COURTS TO THE RESCUE OF THE PUBLIC INTEREST IN CLIMATE CASES?

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1. DEMOCRACIES ON THE DECLINE AND COURTS ON THE RISE?

The 2024 democracy report by V-Dem, providing the largest global dataset on democracy, gathering information from 202 countries and measuring over 600 different attributes of democracy, reveals that autocratisation was ongoing in 42 countries, home to 35% of the world's population in 2023, while democratisation was taking place in 18 countries, hosting only 5% of the world's population. Perhaps even more important is that almost all components of democracy are getting worse in more countries than they are getting better, compared to ten years ago. Within this global trend, democracy was experiencing a particular decline in Asia and Eastern Europe.[1] As far as Eastern Europe is concerned, the euphoria in the EU of the enlargement with eleven Central and Eastern European countries between 2004 and 2013 soon vanished after the rise of illiberal governments in some of these countries.[2] What is interesting, though, is that where the political branches of government in many countries seem to have increasing difficulties dealing with global problems, such as discrimination, election interference and disinformation, terrorism, climate change, and reception of refugees, courts have been stepping up to the plate to defend the rule of law and protect vulnerable public interests. This has raised both praise and concern. Perhaps a good way to illustrate this is to recall the *Urgenda* climate case, which was the first case in Europe in which a government was held accountable for not sufficiently protecting its citizens against the dangers of climate change.

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1 See https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf.

2 A. Bakardjieva Engelbrekt and J. Nergelius (eds.), Rule of law in the EU, Oxford: Hart Publishing 2021, p. 5.

In a nutshell, the case was ignited by a letter of the Dutch government to the Urgenda Association in which it responded to the request to reduce greenhouse gas emissions (GHG) in the Netherlands in 2020 with 40% compared to the situation in 1990. The government recognised the urgency to reduce the risk of climate change but did not want to go further than the EU target of 20% in 2020. This triggered Urgenda, together with 886 citizens, to go to court and demand a reduction of GHG emissions of at least 25% in 2020.

The district court in The Hague delivered its ruling on June 24th 2015. The district court 'constructed' a duty of care by filling in the open tort norm in the civil code with an amalgam of sources (IPCC reports, policy documents, soft law) and ordered the State to reduce GHG emission by 25% in 2020 compared to 1990. The district court however denied that Urgenda's physical integrity (Article 2 ECHR) and privacy (Article 8 ECHR) were violated since the NGO would not be a 'victim' in terms of Art. 34 ECHR. The district court concluded that the state has a duty to take climate change mitigation measures due to the 'severity of the consequences of climate change and the great risk of climate change occurring.'[3] The court did not specify how the government should meet the reduction mandate, but offered several suggestions, including emissions trading or tax measures. The Dutch government submitted 29 grounds of appeal and Urgenda submitted a cross-appeal, contesting the court's decision that Urgenda could not directly invoke Articles 2 and 8 of ECHR in these proceedings. On October 9th, 2018, the Hague Court of Appeal upheld the district court's ruling, concluding that by failing to reduce GHG by at least 25% before end-2020 the Dutch government had acted unlawfully, in contravention of its duty of care under Articles 2 and 8 of the ECHR.[4] The court of appeal determined that the Dutch government has a positive obligation under the ECHR to protect these rights from the real threat of climate change. The court rejected the government's argument that the lower court decision constituted 'an order to create legislation' in violation of the separation of powers doctrine and affirmed its obligation to apply the ECHR provisions with direct effect of treaties to which the Netherlands is party. The court found nothing in Article 193 TFEU that prohibits a Member State from taking more ambitious climate action than the EU as a whole, nor that adaptation measures could compensate for the government's duty of care to mitigate GHG emissions or that the global nature of the problem would preclude the Dutch government from action.

