The Actio Popularis in 'Verein KlimaSeniorinnen Schweiz'

Climate Jurisprudence between Strasbourg and The Hague

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The ink - a large amount indeed: *KlimaSeniorinnen* alone comprising 260 pages - of the three ECtHR judgments of 9 April 2024 is barely dry. In all their complexity of subject matter and argument, they will keep the pens moving for now. Here only a few preliminary observations of a comparative nature between the judgment in the Swiss case, *Verein Klimaseniorinnen Schweiz and four others t. Switzerland*, and the Dutch case law in the *Urgenda* case in terms of access to and role of the courts, noting that - despite the Strasbourg Court saying otherwise - we are essentially dealing with an *actio popularis*, also in the context of Article 6 ECHR. From a constitutional law perspective, this may be important for the possibility of legal protection in national courts. I return to this at the end of this blog.

Access to justice

Perhaps the most striking thing about the judgment in *Verein KlimaSeniorinnen Schweiz and four others v Switzerland* is what it decides about the question of who should be able to bring an action. In Strasbourg, this depends on the answer to the question of whether a person is a victim within the meaning of Article 34 ECHR, while for a national court this depends on national procedural requirements, which may be different and more flexible than the Strasbourg ones, as rightly established by the Netherlands Court of Appeal and the Supreme Court in the famous *Urgenda* case. Article 6 ECHR nevertheless sets minimum requirements for access to justice and thus limit national procedural autonomy: if Article 6 ECHR allows access for parties who would not have access under national law, this constitutes a violation of Article 6.

The judgment in *Verein KlimaSeniorinnen* is highly paradoxical: according to the Court, the four individual women do not meet the 'high threshold' of the requirements of being personally and directly affected by an alleged violation; this would only be the case if, to put it briefly, there is (a) high exposure to the effects of climate change, and (b) an urgent need to ensure the individual's protection. Having examined the documentation of each of the four women individually, the Court concludes that these requirements are not met. As far as the *Verein* is concerned, however, the 'victim' requirement is indeed met. This applies both to the complaint of a breach of Articles 2 and 8 ECHR and to the right of access to justice under Article 6 ECHR, which has far-reaching implications for domestic legal orders where more restrictive requirements are imposed on actions by legal persons, especially if they are brought in the public interest.

Individual complaints inadmissible because in the absence of self-interest

In considering that individual complainants do not have standing to bring an action, the main argument is that an *actio popularis* is not admissible under the ECHR - just as is the case

under Swiss law - and the Court maintains that this also applies to the action brought by a legal person like the *Verein* in Strasbourg (para. 501). Whatever one might think of the refusal to consider the four individual complainants 'victims' of the effects of climate change on individuals, the latter is not convincing.

Actio popularis

The most essential feature of an *actio popularis* is that the plaintiff does not have to have a direct and personal interest in the action. It is sufficient that a violation of a legal duty is alleged; the general interest in enforcing the right in question is sufficient interest. This is also how the ECtHR, in this judgement quoting its earlier case law, understands the prohibition of an *actio popularis*: '[T]the prohibition on the bringing of an *actio popularis* under the Convention system [...] means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly' (para 474).

Except in the *Land* of Bavaria, the constitutions of European states do not expressly recognise the *actio popularis* in constitutional cases (as in a substantive sense the climate case clearly is). The basic reason for this is simple: the general interest, contrary to private interests, should be argued before the political bodies of the state through the democratic process; the courts can in principle only be called upon when actual personal interests worthy of protection by law are involved. The inadmissibility of the *actio popularis* in courts is thus directly related to the separation of powers (see also paragraph 627).

But no need for a direct interest of representative organisations, nor for those whom they represent

For the *Verein*, however, not only is there no requirement of the organisation being itself a 'victim', but also not for those who are represented by the organisation. The representative legal entity can act without requiring that those whom it represents have an interest of their own in which they are personally and directly affected with the degree of intensity normally required for individual victimhood, also in climate cases as we saw happening in this very judgment. The Court is quite explicit: '[T]he standing of an association to act on behalf of its members or other affected individuals within the relevant jurisdiction is not subject to a separate requirement to show that those on whose behalf the suit is brought would themselves have met the requirements for victim status for individuals in the context of climate change' (para 502).

A few requirements are nevertheless imposed on organisations, but these are entirely formal and have little if anything to do with affected interests. For instance, they must be legally established and with the objective of specifically (also) practising human rights protection and they have to be competent. In short, the right to standing of organisations amounts essentially to them being able to bring an *actio popularis*.

The very limited admissibility requirements for general-interest actions, which do not require any self-interest on the part of those represented by an organisation, works through in the Court's reasoning on the admissibility of the complaint of violation of Article 6 ECHR. As with accessibility in the context of assessing the violation of Article 8, the significance of organisations in the environmental and climate movement plays an important role in the argument, as well as the particularities of the effects of climate change. Considering also the previous conclusion regarding the breach of Article 8 ECHR, the Court again concludes that by refusing to receive the Verein in the Swiss courts, there has been a breach of 6 ECHR.

... in climate litigation only(?)

For the time being, we should understand that this applies exclusively in climate litigation. The reasoning by the Court is oriented on the particularities of climate change and its consequences. It is the important role of organisations in climate issues which weighs very heavily in the reasoning of the Court, so heavily that this in itself is almost a reason to grant them access to justice (para 614 and passim). The Court's reasoning boils down to the argument that organisations bringing cases to court are so important that this should lead to their right of standing in terms of access to justice. One wonders whether the Court is saying that because organisations play a big role in calling attention to climate issues, and therefore courts should play a big role in climate issues.
Although it is quite clear that the whole reasoning is geared to the particularities of the consequences of climate change, we all know that judgements of principle by highest courts are rarely limited to one case or type of case only, even if those courts say so the first time. It is not a wild guess that the role that the Aarhus Convention plays in the Court's reasoning (para. 490-494) increases the likelihood that sooner or later such an *actio popularis* for organisations will also be deemed permissible in other environmental cases. If so, the Court has definitely reversed its position on the *actio popularis*. It responds to the Siren of the great general interest involved in the protection of fundamental human rights, an interest so great that special interests fall away in the process.

Consequences for access to courts in the Netherlands (and other domestic courts)?
By way of conclusion, we may ask whether this has major implications for access to the Dutch courts especially in the protection of constitutional rights (which the ECHR rights under the constitutional principle of monism and the priority rule of Article 94 of the Constitution certainly are)?
As regards civil jurisdiction, which in cases of private parties against the State are concentrated in The Hague, and also in other cases can reach the Supreme Court via the preliminary ruling procedure ex 392 Rv, the Dutch Civil Code (Article 3:305a) admits'general interest litigation'. Precisely for collective actions with 'idealistic' purposes, most of the admissibility requirements set for other collective actions do not apply (3:305a(6) Civil Code). Although this general interest action in itself does not detract from the requirement of a 'sufficient direct interest' within the meaning of Article 3:303 Civil Code, which in principle also applies in environmental cases, in *Urgenda* the courts at The Hague did not review the existence of such a 'sufficient direct interest'. We may thus assume that, compared to the Spanish *amparo* and the German *Verfassungsbeschwerde*, in general interest cases we have a quasi *actio popularis* in constitutional terms, and in *climate cases* already more of an *actio popularis* proper, subject to the slight formal requirements of 3:305a of the Civil Code.
Whereas we may conclude that the very wide access to justice requirements which follow in particular from the findings in *Verein Klimaseniorinnen Schweiz* do not greatly affect the case in a country like the Netherlands, the same may not be true in quite a few other European states. We may expect the consequences of this judgment on access to justice to become evident over time.

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