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Reports & Essays on Climate Change Litigation

Edited by
Elena D'Alessandro and Davide Castagno

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Via Verdi, 8 – 10124 Torino
www.collane.unito.it/oa/
openaccess@unito.it

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1. *Introduction*

A study conducted in France has highlighted that climate activists encounter at least four procedural considerations when they choose to initiate legal action in any court: legal standing, forum choice, burden of proof, and separation of power theory, that is to say the limits of a Court order with regard to the legislative and executive powers[1]. In this study, we will focus particularly on the first of these aspects, namely the claimants' legal standing in climate change litigation and its legal basis. Indeed, if procedural rules are sometimes of help, providing *ad hoc* standing for this kind of litigation, the fact remains that judges are still often required to manage such claims without a specific rule. In said instances, judges are compelled to modify conventional standing regulations to align them with the unique characteristics of climate change litigation. Otherwise, the absence of legal standing is frequently the primary argument used to dismiss the lawsuit, providing judges with a strategic response to a strategic claim[2].

Therefore, bearing in mind that in this study we are only considering strategic human rights-based domestic litigations in which the defendant is a State[3], we are going to examine four key "standing-orientated" climate

1. Cf. M. Hautereau-Boutonnet - È. Truilhé, *Le procès environnemental: du procès sur l'environnement au procès pour l'environnement*, in *www.gip-recherche-justice.fr*, 2019 Final Report.

2. On the difference between strategic cases and routine cases in climate change litigation, cf. C.V. Giabardo, *Climate Change Litigation and Tort Law. Regulation Through Litigation?*, in *Diritto&Processo* (University of Perugia Law School Yearbook), 2020 (2019), 361, 362 f.

3. Consequently, we do not refer to litigations against multinational companies, which represent another branch of climate change litigation, in which different mechanisms apply. From this perspective, let's consider that in accordance with the 2022 Report of

cases, that is to say cases in which the court's decision largely hinged on whether or not the claimants possessed the requisite legal authority to sue the State. In particular, we will refer to the Dutch case of *Urgenda* (para. 2.1) and to the Canadian case of *ENvironnement JEUnesse* (para. 2.2), on the one hand, and to the Belgian case of *Klimaatzaak* (para. 3.1) and to the Swiss case of *KlimaSeniorinnen* (para. 3.2), on the other. The reason for this choice is that in the first group of cases, collective actions for the protection of general interests are provided for. However, in the second group, such actions do not exist, or at least did not exist at the time the cases were brought. Furthermore, it is worth noting that all of these cases were adjudicated by civil law courts[4].

Finally, in our concluding remarks, we will address an Italian precedent, not concerning climate change litigation at all, in order to emphasise how the "strategic" use of procedural rules can always enable a court decision, even when under those rules this would seem impossible.

2. *Climate Change Litigation Under Specific Regulations that Permit Collective Actions*

2.1 *The* Urgenda *Case in The Netherlands*

To assess the significance of standing rules in climate change litigation, we can observe that in the *Urgenda* case, from which the climate litigation network originated, the claimant's right to standing was the primary point of contention in the adjudication of the claim.

In this case, the claimant was an association, namely Urgenda Foundation, that expressly acted on behalf of itself as well as legal representative of 886 individuals who had authorised Urgenda to also conduct the proceedings on their behalf[5]. The proceedings had been instituted in

The London School of Economics, in the European context around 75% of cases have been filed against a wide variety of government actors (cf. J. Setzer - H. Narulla - C. Higham - E. Bradeen, *Climate litigation in Europe. A summary report for the European Union Forum of Judges for the Environment*, in www.lse.ac.uk, accessed on 10 September 2023).

4. Even if Canada is a common law country, in the region of Quebec civil law applies. Quebec is indeed the only Canadian province with a civil code, which is based on the French Napoleonic Code.

5. Urgenda – a contraction of the words "Urgent" and "Agenda" – was founded in 2007 as an initiative of the Dutch Research Institute for Transitions (DRIFT), an institute for the

accordance with Article 305a of the Dutch Civil Code (hereafter DCC), which allows collective actions (otherwise called class actions) to obtain a declaratory judgment[6]. A distinctive feature of this process is that there is no specific conflict between the defendant and the organisation that typically files the claim. This is because the organisation does not pursue litigation based on its own interests but rather advocates for the interests of an unspecified group of "others"[7].

