Alma Mater Studiorum - Università di Bologna

DOTTORATO DI RICERCA IN

SCIENZE GIURIDICHE

Ciclo 35

**Settore Concorsuale:** 12/F1 - DIRITTO PROCESSUALE CIVILE

**Settore Scientifico Disciplinare:** IUS/15 - DIRITTO PROCESSUALE CIVILE

# ACCESS TO CLIMATE JUSTICE: THE MAIN PROCEDURAL HURDLES, AND POSSIBLE SOLUTIONS, WITHIN THE ITALIAN LEGAL FRAMEWORK AND THE IBA MODEL STATUTE

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**Esame finale anno 2023**

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## List of Abbreviations

| | |
|---|---|
| Codice civile | c.c. |
| Codice del processo amminstrativo | c.p.a. |
| Codice dell'ambiente | cod. amb. |
| Codice della proprietà industriale | c.p.i. |
| Codice di procedura civile | c.p.c. |
| Codice penale | c.p. |
| Convention for the Protection of Human Rights and Fundamental Freedoms | ECHR |
| Corte Costituzionale | Corte cost. |
| Corte di Cassazione | Cass. |
| Costituzione | cost. |
| European Charter of Fundamental Rights | EUCFR |
| European Court of Human Rights | ECHR |
| European Court of Justice | ECJ |
| General Court of the European | GC |
| International Bar Association | IBA |
| International Bar Association Model Statute for Proceedings Challenging Government Failure to Act on Climate Change | Model Statute |
| IPCC Assessment Report | AR |
| IPCC Sixth Assessment Report | AR(6) |
| The United Nations Economic Commission for Europe Convention | Aarhus Convention |

| | |
|---|---|
| on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters | |
| Treaty on the Functioning of the European Union | TFEU |
| United Nations Environment Programme | UNEP |
| United Nations Framework Convention on Climate Change | UNFCCC |
| World Meteorological Organization | WMO |

## Content and Structure of the Research

## i) The Ideas Developed in this Thesis

This thesis deals with standing and justiciability in climate litigation against governments and the private sector, pursuing three fundamental ideas.

First, the features of climate change, and the growing case law, highlight that traditional standing and justiciability rules largely ignore the need to protect supra-individual interests related to climate change. Such procedural rules are historically designed for individual conflicts and reflect the exclusive nature of 'property rights' as the archetype of every legally relevant relationship. Climate change, however, produces mass harm and threatens the public interest in living in a safe climate. This is a scientific fact, as reported by the Intergovernmental Panel on Climate Change – IPCC. Another reality is that nobody can claim an 'exclusive' right – or interest – to a safe climate. The climate system belongs to nobody – and to anyone. Hence, procedural law should evolve accordingly, allowing effective access to justice to citizen groups and individuals trying to vindicate public interest and privately enforce climate obligations.

Second, the study of Italian civil procedural law, with particular regard to the scholarly debate on the *diritto d'azione*, is crucial to navigating the uncertainties posed by new branches of collective litigation – such as climate litigation. The historical perspective on civil procedural law allows to propose solutions to overcome the 'procedural hurdles' of standing and justiciability so that Italian courts can hear the merits of claims. Yet these solutions are precarious, and, to date, in Italy, there are no judicial rulings acknowledging the right to live in a safe climate – consequently recognizing that plaintiffs have standing to sue and the claims are justiciable. Moreover, the history of civil procedural law – explored through the opinion of the most prominent scholars – helps realize that climate litigation is part of a long-standing 'reform wave' – to use Mauro Cappelletti's words – aimed to promote public interest litigation.

Third, the proposals made by the International Bar Association (IBA) with the 'Model Statute For Proceedings Challenging Government Failure To Act On Climate Change' offer an interesting perspective on how civil procedural law could evolve soon.[1] The 'Model Statute' stands as a reference point for procedural rules that foster citizen participation in the 'governance' of the public interest. Its rich background shows that such reforms are possible and even desirable. Introducing citizen suits in the EU would also contribute to the judicial protection of 'commons' – namely, those material and immaterial goods that are the backbone of the European democracy.

## ii) Synopsis: Four Parts and Thirteen Chapters

The outcomes of this research are divided into four parts and thirteen chapters.

The first part is composed of Chapter 1, which introduces the reader to climate change's main legally relevant features and the roots of climate litigation. The reference to climate science is

[1]The text of the IBA Model Statute Articles is available on the IBA website: https://www.ibanet.org/Climate-Change-Model-Statute

minimal in consideration of the complexity and extraneity of this subject from the scope of this thesis. Yet keeping in mind the critical features of climate change, as described by the IPCC, is crucial to understand why access to climate justice is so complex. Notions such as 'tipping points' and 'carbon budget' are strictly linked to the struggles that plaintiffs are experiencing to establish standing and justiciability to vindicate the public interest also on behalf of future generations. The IPCC Reports further highlight that climate change harm is not only an environmental issue. Conversely, it is primarily a threat to humans. From the lawyer's perspective, climate change concerns human rights and undermines the common interest of living in a severe climate.

Chapter 1 touches upon the international climate law from the early 1990s to the 2015 Paris Agreement and its temperature goals. The chapter then shows how climate litigation is the attempt to privately enforce climate law or seek relief for the damages caused by climate harm.

The second part of the search focused on case law developments. Courts worldwide are facing growing claims against governments and the private sector. While some courts are reluctant, others are prepared to accept a broad interpretation of procedural rules. The common feature is that, in most cases, procedural rules seem largely unfit for climate litigation.

Each chapter of this second part analyses cases that fall into a different category: Chapter 2 strategic litigation before constitutional or international courts; Chapter 3 strategic claims before ordinary courts against governments and the private sector; Chapter 4 focuses on litigation for damages against the private sector; Chapter 5 on cases initiated before administrative courts.

Each case is considered with specific regard to how the parties and the court addressed the procedural issues of standing and justiciability, while the substantive law arguments are summarized to provide some context. To allow a more detailed study of the case law, the text contains direct quotes of the decisions to appreciate the language used by courts.

Chapter 6 exposes the results of a comparative study based on domestic case law. Climate litigation is still in its infancy, and most jurisdictions are experiencing a few cases pending before different courts and seeking a vast array of remedies. Hence, the comparison, however, is not between jurisdictions. The choice was instead to compare case categories, given that similarities and differences can be better traced back to claims sharing common objectives initiated before similar courts. As a result, this chapter reaches unexpected outcomes. For example, administrative law planning cases present critical advantages for plaintiffs pursuing 'strategic' climate ambitions; conversely, the Canadian and Dutch case law shows that class actions – surprisingly – must be 'handled with care' to avoid a dismissal on standing grounds. Chapter 6 draws conclusions on each litigation category concerning the issues of standing and justiciability.

The third part of this thesis deals with the regulation of standing and justiciability in Italy. Each Chapter relies on the provisions that come into play – referring in particular to the *Costituzione*, *Codice di procedura civile*, and *Codice Civile.* All articles mentioned in the text are quoted in Italian and translated into English to allow a better understanding of the language used by the legislator.

This part aims to offer an in-depth analysis of the historical background of the legal concepts and rules that relate to what, in the English language, is understood as standing and justiciability,

to then makes some proposals on how such procedural hurdles could be overcome in the existing legal scenario.

Chapter 7 introduces the articles regulating the conditions to the 'right of action.' Namely, the three *condizioni dell'azione* that plaintiffs must satisfy to have the case heard on the merits: *legittimazione ad agire*, *interesse ad agire*, and *possibilità giuridica*, providing a translation for each provision. It then explores the history and the main scholarly theories on the *diritto d'azione* – from ancient 'Roman law' to the nineteenth-century German scholars, to the cornerstone of Italian civil procedural law: Giuseppe Chiovenda, Enrico Redenti, Piero Calamandrei, Salvatore Satta, and Mauro Cappelletti, to mention just some of the authors considered in the text. Finally, Chapter 7 argues that their contribution is relevant to understanding civil procedural law's function with regard to emerging needs for judicial protection and the potential for future reform.

Chapter 8 analyzes justiciability in its twofold nuances of *possibilità giuridica* and *giurisdizione.* The chapter describes the function of these two concepts. With regard to jurisdiction, it explores the criteria that base the distinction between ordinary and administrative jurisdiction. The categories of *diritto soggettivo*, *interesse legittimo*, *interessi diffusi*, and *interessi collettivi* are relevant for climate litigation: depending on the way the claim is framed, justiciabiliy poses different challenges.

Chapter 10 is dedicated to *interesse ad agire*, which roughly translates into standing based on having an interest in suing. Climate litigants often deal with the objection that their claim is fundamentally useless. Hence, those undertaking litigation in Italy must be prepared to overcome this hurdle. This condition is controversial, and the Chapter accounts for scholars' different positions in this respect. It further considers the implications of the provision introduced under Article 614-bis c.p.c., potentially relevant for climate litigation.

Chapter 11 concludes as to the strategies that plaintiff's lawyers could pursue to overcome objections based on the three *condizioni dell'azione* analyzed in Chapters 8, 9, and 10: *possibilità giuridica*, *legittimazione ad agire*, *interesse ad agire*.

After venturing into the nuances of Italian law, the thesis continues its journey considering the future developments of civil procedural law in Italy and Europe.

Finally, the fourth part introduces the 'Model Statute' proposed by the International Bar Association, which contains bold ideas to promote effective access to justice through significant procedural law reform.

Chapter 12 explores the provisions set forth by the IBA under Articles 4, 5, 17, and 18 of the 'Model Statute,' which contain standing and justiciability provisions. In addition, the Chapter offers a commentary on each article and highlights their national background.

Chapter 13 concludes by arguing that the *ratio legis* of the 'Model Statute' could be implemented in Italy and the European Union. Promoting citizens' climate suits is indeed consistent with the historical developments of the *diritto d'azione* in Italy after the entry into force of the constitution and the work of prominent scholars such as Mauro Cappelletti and Stefano Rodotà. Further, the Model Statute is also consistent with the EU legal framework and with the policies pursued by the Union under the 'European Green Deal.'

## iii) Reasons for Writing in English

One final note on the choice to write this thesis directly in English. There are several reasons.

The first reason relates to the cross-border dimension of climate litigation. While a significant part of the text refers to the most prominent Italian scholars and domestic case law, the topic is inherently international. The scholarly debate in Italy has grown since this research started, but most of the material was initially available only in English.

Second, English is an extraordinary tool for communicating with people worldwide. It helps reach out to scholars and lawyers with different backgrounds who can help get a deeper understanding of the common issues posed by climate litigation worldwide.

Third, writing in English might help share the ideas developed in this thesis, engage in conversations, and get feedback.

Finally, researching for a Ph.D. thesis is an intellectual adventure, a unique opportunity for discovery. Writing in a foreign language made it (even) more intense.

# FIRST PART
# WHAT IS CLIMATE LITIGATION?

# CHAPTER 1
# CLIMATE CHANGE AND JUSTICE

## 1. Introduction

Heatwaves, floods, droughts, forest fires, melting glaciers, and other grim events are making headlines across the globe and are causing – among other things – economic and environmental losses, not to mention deaths and human displacement. The World Meteorological Organization (WMO) has called climate change and its effects the 'new normal.' This scenario is not a matter of scientific speculation anymore. It is, rather, very tangible. As this thesis is still being written, the effects of climate change are being felt in dramatic ways. In August 2022, one-third of Pakistan was submerged under water following intense flooding.[2] Alpine glaciers are retreating at an unprecedented speed with lethal consequences.[3] In the Italian Dolomites, after a dry winter and a scorching summer - on July 3rd, 2022 – an avalanche caused by the collapse of the *Marmolada* serac killed thirteen people. Over the summer of 2022, the United Kingdom experienced 40°C heat despite its latitude. This is only a glimpse at the global climate emergency and the depressing list of extreme weather events - or slow onset processes - caused by our heating planet.

This section explores why climate change is a matter of justice and why courts should deal with it. At first glance, climate change involves other domains of human knowledge – certainly not law and courts, even less civil procedure law. Climate change is more immediately relatable to the scientific, political, and economic domains. It involves factors such as energy supply systems, geopolitical strategies, industry needs, and technological advances. At a lower level, climate change is linked to people's everyday life and habits. Even talking about climate litigation seems, at first, a little far-fetched. Yet, courts are becoming increasingly involved in cases related to the growing effects of climate change. It might come as a surprise, but climate litigation exists: individuals, citizen groups, and local institutions are demanding climate justice with increasing recurrence.[4]

This thesis dives into specific procedural law considerations on climate litigation involving the legal notions of standing and justiciability, which ultimately lead to the topic of access to justice in the era of climate disruption and mass harm.

The following sub-sections will addresses why is climate change is a matter of justice, and the reasons for domestic courts to get involved into climate change-related claims.