Again the government appealed the decision, and the Dutch Supreme Court heard the appeal on May 24, 2019 and decided to uphold the decision by the

[3] District Court The Hague of 24 June 2015, ECLI:NL:RBDHA:2015:7196.
[4] Court of Appeal The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2610.

court of appeals decision on December 20th 2019.[5] Apart from the fact that the Dutch supreme court dared to anticipate what the European Court of Human Rights (ECtHR) would later decide (see below), without raising a preliminary question to the Strasbourg court,[6] it also triggered criticism by upholding an injunction that was by some scholars seen as a disguised order to legislate and thereby as an infringement of the separation of powers doctrine.[7] On the positive side, certain other scholars saw the decision as a groundbreaking ruling that showed how courts are capable to act as 'the grown-up in the room' by offering a strong incentive to overcome legislative paralysis.[8] Last but not least, the *Urgenda* case was a spark that ignited other public interest litigation cases on climate change, but also on other issues. One of the reasons for that has undoubtedly been that it showed NGOs that using class actions to protect vulnerable public interests might be a shorter route to success in a highly divided political landscape than lobbying legislators. Therefore it is not surprising that the case revived the attention for public interest litigation (PIL, also known as strategic litigation).[9]

2. PUBLIC INTEREST LITIGATION: WHAT'S IN A NAME?

Public interest litigation is certainly not a new phenomenon and it is notoriously hard to define.[10] The difficulty lays in the concept being in essence an

5 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006. See for the full-text English translation: ECLI:NL:HR:2019:2007.

6 Protocol No. 16 to the ECHR allows the highest courts and tribunals to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its protocols. An advisory opinion may be requested only in the context of a case pending before a domestic court and is non-binding. In the *Urgenda* case decided on December 20 2019, there was probably too little time to ask for an advisory opinion because the claim was to reduce GHG emissions before the end of 2020 by at least 25%. Waiting for an advisory opinion would have taken too long to guarantee compliance in case the decision of the Court of Appeal was to be upheld by the Supreme Court.

7 See for instance: L.F.M. Besselink, The National and EU Targets for Reduction of Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives: Hoge Raad (Netherlands Supreme Court) 20 December 2019, Urgenda v The State of the Netherlands. European Constitutional Law Review 2022, Vol.18(1), p. 155–182.

8 See for instance L. Burgers, Should Judges Make Climate Change Law? Transnational Environmental Law 2020, Vol. 9(1), p. 55–75.

9 K. van der Pas, 'Conceptualising strategic litigation', Oñati Socio-Legal Series, 2021 11(6(S), pp. S116-S145. Available at: https://opo.iisj.net/index.php/osls/article/view/1315.

10 The problem that PIL is hard to grasp conceptually has been a problem right from its birth. See for instance: M. Cappelletti, Vindicating the Public Interest through the Courts: A Comparativist's Contribution, Buffalo Law Review 1976, Vol. 25, No. 3 p. 643–690 an A. Chayes, The Role of the Judge in Public Law Litigation 1976, Vol. 89, No. 7, p. 1281–1316.

amalgam of public and private law proceedings, while not all of the formal characteristics are necessarily present in each case.[11] Nonetheless, Maglica has attempted to collect a number of more or less common characteristics or family resemblances of PIL across different jurisdictions.[12]

First, the claimant usually pursues adjudication that transcends the rights and interests of the litigants in the proceedings, but at the same time represents their interests. Second, the rights and interests at stake often have a fundamental (rights) nature, which can be either explicit or implicit. Third, PIL is hardly ever conducted exclusively between natural persons, but if it is started by a private party that party always represents more than its personal interest, which is also why the claimants in PIL cases have sometimes been labelled as 'private attorney generals'. Fourth, they serve not only to defend their own interests, but also to uphold the law for the benefit of others. The defendants are usually administrative agencies, the state or sometimes state-like entities, such as multinational corporations,[13] with similar powers and resources. Fifth, the relief sought is usually not mere monetary compensation to redress past harms as in most traditional civil liability cases. Instead the main purpose is usually to invoke a future change in existing policies or laws, which may include requesting compensation for adaptation costs. And, last but not least, the judge in PIL cases usually has a more active (managerial) problem-solving role than in most purely private disputes, let alone because the decision often has far-reaching societal consequences. Courts in PIL cases usually go beyond acting as mediators and operate against the backdrop of formal procedures: if you cannot negotiate a solution, then the formal rules are applied and the case goes to trial.