Since Urgenda was not acting as the legal representative of all other claimants, it was evident that its lawsuit sought to safeguard a matter of public concern central to its constitutional mission: safeguarding the interests of both present and future generations from the hazards of climate change.

On its own, the State did not dispute Urgenda's capacity to represent the present generations of Dutch citizens, but it argued that Urgenda had no basis when it sought to protect the interests of current and future generations in other countries[8]. As for the interests of future Dutch generations, the State deferred to the court's opinion.

Considering that Urgenda had made sufficient efforts to attain its claim by entering into consultations with the State, according with Article 3:305a(2) DCC, the Hague District Court concluded that Urgenda's claim,

transition to a sustainable society, at the Erasmus University in Rotterdam. Urgenda is a non-governmental organisation that has gained Dutch NGO status (*algemeen nut beogende instelling*). The official purpose of Urgenda, as stated in its articles of incorporation, is «to stimulate and accelerate the transition to sustainable society, starting in the Netherlands».

6. Under this provision, a legal entity, such as a foundation or association, can submit a complaint if it seeks to protect a common interest or the collective interests of others, provided that such an interest aligns with one of the constitutional objectives of that legal entity. Since the Urgenda claim was initiated in 2013, we refer to the regulation as existing before the amendments which from January 2020 were made to the procedure as a result of the enactment of the Act on collective damages in class actions (Act of 20 March 2019, Stb. 2019, 130).

7. As for these interests, they may relate to a specific group interest or to a more ideological public interest, to the extent that they are of a similar nature: cf. V.B. de Vaate, *Collective redress and workers' rights in the Netherlands*, in *European Labour Law Journal*, 12 (4), 2021, 455, 464. Article 3:305a DCC represents in any case an exception to the general provision of Article 3:303 DCC, which determines that a (legal) person can file a complaint before civil courts only when that person has sufficient individual and personal interest in that claim.

8. Since climate change and sustainability were transboundary in their nature and thus have strong international dimensions, the interests that Urgenda represented were in fact not limited to the Netherlands.

in so far as it acted on its own behalf, was allowable to the fullest extent[9]. Nevertheless, the Court considered that Urgenda itself could not rely on Articles 2 and 8 of the European Convention on Human Rights (hereafter ECHR), since Urgenda itself could not be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. The fact remains, however, that these treaty obligations have contributed to detailing the standard of care under Article 6:162 DCC invoked by Urgenda towards the State[10].

Urgenda's standing has been reviewed by the Hague Court of Appeal, whose decision expressly relied on "regulations of a predominately procedural nature", namely Article 34 ECHR and Article 3:305a DDC, respectively[11]. The Court of Appeal observed that the District Court had failed to acknowledge that Article 34 ECHR could not serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in those proceedings. While individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda

9. Cf. The Hague District Court, 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.9, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation). For some comments, cf. *inter alia* K. De Graaf - J. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, in *Journal of Environmental Law*, 27 (3), 2015, 517; J. Lin, *The First Successful Climate Negligence Case: A Comment on Urgenda Foundation c. the State of the Netherlands*, in *Climate Law*, 5, 2015, 65; J. Van Zeben, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, in *Transnational Environmental Law*, 4 (2), 2015, 339; R. Cox, *A Climate Change Litigation Precedent: Urgenda Foundation c. the State of the Netherlands*, in *Journal of Energy & Natural Resources Law*, 34 (2), 2016, 143.

10. Cf. The Hague District Court, cit., para. 4.45. As for the action instituted on behalf of the individuals, the Court observed that Urgenda was defending the right of not just the current, but also the future generations' right to access of natural resources and to live in a safe and healthy environment. In any case, in this situation, the Court found out that the individual claimants did not have sufficient personal interest besides the Urgenda's interest (cf. The Hague District Court, cit., para. 4.109).

11. Cf. The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 34, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation). For some comments, cf. *inter alia* B. Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*, in *Transnational Environmental Law*, 8 (1), 2019, 167; P. Minnerop, *Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case*, in *Journal of Energy & Natural Resources Law*, 27 (2), 2019, 149; I. Leijten, *Human rights v. Insufficient climate action: The Urgenda case*, in *Netherlands Quarterly of Human Rights*, 37 (2), 2019, 112.

may also do so on their behalf under Article 3:305a DCC[12]. On the other hand, with respect to Urgenda's inability to represent the future generations of Dutch citizens or the current and future generations of individuals from other countries, the Court noted that the claim remained permissible as long as Urgenda acted on behalf of the current generation of Dutch citizens and individuals. After all, it was without a doubt plausible that the current generation of Dutch nationals – in particular but not limited to the younger individuals in that group – would have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases were not adequately reduced[13].