[2] Among many news Articles, see https://www.theguardian.com/global-development/2022/sep/01/pakistan-floods-satellite-images-underwater-urgent-aid-appeal (accessed on September 14, 2022).
[3] Laurent, L., Buoncristiani, JF., Pohl, B. *et al.* The impact of climate change and glacier mass loss on the hydrology in the Mont-Blanc massif. *Sci Rep* 10, 10420 (2020). https://doi.org/10.1038/s41598-020-67379-7
[4] ESTRIN, Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts—Despite the Paris Agreement, in CIGI Papers No. 101, 2016, available at: https://www.cigionline.org/publications/limiting-dangerous-climate-change-critical-role-citizen-suits-and-domestic-courts/. Accessed 1 March 2022.

## 2. Climate Change Is a Matter of Justice

The first question requires understanding the causal relationship between human activity – Green House Gasses (GHGs) – climate change – and the subsequent effects on individuals and communities. This causal chain has been assessed as scientifically proven by the Intergovernmental Panel on Climate Change (IPCC), the United Nations body that assesses climate science. It is, therefore, a scientific fact, not an opinion, that human activity contributes to ongoing climate change.

The IPCC, created in 1988 by the WMO and the United Nations Environment Programme (UNEP), represents 195 countries. Its task is to peer review climate science and provide governments with validated scientific knowledge for climate policies. It does not conduct independent research, and given its large and representative member base, it cannot be reasonably accused of bias.

The IPCC reviews studies conducted worldwide on climate-related matters and releases Assessment Reports and Special Reports detailing current knowledge on climate change impacts, risks, and possible solutions for mitigation and adaption. The latest issue is the Sixth Assessment Report (AR6). AR6 comprises the contributions of three Working Groups: Working Group I: Climate Change 2021: The Physical Science Basis[5]; Working Group II: Climate Change 2022: Impacts, Adaption, and Vulnerability[6]; Working Group III: Climate Change 2022: Mitigation of Climate Change.[7]

The following section will consider the first two reports, as they help to draw the connection between climate change and justice.

### 2.1 Working Group I – *Climate Change 2021: The Physical Science Basis*

This contribution highlights that humans, as a species, are responsible for ongoing climate change. Human activity has been contributing to global warming and, thus, interfering with natural climate fluctuations. Since 1890-1900, human-produced GHGs have been causing approximately a +1.1°C temperature increase.

[5] IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 3−32, doi:10.1017/9781009157896.001.

[6] IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. In Press.

[7] IPCC, 2022: Summary for Policymakers. In: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.001.

Although the climate has always changed, the rate at which the climate is currently warming is unprecedented. At the current rate, the global average temperature is expected to have increased by 1.5°C above pre-industrial levels by 2040.

## 2.2 Working Group II – *Climate Change 2022: Impacts, Adaption, and Vulnerability*

The core takeaway, for the purpose of this thesis, is that climate change is not merely an environmental matter: it affects our health, and our safety, and will increasingly do so, with the potential to impact every aspect of our lives.

Human-induced climate change has increasingly contributed to extreme weather events, such as heatwaves and wildfires, as well as onset processes such as ocean acidification and rising sea levels. Working Group II stressed that such impacts extended to food and water security; urban infrastructure; economic damages; and humanitarian crises in both developed and developing countries.

This report helps us to understand that climate change is a matter of justice: it poses a major risk to fundamental rights and is a driver of inequality with disproportional effects, as stated in 2019 by the UN Repporteur on human rights and the environment.[8] Inequality impacts the way that the effects of climate change are distributed across, and within, countries: the Global South has fewer resources to implement mitigation and adaptation measures.[9] Vast areas of the world are more vulnerable to the risks of climate change.

The report identified – with high levels of confidence – global hotspots for human vulnerability: West, Central and East Africa; South Asia; Central and South America; Small Island Developing States; and the Artic. One of the effects is migration – people try to escape those areas that are more exposed to climate change.[10]

Even within developed countries climate change exacerbates inequality, as less affluent individuals and communities prove to be more vulnerable. According to a report by the US Environmental Protection Agency (EPA), released in 2021, socially vulnerable populations are more exposed to climate change and less able to cope with it.

More specifically, the EPA found that having a low income, belonging to a minority group, and not having a high school diploma were the main factors determining how much climate change affects people in the US.[11]

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[8] See, Robert Boyd, UN Special Rapporteur on human rights and the environment. 2019. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A/74/161. Also, see the 2015 United Nations Environmental Program Report, Climate Change and Human Rights. https://www.unep.org/resources/report/climate-change-and-human-rights Accessed 28 February.

[9] See MALIJEAN-DUBOIS, Climate Change Litigation, in Oxford Public International Law, Oxford, 2015. Also, see DIFFENBAUGH, BURKE, Gobal warming has increased global economic inequality, in Proceedings of the National Academy of Sciences of the United States of America, 2019, pp. 9808-9813. doi:10.1073/pnas.1816020116.

[10] Cass. Civ., 10 November 2020, decision n. 25143. The Italian Supreme Court granted the right to humanitarian protection to a migrant coming from the Niger Delta, on the basis that it is an area hit by environmental damages and climate change.

[11] EPA. 2021. Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts. U.S. Environmental Protection Agency, EPA 430-R-21-003. www.epa.gov/cira/social-vulnerability-report.

The ratio between responsibility for GHG emissions and suffering from the effects of climate change is marked by disproportionality. Historically, not all countries have equally contributed: developed countries account for the vast majority of emissions. Yet, the Global South disproportionately faces the negative effects.

Working Group II stated that:

> *"Across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected."*[12]

Further, vulnerability is influenced by historical and ongoing patterns, such as colonialism. In the IPCC's own words:

> *"Vulnerability of ecosystems and people to climate change differs substantially among and within regions (very high confidence), driven by patterns of intersecting socioeconomic development, unsustainable ocean and land use, inequity, marginalization, historical and ongoing patterns of inequity such as colonialism, and governance (high confidence)."*[13]

In this context, indigenous peoples are particularly exposed. This fact has been legally acknowledged by the principle of "*common but differentiated responsibilities"* enshrined in Articles 3 and 4 of the 1992 UN Framework Convention on Climate Change (UNFCCC).

Furthermore, future generations will be disproportionately affected by climate change.[14] The AR6 Summary for Policymakers exposes the mismatch between present GHG emissions and the increasing threat posed by climate change. The irreversible effects of emissions will increasingly encroach upon fundamental rights.

The German Constitutional Court[15] recognized that present climate policies will affect the fundamental rights of future generations in two separate ways: firstly, they will be more exposed to risks deriving from climate change, and, secondly, restrictive measures will likely be introduced to meet the emission targets, thus impacting individual freedoms.

Climate change, therefore, extends well beyond the economy, geopolitics, and energy policies: it also impacts fundamental rights, driving inequality and disproportionately hitting those less capable to adapt and future generations. Climate change is most definitely also a matter of justice that might escalate social conflicts if a solution is not found. It is, primarily, an issue of social justice that falls into the domain of policy. And yet, climate justice is also being addressed in courtrooms across the world. The next subsections explain why.

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[12] Id., footnote 8, SPM.B.1.

[13] See. AR6 Summary for Policymakers, p. 12.

[14] SANSON, BURKE, Climate Change and Children: An Issue of Intergenerational Justice. In Children and Peace. Peace Psychology Book Series, ed. Balvin, Christie D., 2020, pp. 243-259. https://doi.org/10.1007/978-3-030-22176-8_21

[15] Neubauer et al. v Germany: BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, paragraphs 243-245. Also referred to as *Neubauer*, from the name of the first plaintiff.

## 3. International Climate Law

Given its far-reaching implications for justice, international law has addressed climate change.

The first milestone was the United Nations Framework Convention on Climate Change (UNFCC), adopted by the UN General Assembly after the 1992 United Nations Conference on Environment and Development, held in Rio de Janeiro.

Article 2 of the UNFCC sets the following objective:

> *"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (…)."*[16]

The Convention acknowledges that not all countries hold equal responsibility and, thus, identifies the principle of "*common but differentiated responsibilities"* which requires developed countries to take on a leading role in terms of commitments and climate finance.

Article 7 of the UNFCCC also created the Conference of the parties to further implement and develop the convention.

In 1997, the Kyoto Protocol was signed to operationalize the UNFCCC. It attributed mandatory reduction targets to developed countries and created a market-based mechanism. It was then updated in 2012 in Doha.

The 2015 Paris Agreement constitutes the most advanced piece of international law legislation on climate matters. The Paris Agreement sets a common objective and a method to achieve it. The goal is to contain the global temperature rise to a maximum of +2°C, preferably to 1.5°C, above pre-industrial levels. For this purpose, it relies on the commitment of each country. Article 2 introduces the concept of Nationally Determined Contributions (NDCs) to identify the efforts that signatory parties must bring to mitigate climate change.

Every five years, governments must submit their NCDs. The content of such NCDs is, however, left to the governments to determine. Insufficient ambition, as well as a lack of action, are not subject to any penalty or legally binding consequence.

The 2021 Glasgow Climate Pact further implements the Paris Agreement. Governments committed to a 1.5°C temperature increase limit,[17] keeping in place the structure of the Paris Agreement and its reliance on individual good will to effectively contribute to climate change mitigation.

[16] UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189. https://www.refworld.org/docid/3b00f2770.html. Accessed 1 March 2022.

[17] The Glasgow Climate Pact is the result of 2021 Glasgow Climate Change Conference COP26ttps://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26.

## 4. The 'Original Sin' of Climate Litigation

The legal instruments developed under the UNFCCC do represent, in many ways, essential steps forward in the fight against climate change. Nevertheless, none of them imposes coercion mechanisms with regard to the reductions that each government must achieve.

The Paris Agreement ultimately resorts to procedural duties – such as the NDCs – and mere "best efforts" obligations imposed on the signatory parties.[18]

The lack of legal coercion contributed to insufficient climate action. Consequently, emissions have been increasing, [19] causing the erosion of the carbon budget, meaning the emissions allowed before hitting the +1.5°C temperature increase threshold considered relatively safe by the IPCC.[20]

Considering the threat to fundamental rights and the inadequacy of international law in its efforts to contain it, litigation is increasingly being used against governments and the private sector to privately enforce the temperature goals set out by the Paris Agreement.

To date, climate litigation against governments has generally focussed on efforts to obtain judicial orders requiring the state to reduce its overall emissions. This means that, with other states doing the same, the collective goal to hold the global average temperature limit increase within 1.5°C would be achieved. Such lawsuits against governments have been labeled as 'strategic' for their ambition to reduce emissions.

Plaintiffs have also directed their strategic climate ambitions against the private sector, as the 1.5° C limit objective could not be reached without the cooperation of the private sector. In effect, certain groups of companies – referred to as 'big carbons' or 'carbon majors' – impact the climate system more than entire countries.[21] They also bear the responsibility for actively contributing to climate change denial, having financed scientific studies to instill doubt in the general public regarding the consequences of GHG emissions and their risks.[22]

[18] Preston, J. Brian. 2020. The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I). *Journal of Environmental Law* 00:3 – 6.

[19] See the WMO Greenhouse Gas Bulletin (GHG Bulletin) No.17: The State of Greenhouse Gases in the Atmosphere Based on Global Observations through 2020. https://library.wmo.int/index.php?lvl=notice_display&id=21975#.Yh42jujMKUk.

[20] For a definition of carbon budget, see Damon Matthews, H., Tokarska, K.B., Rogelj, J. et al. 2021. An integrated approach to quantifying uncertainties in the remaining carbon budget. In *Communication Earth and Environment* 2, 7. https://doi.org/10.1038/s43247-020-00064-9.

[21] The RDS group emits more than the entire Netherlands, as ascertained by The Hague District Court: The Hague District Court. 6 May 2021. ECLI:NL:RBDHA:2021:5339, paragraph 4.4.5.

[22] See the report issued by the Center for International Environmental Law, *Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis*, published November 2017 and available here: https://www.ciel.org/reports/smoke-and-fumes/. Responsibility also depends on the fact atht science has been warning of climate change effects ever since 1956, when Charles Keeling started studying the excesses of CO2 in the atmosphere due to human activities. Marx, W., Haunschild, R., French, B. et al. 2017. Slow reception and under-citedness in climate change research: A case study of Charles David Keeling, discoverer of the risk of global warming. Scientometrics 112: 1079–1092 https://doi.org/10.1007/s11192-017-2405-

This parallels what happened with pesticides, the ozone layer, tobacco products, and their related risks.[23] In the case of tobacco, litigation played a critical role in establishing legal responsibility against those producers that had denied the health risks of their products. The same is happening with climate litigation against the carbon majors who profited enormously from carbon-based energy products and public investment and spread doubt about the risks of GHGs.

Through litigation against governments and corporations, citizens are trying to take matters into their own hands and get from the judiciary what is not being achieved politically. While this bottom-up approach reflects the failure of governments to address climate change in a timely way, it also inevitably creates friction between the judiciary and the other branches of the government. Defendants in courts, and critics, have an easy game arguing that courts cannot make climate policy. Some consider the attempt to enforce the climate obligations established by the Paris Agreement as its 'original sin'. As a result, plaintiffs struggle to establish standing and justiciability, and courts often dismiss claims on procedural grounds without even considering the merits. The argument is that courts cannot play any role in policy matters, and individuals lack the standing to seek such a vast remedy.

