URGENDA AND DUTCH DIKASTOPHOBIA: IS THIS THE END OF PUBLIC INTEREST LITIGATION FOR THE ENVIRONMENT, AND THE END OF ARTICLE 3:305A DUTCH CIVIL CODE?

FEBRUARY 17, 2020 DINA TOWNSEND LEAVE A COMMENT

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1. **Introduction**

In recent years, the domestic courts of the Netherlands have produced a series of judgments, all relating to general issues of global concern, which have been praised by international lawyers from all over the world. In the *Mothers of Srebrenica* case, the Netherlands was held responsible for the failure of a United Nations peacekeeping mission. The failure to protect Bosnian Muslims from the Bosnian Serbs was regarded as a breach of Article 2 (right to life) of the European Convention on Human Rights (ECHR). In the *SyRI* case (only available in Dutch), an automated algorithmic system designed to detect and analyse welfare fraud was held to be in breach of Article 8 ECHR (right to private life). The best-known example is the *Urgenda* case, in which a failure of the Government to take appropriate measures against the threat of dangerous climate change was held to constitute a breach of Articles 2 and 8 ECHR (right to life and well-being).

All these cases were instituted by foundations, claiming to act in the common interest. Such claims are based on Article 305a of Book 3 Dutch Civil Code (in short "3:305a Civil Code"). This provision is introduced first (section 2); immediately followed by an explanation how it is used as legal basis for public interest litigation (section 3). All rulings mentioned above are considered highly "political", and thus the court responsible for these rulings is often accused of trespassing into the realm of politics. This controversy, *i.e.* of the judge as lawmaker, is discussed next (section 4). I will then zoom in on the *Urgenda* case, as an example of public interest litigation for the environment on the basis of 3:305a Civil Code (section 5); and end with a look into the future of public interest litigation for the environment on the basis of Article 3:305a Civil Code (section 6).

2. **Article 3:305a Civil Code: A Most Curious Provision**

Article 3:305a Civil Code is unique in the world. It allows anyone to establish a foundation, mandated to protect a public interest. This foundation can then be used to institute legal proceedings, aimed at protecting that public interest, against the State of the Netherlands. The State of the Netherlands does not enjoy any kind of immunity against such claims, unlike many other States in this world. People, who supposedly know what is best for everyone, can thus set up a foundation, and force their lifestyle on the rest of the Dutch population via the courts. This is a much more effective way to influence the policy of the State than setting up a political party. After all, a political party needs to gather enough votes to have meaningful influence on public policy, and is constantly accountable to its

voters. A foundation established to protect the general interest is not accountable at all to those whose interests it purports to protect. This most curious provision – 3:305a Civil Code – explains why the Dutch court is constantly issuing ground-breaking decisions on matters of general interest, unique to the world.
As mentioned above, for courts in many other countries, the political nature of a claim against the State is already a reason to declare the claim inadmissible. There is no such rule in the Netherlands. That said, even in the Netherlands, there are limits to what a court can do. The courts cannot oblige the State to enact legislation. The question whether a new law must be enacted and, if so, what content this new law must have, is a matter of government and parliament (*i.e.* the legislature). No court, not even the Supreme Court, can order the legislature to enact new law. But it *is* up to the court to determine whether the government and parliament, when making new law and/or policy, are acting in compliance with the (inter)national legal obligations of the Netherlands, including those that follow from the European Convention on Human Rights.

3. **Public Interest Litigation on The Basis of Article 3:305a Civil Code**

Using the courts to influence public policy, in the way described above, is generally referred to as public interest litigation. This has recently gained significantly in popularity in the Netherlands.

International treaties often play a major role in litigation in the public interest. This is because the domestic courts of the Netherlands are not permitted to check legislation on its constitutionality (see Article 120 of the Dutch Constitution). But the courts *are* allowed to set aside domestic legislation, when it is incompatible with provisions of international law, such as the rights contained in the ECHR.
The fact that international law is used as basis for public interest litigation only adds to its controversial character. After all, if the policies of the national government are contrary to existing *national* legislation, the legislator can simply change the law. However, if there is a conflict between government policies and provisions in an *international* treaty, then it is a lot more complicated for the domestic legislator to change that treaty. If only because agreement is needed between all States parties to the treaty, and because a treaty, which contains no provision regarding its termination and which does not provide for denunciation or withdrawal, is subject to denunciation or withdrawal only in exceptional circumstances (see the Vienna Convention On The Law Of Treaties).
Another thing that adds to the controversy, is the fact that all judgments referred to above are based on very open norms. The rights in treaties such as the ECHR are very open and vague. And they appear to have a very different meaning today than they had thirty years ago, when the treaty was made. For example, the right to well-being and a healthy environment is based on Article 8 ECHR, which literally proclaims that “everyone has the right to respect for his private and family life, his home and his correspondence”. It is thus up to the judge to apply the open and somewhat out-dated norm to a concrete and contemporary state of affairs.