The possibility to start PIL cases varies tremendously across jurisdictions. In the U.S.,[14] for example, there are rather strict requirements for NGOs to start class actions in the public interest.[15] In India, on the other hand, the threshold

11 J. Fowkes, Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge Cambridge Journal of International and Comparative law 2012, Vol. 1, No. 3, p. 235–253.

12 A. Maglica, Public end through private means: A comparative study on public interest litigation in Europe, Erasmus Law Review 2023, No. 2, p. 1–15. The idea of family resemblances was developed by Wittgenstein in Philosophical Investigations. See: Ludwig Wittgenstein, Philosophical Investigations, translated by Gertrude Elizabeth Margaret Anscombe, Blackwell 1953.

13 A. Homburger, Private Suits in the Public Interest in the United States of America, Buffalo Law Review 1974, Vol. 23, p. 343–410.

14 Article III of the American Constitution forms the basis for the standing rules in PIL cases in conjunction with Article 23 of the Federal Rules of Civil Procedure on class actions. Article III, section 2, constrains the role of courts to 'cases and controversies', thereby limiting the power of the federal judiciary, requiring an 'injury in fact'.

15 See D. Marcus, The Persistence and Uncertain Future of the Public Interest Class Action, Lewis & Clark L. Rev. 2020, Vol. 24, p. 395–432. However, see also M. Morley and F. Andrew Hessick, Against Associational Standing (August 14, 2023). University of Chicago Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4540176.

to start a PIL for NGOs and public spirited persons is extremely low and the Supreme Court is even capable of starting such cases *suo moto*,[16] which means that the court can do this itself without any petition from a claimant! There are famous examples of the Supreme Court starting a PIL case on the basis of a newspaper article or a postcard.[17]

In most European countries the availability of PIL procedures varies. There are differences between jurisdictions regarding the possibilities to start a class action to protect public interests and there may be differences based on the distinction between public and private law proceedings, as is the case in The Netherlands.[18] In general, EU law has broadened the possibility for class actions in EU Member States, but mainly for environmental organisations in order to provide them with access to information and for consumer organisations filing cases for damages on behalf of their members.[19]

3. GROUP ACTIONS VERSUS PUBLIC INTEREST ACTIONS

EU Directive 2020/1828 has introduced a 'representative action mechanism' for the protection of the collective interests of consumers in all Member States. Representative action means 'an action for the protection of the collective interests of consumers that is brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both.[20] Obviously, representative action on behalf of consumers or other individuals to, for instance, receive compensation from a producer of a defective product is something totally different from filing a class action to prevent current and future generations in a certain jurisdiction from the dangers of irreversible climate change, as was the case in the aforementioned *Urgenda* case. In other words, it is necessary to distinguish representative (class) actions from PIL. The

[16] The legal basis is Order 38, Rule 12(1)(a) of the Indian Supreme Court Rules 2013 (https://main.sci.gov.in/supreme-court-rules-2013). See also https://www.scobserver.in/journal/46-suo-moto-cases-in-the-supreme-court-from-1990-2021/.

[17] See for instance Mukesh Advani v State of Madhya Pradesh AIR 1985 SC 1363, where the Supreme Court marked a newspaper clipping as a 'writ petition'. See also J. Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' American J of Comparative Law 1989/37, p. 495–519 (at p. 498–499).

[18] See in great detail about this: R. Stolk, Procederende belangenorganisaties in de polder. Een interdisciplinair perspectief op de toegang tot de rechter, Dissertation Leiden 2024.

[19] Regulation 1367/2006/EG on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies and Directive 2020/1828 EU on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[20] Art. 3(5) of Directive 2020/1828/EU.

South African Law Commission has explained the essential procedural difference between representative collective class actions and public interest actions quite clearly:

> Class action means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act (…) public interest action means: an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in the representative's own interest.[21]

In other words, a traditional class action involves a bundling of sufficiently similar individual interests, by which the representative of the class seeks compensation for past wrongdoings and usually must be 'certified' to act on behalf of those bringing a claim before court. As a consequence, there must normally be either an opt-in or opt-out option for members of the class.[22] A public interest action, however, is usually not about bundling a number of individual (personal) interests, but often concerns an action brought by an NGO that defends public interests, which are more than the mere sum of the class members interests. However, who may bring a PIL case on behalf of which others, and under what kind of conditions, may vary considerably across jurisdictions.