The next chapters explore strategic claims and cases seeking compensatory damages against governments and the private sector. The aim is to point out that climate litigation has no (metaphorical) sins. On the contrary, it constitutes a desperate – but legitimate – attempt to enforce existing climate obligations upon governments and carbon majors. Courts offer a last resort for the protection of the plaintiff's rights. More broadly, courtrooms are emerging as the place where legally relevant general interests are vindicated, and procedural law should evolve accordingly.

## 5. (Only Some) Climate Litigation Categories

The number of cases that can be labeled as climate change litigation has been growing exponentially. Until 2014, there were only 800 cases filed around the world. From 2015 to 2022, a new 1200 were launched. In addition, one-quarter of them were brought to court between 2020 and 2022.[24] While climate change litigation is expanding, it also gets more nuanced, involving more branches of law such as competition law, consumer protection law, and corporate law.

This thesis focuses only on three main domains: strategic litigation against governments, strategic litigation against the private sector, and, finally, claims to recover damages. To better understand how standing and justiciability rules challenge plaintiff's effective access to climate justice, the following chapters will divide cases into five categories: *(i)* strategic litigation based on fundamental rights before constitutional or international courts, *(ii)* strategic litigation based on the fun-

[23] See, in historical perspective, ORESKES, CONWAY, Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming, Bloomsburry, 2010.
[24] SETZER-HIGHAM, *Global trends in climate change litigation: 2022 snapshot*, Policy report June 2022, available on the website of the Gandham Research Institute on Climate Change and the Environment: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/

damental right against governments or the private sector, *(iii)* strategic litigation based on fundamental rights against the private sector, *(iv)* litigation for damages against the private sector, *(v)* strategic litigation against the private sector before administrative courts.

These five categories are the result of the combination of three factors: the parties involved, the legal foundation, and, finally, the jurisdiction level chosen by plaintiffs. The next chapter will focus on the ways standing and justiciability rules impacted on each category. The following chapter then will draw some conclusions.

Before diving into the case law analysis, it must be kept in mind that new categories are emerging. In the future, climate litigation will probably expand to most areas of law. Hence, working on some categories is helpful but only as long as it remains clear that new cases might not fit into such boundaries.

# SECOND PART
# CASE LAW ANALYSIS

# CHAPTER 2
# STRATEGIC LITIGATION BEFORE CONSTITUTIONAL OR INTERNATIONAL COURTS

## 1. *Armando Ferrao Carvalho v European Parliament*

### 1.1 Introduction to the Case

*Armando Ferrao Carvalho and Others v. The European Parliament and the Council* is also known as the *People's Case*, as it represented a wide range of EU society affected by climate change and even non-EU citizens.

Ten families, in total 36 individuals, including their children, from various EU countries and Kenya and Fiji, launched the case. The common trait of these individuals is that they operate in agriculture and tourism. In addition, a Swedish association named *Sàminuorra* joined the proceedings on behalf of the young indigenous Sami.

The defendants were the European Parliament and the European Commission – the two political and institutional bodies that promulgated the legislative package regulating GHG emissions that violated their fundamental rights, according to the plaintiffs. Such body of EU laws is composed of the Directive (EU) 2018/410, the Regulation (EU) 2018/842, and Regulation (EU) 2018/841.

This case falls under the strategic climate change litigation category given that it is brought against a political entity – the EU and its institutions – and aims to influence climate regulations through a judicial decision.

This case developed over two levels of EU jurisdiction. The first instance judge was the General Court of the European Union ("GC"), which rendered its decision on May 8th, 2019.[25] Following an appeal, on March 25th, 2021,[26] the European Court of Justice (ECJ) upheld the first instance decision.[27]

[25] See the full text of the decision at the following link: http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190515_Case-no.-T-33018_judgment.pdf

[26] See the full text of the decision at the following link: http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment-1.pdf

[27] A premise has to be made on the judicial system foreseen by the Founding Treaties. These so-called primary sources of EU law (as opposed to Regulations and Directives which are secondary sources) institute a judicial system composed of three adjudicating bodies: the General Court (GC), the European Court of Justice (ECJ), and the Civil Service Tribunal.

The treaties assign to the different courts a variety of competencies. In the case of "actions of annulment" (aiming at annulling an act of the EU) and in case of actions based on the non-contractual liability of the EU, such as in the so-called People's case, the GC has first instance jurisdiction, while the ECJ serves the court of final appeal. When adjudicating as a Court of Appeal, the ECJ cannot re-establish the facts or examine the evidence that the GC has already considered for its decision. This is important to point out as, in the case at stake, the ECJ refused to review how the GC considered the facts upon which the Applicants (then Appellants) argued on the existence of individual concern.

## 1.2 Remedies Sought by the Plaintiffs

The plaintiffs brought two actions and sought two sets of remedies.

First, under Article 263 TFEU, they sought the partial annulment of Directive (EU) 2018/410, Regulation (EU) 2018/842, and Regulation (EU) 2018/841 – which regulates GHG emissions within the European Union. The reason for the action of annulment was the asserted unlawfulness of such secondary sources of law based on the primary ones that offered protection for fundamental rights.[28]

Second, the plaintiffs maintained the tortious liability of the EU institutions for their insufficient climate action and asked therefore for compensation in kind based on the alleged breach of non-contractual liability. This remedy finds legal basis in Article 340 TFUE, the second paragraph, which language reeds:

> *"In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."*

The remedy would consist of a judicial order that compels the EU to impose more stringent GHG emissions targets.

Both actions, the one of annulment and the tortious one, despite their differences in terms of the cause of action and remedies, aim to substantially reduce European GHG emissions down to 50-60% of the 1990 levels by 2030.

The cause of action is based on the effects of climate change on the fundamental rights of the individual plaintiffs and those represented by the Swedish Association, as protected under the EU Charter of fundamental rights.

In particular, the plaintiffs lamented that droughts, floods, melting snow, and heatwaves violate their right to life protected under Article 2(1); their right to health under Article 3(1); their right to equality and non-discrimination provided in Article 21; their right to pursue an occupation under Article 15(1); the property rights set out in Article 17(1); and the rights relating to children under Article 24 of the EU Charter of fundamental rights.

Each plaintiff articulated differently how they were personally affected, in consideration of their place of residence and their economic activity.[29] Furthermore, the Applicants argued that the economic and technical capacity of the EU would allow for a 50 to 60% emissions cut by 2030, compared to 1990. The action further relies on the EU ratification of the Kyoto Protocol to the UNFCCC in 2002 and, in 2016, the 2015 Paris Agreement.

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[28] According to the TFEU, secondary law comprises two categories: those foreseen by Article 288 TFEU – regulations, directives, decisions, opinions and recommendations – and those not listed in Article 288 TFEU which are atypical acts. The category of atypical acts includes, for example, rules of procedure of the instiutions or interinstitutional agreements.

[29] See pp. 9-15 of the application: http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180524_Case-no.-T-33018_application-1.pdf

The EU and the Member States have jointly committed to reducing GHG emissions by 40% compared to 1990 levels. However, the plaintiffs deemed such a reduction insufficient to protect their rights. The insufficiency of the goals set using National Determined Contributions (NDCs), the factual risk for fundamental rights, and the provisions that protect such rights serve as a factual and legal base for both claims: *(i)* The action of annulment, which is a procedural action; *(ii)* the request for compensation in kind is based on the non-contractual liability of the EU.

## 1.3 Standing Requires 'Direct and Individual Concern'

On the merits, the only defense was on the existence of a sufficient causal link between climate change and the damages alleged by the plaintiffs.[30]
The main arguments raised by the defendants were purely procedural as they proposed a plea of inadmissibility for both claims for lack of standing. Therefore, according to Articles 130(1) and (7) of the Rules of Procedure, the GC decided to rule on the procedural plea without assessing the merits.

Considering that the plea of inadmissibility was based on the requirement of standing, the Court did decide on that sole requirement without exploring those of justiciability and burden of proof.

The key point to solve the issue of standing, in this case, revolves around the notion of "*direct and individual concern*" that is required by Article 263(4) TFEU to grant standing for the annulment of an act of the EU.

Article 263(4) TFEU states the following:

> *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*

Standing requires that the act of the EU is of concern to the plaintiffs both "directly" and "individually".

On the matter of direct concern, the plaintiffs argued that they had standing as the EU legislative package infringes directly upon their fundamental rights as far as it is insufficient to mitigate climate change and its consequential damages.

On the matter of individual concern, the plaintiffs argued that each of them is affected – damaged – in a different way by climate change.

For example, a farmer affected by a drought cannot be compared to one whose land is flooded. Their rights may be identical in theory – for example, property rights – but climate change affects those two individuals differently. Moreover, even if both farmers were to suffer from flooding, each of them would still be affected differently by that very same event. This is to argue that the

[30] See § 60 of the GC decision.

damages claimed by the plaintiffs are differentiated and that in the light of the above-mentioned provision, the plaintiffs are both "directly" and "individually" concerned.

The defendants, on the contrary, argued that the legislative package was not directly affecting the plaintiffs because, it only sets minimum requirements that Member States have to comply with. States can always foresee further restrictions. The package does not authorize anyone to emit GHGs. It is up to the national authorities to internally authorize the concrete level of permitted emissions.

On the issue of individual concern, the defendants further argued that climate change does not affect the plaintiffs differently than anyone else. The damage – in other words – is not sufficiently differentiated from any other individual. The Court reasoning highlights what is discussed by Cappelletti and Kroell, in their work *Access to Justice and Welfare State* where they posit that "fragmented and diffuse interests" are not considered under most standing laws. This paradox is spectacularly displayed in this case.

On this matter, the CG argues that the very fact that the fundamental rights that the plaintiffs seek to protect are violated in such a way that is not exclusive to them does not allow for granting standing. Based on the *Plaumann case*[31], the CG standing cannot be granted because the plaintiff's fundamental rights are threatened in a non-exclusive way.

In *Plaumann* a German importer of clementines brought an action against the Commission, alleging damages by an illegitimate act of the EU Commission that contained protectionist fiscal measures, burdening the import of clementines from countries outside the Community (today 'the Union'). The court found that the plaintiff, on this occasion, was lacking sufficient "individual concern" and therefore had no standing.

The Court framed the individual concern requirement, foreseen by Article 263 TFUE as follows:

> *"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them 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."*

This strict notion of individual concern has been replicated in the People's climate case. The plaintiffs were well aware of such precedent and, in fact, argued that: *(i)* there was an individual concern even under *Plaumann* and that, alternatively, *(ii)* they required a more flexible interpretation of the notion of individual concern, given its inadequacy in case of widespread harm. They highlighted that the strict enforcement of the *Plaumann* notion of individual concern causes a paradox:

[31] Judgment of the Court of 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, Case 25-62. The text of the decisions is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0025

> *"The more widespread the harmful effects of an act, the more restricted the access to the Court."*

This is the wording of the GC in § 32 of its decision, where it summarizes the reasoning of the applicant. The plaintiffs argued that it is possible to overcome this paradox by interpreting the previous case law in accordance with the 1998 Aarhus Convention, which Article 9(3) requires states to grant effective access to justice in environmental matters.

Also, as the plaintiffs cited, Article 47 of the Charter of Fundamental Rights of the European Union requires an updated and evolving interpretation of the Plaumann principle. In this regard, the plaintiffs also made it clear that:

> *"the possibility to obtain an effective remedy before a national Court (…) is hypothetical and infeasible in the circumstances of the present case."*

For all these reasons, the plaintiffs asked the GC to widen the *Plaumann* concept of direct concern. However, the Court maintained that individual concern requires that the contested act affects the plaintiffs in a peculiar way, which had not been established. The Court did recognize that every individual might suffer differently from climate change; however, that alone does not fulfill the criteria of individual concern. According to the Court, a different approach would render meaningless the requirements outlined in Article 263(4) TFEU. The Court also posited that the plaintiffs did not distinguish themselves from all other natural or legal persons also concerned by the legislative package. In other words, the Court applied the *Plaumann* principle and did not allow for an overruling.

The same lack of individual concern was found for the association Saminuorra. Furthermore, the GC asserted that, according to EU case law, associations can bring a claim for annulment only in three types of situation:

> *"first, where a legal provision expressly grants a series of procedural powers to trade associations; secondly, where the association represents the interests of its members would themselves be entitled to bring proceedings; and thirdly, when the association is distinguished individually because its own interests as an association are affected."*

The GC concluded that the association did not fall under any of these categories and, thus, had no standing.

Regarding the tort law claim for damages depended on the first one. Hence, the defendants argued that it was inadmissible, given that the Court ruled that the first was inadmissible action. The compensation claim was indeed based on the same legislative package, against which, the action for annulment was brought forward and it also aimed to achieve the same objective: the partial modification of the legislative package.

