

Austrian climate case: Constitutional Court Rejection

The Austrian climate case (“Klimaklage”) brought forward by Greenpeace with the support of thousands of individuals, was rejected by the Constitutional Court in October 2020. As a direct charge against legal inactivity of the legislator in the face of the climate crisis is not legally possible in Austria, a "diversion" was chosen by challenging concrete, climate-damaging provisions by which individuals are harmed in their human rights in view of the worsening of the climate crisis. This was done by means of individual applications to the Constitutional Court. Tax benefits for air traffic in the Value Added Tax Act (“Umsatzsteuergesetz”) and Mineral Oil Tax Act (“Mineralölsteuergesetz”) were challenged, as well as the test increase of the maximum speed on certain motorway sections. According to the reasoning of the case, Austria would not only fulfil its obligations to protect the climate and thus protect its population from drought, heat waves with increased mortality for persons with impaired health and other extreme weather events with potential damage to property and persons, but would also violate these protective obligations by actively promoting climate-damaging behaviour. Furthermore, the privileging of air traffic is also contrary to the constitutional principle of equality, seeing as it is not justified in view of the climate crisis.

While the increase in the maximum speed limit was lifted by the Minister of Transport before the Constitutional Court could reach a decision, he had the opportunity to deal with the question of tax privileges for air traffic. In the 2020 autumn session of the Constitutional Court, the applications were now rejected by the latter on formal grounds. Specifically, the Constitutional Court writes in its very brief reply that tax advantages for air travel cannot be attacked by persons who travel by train anyway and are therefore not directly affected by the advantages for plane traffic. In doing so, the court also generally denies that the claimants are affected by the tax exemption of the climate-damaging alternative behaviour "flight" and fails to recognise that this very system is the subject of the "climate complaint". In other words, the court argues, that people who use the train anyway are not legally affected by tax exemptions for air travel. In this case, it is precisely the fact that the state indirectly imposes a lower tax burden on consumers if they behave in a way that is harmful to the climate than if they travel by train. Nevertheless, the Constitutional Court denies that the consumers are "affected" and thus also denies that the content of the statements is discussed on the issue of legal standing. This ultimately leads to the de facto conclusion that these tax exemptions are incontestable, for air passengers will probably not have their rights infringed by a privilege. The Court also rejects other objections raised, arguing that in the 150 pages of individual applications concerning tax privileges no other arguments were put forward separately in respect of these respective paragraphs. The fact that these are purely textual cross-references, the deletion of which must always be requested for formal reasons, is deliberately concealed. In general, any discussion of the arguments and the legal issue on a substantive level is omitted and the requests were rejected very briefly, leaving no more room for challenging the inaction toward the climate crisis on a human rights argument nationally.

Although the decision of the Constitutional Court does not generally exclude the argument that climate protection measures must be taken from a fundamental rights perspective, it does close the door in procedural terms for the examination of specific climate-damaging individual provisions on the basis of individual concern. In combination with the fact that even the non-action or insufficient action of the Federal Government cannot be challenged in law, the Court closes the door on any national legal remedy against the climate crisis. In view of the existential threat posed by the climate crisis and the successful climate lawsuits in several countries such as the Netherlands, Ireland and Pakistan, a possible appeal to the European Court of Human Rights will have to be considered due to the now obvious lack of legal protection.