Regarding the State's argument that this type of legal action might also encompass individuals who may not even desire representation, this argument was refuted by the Court, considering the legislative history of Article 3:305a DCC. After all, in the Parliamentary papers, the legislator specifically acknowledged that:

> nancial interests, but also more idealistic interests, and in this case, it is irrelevant whether each member of society attaches the same value to these interests. It is even possible that the interests that are sought to be protected in the proceedings conflict with the ideas and opinions of other groups in society. This alone shall not stand in the way of a class action. […] It does not have to concern the interests of a clearly defined group of others. It may also concern the interests of an indeterminable, very large group of individuals[14].

The decision was finally confirmed by the Dutch Supreme Court, which argued that Urgenda, on the basis of Article 3:305a DCC, was representing the interests of the residents of the Netherlands, with respect to whom the obligation under Articles 2 and 8 ECHR applied. After all, the interests of those residents were sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. The mere fact that Urgenda did not have a right to complain to the European Court of Human Rights on the basis of

12. Cf. The Hague Court of Appeal, cit., para. 36.
13. Cf. *ivi*, para. 37.
14. Parliamentary Papers II, 1991/92, 22 486, No. 3, 22. Moreover, it was set out in the Explanatory Memorandum that an environmental organisation's claim in order to protect the environment, without an identifiable group of persons needing protection, would be allowable under that scheme. On this point, see also M.F. Cavalcanti - M.J. Terstegge, *The Urgenda case: the Dutch path towards a new climate constitutionalism*, in *DPCE online*, 2020/2, 1371, 1383 f.

Article 34 ECHR, because it was not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, did not detract from Urgenda the right to institute a claim before Dutch civil courts, in accordance with Article 3:305a DCC on behalf of residents who were in fact victims[15].

2.2 *The Canadian Case of* ENvironnement JEUnesse *(*Enjeu*)*

A somewhat analogous case was unfolding in the Canadian province of Quebec, albeit with a completely different outcome. We are referring to the class action brought by *ENvironnement JEUnesse* (*Enjeu*) against the Canadian Government.

Enjeu is an association that was founded in 1979 with the constitutional purpose of educating young people on environmental issues. In this case, *Enjeu* specifically acted on behalf of all Quebec resident aged 35 and under on November 26, 2018 (i.e., the date of the filed action), aiming at a declaratory judgment establishing that the Canadian Government's behaviour in the fight against climate change had infringed on the rights of the youth, as well as an order to pay punitive damages[16]. According to Article 571 of the Quebec Code of Civil Procedure (hereinafter QCCP),

> a class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class. In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with juridical personality may be members of the class.

15. Cf. The Netherlands Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007, para. 5.9.2 and 5.9.3, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation).

16. According to the *Enjeu*'s claims, the Canadian Government's behaviour had infringed on a number of rights protected by the Canadian Charter of Rights and Freedoms and Quebec's Charter of Human Rights and Freedoms, namely: the right to life, integrity and security of the person protected by section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec's Charter of Human Rights and Freedoms; the right to live in a healthful environment in which biodiversity is preserved, protected by section 46.1 of the Quebec's Charter of Human Rights and Freedoms; the right to equality protected by section 15 of the Canadian Charter of Rights and Freedoms and section 10 of the Quebec's Charter of Human Rights and Freedoms (cf. Trudel Johnson & Lespèrance, Completed class actions, ENvironnement JEUnesse v. Attorney General of Canada, in www.tjl.quebec, accessed on 10 September 2023). For further details, see also C. Feasby - D. Devlieger - M. Huys, *Climate Change and the Right to a Healthy Environment in the Canadian Constitution*, in *Alberta Law Review*, 58 (2), 2020, 213.

