and 44% of them remain pending for longer than five years; see E. YILDRIM, M.F. SERT, B. KARTAL, Ş. ÇALIŞ, *Non-Compliance of the European Court of Human Rights Decisions: A Machine Learning Analysis*, cit., pp. 1-20; G. STAFFORD, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1: Grade Inflation*, in *EJIL:Talk! Blog of the European Journal of International Law*, 2019, available at https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-1-

risks weakening the legitimacy, credibility and authority of one of the most developed systems of human rights protection of the world[115].

In other words, much of the positive impact of the decision depends on the implementation thereof. This is the reason why perhaps more attention to (participatory) human rights justifications as an emerging practice to avoid international human rights obligations would have been beneficial in this case and is surely needed in future cases concerning climate change and beyond.

ABSTRACT: The recent decision of the ECtHR on the case *Verein KlimaSeniorinnen* remarkably innovated its jurisprudence on environmental cases. After a description of the case and its elements of continuity and novelty, we will focus on a neglected aspect of this dispute and the final decision, namely that an important element of the Swiss government's defense has been the justification of its (in)action through (participatory) human rights. Switzerland has indeed claimed that its system of semi-direct democracy – that ensures wide participatory rights – allows individuals and societal groups to participate and be heard in the context of climate change policies, thus giving them sufficient channels of involvement in this area. The article suggests that more attention should have been paid to this aspect of the Swiss stance of the dispute. This would have perhaps eased the tensions that arose after the ruling and facilitated its implementation.

KEYWORDS: KlimaSeniorinnen – Switzerland – European Court of Human Rights – Human Rights Justifications – Climate Change.

grade-inflation/; G. STAFFORD, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof*, in *EJIL: Talk! Blog of the European Journal of International Law*, 2019, available at https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/.

[115] It must also be recalled that domestic rulings can be considered as evidence of State practice that is relevant for the interpretation of the Convention; see Y. SHANY, *Assessing the Effectiveness of International Courts*, Oxford, 2014.