An interesting debate regarding the latter is going on in The Netherlands, where the civil code (CC) was changed in 2020 when the Act on Redress of Mass Damages in Collective Action (in Dutch: Wet afwikkeling massaschade in collectieve actie, or WAMCA) entered into force, which made it possible for representative organisations to seek monetary damages in Dutch class actions. Previously, class actions could only be used as a steppingstone towards obtaining financial compensation, which was usually secured through a collective settlement agreement. Damages could not be claimed and it made no difference whether the action was filed to protect the financial interests of a certain group or a public interest. After 2020, though, monetary relief may be sought irrespective whether the class action was filed to protect a certain financial interest on behalf of a particular group (such as consumers) or by a foundation or association that claims to protect a certain public interest (such as protection of the environment). In both cases, one of the requirements for admissibility became that the legal entity serving as plaintiff is sufficiently 'representative', given the constituency and size of the claims represented. This criterion has proven to be particularly problematic in PIL cases because there often is no closed group of individuals that can serve as constituents or as members of the plaintiff. This

[21] South African Law Commission, Project 88. 'The recognition of class actions and public interest actions', South African Law, August 1998, p. VI en V. See www.saflii.org/za/other/ZALRC/1998/6.pdf.

[22] See for an overview of: D. Hensler, C. Hodges and I. Tzankova (eds.), Class actions in context, Cheltenham: Edward Elgar 2016.

makes it extremely difficult for courts to assess the representativeness of the plaintiff in PIL cases. For instance, how many donors, members or followers will an association need if it wants to file a PIL case to block certain government measures (such as a curfew) which are supposedly taken by the government to prevent negative health effects during a pandemic?[23]

An additional problem was created due to the fact that Dutch courts, in case a foundation or association filed a PIL together with a number of private citizens, often dismissed the claims of the individual citizens as inadmissible, because they would no longer possess a legitimate interest as a separate litigant since their interests would have been bundled and usurped by the NGO that serves as the plaintiff.[24] However, what most Dutch courts did not seem to realise is that by excluding individual citizens to serve as co-litigants, there could be severe repercussions for them in case the claim brought by the NGO as plaintiff would be rejected by courts in appeal or cassation. The reason is that in such a case, NGOs serving as the plaintiff in the national procedure would usually not be able to, for example, start a case before the ECtHR.[25] This court may only receive applications from any person, non-governmental organisation or group of individuals claiming to be the *victim* of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. Traditionally, the case law of the ECtHR has been that NGOs – as being legal persons – were normally not considered to be victims in the sense of Article 34 of the European Convention on Human Rights (ECHR). Natural persons, on the other hand, are only admissible to bring a case before the ECtHR after all domestic remedies have been exhausted. This would, in principle, mean that people whose claims were declared inadmissible by one of the national courts, because their interests were supposed to be served by an NGO operating as the plaintiff of a class action, would then first need to go through the entire national courts system again with an individualised claim before being able to address the ECtHR. This would only be different if either national courts would view the possibility of a potential appeal to the ECtHR

[23] Compare the decision of the District in The Hague November 29 2021, ECLI:NL:RBDHA:2021:12992, which declared the plaintiff (Viruswaarheid to be translated as 'Virus truth') who was filing a PIL to stop a curfew during the Covid pandemic admissible without further ado, while the Court of Appeal in The Hague declared on April 19 2022, ECLI:NL:GHDHA:2022:643, para. 6.5 that 300.000 followers and supporters of this plaintiff would not be sufficient to make the association a representative organisation that could legitimately file a PIL case.

[24] See for instance: District court The Hague February 5 2020, ECLI:NL:RBDHA:2020:865 (*Syri* case) and District court The Hague May 26 2020, ECLI:NL:RBDHA:2021:5337 (*Friends of the Earther vs Royal Dutch Shell*).