In any case, according to Article 574 QCCP, in order to institute a class action, a prior authorization of the court is required. Thus, in its motion for authorization, *Enjeu* argued that the claim complied with all the requirements mentioned in Article 575 QCCP[17], relying in particular on the fact that the class composition made it difficult or not viable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings[18]. Nevertheless, in its reply, the Government challenged *Enjeu*'s decision to use a collective action under Article 571 QCCP as a procedural vehicle for its claims, arguing that the association had failed to fulfil different requirements established in Article 575 QCCP.

In July 2019, the Superior Court of Quebec refused the authorisation, focusing on the claimant's standing right. According to the Court's opinion, it was accurate to assert that the class action could guarantee the adherence to regulations pertaining to environmental matters. However, this did not mean that a class action could be authorised automatically every time an environmental issue was a stake[19]. In particular, after having rejected the Government objections based on the separation of powers theory and after having *prima facie* acknowledged the rights alleged by the petitioner, the Court argued that *Enjeu*'s choice to cap the age of the group members at 35 was not reasonable. Indeed, according to Article 591 QCCP, the judgment on a class action describes the class to which it applies and is binding on all class members who have not opted out. But,

17. In accordance with Article 575 QCPC, «The court authorises the class action and appoints the class member it designates as representative plaintiffs if it is of the opinion that: (1) the claims of the members of the class raise identical, similar or related issues of law or fact; (2) the facts alleged appear to justify the conclusions sought; (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and (4) the class member appointed as representative plaintiff is in a position to properly represent the class members».

18. Cf. Motion for authorisation to institute a class action and obtain the status of representative, para. 3, in www.enjeu.qc.ca, accessed on 10 September 2023 (in French). In particular, *Enjeu* affirmed that: «[…] the actions of the Canadian government affect millions of members. 3.2. According to Statistics Canada, in 2017, the population aged 35 and under in Quebec was 3,471,903, including residents and citizens. 3.3. Moreover, it is clear that class members cannot individually bear the costs of such a lawsuit. A class action is undoubtedly the only way for class members to go to court and obtain the cessation of the interference with their rights protected by the Charters».

19. Cf. Quebec Superior Court, 11 July 2019, 2019 QCCS 2885, para. 43 s., in www.enjeu.qc.ca, accessed on 10 September 2023 (English unofficial translation).

even if the judge has the power to modify the group definition, this power should not be accomplished by the arbitrary exclusion of persons having the same interest in the common issues[20]. In this instance, this translated to the elimination of the 35-year-age limit, resulting in the formation of a group of over 7 million inhabitants of Quebec aged over 18.

Conversely, when considering minors who were included in the group due to being under 18, the very right to take legal action was subject to scrutiny. In particular, *Enjeu* should not be recognised as having the power to impose on millions of parents the obligation to act to exclude their children from class action nor was it a statutory entity created by the legislator to protect the rights of minors or to act on their behalf[21]. So, in conclusion, the Court observed that the mission and objectives of *Enjeu* – even if admirable in socio-political terms – were too subjective and limiting, by nature, to constitute the ground for an appropriate group bringing a class action on the basis of Article 571 QCCP.

The authorisation refusal was challenged by *Enjeu* before the Quebec Court of Appeal, but the Court dismissed the appeal. Granting the interlocutory appeal, the Court first of all assumed that the claimant's assertions were not justiciable, because of their vagueness and their politically-oriented nature. Besides this aspect, which falls outside the scope of this study, the Court revisited the claimant's standing right, confirming the Superior Court's decision regarding the group definition. Global warming was indeed a common issue for all Canadian residents and the fact that the younger people may be more exposed is merely a matter of time[22].

20. Cf. Canadian Supreme Court, 18 October 2001, 2001 CSC 68, para. 21, in www.scc-csc.ca, accessed on 10 September 2023. On the risk of failing on a class definition issue, cf. C. Cameron - R. Weyman, *Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices*, in *Journal of Environmental Law*, 34 (1), 2022, 195, 203 ff. On the topic, see also J. Kalajdzic, *Climate Change Class Actions in Canada*, in *Supreme Court Law Review*, 2d, 100, 2021, 29.

21. Cf. Quebec Superior Court, cit., para. 132.

22. Cf. Quebec Court of Appeal, 13 December 2021, 2021 QCCA 1871, in www.enjeu.qc.ca, accessed on 10 September 2023 (English unofficial translation). The application for leave to appeal from the judgment of the Court of Appeal of Quebec has been dismissed by the Supreme Court of Canada (cf. Canadian Supreme Court, 28 July 2022, 2022 CSC 40042, in www.scc-csc.ca, accessed on 10 September 2023).

