Access to Justice in the Netherlands

An update on current affairs, case law & prospective legislation

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Task Force on Access to Justice, Aarhus Convention, 28 February 2018
Dutch Whistleblowers Authority

- Est. July 1st 2016 as an Independent State Authority
  - Based upon Act of Parliament: Whistleblowers Centre Act

- Confidential provision for employees from Public/Private Organisations feeling compelled to expose abuses/breach of law/public offences -> including ‘environmental cases’

- Advising and supporting Whistleblowers; investigating cases

- Chairman and Commissioners appointed by Head of State

- Advisory Department; Investigation Department; Bureau
Functioning & Results: startup problems?

- 2017: The House is not functioning properly
- Since 1 July 2016: 965 advice requests, 132 ‘Whistleblower-cases’ (34 ‘heavy’ cases)
- Since 1 July 2016: 14 Investigations started but none finished
- Board orders research into causes: report 14 dec. 2017
- Establishment of the Centre under time pressure
- Merging of three existing organizations: different cultures
- High case load, acute working pressure from the start
- Strict separation departments hinders integral management
- Dissension within Board; no support from staff members
- New start necessary; board resigns; interim management
- During reorganization Centre continues its services normally
Lessons to learn?

- Guiding principle should be Interests of clients
- Limited management levels
- Every board member responsible for entire organization: no separate responsibility for different departments
- Identify tasks/responsibilities clearly
- Establish working processes and research protocols in advance
- Centre’s tasks prescribed by Law; have to be continued
Access to Justice for NGOs

- Public law: NGOs as interested parties may use administrative procedure in administrative courts/appeal to Council of State

- Civil law: NGOs use liability law to stop/prevent environmental harm through claims for damages, financially or otherwise

- NGOs basically operating through ‘class actions’: art. 3:305a Civil Code, representation of common interests -> financial claims excepted

- (new legislation: modification of 3:305a, i.a. NGOs may claim financial damage; legislation not finalized yet, possibly 2019)
Case Law

- NGOs litigating in civil courts under art. 3:305a BW, class actions, no direct representation
- Judge has to decide on admissibility of the claim: - if effective remedy can be obtained through administrative procedure, no civil procedure; if sufficient interest is lacking, no civil claim either

- Urgenda vs the Netherlands: Hague District Court 24 June 2015:
  - Claim admissible: State liable for breach of duty of care if Carbon dioxide-emissions are not reduced to 25% in 2020 compared to the 1990 emission-level
  - State decided to appeal; hearing scheduled 28th May 2018

- Sept. 2016: Locally based Foundations claiming State civil liability for air pollution in cities: State is not living up to its own regulations
  - Claims not admitted: effective remedy under administrative law
2017: Foundations for Environmental Protection vs the Netherlands

- State liable for not meeting EU-levels for emissions of Nitrogen dioxide and PM 10 or particulate matter?
- Preliminary Injunction, Hague District Court, 7 Sept. 2017: claim admissible in civil court; State is acting wrongfully for not complying with EU emissions limits

- Standard Civil Procedure, Hague District Court, 27th Dec. 2017:
  - NGOs only admissible if parties represented have sufficient interest
    - and if no effective remedy in administrative law exists
  -> administrative procedure for main part of the claims available & effective remedy

- State can not be held liable anyway: WHO-guidelines not legally binding. No liability for minimally exceeding EU-emission levels because damage suffered by plaintiffs/NGOs representing them not established.