[25] C. Loven & M. Vetzo, Vergeet de individuele eiser niet! 'Public interest litigation' en de weg naar Straatsburg, Blog of the Montaigne Centre for Rule of Law and Administration of Justice 2021: https://blog.montaignecentre.com/nl/public-interest-litigation-en-de-weg-naar-straatsburg/.

as a reason to allow private citizens to act as co-applicants of a PIL case,[26] or if the ECtHR would be willing to make an exception for NGOs previously seen as representing actual victims of abuse of convention rights.[27]

4. TRANSNATIONAL PIL

4.1 PIL before the ECtHR

Until recently, the ECtHR refused to take on board applications that could be considered an 'actio popularis'. The reason was that the Court did not want to be instrumentalised by NGOs to review domestic laws or policies via general and abstract forms of judicial review because that could endanger the legitimacy of the court in the eyes of the member states of the Council of Europe. Apart from the fact that strategic cases can be brought by direct victims supported by NGOs, there have been signals in the literature that climate change could be a reason for the ECtHR to stretch its strict interpretation of victimhood.[28] It has been argued that the nature of climate change necessitates action based on scientific evidence concerning future risks with severe and ultimately irreversible impact on societies where individual applicants have not yet suffered concrete harm and could therefore not be held admissible in a traditional interpretation of victimhood.[29] Indeed, the ECtHR has sometimes broadened access to justice in environmental cases because of the complexity, technicality, expense or novelty and urgency of certain environmental risks.[30] Interestingly, this seems to be exactly what has happened in the case of the *Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* (*KlimaSeniorinnen*)[31]

The case before the ECtHR concerned a complaint by four women over the age of 80 and a Swiss association, (KlimaSeniorinnen Schweiz), whose members are (also) all older women concerned about the consequences of global warming on their living conditions and health. They considered that the Swiss authorities

[26] District court The Hague May 19th 2021, ECLI:NL:RBDHA:2021:10080 (*Amnesty International c.s. vs The State of the Netherlands*).

[27] ECtHR November 21 2017, Case no 53461/15, ECLI:CE:ECHR:2017:1121DEC005346115 (*Kósa v. Hungary*).

[28] See for instance: ECHR, January 24 2019, Apps nos 54414/13 and 54264/15, ECLI:CE:ECHR:2019:0124JUD005441413 (*Cordella and Others v Italy*) in which the pollution of steelworks in the Taranto area affected not only the health of the applicants but also that of the local community.

[29] C. Heri, Climate cases as public interest litigation before the European Court of Human Rights, in: J. Bendel & Y Suedi (eds.), Public Interest Litigation in international law, London/New York, Routledge 2024, p. 331–332.

[30] Ibid p. 333.

[31] ECtHR April 9 2024, No. 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020 (*KlimaSeniorinnen Schweiz and others v. Switzerland*).

were not taking sufficient action, despite their duties under the Convention, to mitigate the effects of climate change. The Grand chamber first examined whether the individuals and the association had standing. This requires the existence of a direct impact of the impugned action or omission on the applicant or a real risk thereof. The ECtHR held that applicants need to show 1) that they are subject to a high intensity of exposures to the adverse effects of climate change and 2) there is a pressing need to ensure the applicant's individual protection. The four individual applicants did not fulfil these requirements and were declared inadmissible. The association KlimaSeniorinnen, however, was affirmed by the ECtHR because of specific considerations relating to climate change, being a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context. Moreover, the ECtHR argued that to preclude the applicant association's application under Articles 2 and 8 by virtue of the fact that it was a legal person, would be to ignore reality and be out of line with the principle that the Convention rights should be practical and effective and ensure that its approach to the notion of victim status was in line with the Aarhus Convention which provides the possibility that associations may substitute individuals in pursuit of environmental actions. Next, the ECtHR found that the right to effective protection by public authorities from the serious adverse effects of climate change is encompassed by Article 8 ECHR and that the Swiss authorities had violated this right by failing to fulfil their positive obligations under the ECHR in relation to climate change. This because there were critical flaws in the relevant domestic regulatory framework, including the absence of a carbon budget or national GHG emissions limits. Switzerland had also failed to comply with its GHG emissions reduction targets. The ECtHR also found a violation of Article 6 ECHR. Although the KlimaSeniorinnen had exhausted all available avenues of appeal, the Swiss courts had not carried out a substantive examination of their griefs. According to the ECtHR, the Swiss courts should have provided convincing reasons on why they did not consider it necessary to examine the merits of the complaints and for their dismissals. In addition, the ECtHR found that the Swiss courts did not adequately consider the strong scientific evidence on climate change and had failed to take the association's complaints seriously.