The defendant also argued that the claim for damages, insofar as it required an injunction to modify the legislative package, was an attempt to circumvent Article 263 TFEU and its standing barriers. The EU institutions also argued that, given the global nature of climate change, the EU is not able to solve the problem alone and that the plaintiffs did not prove the existence of a causal link.

The plaintiffs, on the other hand, maintained that the two actions were not identical. The claim for damages would, they asserted, prevent the EU from committing acts that would cause further damages. They also believed that whether or not an injunction would also be beneficial for the general public was irrelevant to examining the admissibility of their claim. Furthermore, the plaintiffs argued that when evaluating the standing requirement, there was no room to verify whether sufficient proof of a causal link has been provided. The establishment of a causal link relates, they posited, to the merits of the controversy - not the evaluation of procedural requirements such as standing.

The GC made a preliminary observation regarding the coexistence of two separate actions. It stated that the admissibility of each claim must be evaluated separately. The court then highlighted that the claim for damages sought compensation 'in-kind', in the form of an injunction ordering the EU to adopt measures that modify the legislative package in a way that reduces greenhouse gas emissions by 2030 by at least 50-60% compared to 1990 levels. This remedy constitutes compensation in-kind as opposed to pecuniary compensation. The GC noted that both claims - the claim for annulment and the claim for damages - seek the same result, namely the modification of the legislative package. The Court concluded that, given such equivalence and the lack of standing for the action of annulment, the plaintiffs did not have standing for a tort law claim. Therefore, this second and separate action was also to be rejected as inadmissible.

## 1.4 Appeal to the European Court of Justice

The applicants filed an appeal against the GC's decision to the European Court of justice (ECJ) based on four grounds.

The first grounds for appeal alleged that the General Court erred in law by finding that the plaintiffs were not individually affected. On such a matter, the ECJ reminded us that it could not examine evidence that has already been examined b the GC, nor can it establish facts differently. The ECJ has jurisdiction limited to European law's correct interpretation and application. In the context of this case, the ECJ could not interpret differently the facts established in connection to the issue of individual concern: the ECJ affirmed that the General Court had correctly applied the principle stated in the Plowman Case, which the Lisbon Treaty had not changed. The acts that comprise the 'legislative package' cannot be considered to affect the plaintiffs in a unique or different way, due to the impossibility of distinguishing between the plaintiffs and the general public.

The second ground for appeal was based on the consideration that the GC failed to adapt established case law on locus standing to guarantee the protection of the plaintiffs' fundamental rights. The ECJ found that it could not go beyond the standing provisions set out by the Treaty, nor – even by interpreting the Treaty in accordance with Article 47 of the EU Charter of Fundamental Rights – end up substantially setting aside the conditions foreseen by the treaty. This argument is inconsistent with the hierarchy of the sources of law; the court assigns substantially more weight to established case law as opposed to the Charter of Fundamental Rights.

The assertion that the GC had erred in finding that the association did not have standing was the third grounds for appeal. The ECJ confirmed what had been stated by the General Court: in the

first instance, that the association had not proven that it was individually concerned. Secondly, referring again to established case law, the ECJ stressed that an action for annulment may only be brought by associations three types of situation, as already stated by the General Court - and the Swedish association did not fall into any of these categories.

The fourth and final grounds for appeal alleged that the GC erred in rejecting the claim for damages. The plaintiffs asserted that there was a profound difference between the action for annulment and the one for damages. Such autonomy was based, according to the plaintiffs, both on the cited EU law as well as on the different results each action sought to obtain.

The ECJ recognized that the claim for damages did, in fact, have an autonomous nature and that the standing requirements had to be separately considered. In spite of this, however, the ECJ confirmed the inadmissibility of the claim for damages, as the court deemed it an attempt to circumvent the admissibility of the action for annulment. Thus, according to the ECJ, the GC was right to deny standing to the Applicants for the damages claim, considering the lack of standing for the action of annulment and its substantial equivalence. Because of these arguments, all grounds for appeal were rejected based on a lack of standing.

## 2. *Duarte Agostinho v Portugal and Others*

### 2.1 Introduction to the Case

In *Duarte Agostinho and Others vs. Portugal and Others* (*Duarte Agostinho)*, six young Portuguese citizens filed a claim directly with the ECHR against Portugal and other thirty-two countries.[32]

The plaintiffs alleged that the Respondents' inaction infringed their fundamental rights under Articles 2 and 8 of the ECHR. The young plaintiffs claimed that the effects of climate change, such as the increased intensity of forest fires in Portugal, endangered their right to life. They also maintained that climate change harms their psychological well-being due to the extreme heat waves that force people to stay indoors.

This case is still pending before the Grand Chamber, but the ECHR put it on a fast track. Several institutions filed *amicus curia* briefs, including the UN Special Rapporteurs on human rights and the environment David Boyd and Marcos Orella, Amnesty International, Greenpeace, and Save the Children.

In 2021, the European Commission filed its observations to the Court, maintaining that environmental degradation and climate change harm human rights. EU Commission concluded that:

> *"the increasing number of climate change-related applications provide the Court with a unique opportunity to continue to forge the legal path towards a more complete implementation of the Convention and to offer real-life protection to individuals affected by environ mental degradation and climate change."*[33]

The EU Commission also tacked the issue of effective access to justice regarding standing. The Commission argued in favor of a broad interpretation of the standing rules informing access to the Court in consideration of the peculiar cross-border and generalized effects of climate change harm:

> *"Climate change does not fit traditional rules of international law, based on territorial sovereignty and national jurisdiction. (…) The Commissioner is of the view that a strict and formalistic interpretation of standing requirements when human violations caused by climate change are at stake, particularly when children are concerned, would have the undesired effect of depriving them of any reasonable prospect of seeking and obtaining redress for violations of human rights and fundamental freedoms set forth in the Convention."*

[32] Duarte Agostinho and Others v. Portugal and Others (no. 39371/20), all documents filed so far in the case can be found here: https://climate-laws.org/geographies/international/litigation_cases/duarte-agostinho-and-others-v-portugal-and-32-other-states

[33] See, Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 39371/20 Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States, available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210505_3937120_na.pdf

## 2.2 Procedural Law Considerations

This case is particularly interesting from a procedural law perspective, given that the plaintiffs skipped their national Courts and resorted directly to the ECHR. Access to the Court is restricted under Article 35(1) of the ECHR, which requires plaintiffs to exhaust all available remedies in their respective national jurisdictions. The plaintiffs requested a liberal interpretation of Article 35(1) for several reasons.

First, they argued that they could not obtain an effective remedy before a domestic court due to the shared responsibilities of all defendants. Multy-party litigation before the ECHR allows plaintiffs to obtain one ruling with 'top-down' binding effects. If the Court accepts this claim, the ruling will bind all governments simultaneously – including those currently involved in strategic litigation before domestic courts.

If successful, this case's impact on pending strategic litigation is potentially unprecedented. For example, the Italian government faces litigation at home and before the ECHR. Given that both *Giudizio Universale* and *Duarte Agostinho* involve similar facts, the first ruling might influence the other. Moreover, given that the facts presented to the courts in the two cases are partially identical, one might wonder if ECHR rulings produce binding *res judicata* effects for domestic courts. If so, plaintiffs could rely on a binding ruling in their cases before national courts.

The second reason for resorting directly to the ECHR involves the limits of domestic jurisdiction. In the plaintiff's view, a Portuguese Court lacked jurisdiction against other foreign governments.

Third, plaintiffs maintained that the 'climate emergency' urgency requires a 'top-down' approach. In the People's case, a similar tacit was used – without success – rejected by the ECJ on standing grounds.

Fourth, plaintiffs held that they lacked the resources to sue all thirty-two respondents before their national Courts.

*Duarte Agostinho* raises some serious arguments on the issues of effective judicial remedies. The case is still pending. It will be interesting to observe whether the Court will decide the case as a *de facto* first instance court, therefore accepting a liberal interpretation of Article 35(1) ECHR.

## 3. *Neubauer v Germany*

## 3.1 Introduction to the Case

On March 24, 2021, the German Constitutional Court issued a landmark decision in which it declared part of German Federal Law regulating emissions - § 3(1), the second sentence, and § 4(1), the third sentence, in conjunction with Annex 2 – to be unconstitutional, *KilmaSchutzGesetz (KSG)*.[34]

One feature of the German Constitutional Court's jurisdiction is its direct access to individuals. Any individual can lodge such complaints directly with the Court, and this can happen regardless of the existence of underlying judicial proceedings. This is in contrast to the Italian system – for example – where individuals may access the Constitutional Court only if the issue of constitutionality arises in the course of ordinary court proceedings.

The case started following a claim made by a group of young people. Luisa Neubauer was the first on the plaintiff's list – hence the name of the case.

The court's decision was issued after combining this complaint with three other complaints – also seeking the declaration of unconstitutionality of the same federal law – which were already pending.

The Constitutional Court decided on three of the complaints together, excluding one which was deemed unfounded.[35] The other three were accepted, with the result of declaring the aforementioned legislation to be unconstitutional.

§3 KSG imposed reduction targets, compared to 1990:

> *"by at least 65 percent by the year 2030"*
>
> *"by at least 88 percent by the year 2040."*

To achieve the targets set forth by §3(1), §4 states that annual emission budgets and annual mitigation targets are determined by considering six different sectors.[36]

Such provisions were declared unconstitutional insofar as they do not set sufficient guidelines for the reductions required after 2031 – therefore causing, after 2030, a future impairment of fundamental rights that is disproportionate. In other words, the insufficient reductions in the decade 2020-2030 and the burden of GHG reductions falling in the years 2030-2040 put at risk fundamental rights after 2030.

The Court conceded that this was a risk, as there was no certainty regarding the future measures to contain emissions, and that this risk was too great to be ignored.

This Court said the following:

> *"The emission amounts specified until 2030 in § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 significantly narrow the emission possibilities that will be available thereafter for*

[34] See, KlimaSchutzGesetz (KSG) available online at: https://www.gesetze-im-internet.de/ksg/BJNR251310019.html
[35] BvR 78/20
[36] §4 distinguishes between the followings sectors: energy, industry, transport, buildings, agriculture, waste and others.

> *staying within the temperature limit of well below 2°C and preferably 1.5°C that was specified in accordance with the obligation to take climate action arising from Article 20a GG. In view of the advanced effect on fundamental rights, this can only be justified if sufficient precautionary measures are taken to ensure that freedom is respected when making the transition to climate neutrality, so that the reduction burdens faced by the complainants from 2031 onwards are alleviated and the associated risks to fundamental rights are contained [...]."*[37]

The Court refused arguments centering around the current violation of fundamental rights to human dignity, life, and physical integrity protected under Articles 1 and 2 of the Basic Law because Germany was, the court argued, indeed taking action to protect such rights. The federal government, the court maintained, was implementing precautionary measures that may be deemed as insufficient by some, but that were not "manifestly unsuitable". The unconstitutionality, however, laid in the fact that the legislation offloaded the most stringent reduction measures onto future generations.

This case is of great interest because the plaintiffs directly accessed the Constitutional Court with the effect of obtaining a direct modification of the law, which is impossible for ordinary courts. Furthermore, the Court also addressed standing and justiciability.

The complainants sought a partial declaration of unconstitutionality of §§ 3 and 4 of the Federal law on GHG emissions. The 'partiality' was related to the fact that such a declaration was not supposed to entirely erase the provisions, but rather to produce an effect insofar as the statutory provisions did not foresee higher levels of emission reductions - implying the intervention of the Federal Government and Parliament to establish higher climate ambition in accordance with the Court's findings.

## 3.2 Facts Presented to the Court and Legal Arguments

The complaint presented the connection between human activities and the temperature rise. It then introduced the notion of a carbon budget and the distinction between mitigation and adaption. Particular emphasis is put on the notion of the 'tipping point,' meaning the moment after which the consequences of climate change might become unpredictable.

However, the main factual element presented to the Court was the existential threat faced by younger generations. The complaint referred this topic to a 2018 paper – *Deep Adaptation - A Map for Navigating Climate Tragedy*[38] – released by the Institute of Leadership and Sustainability (IFLAS) at the University of Cumbria in the United Kingdom, which stated the following:

> *"The findings indicate that we are moving towards destructive and uncontrollable levels of climate change that will bring hunger, destruction, population migrations, diseases, and war. (...) Our norms of behavior –*

[37] See §243 of the decision, p. 73 of the English translation

[38] BANDEL, *Deep Adaptation: A Map for Navigating Climate Tragedy*, IFLAS Occasional Paper 2, available at: https://mahb.stanford.edu/wp-content/uploads/2018/08/deepadaptation.pdf

*what we call 'civilization' – can also be disrupted by the global environmental catastrophe that will occur in our lifetime."*

IPCC science also played a crucial role. The plaintiffs then referred to the IPCC AR5[39], according to which the young plaintiffs, based in northern German coastal areas, were particularly exposed to the risk of rising sea levels with a consequent threat to their lives and physical integrity.