3. *Climate Change Litigation Within Traditional Standing Rules*

3.1 *The Case of Senior Women in Switzerland (*KlimaSeniorinnen Schweiz*)*

In the preceding section, we contrasted two similar lawsuits that yielded entirely disparate results, both founded on the shared procedural mechanism of collective actions, which facilitate the safeguarding of public interests. In the following two paragraphs we will compare two different cases that have been decided without this procedural vehicle, thus in accordance with general standing rules which normally require the direct and personal interest of the claimant.

The first one is the Swiss case of the Association of Swiss Senior Women for Climate Protection (*KlimaSeniorinnen Schweiz*), an association founded in August 2016 with the specific aim to fight for climate protection before Swiss courts (therefore, an *ad hoc* association). The concept of forming an association aimed to prevent legal proceedings from relying on individual individuals, whereas the restriction to elderly females stemmed from the vulnerability of older women to severe and frequent heatwaves experienced in Switzerland. In essence, the petitioners sought to align the broader public interest with an individual and particular standpoint, with the goal of addressing the issue of the claimant's legal standing[23].

The claim was introduced in November 2016 on the ground of Article 25a(1)(a) of the Administrative Procedure Act (hereinafter APA), according to which

> any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and

23. As pointed out on the association's website, petitioners were obviously aware that older men, people with diseases, and small children also suffer from heat waves and other climate effects. Nevertheless, by focusing on the proven susceptibility of older women, they were simply enhancing the lawsuit's chances of success which was ultimately good for everyone (cf. www.en.klimaseniorinnen.ch, accessed on 10 September 2023). On the topic, cf. C.C. Bähr - U. Brunner - K. Casper - S.H. Lustig, *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation*, in *Journal of Human Rights and the Environment*, 9 (2), 2018, 194, 214. With particular regard to the strategic action of *KlimaSeniorinnen*, see also S. Keller - B. Bornemann, *New Climate Activism between Politics and Law: Analysing the Strategy of the KlimaSeniorinnen Schweiz*, in *Politics and Governance*, 9 (2), 2021, 124.

which affect rights or obligations that it refrains from, discontinues or revokes unlawful acts[24].

The legal request was submitted to the Federal Council, the Federal Department of Environment, Transport, Energy and Communication (DETEC), the Federal Office of Environment (FOEN) and the Federal Office of Energy (SFOE).

In April 2017, DETEC responded to the request on behalf of the other three respondents and denied the applicants' standing according to Article 5(1)(c) APA, since the applicants' rights had not been affected as required by Article 25a APA. Specifically, the authority contended that Article 25a of the Administrative Procedure Act (APA) should be interpreted in conjunction with the constitutional guarantee of access to the courts outlined in Article 29. This constitutional provision ensures the right to have legal disputes adjudicated by a court when an individual legal position is deemed worthy of protection. However, in this instance, the primary objective of the applicants' petition was not solely the reduction of atmospheric CO2 levels in their immediate vicinity but rather on a global scale. This is because the applicants were urging the administrative authorities to formulate draft legislative measures aimed at further reducing CO2 emissions or to assume responsibility for preparing such legislative proposals. Consequently, the authority of first instance did not enter into the case, stopping the process at a procedural stage on the ground of the petitioner's lack of standing according to Article 25a APA, since no individual legal positions were affected[25].

In May 2017, the senior women appealed to the Federal Administrative Court. In the appellants' opinion, women over 75 would have indeed been affected to a particular degree in terms of mortality and health impairments. Therefore, the applicants' request could not be termed an inadmissible *actio popularis*, as made by the authority's ruling. On the contrary, the appellants had an interest worthy of protection in the issuance of a ruling concerning the contested omissions.

24. Article 25a of the Administrative Procedure Act (APA) is labelled "Ruling on real acts" and is designed to bring under judicial scrutiny cases where the government's actions, while not primarily focused on regulating rights and obligations, still impact such rights and obligations (so-called "real acts").

25. Federal Department of the Environment, Transport, Energy and Communications, Order of 25 April 2017, in www.klimaseniorinnen.ch, accessed on 10 September 2023 (in German).

