On Separating Rights and Remedies in the ECtHR's Climate Judgment

VB verfassungsblog.de/who-is-afraid-of-actio-popularis/

Jakob Hohnerlein

26 April 2024

Who is afraid of *actio popularis*?

In its judgment in *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, the European Court of Human Rights (ECtHR) has, for the first time, recognized a right to climate protection. The Court's reasoning is certainly innovative – and for this reason, an easy target for critics. Yet, as far as the merits are concerned, the argument that Art. 8 ECHR requires states to engage in climate-change mitigation does not come as a surprise. The Court views the Convention as a living instrument and has developed new dimensions of its rights for decades, as have many other human rights organs and constitutional courts like the German Bundesverfassungsgericht and, at least in the past, the U.S. Supreme Court. More surprising is the ECtHR's reasoning on who has standing to invoke the right to climate protection: For fears of *actio popularis*, the Court decided that individuals could only lodge complaints under very high thresholds. However, to ensure the justiciability of the new right, the Court accepted the standing of associations, drawing a parallel to environmental NGO litigation under the Aarhus Convention and European Union (EU) law. I would like to raise doubts about this parallel. Litigation by environmental NGOs has so far served as a means to review the legality of administrative action where no one claims a violation of rights. But why should a human right be invokable only by associations rather than by individuals? Drawing on the experience from Germany, I argue that the Court's fear of *actio popularis* amounts to an uncomfortable and unwarranted separation of rights and remedies.

Subjective rights and objective law: A German view on the actio popularis exclusion

The *actio popularis* exclusion is familiar in the domestic administrative law of many countries. In Germany, it is applied in a particularly stringent way. The distinction between subjective rights and objective law is at the heart of the doctrine. To challenge executive action in court, it is not enough to argue that it was illegal. One needs to invoke a violation of one's rights (§ 42.2 of *Verwaltungsgerichtsordnung* [Code of Administrative Courts Procedure], for an overview, see Anna Katharina Mangold). In 19th century Germany, the crucial role of rights for judicial review of administrative action was the natural consequence of the constitutional monarchy: The administration had to respect the rights that the constitution or legislation had

granted to the “subjects.” Beyond rights, the authorities, acting on behalf of the sovereign monarch, were legitimized to act for the common good according to their own ideas. In a democratic state, excluding *actio popularis* is not so self-evident. If the common good is to be determined in democratic law-making processes rather than by an autonomous administration, it is not unthinkable to allow every citizen to challenge executive action for non-compliance with objective law. Nevertheless, the *actio popularis* prohibition was retained in Germany as well as in most democratic states.

There are reasons for this beyond pure pragmatism: In constitutional democracies, individuals enjoy a double legal status as political citizens and private persons. For the *political status*, it is crucial to participate in the making of objective law (by voting, but also by contributing to the public discourse through political speech and assemblies), which will then guide executive action. The political status is not thought to imply standing in court to challenge administrative action in an *actio popularis*. Indeed, the political status is closely connected to the idea of acting together with one’s co-citizens, and going to court on one’s own does not fit with this. By contrast, for their *status as private persons*, it is essential that individuals do not only have rights that limit the exercise of public powers, legislation as well as executive action, but also remedies to address rights violations in court. Constitutions and human rights treaties highlight this point, as they include a right to an effective remedy in ordinary (administrative) courts (see Art. 13 ECHR) and institutionalize individual complaint mechanisms at constitutional and international courts. As Mattias Kumm has argued, it is an essential feature of rights that individuals have an institutionalized opportunity to ask public powers for a justification.

The problem of enforcing objective law and the idea of environmental NGO litigation

If individuals may only invoke rights in courts, there is a risk that (democratic!) objective law is not sufficiently enforced. In West Germany after 1949, courts tried to mitigate the problem by strategies for a broader review of objective legality on the basis of subjective rights. All administrative decisions that limit constitutional rights of the addressees (at least the “general freedom of action” recognized under Art. 2.1 GG) were subjected to a broad review with the argument that a failure to comply with all applicable objective law amounted to a violation of those rights. In cases of enforcing legally guaranteed benefits or challenging the legality of administrative decisions in favor of third parties, courts read many pieces of legislation as conferring rights to groups of individuals. In environmental law, for example, emission limits for industrial installations are understood to be in the interest not only of the public but also of neighbors of the installations, who are thus entitled to invoke them in court.

For certain areas of legislation, no plausible argument can be made that they are in the interest of concrete persons rather than just the general public. This is especially clear for parts of environmental legislation. And precisely in this field, there are particular concerns

about an enforcement deficit. A solution was found in a novel instrument, first introduced in Germany by several Länder in the 1980s in the legislation on the protection of natural resources: Registered environmental associations were allowed to invoke the illegality of executive decisions in court. In 1998, standing of environmental associations has reached the international level. The Aarhus Convention aims to improve environmental protection by strengthening civil society participation. In this context, Art. 9 calls for access to justice for environmental NGOs. EU law has taken up the approach and now requires access to courts for NGOs in the Environmental Impact Assessment Directive (Art. 11) and the Industrial Emissions Directive (Art. 25). Germany initially implemented the European obligations in a half-hearted way, allowing environmental NGOs only to invoke non-compliance with those provisions that also neighbors could invoke. Against this approach, the CJEU pointed out that environmental NGO litigation as prescribed in the directives serves to ensure compliance with all environmental legislation. Today, the *Umwelt-Rechtsbehelfsgesetz* allows NGOs to initiate full judicial review of whether executive decisions comply with all applicable environmental laws (on the development, see Mangold, p. 248 ff.).

Everyone's rights, no one's remedy?