Plaintiffs argued for the unconstitutionality of § 3 and § 4 of the Federal Climate Protection Act, in connection with Annex 2, and the National Climate Protection Program, basing their case on three levels of legal sources. At the international law level, they cited the Paris Agreement; at the regional level, EU primary and secondary law; at the national level, the German Basic Law.

The Court used the arguments described hereafter as the basis of its decision. With reference to the Paris Agreement obligations, the *Bundesverfassungsgericht* stated: *(i)*Article 2(1)(a) requires parties to limit emissions to 1.5°C maximum 2°C above pre-industrial levels; *(ii)* Article 3 outlines a plan of progressive ambition for further nationally determined contributions over time, meaning that nationally determined contributions must increasingly strengthen over time; *(iii)* Article 4 differentiates between the responsibility of developed and developing couuntries, expecting that the former group take a leading role, consistent to the principle of common but differentiated responsibilities.

In the realm of EU climate law the Court referred to the legal framework of the EU's overall climate action, beginning with the Emissions Trade System (ETS), designed by the Directive (EU) 2018/419 of the European Parliaments as one of the tools to achieve an overall 55% reduction in GHG emissions.[40] Sectors that fall outside the ETS, for the period of 2021-2030, were covered by the effort-sharing regulation, that requires Germany to reduce emissions by 38%, as compared to 2005, before 2030.

Secondary EU law is backed by the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights: Article 191 TFUE grants environmental protection through a preventive approach to environmental damage, embodied by the precautionary principle.

The third category of legal sources mentioned both by the plaintiffs and the Court was the German Basic Law, as the plaintiffs maintained that Germany's omissions were violating the right to human dignity, life and physical integrity, occupation, and property, which were protected under Articles 1, 2(2), 12, 14 in conjunction with Article 20a, respectively, of the Basic Law.

## 3.3 The Ruling on Standing

The Court tested the standing requirement against two criteria: *(i)* the possibility of a violation; *(ii)* individual and direct concern.

Concerning the first test, standing was granted for the claims based on Articles 1, 2, 12, and 14 Basic Law in conjunction with §§ 3(1) and 4(1) KSG.

[39] IPCC 5th Assessment Report.

[40] The ETS system covers only certain sources of emissions: Those produced by large combustions plans, energy-intensive industries and the aviation sector.

The Court argued that fundamental rights violations, with regards to the 2020-2030 period, were possible even if the harm was only in the future, given that the Basic Law requires preventive protection of fundamental rights. Even more so, if the harm were irreversible, as the Court argued was the case with climate change:

> *"The possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights. Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law (cf. BVerfGE 49, 89 <141>). This is certainly the case where a course of events, once embarked upon, can no longer be corrected."* [41]

With regards to the individual and direct concern issue, the Court noted how the plaintiffs were invoking their own rights and not the rights of unborn people, who could not be considered to enjoy subjective fundamental rights.[42]

The decision also, interestingly, cited the ECJ *People's Case* to differentiate between the standing requirements before the EU Court of Justice and the German Constitutional Court. A claim to the latter needs to be linked to individual rights and harm: plaintiffs must establish an individual concern, not an exclusive one, nor any degree of differentiation from other people.[43]

In contrast to what has been discussed so far, the Court did not grant standing for the claims based on §4(6) KSG, stating that it "contained an authorization to enact ordinances" for the post-2030 period. Future constitutional complaints would still be possible, it was acknowledged, if the content of those ordinances will infringe upon fundamental rights.

Likewise, claims based on Article 20a of the Basic Law also lack standing. The provision protects the natural foundation of life and animals but it has only a programmatic nature without attributing subjective rights to individuals. For that reason, it is excluded from the list contained in Article 93 of the Basic Law.

Article 20a of the Basic Law is a justiciable provision, though, but it can be leveraged in combination with constitutional subjective rights

On this matter the Court said:

> *"Article 20a GG cannot be directly relied upon to establish standing to lodge a constitutional complaint. It is true that the protection mandate laid down in Article 20a GG encompasses climate action (see para. 198 below). It is also a justiciable provision (see para. 205 ff. below). However, Article 20a GG does not entail any subjective rights."*[44]

As a result, no standing could be granted on the part of the claim solely based on Article 20a.

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[41] See § 108, of the decision.
[42] See § 109 of the decision.
[43] See § 110.
[44] See § 112 of the decision

Furthermore, the Court found that there was no standing for the protection of the rights to "an ecological minimum standard of living" and to "a future consistent with human dignity." The values and interests expressed by these allegedly existent rights, the Court asserted, were relevant to the Basic Law and, in fact, they were already being expressed by other Basic Law provisions. The court concluded that they did not exist independently.[45]

The Court refused to grant standing to the ENGOs involved in the proceedings, decided in conjunction with Neubauer and Other v. Germany. Only individuals, according to the Court, were entitled to lodge a constitutional complaint

## 3.4 The Ruling on the Merits

As mentioned above, standing is granted for those provisions that provide for individuals with subjective rights, and yet, when it comes to the merits, the Court dismissed these claims based on the fact that the German government was already taking precautionary measures to protect fundamental rights.

The Basic Law requires the state to protect fundamental rights in a proactive way and before any harm can take place. Nevertheless, according to the Court, Germany was already implementing precautionary measures, such as passing the KSG, which may have been insufficient but, as previously stated, not "manifestly unsuitable."

This is the language used by the Court:

> *"The German legislator has taken precautionary measures that are not manifestly unsuitable. The legislator has made efforts towards limiting climate change, not least by introducing the provisions of the Federal Climate Change Act challenged here. The adopted provisions are not manifestly unsuitable for safeguarding the interests protected under Article 2(2) first sentence GG."*[46]

The Court, however, accepted the argument that the national law in question unconstitutionally violated fundamental rights insofar as it offloaded most reduction measures after 2030. After that date, draconian intervention would likely be necessary for the obligations arising out of Article 20a of the Basic Law. The insufficient reductions planned up to 2030 would cause a future disproportionate restriction of fundamental rights. Even though there is no certainty of this happening, the sheer possibility that an intervention of such magnitude would be required was sufficient to establish the violation of fundamental rights. Sections 3 and 4 of the KSG were, thus, deemed unconstitutional insofar as they created a disproportionate risk to fundamental rights in the future.

As a matter of fact, the Basic Law requires the preservation of fundamental rights across generations every time there is a risk of "consumption until exhaustion" of certain rights. The Court highlighted one of the main legal features of climate change: while it is caused by the present enjoyment of fundamental rights, it also puts at risk present and, most importantly, future rights.

[45] See §§ 113 and 114 of the decision.
[46] See § 154 of the decision

Oftentimes, the very same rights are causing today's climate change. The Court mentioned an "intertemporal guarantee": the notion that freedom has a futuristic dimension and, for the time ahead, it must be preserved. §§ 3(1) and 4(1) create a disproportionate risk of future fundamental rights violation.

The court issued the following statement:

> *"§ 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 are unconstitutional to the extent that they create disproportionate risks that freedom protected by fundamental rights will be impaired in the future. Since the two provisions specify emission amounts until 2030 which – in fulfilling the obligation arising from constitutional law to take climate action – significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making a transition to climate neutrality. Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Article 20a GG being unilaterally offloaded onto the future."*[47]

As a result, the complaint was accepted, the §§ 3 and 4 of the KSG were deemed unconstitutional, but only partially - meaning only insofar as they violated an 'intertemporal guarantee'.

## 3.5 Standing as Having an Interest in Suing

The Court tackles this issue by stating that Germany cannot refuse to take action on climate change merely because it is a global phenomenon. As in *Urgenda*, the Court found that there was an interest in bringing a claim that has an impact on national emissions, given the individual responsibility that each country bears according to the Paris Agreement.

Article 20a of the Basic Law requires the German state to engage in both national and international protection of the climate system.

Such a constitutional obligation has two effects: *(i)* Germany is constitutionally obliged to contribute to all forums and conventions, and in general international cooperation, to mitigate climate change; *(ii)* Germany has to take responsibility singularly and implement national climate action.

Climate responsibility, addressed in Article 20a of the Basic Law, does not allow the German state to argue that national climate action would be useless because it is unable to stop, by itself, climate change.

In the Court's own words:

[47] See §183 of the decision.

> *" (…) the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. It is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action. Climate change can only be stopped if climate neutrality is achieved worldwide."*

The decision also reflects the call for individual responsibility attributable to each country, as a component of collective global responsibility, and for the mutual trust established by the Paris Agreement.

> *"The Paris Agreement very much relies on mutual trust as a precondition for effectiveness. (…) Creating and fostering trust in the willingness of the Parties to achieve the target is therefore seen as a key to the effectiveness of the Paris Agreement. Indeed, the Agreement is highly reliant on the individual states making their own contributions. This is significant from the constitutional law perspective to the extent that the route signposted by Article 20a GG towards globally effective climate action is largely directed through this Agreement."*

At the international level, the duty to cooperate and take individual responsibility acts as a means to generate climate action and a method to avoid finger-pointing from one country to the next. The underlying idea is that, if everyone does their part, global emissions can be reduced. Once again, the court recognized a link between an interest in acting and individual responsibility - finding that even an individual decision is capable of contributing to the global problem.

## 3.6 Justiciability

The matter of justiciability revolved around the open-ended provisions of Article 20a GG. The power to adjudicate over fundamental rights was not disputed.

Article 20a GG has a programmatic nature and does not grant subjective rights to individuals. Yet, the courts maintained that the provision was justiciable. In principle, it is not up to the Courts to determine the number of emissions allowed as this is the responsibility for this lies with the political branch of government.

> *"It is not, in principle, for the courts to translate the open wording of Article 20a GG into quantifiable global warming limits and corresponding emission amounts or reduction targets."*[48]

[48] See § 206 of the decision.

However, the *Budesverfassungsgericht* has has jurisdiction to review whether the government respects its obligations to protect the "natural foundations of life" under Article 20 GG.[49]

[49] See §206 of the decision: «At the same time, however, Article 20a GG may not be drained of substance as an obligation to take climate action. In this respect too, it remains for the Federal Constitutional Court to review whether the boundaries of Article 20a GG are respected (…). There is nothing to indicate that Article 20a GG - as a singular exception among the provisions of the Basic Law - is beyond the scope of judicial review with regard to how its regulatory content is interpreted and applied»

# CHAPTER 3
# STRATEGIC LITIGATION BEFORE ORDINARY COURTS

## 1. *Urgenda v The Netherlands*

The *Urgenda* case constitutes a milestone along the evolutionary path of climate litigation. It has ben called the 'strongest climate ruling yet.'[50]

The Urgenda foundation and 886 Dutch citizens brought a class action under Article 305:a of the Dutch Civil Code against the government of the Netherlands, on behalf of all Dutch residents.

After a first instance ruling issued, and two appeals, the Dutch Supreme Court upheld the ruling issued by the Court of appeals, which ordered the government to reduce GHG emissions by 25%, compared to 1990 levels, before 2020.[51]

On the factual ground, the plaintiffs relied on the 2007 IPCC Report, which established that temperature increase cannot exceed 2°C. The claim also mentions the impacts of climate change on human rights. The Netherlands is particularly exposed to seal level rise. To achieve the goal of limiting the global temperature growth, "developed" countries – part of Annex I to the 1992 UNFCCC – are required to reduce emissions by 25-40% by 2020 and 80-95% by 2050. The international consensus crystallized by reports published by the IPCC is the starting point for the interpretation of the rules of law invoked by the plaintiff. The plaintiffs further relied on the overall current level of Dutch GHG emissions and claimed that, at such an emission pace, it is likely that the current generation will suffer serious harm as a result of rising temperatures. These facts were not disputed by the defendant.

In legal terms, on the other hand, the plaintiffs argued that the government has a duty of care towards its citizens, which implies the duty to prevent harm. Such obligation was based on the tort law provisions set forth by Book 5, Section 37 of the Dutch civil code, Article 21 of the constitution, which require the state to protect the environment and preserve its habitability, and Articles 2 and 8 ECHR, aimed at protecting the right to life and the right to respect for private and family life.

For ease of reading, the *Urgenda* case is anlayzed in three sections, following the three decisions issued at the various jurisdiction levels: *(i)* the first instance judgment; *(ii)* the appeal judgment; *(iii)* the cassation judgment; and *(iv)* concluding remarks.

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[50] SPIER, The "strongest" Climate Ruling Yet: The Ducth Supreme Court's Urgenda Judgment, in Netherlands Judicial Decisions Law Review, 67, 2020, 319-391.