Considering that the appeal was introduced by the association and by four more individuals, who certainly had an interest worthy of protection in the revocation of the contested ruling, the Federal Court did not expressly decide whether, within the scope of an appeal brought by an association in its own name but in the interests of its members (*egoistische Verbandsbeschwerde*), the association was entitled to file a request with the authority of first instance and to file an appeal before the Court itself[26]. Considering this, the Court noted that the pivotal issue in this case revolved around the determination of whether there was a requirement for individual legal protection. This determination was crucial to narrowing the scope of application and excluding the possibility of an *actio popularis* under Article 25a of the Administrative Procedure Act (APA).

Therefore, concerning the interest in legal protection, it implies that a tangible advantage must be sought, and this interest must also be presently relevant. In terms of interests deserving of protection, which is a matter-specific criterion, it is essential that the appellant is affected in a manner that distinguishes them from the general population according to Article 48(1)(b) of the Administrative Procedure Act (APA)[27].

From this perspective, considering all possible impacts of climate change in Switzerland, the Court concluded that the group of women older than 75 years of age was not particularly affected by climate change. Although different groups were affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said that the proximity of the appellants to the matter in dispute was particular, compared with the general public. Consequently, since the appellants had no sufficient interest worthy of protection, the Court held that the authority of first instance had rightly refused to issue a material ruling on the basis of Article 25a APA[28].

26. Cf. Swiss Federal Administrative Court, 27 November 2018, A-2992/2017, para. 1.2, in www.klimaseniorinnen.ch, accessed on 10 September 2023 (English unofficial translation).
27. Cf. Swiss Federal Administrative Court, cit., para. 6.3.2. In accordance with Article 48(1)b APA, which refers to appellant locus standi, «A right of appeal shall be accorded to anyone who: […] has been specifically affected by the contested ruling».
28. Cf. Swiss Federal Administrative Court, cit., para. 7.4.3. According to the Court's opinion, further claims to the issuance of a material ruling do not result from the European Convention of Human Rights: since a reduction of the general risk of danger cannot be achieved directly through the actions demanded, the authority of first instance was not obliged on the basis of Art. 6(1) ECHR to enter into the matter of the appellants. After the judgment, the association decided to file a complaint before the European Court of Human Rights, alleging the violation of Articles 2 (Right to life), 6 (Right to a fair trial), 8

3.2 *The Belgian Case of* Klimaatzaak

The last case we will consider is the Belgian case of *Klimaatzaak*. *Klimaatzaak*, i.e., Climate Case, is a non-profit organisation established in 2014 by 11 concerned citizens who wanted to take action against Belgium's ailing climate policy, following the model of the Urgenda's legal action.

In December 2014 *Klimaatzaak* formally declared the four responsible Governments (the three regions and the Federal State) to be in breach of their climate obligations. Having failed to reach a consensus at a round table, in June 2015 the legal proceedings began. The claimants were the association itself, 58.586 individuals and a mountain alder with 81 other trees. Leaving aside the *locus standi* of the trees, which are not entitled to bring a claim in the Belgian legal system, let us concentrate on the standing of the association and the individuals[29].

On the basis of Article 17(1) of the Belgian Judicial Code (hereinafter BJC), in order to bring a claim, the claimant needs legal standing and interest[30]. Regarding the interest, it must be present and current as per Article 18 BJC. From this perspective, in the summons, individual claimants affirmed that due to climate change they were exposed to

(Right to respect for private and family life) and 13 (Right to an effective remedy) ECHR. The claim is pending before the Grand Chamber (cf. ECtHR, Verein Klimaseniorinnen Schweiz and Others v. Switzerland, application No. 53600/20, in www.coe.int, accessed on 10 September 2023).

29. However, the idea that natural objects, such as trees, can also have a legal standing is not new: cf. C. Stone, *Should trees have standing? Toward Legal Rights for Natural Objects*, in *Southern California Law Review*, 45, 1972, 450 ff. After all, natural objects such as the Amazonian forest in Colombia or the Ganges and Yamuna rivers in India, as well as all their tributaries, have been recognised by courts as entity subject of rights entitled to legal protection: cf. respectively, Colombian Supreme Court, 5 April 2018, STC4360-2018, in www.cortesuprema.gov.co, accessed on 10 September 2023 (in Spanish) and High Court of Uttarakhand, 20 March 2017, Salim v. State of Uttarakhand, Writ Petition PIL No.126 of 2014, in www.elaw.org, accessed on 10 September 2023.