And so, the judge is forced to make some difficult (policy) decisions. This explains all the criticism. Critics say that it is the task of the democratically elected legislator to determine how our society should be governed, within the limits of our (constitutional) law. Such

political considerations should not play a role in the choices that judges have to make when deciding what is legitimate or not in a particular dispute submitted to them. The judge must settle a specific dispute on the basis of the applicable law, not on the basis of her or his own particular personal or political preferences.

The danger is that, at some point, politicians will tell the judge: "no, we just won't do that". For politicians, this is a very tempting thing to do, especially if they know they have the support of the (majority of) the population. The court is then powerless. This might set a dangerous precedent: people will ask themselves: if the government refuses to comply with the court's decisions, then why should we comply?

4. Dutch Dikastophobia

In this controversy, the word "Dikastophobia" is sometimes used. It is a Greek term, which literally means fear of judges. It is said that judges pose a threat to democracy. They constitute a highly educated elite, with no idea what ordinary people want and believe. They use international treaties as basis for their decisions, thereby bypassing "our" own Dutch domestic law. Judges make far-reaching decisions, affecting ordinary people's lives in fundamental ways. But, so it is argued, they prefer to keep these very same people at a distance. Judges are said to suffer from "Messiah delusion" – the idea that they alone can and must save the world.

In reply to such accusations, judges insist that they are professionals, trained in the judicial craft, usually with extensive experience, bound by the law when making their decision. And judges – unlike politicians – look no further than the specific dispute presented to them. They ask themselves: "what does the law say about this particular dispute submitted to me? How should the law be applied to this specific case?" In short, they are not powerful. They lack the powers of Judge Dredd, who was entitled to arrest, convict, sentence, and execute criminals. Like bureaucrats, the judges in the Netherlands are just carrying out a harmless task: applying law to specific facts. And in the Netherlands, the court is obliged to always give judgment, even when there are no clear rules that govern the specific issue put before it. The court cannot pronounce a *non liquet*, certainly not because a dispute put before them is said to be "too political".

There is a lot of support for the courts. Judges are portrayed as today's heroes, our last hope in the fight against populist governments. Faced with strong social and political pressure, judges keep their heads cool and undisturbed, and arrive at an independent, professional judgment. That should reap respect, not suspicion. Linos-Alexandre Sicilianos, President of the European Court of Human Rights, referred to the "hailed as historic" Urgenda-ruling, and insisted that, "by relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention of Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time". The problem is that this support generally comes from the very same highly educated elite: academics – of which I am one, civil servants, and…. fellow judges.

5. Urgenda As Example of Public Interest Litigation for The Environment on The Basis of Article 3:305a Civil Code

What is the relevance of all this for the Urgenda ruling? To address this question, we need first to briefly summarize the essence of that ruling. Briefly put, the Supreme Court of the

Netherlands held that the Netherlands Government must ensure that, by the end of this year (2020), greenhouse gas emission levels from the Netherlands are at least a quarter below 1990 levels, otherwise the Dutch people's rights to life and wellbeing, as guaranteed in Articles 2 and 8 ECHR respectively, are breached.

Urgenda is a foundation, established under 3:305a Civil Code, to defend the interests of the current residents of the Netherlands, who are threatened by dangerous climate change. This is what the Supreme Court said about Urgenda's standing, in para. 5.9.2:
"Urgenda, which in this case, on the basis of 3:305a Civil Code, represents the interests of the residents of the Netherlands with respect to whom the obligation [to take appropriate measures against the threat of dangerous climate change] applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. Especially in cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective. This is also in line with Article 9(3) in conjunction with Article 2(5) of the [Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, or Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law […]."
The next section contains a critical evaluation of this line of argumentation.

6. The Future of Public Interest Litigation for The Environment on The Basis of Article 3:305a Civil Code

The Foundation for Mothers of Srebrenica aims to look after the interests of (approximately 6,000) relatives of victims of the fall of Srebrenica. This is a relatively small group, which can be clearly identified.

But the *SyRi* case was instituted by the Dutch Lawyers Committee on Human Rights (NJCM), a collective interest organization within the meaning of 3:305a Civil Code, claiming to represent those persons or groups interested in the protection of their fundamental human rights. It is difficult to find someone who is *not* interested in such protection. But the NJCM is not accountable to the persons of groups it claims to represent. It clearly did not consult the entire population of the Netherlands, before initiating the proceedings against the Government regarding its use of SyRi.
Similarly, the "Club Actieve Nietrokers" (Clean Air Nederland, or CAN) initiated proceedings against the State, again on the basis of art. 3:305a Civil Code, claiming that the exception to the smoking ban for smoking rooms accessible to the public was unlawful. In a ruling of 27 September 2019, the Netherlands Supreme Court agreed. CAN strives towards a ban on tobacco smoking, in so far as it causes nuisance or damage to others. CAN thus claims to represent the interests of anyone exposed to tobacco smoke in publicly accessible areas, which is basically everyone. Again, it is obvious that they did not consult with literally everyone that falls within this category of persons, before initiating these legal proceedings.
Urgenda also has standing on the basis of 3:305a Civil Code. As mentioned above, Urgenda is established to defend the interests of the current residents of the Netherlands, who are