[51] The *Urgenda* case developed over three layers of jurisdiction. Each judgment is cited here following the Dutch system: Rechtbank Den Haag, ECLI:NL:RBDHA:2015:7145, June 24th, 2015 (*Urgenda I*); Gerechtshof Den Haag The, ECLI:NL:GHDHA:2018:2591, October 8th 2018 (*Urgenda II*); ECLI:NL:HR:2019:2007, 13th January, 2020, (*Urgenda III)*. All documents related to this case can be found in the on-line database created by the Sabin Center for Climate Change Law. All citations are referred to the unofficial English translation from Dutch provided by the database.

## 1.1 *Urgenda I*

The court of first instance – the *Rechtbank Den Haag* – accepted the plaintiff's claim and ordered the Dutch state to reduce total greenhouse gas emissions by 25 percent from 1990 emission levels. Urgenda I addressed the three procedural issues analyzed by this thesis: *(i)* standing as being entitled to sue; *(ii)* standing as having interest in suing; *(iv)* justiciability.

### 1.1.1 Standing as Being Entitled to Sue

The plaintiffs started the case in form of public interest class action, instituted under Article 3:305a of the Dutch Civil Code. Such provision allows interest groups to vindicate public interests.

The plaintiffs argued that they had standing to sue based on Article 3:305:a combined with Articles 2 and 8 ECHR, Article 21 of the Constitution, which requires the government to protect the environment, and the domestic tort law provisions.

The Court found that the plaintiff's lacked standing in relation to Articles 21 of the constitution, and 2 and 8 ECHR. In fact, the Court found that Article 21 of the Dutch constitution could support the plaintiff's claim, since the mandate to grant environmental protection did not create an obligation towards the plaintiff.[52] With regard to Articles 2 and 8 ECHR, the Court held that the Urgenda fundation was neither directly nor indirectly entitled to the rights granted by Articles 2 and 8, as required by Article 34 ECHR. The latter provision grants standing before the European Court of Human Rights only to those who claim to be the direct or indirect victims of a rights violation. According to the Dutch Court, it does not matter the content of the objectives set out by the foundation's by-laws: only physical persons can claim the violation of the right to life, private and family life:

> *"(...) the court considers that Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. After all, unlike with a natural person, a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with (cf. ECtHR 12 May 2015, Identoba et al./Georgia, no. 73235/12). Even if Urgenda's objectives, formulated in its by-laws, are explained in such a way as to also include the protection of national and international society from a violation of Article 2 and 8 ECHR, this does not give Urgenda the status of a potential victim within the sense of Article 34 ECHR (cf. ECtHR 29 September 2009, Van Melle et al./Netherlands, no. 19221/08). Therefore, Urgenda itself cannot directly rely on Articles 2 and 8 ECHR."*[53]

Conversely, the Court found that Urgenda had standing to sue with regard to the codified tort law. Based on the civil code, the court derived a duty of care on the part of the state, aimed to prevent damage caused by climate change.

[52] Urgenda I, paragraph No. 4.52: "The foregoing leads the court to conclude that a legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch constitution".
[53] Urgenda I, paragraph No. 4.45.

### 1.1.2 Standing as Having Sufficient Interest to Sue

Regarding the interest in suing, the defendant argued that the Netherlands contributes only to 0.5% of global emissions. Consequently, reducing Dutch GHG emissions would not prevent climate change harm, as it would reduce global emissions by 0.004-0.009%. In essence, the state argued that Urgenda would have lacked a sufficient interest in bringing the claim because the court's judgment would have been completely useless for the protection of the plaintiffs' rights. The Court summarized these objections as follows:

> *"(...) the States relies on the fact that the Dutch contribution to worldwide emissions is currently only 0.5%. If the reduction target of 25-40% from Urgenda's claim were met the State argues that this would result in an additional reduction of 23.75 to 49.32 mt co2-eq (up to 2020), representing only 0.04-0.09% of global emissions. Starting from the idea that this additional reduction would hardly affect global emissions, the State argues that Urgenda has no interest in an allowance of its claim for additional reduction".*[54]

The Court, however, did not accept this objection. In fact, Urgenda I found that national governments are potentially liable for the violation of international climate obligations even in the context of a global phenomenon.

Two further arguments followed suite. First, the Netherlands is a member of the Annex I countries to the 1992 UNFCCC, so it must make a greater effort than developing countries. Second, according to scientific data, per-capita emissions of Dutch citizens are among the highest in the world.

### 1.1.3 Justiciability

The government also objected that the court lacks jurisdiction, as the claim is not justiciable due to its political implications. The Court premised that the role of jurisdiction is to protect rights without entering the realm of political discretion.

To ensure the rule of law, the jurisdictional function must also be performed vis-à-vis the executive and legislative branches of power. Ultimately, the Court held that a claim is justiciable under two conditions: first, plaintiff must allege an existing right protected by the legal system; second courts must stick to the sole protection of rights, without imposing on the executive (or legislative) power further obligation as to how the result must be achieved.

[54] Urgenda I, paragraph 4.45.

## 1.2 *Urgenda II*

The *Gerechtshof Den Haag* rejected the main appeal proposed by the Dutch government confirming the order to reduce GHG emissions by 25%.[55]

On the merits, it is worth noting that the Court leveraged the "precautionary principle" to establish the state's responsibility to prevent the violation of Articles 2 and 8 ECHR, despite the best available science cannot predict with absolute certainty neither the effects of climate change, nor the effects of the GHG reductions ordered by courts:

> *"The precautionary principle, a generally accepted principle in international law included in the United Nations Framework Convention on Climate Change and confirmed in the case-law of the European Court of Human Rights (*Tătar/Romania*, ECtHR 27 January 2009, no. 67021/01 section 120), precludes the State from pleading that it has to take account of the uncertainties of climate change and other uncertainties (for instance in ground of appeal 8). Those uncertainties could after all imply that, due to the occurrence of a 'tipping point' for instance, the situation could become much worse than currently envisioned. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices."*[56]

This finding is rather significant as it could be replicated by other climate litigants, in other cases, to overcome the objections raised by both governments and private entities. The obligation to reduce dangerous GHG emissions exists despite the – unavoidable – lack of absolute certainty.

The Court then addressed the two-fold nature of standing and the issue of justiciability.

### 1.2.1 Standing as Being Entitled to Sue

The Court upheld the cross-appeal brought by Urgenda on the issue of standing, therefore partially reversing the first instance decision. In fact, the Court accepted that the plaintiff had standing to sue based on Articles 2 and 8 ECHR.

Differently from the first instance court, the appellate judges found that Article 34 of the ECHR only applies to the claims brought before the European Court of Human Rights – not in claims brought by plaintiffs before their national Courts. In other words, in The Netherlands the ECHR applies directly and individuals can claim such rights. At the same time, the limits set by Article 34 ECHR do not apply in the Dutch legal system. Uganda had, therefore, standing to sue under Articles 2 and 8 ECHR and the claim was to be accepted based on those rights.[57]

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[55] The text of the decision is available on the online database *De Rechstpraak*, at the following link: https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2018:2610

[56] Urgenda II, paragraph No. 63.

[57] BURGES-STAAL, Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands, in WESSEL-WERNER (editors), Netherlands Yearbook of International Law 2018, Amsterdam, 2019, pp. 223-244.

### 1.2.2 Standing as Having Sufficient Interest to Sue

On the point of interest to sue, the Court reaffirmed the principle was affirmed that the order to reduce emission would be useful even if Dutch emissions alone make up for a relatively small portion of overall global emissions and their reduction, alone, would not be sufficient to stop climate change:

> *"In order to give an order, it suffices (in brief) that there is a real risk of the danger for which measures have to be taken. It has been established that this is the case. Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court."*

In other words, the Court dismissed the argument that individual reductions are irrelevant, if everyone does not comply with climate obligations. This argument is often raised by both governments and private entities.

Further, the Court addressed the government's objection that not every Dutch citizen did necessarily share the concerns and aspirations of the plaintiffs. The Court, however, rejected this argument. It recalled the rationale for class action, which is a procedural device to protect "diffuse interests", including those of an ideal nature. These, they added, do not necessarily have to be shared by all citizens: it is sufficient if such interests are traceable to class members. The Court backed its findings mentioning the parliamentary papers about the provision set by section 305a of the Dutch civil code, that regulates the class action device:

> *"The defence of the State that these proceedings also involve individuals who may not even want to be represented by Urgenda is refuted by the following quote from the legislative history of Book 3 Section 305a of the Dutch Civil Code, in which the legislator specifically acknowledged this issue (Parliamentary Papers II, 1991/92, 22 486, no.3, p. 22):* 'The interests that are suitable for a grouping in a class action may be financial interests, but also more idealistic interests. A class action may protect interests that directly affect people, or that people want to advocate out of a particular conviction. In the case of idealistic interests, 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. (…)*'"*[58]

[58] Urgenda II, paragraph No. 38.

### 1.2.3 Justiciability

Regarding the justiciability of the claim, it was reiterated that the order to reduce emissions was issued to protect rights under Articles 2 and 8 ECHR. According to the Court of appeal, the first instance court did not order the other branches of government to "produce legislation", nor did it interfere with the political choices involved in reducing GHG. The Court of appeals found that, despite the order, the other branches of government remain free to determine the policies to comply with the order to reduce emissions by 25%, compared to 1990 levels, before 2020.

> *"(...) the district court correctly considered that Urgenda's claim is not intended to create legislation (...) and that the State retains complete freedom to determine how it will comply with the order (...)*[59]

The key argument to overcome this objection is that, even though it might be necessary to pass new legislation, the judiciary did not prescribe what content it should have:

> *"(...) Even if it were correct to hold that compliance with the order can only be achieved through creating legislation by parliament or lower government bodies, the order in no way prescribes the content of such legislation. For this reason alone, the order is not an 'order to create legislation'"*[60]

On the matter of justiciability, in Urgenda II the Court further stated that it is appropriate for the judiciary to issue orders against the state, as long as the latter are issued based on applicable legal provisions. Articles 2 and 8 of ECHR are directly applicable in the Dutch legal systema and grant subjective rights to its citizens. The latter can therefore sue their government, based on Article 2 and 8. This is the wording used by the Court of appeals:

> *"The Court is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch jurisdiction and even take precedence over Dutch laws that deviate from them."*

In this context, and mindful of the separation of powers doctrine, it is appropriate for courts to adjudicate the claims made by Urgenda.

## 1.3 *Urgenda III*

The Dutch government appealed the appeal's decision to the supreme court – the Hoge Raad putting forwards nine grounds of appeal. The third one concerned standing, in its nuance of being entitled to sue. The government maintained that the lower court had misinterpreted Articles 2 and 8 ECHR combined with Article 3:305a of the Dutch civil code. The ninth ground for cassation

[59] Urgenda II, paragraph No. 68.
[60] Urgenda II, paragraph No. 68.

revolved around the issue of justiciability and developed around two arguments. First, the lower courts orders were tantamount to an impermissible "order to create legislation".61 Second, the government asserted that the Court of appeal erred by not recognizing that courts it is not court's role to

> *"make the political considerations necessary for a decision on the reduction of greenhouse gas emissions".*[62]

Further, the government also raised the objection that a GHG reduction by the Netherlands alone would not have led to any measurable benefit for the climate system:

> *"(...) The recommended extra reduction for the Netherlands in 2020 will have no measurable effect on the global rise in temperature."* [63]

The government phrased this objection regarding the merits of the claim but, as it will later be discussed, this argument touches upon the notion of standing, in its meaning of having sufficient interest to sue. In Italy, this legal arrangement is known as *interesse ad agire*, while in the German legal system it is called *Rechtschutzbedurfnis.* It is therefore interesting to analyse how this objection was overcome by the Dutch *Hoge Raad*, as this argument could be replicated in any other legal system, given that individual judicial findings cannot – alone – solve the issue of global warming.

On the merits of Urgenda's claim, with the grounds for cassation No. 2-8, the government also appealed the decision regarding the state's responsibility to reduce emissions by 25% before 2020. The government maintained that there is not an individual obligation on the state but it is the European Union, as a whole, who is bound to such a reduction target and, in the government's view, this target would have easily been met:

> *"The State is not legally bound to a reduction target of 25% in 2020. The State did not agree to this reduction target, nor is it an internationally accepted standard. The State is, however, bound in both an international and European context to a target of 20% in 2020 by the EU as a whole. The EU will easily surpass this percentage (specifically, by a reduction of between 26% and 27%)."*[64]

It the Court confirmed the findings of the lower courts, dismissing all grounds for cassation. The following part of this section considers how the Hoge Raad decided over the issues of standing and justiciability.