30. In this study we do not consider Article 17 BJC as implemented by the 2018 Justice system reform, which did not apply in that case. In any case, starting from 10 January 2019, on the basis of Article 17(2) BJC, the action of a legal person, aimed at protecting human rights or fundamental freedoms recognised in the Belgian Constitution and in the international instruments which bind Belgium, is admissible under the following conditions: 1st - the purpose of the legal person is of a particular nature, distinct from the pursuit of the general interest; 2nd - the legal person pursues this object in a sustainable and effective manner; 3rd - the legal person takes legal action within the framework of its object, with a view to ensuring the defence of an interest related to this object; 4th - only a collective interest is pursued by the legal person through its action.

material damage (such as damage resulting from storms or floods) and damage to their health and well-being (such as spread of new tropical diseases, heat waves, psychological and emotional stress, and so on). Consequently, the government's inaction against climate change violated their subjective rights, allowing them to act on the basis of Article 1382 of the Belgian Civil Code (hereinafter BCC), which provides for compensation in case of (future) damage caused by negligence. While for *Klimaatzaak*'s standing, the action was based on a Supreme Court's judgment which had permitted an environmental association to carry out a legal action aimed at contesting negligence of public authorities, which would be contrary to the provisions of environmental law, on the basis of the Aarhus Convention[31].

So, starting from the individuals' standing, the Brussels Court of First Instance argued that Belgium was of course concerned by climate change effects as demonstrated by national and European scientific reports. By attributing part of the climate change responsibility to the Belgian Government, individual claimants were therefore giving sufficient reasons for their standing, as they were pursuing a personal and real interest according to Article 18 BJC. Although it was a possibility that other Belgian individuals could be impacted by the same alleged harm as the claimants, this was not a compelling reason to categorise the filed action as an inadmissible *actio popularis*, nor was the fact that individuals were acting to prevent damage a hurdle, since Article 18 BJC also admits action to prevent the violation of a seriously threatened right, even on a declaratory basis[32].

As for *Klimaatzaak*'s legal standing, the Court contended that initially, a legal entity may initiate a lawsuit primarily to safeguard its legal existence, as well as its assets and moral rights, such as honour and reputation. Conversely, the existence of a constitutional purpose for a legal entity does not automatically grant it the authority to act on behalf of that purpose. Nevertheless, environmental associations benefit from a preferential status since Article 9(3) of the Aarhus Convention has to

31. Cf. Belgian Supreme Court of Cassation, 11 June 2013, ECLI:BE:CASS:2013:ARR.20130611.12, in www.juportal.be, accessed on 10 September 2023 (in French).

32. Cf. Brussels Court of First Instance, 17 June 2021, 2015/4585/A, para. 1.1, in www.klimaatzaak.eu, accessed on 10 September 2023 (in French). For a comment on the case, see C. Renglet - S. Smis, *The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?*, in *American Society of International Law*, 25 (21), 2021.

be intended as conferring legal standing to this kind of association with regard to environmental claims[33]. In particular, according to the European Court of Justice's case law, even if Article 9 of the Aarhus Convention contains any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, it is up to the national court to give an interpretation of national procedural law which is consistent with the objectives laid down in that Article. From this perspective, therefore, the Court considered that *Klimaatzaak*'s claim was consistent with the association's constitutional purpose of preventing climate change. Thus, the association's claim under Article 1382 BCC met the criteria laid down in Article 18 BJC, since the claimant could be considered as having a personal and direct interest, which was actually different from the general interest[34].

4. *An Italian Precedent as a Conclusion*

We started this paper by pointing out that legal standing can sometimes offer judges a strategic answer to a strategic claim. The four cases we analysed have provided sufficient evidence of this. The Canadian case of *ENvironnement JEUnesse* has demonstrated that collective actions intended to safeguard public interests are insufficient without robust intervention by the courts. On the other hand, the Belgian case of *Klimaatzaak* has demonstrated to what extent court activism can overcome traditional limitations of procedural rules. Moreover, the *Urgenda* case in the Netherlands and the case of Senior Women in Switzerland appear to be two opposite examples of the way in which judges may offer or deny a political answer to the global problem of climate change by using the rules of proceedings[35]. In any case, and this is the key point, rules of procedural law were always at stake.