The *KlimaSeniorinnen* case not only raised praise, but also scepticism. After all, why would the ECtHR make an exception to its regular admissibility standards only (or especially) for climate change cases, but not for other public interest related cases with similar features? Politicians in, for example, the UK, Ireland, the Netherlands, and Norway criticised the decision because how to tackle climate change affects economic development, energy policy, and national security, arguing that elected politicians are best placed to make those decisions. Some argued national authorities would be in a better position than an international court to evaluate the relevant needs and conditions

under which certain climate change policies would violate the law. Others, were concerned about courts violating the separation of powers doctrine, including dissenting ECtHR judge Eicke who argued that judicial decisions should not be used to circumvent the democratic process because forcing domestic authorities to assess their policies and regulations might have the opposite effect of strengthening climate protection.[32]

It is too soon to predict whether the latter is true, but a Swiss parliamentary committee May 21th 2024 rejected the ruling of the ECtHR, following the legal affairs committee of the upper house of parliament which voted to rebuff the decision on the grounds that the country was taking enough action and the minister of the environment who claimed that the ECtHR decision was hard to reconcile with Switzerland's democratic system.[33] We can only wait and see where this is going to end, but for those who believe in the rule of law, it should be a worrisome sign that a national government suggests that it will simply ignore decisions of a supranational human rights court, such as the ECtHR, in case it disagrees with its judgments and believes that its case law violates the results of a referendum. After all, the ECtHR has clarified that 'democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes.'[34] It added that oversight is all the more important in case of problems that are likely to affect intergenerational relationships, because especially with regard to such problems there would be an inherent risk that short-term political interest prevail over the need for sustainable policy-making.[35] In other words, one cannot simply violate fundamental rights and risk tremendous damage for millions of citizens because a (temporary) majority in parliament is unwilling to take action, or a referendum prevents an amendment to a climate law that was supposed to further reduce GHG emissions.[36]

4.2 PIL before the CJEU

For more than 60 years, the Court of Justice of the European Union (CJEU) has refused to directly protect rights that are non-individualisable within the

[32] C. Blattner, Separation of Powers and KlimaSeniorinnen, VerfBlog, 2024/4/30, https://verfassungsblog.de/separation-of-powers-and-klimaseniorinnen/, DOI: 10.59704/3f49776eda0e8e72.

[33] See https://www.reuters.com/world/europe/swiss-parliamentary-committee-rejects-european-climate-ruling-2024-05-21/.

[34] ECtHR April 9 2024, No. 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020, para 412.

[35] Ibid para 420.

[36] See https://www.loc.gov/item/global-legal-monitor/2021-06-25/switzerland-co2-act-amendment-rejected-by-voters/.

procedure for challenging EU legislation under Article 263 TFEU.[37] The problem originates from the *Plaumann* case. In that case the Court ruled that for an applicant to be individually concerned, a party must show that it was affected:

> […] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[38]

Especially for NGOs this has proven to be an almost insurmountable hurdle. This may again be illustrated by a climate case, known as the *People's climate* case,[39] which was initiated by 36 individuals and a Swedish Sami Youth Association seeking to force the EU to take more stringent GHG emissions reductions. Plaintiffs alleged that the EU's target to reduce domestic GHG emissions by 40% in 2030, as compared to 1990 levels, would threaten their fundamental rights to life, health, occupation, and property. They therefore sought the annulment of the legislative package that was supposed to comply with the EU Nationally Determined Contributions (NDCs) under the Paris Agreement and asked for an injunction ordering the EU to take measures reduced GHG emissions by at least 50% to 60% in 2030 compared to 1990.

