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IFHV

BOFAXE

OF CRABBED AGE AND BOLD YOUTH (Part 1)

ON THE "YOUTH 4 CLIMATE JUSTICE" APPLICATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

On November 30th, news broke that the European Court of Human Rights (ECtHR) had decided to fast-track a lawsuit submitted by six Portuguese children and adolescents ("the application"), supported by the Global Legal Action Network. The initiative seeks to hold 33 European States accountable for their insufficient efforts to mitigate climate change. The application is the latest addition to a series of high-profile court-cases in the realm of climate change and human rights. However, already at first glance, it becomes apparent that it is worthwhile to engage in more detail with this application: It is the first case of this type before the ECtHR and, moreover, a particularly ambitious one, considering that it is directed against 33 States. By first putting the application in its broader context and then assessing its prospects and merit, this Bofax aims to answer the question whether the application is indeed too ambitious.

The story so far

"Youth is full of sport; age's breath is short…",
the part of the old sonnet, widely attributed to Shakespeare, seems to hold true, with young people again and again demonstrating their determination and passion to fight for climate protection. Climate activism increasingly takes the shape of a social movement, with young people being strikingly overrepresented (see only the "Fridays for Future" movement largely initiated by pupils), which has recently also resulted in several climate lawsuit cases brought forward by members of the young generation. These are entertained at the national (e.g., Neubauer, et al. v. Germany, 2020), as well as the international level (most prominently the petition Sacchi et al. v. Argentina et al before the United Nations Committee on the Rights of the Child, filed i.a. by Greta Thunberg in 2019). Inspired by one of the first successful national lawsuits, Urgenda Foundation v. State of the Netherlands, which has been praised as a landmark for the human rights-based approach for climate protection, the narrative is usually similar: Under human rights law, States have to protect individuals against reasonably foreseeable harm, including environmental degradation and threats resulting from climate change (see, e.g., General Comment 36 on Art. 6 ICCPR, para. 62). Concerning the latter, the disastrous effects a warming climate of more than 1.5 °C would have are reasonably foreseeable and scientifically proven (IPCC Report 1.5 °C). Moreover, as States have agreed under the Paris Agreement ("PA") to limit global warming to a maximum of 1.5 or at least 2 °C, their obligations under the PA can be used to inform their obligations under human rights law.

The first hurdle: admissibility

…youth is nimble, age is lame".
Usually, it takes time before the ECtHR addresses an application and asks the States to respond. In deciding to fast-track the application (according to Art. 41 of the Rules of the Court), the Court deviated from this process. Although unusual, this is without prejudice to the prospects of the case, but still testifies that the Court was convinced of the importance and urgency of the matter. Nevertheless, the Court still asked the States specifically to also express their views on the admissibility. Art. 35 ECHR prescribes that applications before the ECtHR are only admissible after domestic remedies have been exhausted, a requirement that is in the case at issue not fulfilled. However, it is settled in the jurisprudence of the ECtHR that the exhaustion of domestic remedies rule should not be applied in a manner that would impose an unreasonable or disproportionate burden on an applicant (see Gaglione and Others v. Italy, 2012, para. 22, and here, paras. 88, 103). Specifically, it has to be considered that children and young adults have comparatively fewer means and are generally less well equipped to pursue legal claims (see here, para 24). The Applicants submitted that it would be neither practical nor promising to pursue 33 domestic lawsuits, especially since the matter of climate protection needed to be addressed urgently. Given the young age of the plaintiffs, exhausting remedies in 33 States would be an extraordinarily high burden, particularly since national court cases would not offer a sufficient prospect to maintain global warming at under 2 degrees.

This last point, however, seems a bit hasty and demonstrates a dilemma the plaintiffs are faced with: Famously, the highest Dutch court found the Netherland's climate protection efforts to be incompatible with Arts. 2, 8 ECHR in its Urgenda ruling. If the plaintiffs now conceded that Urgenda was a huge success, an obvious defense would have been: "if national court cases are so effective, why don't you exhaust local remedies first?". Apparently conscious of this dilemma, the application somehow discredits Urgenda, finding the ruling to be not ambitious enough (application, annex para. 37). While understandable from a strategic perspective, it is regrettable that the application deemphasizes Urgenda's meaning and success. It would have been desirable to only focus on the fact that 33 court proceedings of this magnitude alone require too much time and more resources than can be expected of youth plaintiffs – which arguably would have sufficed to convince the judges. Moreover, the application pointed to past events that already impacted the plaintiffs (e.g. the 2017 wildfires in Portugal), to demonstrate their "victim status" under Art. 34 ECHR – otherwise, States could have claimed that the application is an *actio popularis* and therefore inadmissible. While certainly the application is pursued in the common interest, this should have sufficed to satisfy the requirements of Art. 34 (another result is hardly conceivable: climate change, a threat to humanity as a whole, must rather enable everyone than no one to pursue their rights. See also here).