33. Cf. Compliance Committee, 12th meeting, 16 June 2006, Communication ACCC/C/2005/11, para. 34, in www.unece.org, accessed on 10 September 2023: «When assessing the Belgian criteria for access to justice for environmental organisations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced».

34. Cf. Brussels Court of First Instance, cit., para. 1.2.

35. On this point see also C.V. Giabardo, *Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate*

An Italian precedent appears highly pertinent in this regard. I am referring to the claim brought in 2009 to the Court of Milan by some citizens who aimed at challenging the electoral regulation of 2005 (Law No. 270/2005 of 21 December 2005). In that instance, ultimately adjudicated by the Italian Supreme Court of Cassation, which subsequently referred the matter to the Constitutional Court, the issue of the claimants' legal standing was under scrutiny. Indeed, the State's defence, *inter alia*, focused on the fact that the claimants did not have any actual interest in the claim according to Article 100 of the Italian Code of Civil Procedure. In the State's opinion, that claim had in fact the sole purpose of obtaining from the court an "entry visa" for access to the constitutional review[36]. From this standpoint, it would have been an impermissible lawsuit, as its subject matter was an ambiguous harm used to resolve purely theoretical legal inquiries, such as the entitlement to voice individual preferences in future elections. Nonetheless, in a landmark ruling, the Court of Cassation allowed the lawsuit, contending that the act of voting constitutes a fundamental right of every citizen. Citizens may be required to exercise this right at any point and should be able to do so in accordance with the Constitution, particularly its Articles 2, 48, 56, and 58. According to the Court's opinion, the state of uncertainty in this regard was therefore a source of concrete prejudice and that was a sufficient reason to justify the applicant's interest in bringing proceedings in the face of State's inaction[37].

In essence, although, in theory, such a lawsuit appeared to be a procedural debacle and, as a result, seemed initially inadmissible based on conventional civil procedure rules, it transpired that the judges opted for an exceptionally assertive political judgment in that instance. This decision, which allowed not only for the Constitutional Court to declare the unconstitutionality of the electoral regulation in question but also for the potential issuance of a declaratory judgment, recognised both the presence of the fundamental right to vote and its infringement by the State regulation in previous elections[38]. This was ultimately made possible by a

Change?, in B. Pozzo - V. Jacometti (eds.), *Environmental Loss and Damage in a Comparative Law Perspective*, Cambridge, Intersentia, 2020, 393.

36. In the Italian legal order, in fact, individuals are not allowed to directly act before the Constitutional Court, since only judges may refer to the Court with a question raised by the parties through an ordinary claim.

37. Cf. Italian Supreme Court of Cassation, 17 May 2013, No. 12060, in www.dejure.it, accessed on 10 September 2023 (in Italian).

38. Cf. Italian Constitutional Court, 13 January 2014, No. 1, in www.cortecostituzionale.it, accessed on 10 September 2023 (in Italian) and Italian Supreme Court of Cassation,

strategic use of rules concerning legal standing in civil proceedings, since in that case the interest of the claimants did not differ in any substantial way from the potential interest of every other citizen.

Thus, although legal standing is a difficult hurdle to overcome in climate change litigation, it seems to me that judges still have the power to take a strong stance in this field, pushing governments to implement their climate policy. And this through a "wise" use of the rules governing civil procedure, such that a political decision can be reached in a political matter.

16 April 2014, No. 8878, in www.dejure.it, accessed on 10 September 2023 (in Italian). For some comments on the procedural aspects, cf. C. Consolo, *L'antefatto della sentenza della Consulta: l'azione di accertamento della "qualità" ed "effettività" del diritto elettorale*, in *Corriere Giuridico*, 31 (1), 2014, 7; Id., *Dopo la Consulta la Cassazione chiude sulla vecchia legge elettorale, ma quanto davvero?*, in *Corriere Giuridico*, 31 (12), 2014, 1553; G. Basilico, *Mero accertamento di diritti fondamentali e giudizio di legittimità costituzionale*, in *Rivista Diritto Processuale*, 76 (1), 2021, 34. For this and other examples of strategic litigation in Italy, see also S. Pitto, *Public interest litigation e contenzioso strategico nell'ordinamento italiano. Profili critici e spunti dal diritto comparato*, in *DPCEonline*, 50 (Spec), 2021, 1061.