The General Court dismissed the case, because the plaintiffs would not be sufficiently and directly affected by these policies since climate change affects every individual and the plaintiffs would not be affected by the legislative acts in a manner that is 'peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually.' The court also rejected the argument that the concept of 'individual concern' in Article 263 (4) TFEU is not compatible with Article 47 of the Charter of Fundamental Rights (CFR). Nor did the court find that plaintiffs could bring the case under the other possible criteria under the fourth paragraph of Article 263 of the TFEU because they were not direct addressees of the legislative package.

On March 25, 2021, the CJEU upheld the General Court's order. The CJEU followed the lower court's reasoning that the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application, because this would render standing limitations mean-

[37] M. van Wolferen, The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework, Journal of Contemporary European Research 2016, Vol 12, Issue 4, p. 915–930.

[38] Case C-25/62 *Plaumann v Commission of the EEC* EU:C:1963:17. See also Case C-583/11 *Inuit Tapiriit Kanatami v Parliament and Council* EU:C:2013:625, para. 72; Joined Cases C-408/15 *Pand*; C-409/15 P *Ackermann Saatzucht v Parliament and Council* EU:C:2016:893, para 27–46.

[39] Case C-565/19 P *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* ECLI:EU:C:2021:252.

ingless and create locus standi for all. Further, the CJEU rejected the argument that an infringement of fundamental rights automatically provides standing since a fundamental right would almost always likely to be concerned in one way or another by measures of general application. That is why the conditions of Article 263 (4) TFEU should be interpreted in light of the fundamental right of effective judicial protection but cannot have the effect of setting aside the conditions expressly laid down in the Treaty, according to the CJEU.

In the *People's climate* case, the CJEU also stressed that Article 47 CFR does not require that individuals (including NGOs) have an unconditional entitlement to directly bring actions for annulment to the Court. The legislation would require further implementing measures at the EU and Member State level, which would imply that applicants could indirectly contest the validity of the EU legislative acts, either via Article 263 juncto 277 TFEU by contesting the EU implementing measures, or via the preliminary reference procedure of Article 267 TFEU, by contesting the national implementation measures against the backdrop of the EU legislative acts. This argument disregards the fact that national implementation measures as such cannot be contested via the preliminary reference procedure, even if such an action would include questions regarding the validity or interpretation of EU law. It would also imply that every individual or NGO in each Member State would have to question the interpretation of the underlying EU laws via preliminary questions raised through the national courts.

Even when NGOs would want to challenge regulatory acts of general application, they would normally not meet the standing criterion of direct concern. Most regulatory acts also require implementing measures which again may be contested via the indirect route of Article 263 juncto 277 or 267 TFEU. Finally, the Aarhus Regulation access to justice procedures only enable the applicants to challenge a refusal by EU institutions to grant internal review. Therefore applicants can again only challenge the act which was the object of their request for internal review indirectly, in so far as they challenge and seek the annulment of the EU institution's refusal to grant an internal review. However, a decision to grant internal review does not necessarily lead to the repeal or the withdrawal of the relevant act.[40]

In conclusion, NGOs that want to challenge EU laws or regulatory acts of general application will rarely be able to do this directly. Normally, they will have to follow the indirect and lengthy route of Article 263 juncto 277 or 267 TFEU, because they will rarely be able to prove that these act are of direct

[40] G. Claudia Leonelli, A threefold blow to environmental public interest litigation: the urgent need to reform the Aarhus Regulation, European Law Review 2020, Vol. 45, No. 3, p. 324–347. See also G. Claudia Leonelli, Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending, Yearbook of European Law 2021, Vol. 40, No. 1, p. 230–264.

and individual concern to them. However, due to the KlimaSeniorinnen case of the ECtHR, the question is how long the CJEU will be able to maintain this position. The Strasbourg court not only argue that withholding standing for NGOs would render the protection of fundamental rights, such as those enshrined in Article 2 and 8 ECHR ineffective, but might also argue that this violates the Aarhus Convention which essentially provides that associations can substitute individuals in pursuit of environmental actions. Moreover, Article 47 CFR guarantees the right to an effective remedy and a fair trial. Under Article 52(3) CFR, this right needs to be interpreted in line with the case law of the Strasbourg Court.[41] More simply put, now that the ECtHR has broadened its standing rules for NGOs in climate cases, this should have repercussions for the future case law of the CJEU.