### 1.3.1 Standings as Being Entitled to Sue

The Hoge Raad found that Urgenda had standing based on Articles 3:305a of the Dutch civil code combined with Articles 2 and 8 ECHR. The Court noted that the class action device could leveraged by Urgenda, which represented the residents of The Netherlands, as their interested could

[61] Urgenda III, paragraph No. 3.3.
[62] Urgenda III, paragraph No. 3.5
[63] Urgenda III, paragraph No. 3.4.
[64] Urgenda III, paragraph No. 3.4.

be bundled up together in a class action. The Court verified if the class-plaintiff had standing based on the similar interests test, finding that, with regard to the risk of climate harm, Dutch residents shared sufficiently common interests. Further, in the case at hand, the use of the class action device increased procedural efficiency:

> *"Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit."*[65]

The court found that Urgenda had standing to sue based also on Articles 13 ECHR and 9(a) of the Ahrus Convention. Article 13 ECHR provides that the states must allow an effective judicial protection of the rights guaranteed by the ECHR. Article 9(a) of the Ahrus Convention, on the other hand, regulates access to justice in environmental matters also with regard to "interest groups", thus also to individuals gathered in class.[66] This is how the Court put it:

> *"This is also in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR."*[67]

Hence, the Hoge Raad confirmed the lower courts' ruling on the standing issue.

### 1.3.2 Standing as Having Sufficient Interest To Sue

The government argued that the ordered GHG emissions reduction would have no impact on climate change for the residents of The Netherlands, with regard to Articles 2 and 8 ECHR. In other words, the defense amounts to saying that there cannot be individual responsibility as a global problem – such as climate change – needs global solutions and global responsibility. However, this argument the lower courts and the Hoge Raad dismissed this argument. The Supreme court found that states, when partially liable, are burdened by partial responsibility. The global nature of climate change does not eliminate the state's individual – and partial – responsibility. Further, the Dutch climate obligations are binding even though other national governments might leave their duties unfulfilled:

> *"(…) in view of the serious consequences of dangerous climate change (…), the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted".*

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[65] Urgenda III, paragraph No. 5.9.2.

[66] On the procedural law aspect to Article 9(a) of the Aarhus Convention, see cfr. GALANTI, Quale spazio per la *legittimazione ad agire* dei singoli in materia ambientale: considerazioni alla luce della normativa europea, in LUPOI (editor), Frontiere di tutela dei diritti fondamentali (A settant'anni dalla Costituzione italiana), San Giustino, 2019, p. 79.

[67] Urgenda III, paragraph No. 5.9.2.

Further, the Hoge Raad found that national governments cannot evade cclimatte obligations just because their country contributes to a small amount of emission if compared to global emissions. Individual responsibility remains intact, although one national government alone cannot take on the climate crisis:

> *"Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share."*

In other words, the Hoge Raad found that each government should do its part:

> *"(...) the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger."*

For these reasons, the objection was dismissed. It is interesting to note that, in Urgenda, the "usefulness" of the decision to effectively protect the plaintiff's rights is raised and solved on the claim's merits rather than on procedural grounds. However, the court's reasoning can also apply if this objection were to be put forward in procedural terms. As long as there is an individual responsibility, the judicial order sought by the plaintiffs is helpful because it at least contributes to protecting their fundamental rights. In fact, the Court found that every reduction that can be achieved is relevant:

> *"The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible."*

Be it in procedural terms, as it would happen in Italy, as later discussed, or concerning the merits of the claim, the legal reasoning of the Hoge Raad lays out a pattern that plaintiffs could replicate in Italy or other legal systems.

### 1.3.3 Justiciability

The court recalled that Dutch case law stated that, based on Article 94 of the constitution, the judiciary may both disapply legal provisions and order other branches of government to regulate a matter if a vacuum impairs rights:

> *"(...) on the basis of Article 94 of the Dutch Constitution, the courts must disapply legislation if any binding provisions of treaties entail such. It*

*has also been decided in that case law that the courts may issue a declaratory decision to the effect that the public body in question is acting unlawfully by failing to enact legislation with a particular content"*[68]

Courts, however, must refrain from dictating the merits of the legislative measure to be adopted. In this respect, the Hoge Raad found that, in the case at hand, the orders issued by the lower courts left to the Dutch government to decide "how" to intervene to reduce GHG emissions by 25% compared to 1990 levels. The orders only declared to what amount emissions had to be reduced in order to comply with Articles 2 and 8 ECHR, while the other branches of government were free to determine the appropriate means to achieve it.

*"(...) courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation. In view of the constitutional relationships, it is solely for the legislator concerned to determine for itself whether legislation with a particular content will be enacted. Therefore, the courts cannot order the legislator to create legislation with a particular content."*69

Moreover, the courts affirmed that, in the Dutch constitutional system, the government and the parliament have a discretionary power in the realm of political decision-making. However, it is court's role to adjudicate whether such power is lawfully exercised:

*"in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound."*

The rights recognized by the ECHR are the legal standards the court must apply. In this regard, it must be remembered that Articles 93 and 94 of the Dutch constitution adopted a monistic conception of the relationship between domestic and international law. International law 'enters' directly the Dutch legal system and applies without a national piece of legislation. Consequently, Articles 2 and 8 ECHR directly apply in the Dutch legal system, and individuals can claim them against the government before Dutch courts. As to climate obligations, such provisions also provide the legal test to verify whether the government and the parliament are lawfully exercising their discretionary powers. This is the wording of the Court:

*"The limits referred to in 8.3.2 above include those for the State arising from the ECHR. As considered in 5.6.1 above, the Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the*

[68] Urgenda III, paragraph No. 8.2.4.
[69] Urgenda III, paragraph No. 8.2.4.

*interpretation of the ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law."*

Other countries, such as Italy, choose a "dualistic" approach to international law. Consequently, the rights foreseen by the ECHR bind the national government but cannot be directly claimed by individuals before national courts. However, this difference between the Dutch and Italian legal systems does not preclude Italian plaintiffs from replicating these arguments before an Italian court. Anchoring the claim to the rights set out by the Italian constitution instead of the ECHR would help overcome the issue of justiciability.

## 2. *Juliana v The United States*

### 2.1 Introduction to the Case

In 2015, twenty-one young plaintiffs sued the U.S. government, the president, and several federal agencies.

The plaintiffs sought a finding that their rights to life, liberty, and private property protected under the US constitution had been violated and that the US government breached its obligations to protect the "public trust". Second, the action aimed to obtain an order against the government to draft and implement a plan to phase out fossil fuels and the CO2 emissions output in the atmosphere.

This case is of great interest because of the arguments developed by the parties on the issue of redressability, which is one of the three standing requirements under Article 3 of the U.S. constitution. Redressability can be translated in Italian legal terms as both interests to sue and justiciability. As it will be discussed in the third chapter dedicated to mapping the Italian legal framework, this line of defense overlaps with both legal arrangements.

On a factual ground, the plaintiffs alleged that the defendants pursued policies that contributed to the proliferation of fossil energy and the increase in CO2 emissions. This happened, for example, through administrative concessions and federal funding that benefitted fossil fuel developments projects. The plaintiffs argued that the U.S. government is responsible for one of the largest global carbon-footprints:

> *"Plaintiffs allege that over the 263 years between 1751 and 2014, the United States produced more than twenty-five percent of gobal co2 emissions. […] In 2012 the United States was the second largest producer and consumer of energy in the world"*[70]

All this, despite the dangers posed by climate change were well-known to the policy makers. The plaintiff argued that such conduct shows a total indifference to the dangers facing the current and future generations as well as a lack of diligence in their regard. As a result, the plaintiffs alleged both pecuniary and non-pecuniary damages. The claims concerned, among many others, damages to their homes; their health, due to harmful algae in drinking water and the increased expenses for the installation of filtering watering systems; the inability to practice the recreational activity of skiing due to the rise in temperatures; the aggravation of asthma as a result of forest fires.

On a legal level, the plaintiffs relied on the constitutional rights to life, health and private property. The plaintiffs also argued that the constitution implies the right to live in a climate system adequate to sustain human life.

[70] Juliana I, p. 32.

The plaintiffs also referred to the "public trust doctrine", which is the legal theory that the state is obligated to protect those natural elements that, because of their inherent collective importance, must also be preserved for future generations and with respect to which the state has no dispositive power. This notion has ancient roots in the Roman law notion of *res communes omnium*. Indeed, Justinian's Institutions, taking up some passages from the jurist *Marcianus*, established that the air, waterways, sea, and beaches were - by their nature – common goods.[71]

In the United States, this doctrine found momentum thanks to a "historic" Article by Joseph Sax.[72] In a famous 1970' Article, Sax argued in favor of the legitimacy, in the context of the separation of powers, of the activism of the courts in controlling political choices in relation to the management of natural resources falling under the notion of public trusts. In his view, judicial activism, aimed at protecting natural resources democratizes the way natural resources are handled, in three ways. First, to protect minority groups which voice is not heard in the political arena. Second, the judiciary's role is equally crucial when it is the majority that is victimized by a small minority. Third, sometimes there is no need to protect the minority or majority groups but individuals may still be excluded from political decision-making process if organizing their interests is practically difficul. This happens in case of environmental harm and natural resource management: in this realm anyone is a potentially involved, as these interests are difficult to organize and channel into political action. Hence the inequality that becomes necessary to redress.

This reasoning was followed up by the intervention of Mary Christina Wood, who proposed extending the protection obligations incumbent on the federal state to the atmosphere, thus to the climate system.[73] Hence, the academics provided practitioners with the interpretive tools to argue in favor of the power of the courts to scrutinize government's policies in the management of natural resources, including those impacting the climate system. Given their reliance on the public trust doctrine, the *Juliana* and other cases initiated in the United States by Our Children's Trust have been labeled "atmospheric trust litigation".[74]

Based on such legal arguments, the plaintiffs sought, first, a finding that the constitutional rights being acted upon had been violated and, second, an order against the government to draw up a plan containing appropriate measures to reduce the CO2 emissions globally emitted by the United States and, with the techniques now being developed, the removal from the atmosphere of the co2 already emitted.

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[71] See, MARRONE, Istituzioni di diritto romano¸Palermo, 2006, p. 279: "Erano pubbliche – res publicae – le cose appartenenti allo Stato (populus Romanus). Vi rientravano i veni destinati all'uso pubblico, come strade, piazze, piazze, basiliche, teatri, fiumi perenni, porti, rive del mare". At the same p., footnote No. 8, the author mentions that, according to the jurist Marcianus, D. 1.8.2.1 (Marc. 3 inst.) the res publicae included the air, the sea and the seaside.

[72] SAX, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, in Mich. L. Rev., vol. 68, 3, 1970, pp. 557-561

[73] WOOD, Nature's Trust: Environmental Law for a New Ecological Age, Cambridge, 2014. From the same author, see WOOD, GALPERN, *Atmospheric Recovery Litigation: Making The Fossil Fuel Industry Pay To Restore A Viable Climate System*, in *Environmental Law*, Vol. 45, No. 2, Symposium: Public Trust Doctrine (Spring 2015), pp. 259-335. https://www.jstor.org/stable/43432851

[74] GROSSMAN, in Comparative Climate Change Litigation; Beyond the Usual Suspects, SINDICO-MBENGUE (a cura di), Cham, 2021, p. 200-218. Also, see BLUMM, WOOD, No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine, in American University Law Review, vol. 67, n. 1, 2017, p. 33.

The United States District Court for the District of Oregon, in the person of Judge Ann Aiken, held in 2016 that the case could be dealt with on the merits, allowing it to move from pre-trial to trial (*Juliana I*)[75]. The government repeatedly sought intervention from the Ninth Circuit Court of Appeals and the United States Supreme Court to prevent the case from being heard on the merits. Finally, the Court of appeals dismissed the case based on lack of redressability (*Juliana II*)[76].

For ease of reading, this paragraph is divided into three sections: *(i)* the ruling of the U.S. District Court for the District of Oregon (*Juliana I*); *(ii)* the ruling of the Ninth Circuit Court of Appeals (*Juliana II*); *(iii)* judge Staton's dissenting opinion (*Juliana II: dissenting opinion*); *(iv)* concluding remarks on the Juliana case.

## 2.2 *Juliana I*

The U.S. District Court for the District of Oregon, in person of judge Aiken, rejected the defendants' procedural objections that the plaintiff claim was nonjusticiable, and the plaintiffs lacked redressability – hence, standing. According to judge Aiken, the judiciary maintains its power despite the dispute might concern the political domain. Courts must rather ascertain whether the claim, in concrete terms, exceeds the limits of jurisdiction. In application of this principle, judge Aiken found that her court had jurisdiction because the plaintiffs alleged the violation of constitutional rights and of the public trust. Remedy-wise, the order sought by the plaintiffs would leave full discretion to the government about the choices necessary to achieve this goal. In her view, if the judiciary were prevented from protecting subjective rights, the founding structure of constitutional democracy would be undermined, given that the latter is based on a system of 'checks and balances'.

The same principle was established by the 2017 judgment *State of Washington and State of Minnesota v. Trump*, which, ruled in favour of the justiciability of claims seeking the declaration of unconstitutionality of presidential executive orders. [77]

Under U.S. law, claims must meet three requirements to pass the standing-test. First, plaintiffs must allege an actual injury; second, a causal link; third, the suitability of the judicial remedy. All conditions were found existing. With regard to causation, judge Aiken found that the fact that the United States is among the largest global contributors to CO2 emissions was sufficient. judge Aiken also found that an order to reduce emission would be redressable. At the theoretical level, the most relevant element is that judge Aiken found the existence of the right to live in a climate system capable of sustaining human life, considering it instrumental to a free and ordered society.

