On the Swiss Right of Initiative as a Tool Against Climate Change

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Direct Democracy or Climate Litigation?

The Klimaseniorinnen case has gained worldwide attention since the announcement of the relinquishment in favour of the Grand Chamber. The case is one of many strategic proceedings initiated around the world to sanction inaction or insufficient action by states on climate issues and referenced by the Sabine Center for Climate Change Law at Columbia Law School. It raises particularly sensitive issues from procedural and substantive points of view, which we do not intend to address in this analysis. Rather, our aim is to examine one of the arguments the Swiss authorities put forward to oppose the judicial treatment of this case.

The Swiss government argues that the Swiss political system, with its democratic instruments, offers sufficient possibilities for the consideration of such claims. Judicialisation of these processes could only create tension regarding the separation of powers and the principle of subsidiarity. It would also risk short-circuiting the democratic debate and making it more difficult to find politically acceptable solutions. The Swiss Supreme Court was therefore right, in the view of the Swiss government, to find that the applicants' concerns should not be addressed by judicial means but by political means. This blog post argues that democratic rights, especially the right of initiative, constitute interesting instruments to address climate change. However, they must be thought together with other forms of action. In particular, the right to initiative alone is not sufficiently effective and therefore not an alternative to legal proceedings.

Effectiveness of popular rights in climate cases

The Swiss government invites the Klimaseniorinnen to abandon judicial procedures, which are deemed unsuitable for the political process of defining a political programme, and to prefer tools such as the initiative.

This invitation raises the question of how effective a popular initiative is as a means of compelling Parliament to act, or, more precisely, to adopt ambitious climate change legislation.

In Switzerland, the popular initiative at the federal level allows 100,000 citizens with the right to vote to propose a partial revision of the Federal Constitution (Art. 139 Federal Constitution). This tool could therefore seem perfectly suitable for initiating an ambitious climate policy. In practice, however, the popular initiative's effectiveness is limited by not only the rate of acceptance by the people and the cantons but also the difficulties of implementation.

Outcome and Implementation of the initiatives

First of all, we should remember that a majority of the people and the cantons rarely accepts popular initiatives. Only 13 initiatives have been adopted since the revision of the Federal Constitution in 1999.

From this perspective, some observers argue that direct democracy may reduce the 'monopoly of political professionals' but does not increase civil society's political strength.[2] On the contrary, the use of this tool requires significant resources,[3] political support and the respect of codified procedures[4] to try to overcome – often unsuccessfully – the business community's lobbying, with its disproportionate political connections and funding, which are not subject to any control in Switzerland.[5]

Once adopted, the initiatives do not have the desired results: whether or not the newly adopted constitutional provision is directly applicable, its implementation presents difficulties in the Swiss constitutional order.

Option 1: Directly applicable constitutional provision

The first option is for the initiative committee to formulate a directly applicable constitutional provision modelled on the minaret ban initiative (e.g. a non-regression principle for greenhouse gas emissions).

Such a provision's effects are likely to be limited due to a provision specific to the Swiss legal system, Art. 190 of the Federal Constitution, according to which the authorities are obliged to apply federal laws, even if they contradict the Constitution. In other words, if the legislature decides to adopt legislation whose impact in terms of emissions contradicts a constitutional provision, the Swiss Supreme Court cannot sanction the law's unconstitutionality because of its immunity.

In the end, although the adoption of a new constitutional provision enshrining, for example, a principle of non-regression should of course be welcomed, it would not, on its own, bring about any major progress in terms of the concrete fight against climate change but would depend on Parliament's will to respect it.

Option 2: Mandating the Legislature

The second option would be for the popular initiative to mandate the legislature to implement ambitious climate targets by imposing precise material guidelines and a deadline. Such an initiative would have the merit of giving a constitutional basis to precise

objectives binding on the legislature.

On this basis, it would then be up to Parliament to legislate in accordance with the new constitutional provision. This is the aim of the "Healthy Climate initiative (Glacier Initiative)" currently pending before Parliament.

Although this approach seems promising at first glance, it may in fact run the risk of encountering certain pitfalls, as the implementation of comparable initiatives has shown. The entry into force of such a constitutional article implies that the legislature must then give it concrete form by adopting or revising legislative provisions (Art. 164 Federal Constitution). In comparison, the various popular initiatives accepted in recent years have led to the adoption and/or revision of several federal laws. This process is anything but automatic. Several problems are likely to arise, the two main ones being lack of implementation and implementation that does not comply with the substantive guidelines the constituent set.

In the first instance, the legislature has failed to adopt implementing legislation or even had the legislation it adopts rejected in a referendum (Art. 141, para. 1, Federal Constitution). This was the case, for example, with the popular initiative for the protection of the Alpine regions against transit traffic (the so-called Alps initiative), which led to the adoption of Art. 84 of the Federal Constitution. It is acknowledged that the objectives have not yet been achieved.