On the other hand, as Van Wolferen has argued, the rise of PIL on the supranational level is also a response to the growth of the EU into a constitutional order that increasingly goes beyond its economic origins. So far, the CJEU has only seen a possibility for fundamental changes in the judicial system when the basic treaties are redrafted. Primary EU law supposedly cannot be directly changed through other legislation, be it international treaties or secondary law.[42] Since Euroscepticism is on the rise in a growing number of EU Member States, a major dilemma for the CJEU seems to be whether to wait for a new political wind to pave the way for treaty reform that would broaden the room for NGOs to bring PIL cases directly before the Court, or follow the line of the ECtHR, because of the extreme dangers that particularly climate change raises for the European economy and the protection of fundamental rights.

6. CONCLUSION

The history of the Urgenda climate case, in which the Dutch government was ordered to speed up the process of GHG emission reductions in order to avoid infringements of Article 2 and 8 ECHR, shows not only the potential of PIL, but also the downside of a judicialisation of political decisions. Right after the Urgenda ruling, climate sceptic political parties started to fulminate against what was seen as judicial overreach. Similar signs have been seen in several other jurisdictions. Spectacular wins in PIL cases from the side of NGOs, which are perceived as a 'judicialisation of politics', often comes at the risk of a 'politicisation of the judiciary'. The latter can take many different forms varying from a call for stronger political involvement in the appointment of judges to a reform

[41] See also the explanation on article 52 Explanations Relating to the Charter of Fundamental Rights OJ 2007 C-303/02.
[42] Van Wolferen 2016, p. 930.

of the rules of civil procedure in order to raise the threshold for NGOs to bring PIL cases against the government.

Hence, it should not come as a surprise that supranational courts like the ECtHR and the CJEU are also hesitant to open the gates for PIL cases. Not only could this create serious political backlash, it might also flood these already overburdened courts with a stream of new politically sensitive cases. Nonetheless, as we have seen the ECtHR and the CJEU have shown different approaches, especially towards climate change litigation. For the Luxembourg court, the response has so far been to offer no direct access to justice for NGOs, apart from a few cases regarding requests for information under the Aarhus convention. The ECtHR, on the other hand, has tried to develop criteria for environmental organisations to allow them to bring climate cases to the ECtHR, such as that they must be: a) lawfully established; b) able to show a dedicate purpose in line with their statutory objectives to protect their members or other individuals within their jurisdiction against the dangers of climate change; c) capable of demonstrating to be qualified and representative to act on behalf of private citizens who are subject to specific threats or adverse effects of climate change on their lives, health or well-being.[43]

Where this is going to land is unknown. The *KlimaSeniorinnen* case has made it clear that the ECtHR is going to decide on a case by case basis whether it wants to grant NGOs access to justice and that it is going to pay special attention to the non-profit character of NGOs, to the nature and extent of their activities within the relevant jurisdiction, their membership and representativeness, and the adherence to principles of transparency of governance. All of this, to decide whether the granting of standing is in the interests of the proper administration of justice. The CJEU, for the time being, seems to ignore requests to relax the standing requirements for NGOs to directly bring PIL cases. Instead, the CJEU seems to use the preliminary reference procedure as a gap-filler,[44] enabling citizens and NGOs to indirectly via their national courts ask the CJEU whether certain provisions in (national) climate change laws are undermining EU legislative acts, or to indirectly challenge EU legislation. Unfortunately, this leaves very little room for effective participation of citizens, NGOs, and even national courts, during the proceedings in Luxembourg.[45]

[43] ECtHR April 9 2024,No. 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020, para 502.

[44] See https://eulawlive.com/op-ed-legal-standing-in-climate-litigation-before-the-ecthr-and-the-cjeu-by-mario-pagano/.

[45] V. Passalacqua and F. Costamagna, The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge, European Law Open 2023, Vol. 2(2), p. 322–344. See also R.A.J. van Gestel & J.C.A. de Poorter, In the Court we trust, Cambridge: Cambridge University Press 2019, p. 163–165.