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ON THE "YOUTH 4 CLIMATE JUSTICE" APPLICATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

What is New? Thoughts on the Merits

...youth is hot and bold, age is weak and cold".
What is now left to determine is whether the material part of the application is convincing or rather has to be qualified as "too bold". The Applicants allege that the Respondents (all member states of the EU as well as Norway, Russia, Switzerland, Turkey, Ukraine and the UK) are violating human rights law because of their shared responsibility for exacerbating climate change. Precisely, they claim violations of Arts. 2 (the right to life), 8 (the right to respect for private and family life) and 14 of the ECHR (prohibition of discrimination, in combination with Arts. 2 and 8). To substantiate the application, they ask the Court to take into account the findings of the "Climate Action Tracker" (CAT), an independent initiative that evaluates States compliance with the PA (application, annex para. 31). The CAT characterizes the efforts of the EU (as a whole), the UK, Switzerland and Norway as "insufficient". For Russia, Turkey and Ukraine, the CAT finds climate protection efforts to be even "critically insufficient". The reliance on the CAT (especially in this magnitude) is a comparatively new feature in climate cases and also explains the absence of other European States amongst the Respondents, which simply have yet to be rated by the CAT. Notably, Turkey is the only Respondent, which has signed but not ratified the PA (interestingly, the same is true in "Sacchi et al.", where Turkey has yet to respond to the Applicants' communication).
In this regard, the argumentation elaborated in the application is rather thin, as it does not differentiate between Respondents that ratified the PA and Turkey, but simply submits that the obligations under ECHR Arts. 2 and 8 are informed by those under the PA. Certainly, there are good arguments to be made why Turkey is violating said ECHR obligations irrespective of their (non-)ratification of the PA. But these arguments have yet to be made.

What are the likely defenses against these claims?

States will likely argue that the effect on the enjoyment of human rights is too distant and has not reached critical levels yet, that climate protection efforts might prove sufficient and that, accordingly, the application is inadmissible due to the applicants' missing victim-status. Anticipating these defenses, the application points to the impacts climate change already had in Portugal, whereas it relies on the precautionary principle concerning future harm. While this approach becomes increasingly accepted in international environmental law, it is far from settled in the jurisprudence of the ECtHR. This can be expected to be a (not to say *the*) crucial factor for the application's success.

Other arguments which States seemingly do not get tired to make, are that GHG emissions do not trigger human rights obligations towards nationals of other States and that, anyway, their own respective contributions to climate change are negligible and would, in isolation, not lead to detrimental effects (cf. here, paras. 18 ff.). Both arguments fail to persuade: the concept of effects-based extraterritorial jurisdiction becomes increasingly accepted in international human rights law, and also the ECtHR has stressed before that obligations under the ECHR are owed to national of third States, where the actions of a State have a direct and foreseeable impact on the enjoyment of human rights in said State (see, e.g., Andreou v. Turkey, 2009, para. 25). Also the "but the other States do it too" argument is far from a solid legal defense: shared responsibility (cf. Art. 47 of the Articles on State Responsibility) has been recognized by the ECtHR on multiple occasions. The argumentation of the Dutch judges in their Urgenda ruling on joint responsibility is particularly spot-on (see here, paras. 5.7.1 ff.) – a reference that the plaintiffs unfortunately will likely not rely on after they discredited the Urgenda ruling for purposes of admissibility.

Conclusion

...youth is wild, and age is tame."
Although the climate activism of the youth receives a lot of (media) attention, also the elder generation is not inactive, yet maybe comparatively restrained. Importantly, successful climate activism will depend on more than one generation. Strategic human-rights based climate litigation already proved to be an effective tool to nudge States towards more climate protection and the application brought before the ECtHR has the potential to be a successful addition to that end. Nevertheless, just as a single State cannot solve the climate crisis on its own, also one application can only contribute a part to the solution. Therefore, it is imperative that the plaintiffs find the right balance between bold and ambitious arguments and solid legal reasoning. It is now on the States to respond to the application, but it is safe to say that the Youth 4 Climate Justice initiative is on (fast) track to make the most of its potential!

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