Along with the problem of non-implementation comes the risk that Parliament adopts legislation whose content does not comply with the substantive guidelines the initiative establishes. In such a case, no procedure is available to sanction the possible unconstitutionality of the legislature's choices due to the particularity of the Swiss constitutional system mentioned above: the immunity clause enshrined in Art. 190 of the Federal Constitution, according to which the Federal Court cannot refuse, in the context of a concrete appeal, to apply a federal law because of its unconstitutionality.[8)] In addition, acts of Parliament cannot be brought before the Federal Supreme Court (Art. 189 para. 4 Federal Constitution and 82 Federal Court Act *a contrario*). In other words, the Swiss Supreme Court cannot review the constitutionality of parliamentary work. Based on this observation, if Parliament does not have the political will to legislate in accordance with the substantive directives arising from the initiative, no legal tool is available to compel it.[9)] Furthermore, research on successful initiatives has shown that once the people and the cantons have accepted an initiative, the government and Parliament attempt to use legislation to tone down the new constitutional provision.[10)] This was the case – rightly or wrongly – with the popular initiatives 'for the deportation of criminal foreigners', 'to ban construction of second residences' and 'against mass immigration', whose implementing legislation deviated in some respects from the material guidelines contained in the constitutional provisions they were intended to implement.[11)] In such a situation, the only means available to supporters of compliance with the new constitutional provision would be to call for a referendum and campaign for the rejection of the new federal law on the grounds that it does not comply with the constitutional provision (Art. 141, para. 1, let. a Cst.)[12)] However, it is immediately clear that such a

procedure would not advance the climate cause because it would destroy all the legislative implementation work and would mean starting the legislative process all over again, which would logically contradict the objective of combating climate change.

Conclusion

In the end, we have seen that although the instruments of direct democracy, particularly the right of initiative, are suitable tools for stimulating public debate and initiating the legislative process, they cannot force Parliament and/or the government to adopt an ambitious climate policy if they do not want to.

Compared to France, where the Association *Notre Affaire à Tous*, to defend 'an argument on the lack of ambition of the law to deal with the climate emergency',[14] had to start by 'finding a legal basis for compelling the state to act',[15] such a basis can very easily be created in Switzerland by means of a popular initiative. The challenge lies elsewhere, however, in the implementation of this foundation. The case of Klimaseniorinnen has shown us that Switzerland lacks the judicial means to guarantee the implementation of such foundations. Articles 189, para. 4, and 190 of the Federal Constitution do not allow parliamentary work to be challenged regarding constitutional standards. The exclusion of abstract control of federal norms and the immunity clause prevent the judge from confronting Parliament with its constitutional obligations. In the end, it is up to the European Court of Human Rights to decide on the question of the Federal Parliament's inaction, not regarding the requirements of the Federal Constitution – which may be enshrined in a federal initiative – but regarding the provisions of the European Convention on Human Rights.

Based on this observation, the following points can be made: The initiative is an important tool in the Swiss legal system. It can certainly provide legislative impetus, but it cannot force Parliament to adopt ambitious climate legislation. Based on this observation, we are of the opinion, contrary to the Swiss government, that the urgency is such that all means of pressure must be used. As part of this strategy, legal proceedings to challenge the state's failures regarding its obligations to protect human rights in the climate field play an important role. In the end, however, it is this accumulation of actions that will – perhaps – put sufficient pressure on Parliament to adopt a more ambitious law.

References

↑**1** The court of first instance (Federal Administrative Court, decision A-2992/2017, of 27 November 2017) and the Swiss Supreme Court (ATF 146 I 145) rejected the Klimaseniorinnen's application due to lack of standing to appeal, and the victim's standing within the meaning of Art. 34 ECHR is particularly controversial (Evelyne Schmid and Véronique Boillet, Third party intervention within the meaning of Rule 44(3) of the Rules of Court). See also Evelyne Schmid, Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case.

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↑3	Seferovic Goran, Volksinitiative zwischen Recht und Politik, Habilitation Thesis, Bern 2018, p. 114.
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↑5	Bourg Dominique, Des fondement et fonction de la désobéissance civile, in Bourg/Demay/Favre (dir.), Désobéir pour la Terre : Défense de l'état de nécessité, Paris 2021, p. 22.
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↑14, ↑15	Cournil Christel, Notre Affaire à Tous et « l'arme du droit ». Le combat d'une ONG pour la justice climatique, Boillet/Favre/Largey/Mahaim, Environnement, climat : quelle justiciabilité ?, Helbing, to be published.

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