If, as the German experience suggests, the *actio popularis* exclusion serves to bar individuals from invoking objective illegality that does not concern rights, while standing of associations is a way to enforce objective legality despite the *actio popularis* exclusion, it is hard to see why this should have any relevance for the ECHR. Human rights are, after all, rights. Art. 34 ECHR enables everyone (after having exhausted domestic remedies) to bring cases to the Court, arguing that a state's measure has violated his or her rights. For individual administrative and judicial measures, establishing the "victim status" is straightforward, and the only question is whether, under certain circumstances, "indirect victims" like close family members can lodge complaints, too (the Court recalls its case law on this in §§ 460 ff.). But if the rights of the Convention also bear on measures of general legislation it must be possible for a broader group of people to invoke that the legislation violates their rights. Here, the Court points out (§ 469) that following *Tănase v. Moldova*, persons can be victims "if they belong to a class of people who risk being directly affected by the legislation, or if they are required either to modify their conduct or risk being prosecuted". In many cases about legislative measures, e.g., criminal law provisions, that class of people is limited. This is different for legislative omissions in the climate-change context. As the Court notes, "everyone may be, one way or another and to some degree, directly affected, or at real risk of being directly affected, by the adverse effects of climate change" (§ 483). The natural consequence would be that everyone can be a victim of legislative omissions and thus lodge a complaint under Art. 34 ECHR.

This consequence seems unacceptable for the Court, as it would risk to undermine the exclusion of *actio popularis* (§ 481). Thus, the Court understands the *actio popularis* exclusion in the sense that it should not be possible for "anyone from the people" (*quivis ex*

populo) to invoke legislative obligations about climate-change mitigation – even though these obligations follow from rights. The judgment suggests that everyone has a right to sufficient climate protection, but not necessarily the remedy of Art. 34 ECHR. As there has to be a "limiting criterion" (§ 485), individuals may lodge complaints only when they can establish to be particularly severely affected. The individual applicants in *Klimaseniorinnen* and the parallel cases did not meet this high threshold. In order to ensure the right to climate protection to be practically effective despite this, the Court found the creative solution to allow standing of associations following the Aarhus model (§§ 489 ff.).

But why should, for fears of *actio popularis*, individuals be barred from invoking not only mere objective illegality, but also their rights? The ECtHR is not the only court that finds it necessary to limit the circle of complainants (the CJEU's jurisprudence on remedies of individuals against general regulations under Art. 263 TFEU is another example), but there are also courts that do not share the restrictive view. Notably, the German Bundesverfassungsgericht has accepted, in cases about the "right to democracy" developed from the right to vote as a limit to European integration (e.g., BVerfGE 123, 267, § 171), and in cases about limits to public security legislation from privacy rights (e.g., BVerfGE 133, 277, § 83), that virtually everyone can lodge a constitutional complaint. In its own case on climate-change mitigation, the court explicitly rejected the *actio popularis* argument: "In constitutional complaint proceedings, it is not generally required that complainants are especially affected – beyond simply being individually affected – in some particular manner that differentiates them from all other persons" (BVerfGE 157, 30, § 110).

As a reason for its restrictive view, the ECtHR points to the risk of "disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change" (§ 484). Worries about the courts intervening too much with democratic legislation must certainly be taken seriously. However, they are not about who may initiate judicial review, but about what precisely the courts, at the request of some complainant, should oblige legislation to do. At the merits stage, constitutional and human rights courts face the delicate task of not overly curtailing policy space while at the same time developing the rights guarantees in a way that they are practically effective. The Bundesverfassungsgericht arguably went too far in its jurisprudence on limits to European integration. In the field of climate-change mitigation, too, courts should not require specific measures of policy, but oversee that states seriously engage in this task after all. Whatever one thinks of the Court's precise argument on the merits (a first analysis has been posted here), this is independent of who is able to bring the case to the Court.

Another reason for the *actio popularis* argument might have been, as suggested here, the fear of case overload. This is understandable, but there are other means to control the number of cases that reach a close evaluation on the merits. One important means is to

require that appellants present a well-founded argument. This might explain why the Bundesverfassungsgericht was not afraid of granting broad access. The ECtHR, too, can sort out “manifestly ill-founded” applications at an early stage under Art. 35.3.a ECHR.

Is the right to climate protection really a human right?

The ECtHR’s fear of *actio popularis* amounts to an uncomfortable separation of rights and remedies. It might, however, be conceivable to read the judgment in a different way: What the Court meant by the “right to climate protection” might not be a real right, but a principle of objective law similar to the German Art. 20a GG, which establishes environmental protection as a policy objective. The text of the ECHR does not contain principles of that sort. But it might be possible to develop them from rights by interpretation (this idea is not uncommon in German constitutional law). In the climate change context, fair intergenerational burden-sharing (the Court refers to this in § 420) is an obvious candidate for obligations from objective principles since unborn future generations cannot have rights yet. If (or as far as) states’ obligations follow from a principle of objective law rather than from a right, individuals cannot be considered victims under Art. 34 ECHR. And, since the state complaint under Art. 33 might not be an effective means to enforce the principle, it is plausible to draw on the Aarhus approach of NGOs enforcing objective environmental law. This is a possible argument. But the Court decided to stay more along the traditional lines of developing rights, arguing that “Article 8 must be seen as encompassing *a right for individuals* to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life” (§ 519, my emphasis). And it is certainly plausible to assume that climate-change mitigation is something which states are not just legally obliged to do, but something that they owe to all of us. But why should we then not be able to claim it at the Court?

SUGGESTED CITATION Hohnerlein, Jakob:
Who is afraid of actio popularis?

: On Separating Rights and Remedies in the ECtHR’s Climate Judgment, VerfBlog, 2024/4/26, https://verfassungsblog.de/who-is-afraid-of-actio-popularis/, DOI: 10.59704/fb65e8e747132955 .

Explore posts related to this:

Other posts about this region:
Europa