threatened by dangerous climate change. Again, this includes literally everybody. Interestingly, Urgenda is not accountable to those whose interests it claims to defend. In fact, most residents of the Netherlands disagree with Urgenda, and do not feel that the foundation is representing them, or their interests.

Article 3:305a Civil Code is usually employed to initiate proceedings against the State. But it can also be used to initiate proceedings against multinationals. Friends of the Earth Netherlands ("Milieudefensie") believes that the Dutch oil company Shell is breaching its legal duty of care by causing climate damage across the globe, and that this constitutes a wrongful act vis-á-vis Milieudefensie and the public interest it represents. It thus initiated legal proceedings against Shell, before the Dutch court. This competence to represent the public interest is, once again, based on Article 3:305a of the Dutch Civil Code (see paras. 113-121 of the summons, available in Dutch original and English translation). Milieudefensie has around 80,000 individual members and donors. That seems like a lot, but Milieudefensie basically claims to represent the interests of all individuals affected by climate change, *i.e.* all 7,713,468,000 individuals currently living in this world, plus the interests of all future generations (an infinitely large number). Needless to say, Milieudefensie did not consult all these individuals before initiating proceedings against Shell. In reply, Shell argued that the individuals, whose interest Milieudefensie claims to represent, also have other interests, that might clash with the interest in a healthy environment. They need oil to drive their car, to run their business, to run their economy, etc. And, argues Shell, it is up to politicians – and not Milieudefensie or the Court – to weigh those different interests, and develop a balanced and responsible policy (see paras. 343-361 of Shell's Reply, only available in Dutch).
Interestingly, Article 3:305a Civil Code has been changed quite drastically since 1 January 2020 (see here and here). Before 2020, any foundation could institute legal proceedings against the State – or a multinational, or any other (legal) person – aimed at protecting a general interest, as long as the foundation was established to do so. Since 1 January 2020, a foundation must be "sufficiently representative". The foundation must provide appropriate and effective mechanisms for participation in the decision-making to persons for the protection of whose interests the foundation is established. And when such a foundation wants to bring a claim, it must ensure that the claim has a sufficiently close link with the Netherlands. This means that the majority of the persons for the protection of whose interests the legal claim extends must have their habitual residence in the Netherlands. But then, there is paragraph 6. According to this paragraph, a foundation does not have to meet (all of) these new requirements, if the legal action is instituted (1) with an ideal purpose and with a very limited financial interest; or (2) if the nature of the foundation's claim, or the nature of the persons for the protection of whose interests the legal claim is instituted, calls for more flexibility. It is up to the judge to decide in casu whether this exception applies, and to what extent it applies. In any case, this exception cannot apply if the foundation is asking for financial compensation. All claims discussed above appear to fall within this exceptional category: in all cases, (1) the foundation is established for an idealistic purpose, and (2) seeks a declaratory judgment, not financial compensation. Note that the new representativeness requirements are considerably relaxed for this exceptional category, but that some of the other new requirements do apply, including the requirement

that the majority of the persons for the protection of whose interests the legal claim extends must have their habitual residence in the Netherlands.
It is now suggested by many politicians to make 3:305a Civil Code even more strict, especially in its application against non-profit organizations, which includes all foundations referred to above (NJCM, Urgenda, Milieudefensie, CAN, Mothers of Srebrenica, etc.). I personally find this proposed change of 3:305a Civil Code an unsatisfactory solution. It is an easy solution, perhaps even a lazy solution. It might stop the domestic courts from issuing grand and politically charged rulings, but it does not solve the underlying problem. If the legislature, with its preference for open norms, does not provide sufficient clarity, the court will have to provide that clarity. In the absence of clear legal norms, the judge will be forced to make law, by translating open norms into more specific norms. It is inevitable that the court issues judgments whose impact extends beyond the settlement of a particular dispute. This problem is created by the legislature, not by the judge. And it is a particularly persistent problem in the field of environmental and climate change law. The legislature must not pass problems on to the judge, but take responsibility, and make important choices. Public interest litigation for the environment, on the basis of Article 3:305a Civil Code, plays an indispensable role, by breaking through this inertia (silence of legislature). The best way to avoid rulings like Urgenda, is for the legislature to take the tough decisions itself, instead of leaving those to the judges.

Feature image: Otto Spijkers