Such extensive interpretation of the constitutional provisions was based on the U.S. Supreme court precedent *Obergefell v. Hodges*, in which an evolutionary reading was given to fundamental

[75] Juliana v. United States, 217 F Supp 3d 1224 (D Ore2016).
[76] Juliana v. United States, Case 18-36082 (9th Cir, 17 Jan 2020).
[77] *State of Washington and State of Minnesota v. Trump*, 847 F.3d 1151 (9th Cir. 2017). The case was instituted by Washington against executive order No. 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States". The proceedings was later joined by Minesota. commented by BABIE, *"Politics!"? Of Course! A Reflection on Washington v. Trump*, in *ELJ Online*, 67, 2017-2018, pp. 2001-2020.

rights, in view of the principle that the notions of justice and injustice are relative and change over time. And so do the needs worthy of judicial protection.[78]

*Obergefell v. Hodges* made same-sex marriage legal in 50 U.S. states. In that ruling, justice Anthony Kennedy expressed this view, which is the exact opposite of justice Scalia's "originalism", with the following wording:

> *"(...) the nature of injustice is that we might not always see it in our times. The generations that wrote and ratified the Bill of Rights (...) did not presume to know the extent of freedom in all its dimensions, and so they entrusted the future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insights reveal discord between the Constitution's central protections and a received legal stricture, a claim of liberty must be addressed."*

Despite the differences between the Italian and U.S. legal systems, the findings of *Obergefell v. Hodges* as well as the arguments expressed by judge Aiken in *Juliana I* present strong similarities with the reading of Article 2 of the Italian constitution as an open-ended provision under which new rights can find protection, despite their not formally recognized by the textual meaning of the provisions.

## 2.3 *Juliana II*

The Court of appeal did not raise any doubts about the existence of climate change, its anthropogenic origin, and the responsibility of the federal government. It makes no secret of the fact that we humanity is nearing the point of no return:

> *"Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies (...)".*

The Court wondered, however, whether the plaintiffs have standing under Article 3. The court disagreed with the lower court, finding that the plaintiffs lacked redressability, which requires that the remedies sought can effectively protect the rights claimed by the plaintiffs without violating the separation of powers.

The majority is skeptical about the first two standing requirements. Yet, they argue that it might be arguable that the plaintiffs could pass the test:

> *"To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision" (...) These injuries are not simply 'conjectural' or 'hypothetical;' at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked (...) The government argues that the plaintiffs' alleged injuries are not par-*

[78] *Obergefell v.* Hodges, 576 US 644 (2015), of June 26th, 2015.

> *ticularized because climate change affects everyone. But 'it does not matter how many persons have been injured' if the plaintiffs' injuries are 'concrete and personal.' Massachusetts v. EPA, 549 U.S. 497, 517 (2007)".*[79]

In the court's view, the unsurmountable obstacle is posed by the requirement "redressability" and by the justiciability of the claim. Even conceding an order to draft a plan to reduce emissions, it would not be able to stop climate change and thus ensure the effective judicial protection of plaintiffs' constitutional rights.

> *"The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their "injuries would be to some extent ameliorated (…) We are therefore skeptical that the first redressability prong is satisfied."*[80]

The real issue however is the justiciability of the remedy. First, the court finds that an effective remedy would require an overview on the government's actions to implement the order.

> *"(…) it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. (…) These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of 'competing social, political, and economic forces,' which must be made by the People's elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."*

Second, the concluded – "reluctantly" – that the plaintiffs should pursue their claim through the democratic process.

> *"We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes"*[81]

At a closer look, the court's findings requires to think about the justiciability of both declaratory- and enforcement judicial proceedings. The first level of judicial protection aims to a judgment that ascertains the rights of the parties and the remedy. However, lacking an enforceable remedy, the claim is from the beginning not redressable under Article 3 of the constitution. Hence, the claim must be dismissed and cannot be decided on the merits. The court explains why an order to draft a

[79] Juliana II, pp. 18-19.
[80] Juliana II, pp. 24-25.
[81] Juliana II, p. 25.

climate plan against the government cannot be enforced. The actual enforcement of such a judgement would entail an indefinite check on the other powers of the state, to verify the suitability of the plan and its implementation. The court argued that the judiciary lacks the tools and constitutional legitimacy to perform such a task. The "reluctant" conclusion is that the remedy sought by the plaintiffs – an order to draft a plan to reduce emissions – would be effective only as long as there were a legal power to supervise its implementation. Otherwise, any attempt would result in the violation of the separations of powers principle: it is the democratic process – not civil proceedings – that determine climate policy choices. Ultimately, notes the court, no good intention can justify the violation of the separation of powers.

The dissenting opinion issued by judge Staton oppesed vehemently this conclusion.

## 2.4 *Juliana II*: Dissenting Opinion

The dissenting opinion expressed strong disagreement toward the majority of the panel criticizing their reluctance to get involved in the case:

> *"In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. (...) My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary"*[82]

Judge Staton recalled that the protection level that fundamental rights enjoy should be unaffected by the political fluctuations resulting from the democratic process. Under the constitution, not even a majority of voters can abrogate the rights recognized by the constitutional charter.

> *"As fundamental rights, these "may not be submitted to vote; they depend on the outcome of no elections." Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) (quoting Barnette, 319 U.S. at 638)."*

Moreover, the dissenting opinion finds that the climate crisis is a danger not only for individual's fundamental rights but also for the cornerstone principles pf the constitution, such as the "perpetuity of the Republic".

> *"Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights," Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society . . . ." Cox v. New Hampshire, 312 U.S. 569, 574 (1941); see also The Ku Klux Cases, 110 U.S. 651, 657–68 (1884). And, of course, in our system, that organized society consists of the Union. Without it, all the liberties protected by the Constitution to live the good life are meaningless."*

[82] Juliana II, dissenting opinion, p. 33.

Similarly, to the dangers posed in the nineteenth century by the American civil war, the climate crisis equally poses a danger to the democratic order. Climate action is therefore needed both to protect individual rights and general interests. If sufficient actions are not taken at the political level, individuals can take legal action to protect their fundamental rights. Courts are not the place to make political decisions, but they are the appropriate venue for the protection of rights even if cases – such as *Juliana* – have political implications.

Judge Staton then focused on redressability: his findings on it involve considerations that, in Italy, would involve the legal arrangements of interest to sue and justiciability, which will be further discussed in chapter 3. First, judge Staton argued that the volumes of GHG emissions attributable to the United States, and the fact that we are close to the "point of no return", leads to the conclusion that even the mere reduction of emissions could be considered as meaningful remedy.

> *"In other words, under Article III, a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms. Full stop."*[83]

Further, the dissenting opinion found that it is courts' role, in the checks and balances system, to limit the power of other branches of government.

> *"The majority laments that it cannot step into the shoes of the political branches (...) but appears ready to yield even if those branches walk the Nation over a cliff. (...) Our tripartite system of government is often and aptly described as one of "checks and balances." The doctrine of standing preserves balance among the branches by keeping separate questions of general governance and those of specific legal entitlement. But the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power"*

Further, the dissenting judge found that the remedy sought by the plaintiffs would not require an oversight activity on the executive and legislative branches of government. The order to draft a plan and reduce emissions would merely indicate what action are necessary to protect the fundamental rights. The judiciary would not need to further surveil the government and the legislative power. Contrary to the majority, Judge Stratton's view that the forced execution of order is not even an issue. On the other hand, the same happened when *Brown v Board of education*[84] required the desegregation of the racial apartheid in the U.S. school system and in *Brown v. Plata*[85], concerning the prison systems. In both case the defendant relied on the "political question" doctrine to dismiss the claim – without success, as mentioned by the dissenting opinions:

[83] Juliana II, dissenting opinion, p. 47.
[84] U.S. Supreme Court, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[85] U.S. Supreme Court, Brown v. Plata, 563 U.S. 493, 511 (2011).

> *"Nor would any such remedial 'plan' necessarily require the courts to muck around in policymaking to an impermissible degree; (...) our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. See Brown v. Plata, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law.14 See Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954)"*

In that case, as well as in *Juliana*, the plaintiffs sought the protection of fundamental rights against the government, and the court ordered the change of the legislative framework. And yet, the court found the claim to be redressable.

## 2.5 Concluding Remarks on *Juliana*

This case falls under the "strategic" climate litigation between private parties and the government. On the merits, this case is remarkable for its use of the public trust doctrine in the realm of climate litigation. It is interesting how contemporary authors and practitioners are leveraging ancient Roman law legal arrangements, such as res communes omnium or res pubblicae, to protect the environment and the climate.[86] The case is also interesting because it offers a term of reference to the Dutch case *Urgenda*, as in both cases, the young plaintiffs sought an order to draft a national plan for the reduction of GHG emissions based on fundamental rights. Moreover, in both cases, the judgments tackle the issue of standing and justiciability. They also show how such procedural issues are the "acid test" of the underlying conflict between the judiciary and the other branches of government in the realm of climate – and generally, public interest – litigation. The two cases lead to very different outcomes.

Indeed, the Ninth Circuit Court of Appeals held that the matter was outside the jurisdictional power, as the claim was deemed non-redressable. As it will be argued in the next chapter, this view would not be correct in the Italian legal framework considering that the latter foreseen many cases in which judicial orders are not enforceable, and yet claims are allowed under standing and justiciability rules. Despite these critiques, *Juliana II* is interesting as it issues a warning to legal practitioners, hence to academics as well. The Ninth Circuit Court of Appeal's judgments impliedly argued that strategic climate litigation claims must be dismissed for lack of enforcement tools. Juliana II, therefore, adds a piece to the complex puzzle of climate litigation compared to *Urgenda*.

[86] Regarding the notion of res communes omnium, see ZOZ, Riflessioni in tema di res publicae, Torino, 1999, pp. 34-63; ancora, cfr. SINI, Persone e cose: res communes omnium. Prospettive sistematiche tra diritto romano e tradizione romanistica, in Diritto@Storia, 7, 2008.

The Dutch case showed how justiciability poses a problem at the declaratory level: meaning that it is debated whether a court can adjudicate a climate claim and find the government in breach of a duty of diligence under tort- and constitutional law. On top of that, Juliana showed that the justiciability of climate claims must also be considered regarding their future enforceability. In other words, it must be tested if future enforcement proceedings would violate the separation of powers.

## 3. *Washington Environment Council v Bellon*

### 3.1 Introduction to the Case

The case *Washington Environment Council v Bellon* dealt with the notion of standing in the context of 'strategic' climate change suits against governments.

Similarly to *Juliana, t*he Ninth Circuit Court of Appeals denied public interest standing to the plaintiffs, seeking an order against the state of Washington to regulate GHG emissions from state oil refineries. The Court found that the plaintiffs did not meet the 'causation' and 'redressability' tests under Article III of the U.S. Constitution.[87]

*Washington Environmental Council* and *Sierra Club Washington State Chapter* sued the *Washington Department of Ecology*, *Northwest Clean Air Agency*, and the *Puget Sound Clean Air Agency*. The two ENGOs maintained that the state agencies had violated the *Clean Air Act*, given their failure to implement *Washington's State Implementation Plan* concerning the reduction of GHGs deriving from the oil industry. According to the plaintiffs, four companies managing oil refineries operated under expired permits; moreover, that permits did not contain requirements for controlling GHG emissions.

The *U.S. District Court Western District of Washington* concluded the first instance proceedings by issuing an order against the state's agencies to fulfill the duties arising out of the Clean Air Act and establish "reasonably available control technologies (RACT)." Western States Petroleum Association joined the first instance proceedings as an *intervenor-defendant.* The District Court dismissed its motion to reconsider.

### 3.2 The Court of Appeals Ruling on Standing

The first instance decision was appealed before the Ninth Circuit Court of Appeals.[88] In the appeals proceedings, the intervenor-defendant raised the issue of Article III standing for the first time. On October 17, 2013, the Court held that the plaintiffs had not established a sufficient causal link and the element of redressability - which are both required under the notion of Article III standing.

#### 3.2.1 Injury in Fact

The plaintiffs alleged that the government's failure to set and apply RACT standards contributed to GHG emissions and harmed *Washington Environmental Council* and *Sierra Club Washington State Chapter*'s members. The agencies alleged misconduct:

[87] Council v Bellon, 732 F 3d 1131 (US Court of Appeals, Ninth Circuit 2013); rehearing en banc denied, 741 F 3d 1075 (US Court of Appeals, Ninth Circuit 2014), hereinafter also referred to as *Bellon.* All documents are available at: http://climatecasechart.com/case/washington-environmental-council-v-bellon/.

[88] *Washington Environmental Council v Bellon*, 732 F 3d 1131 (US Court of Appeals, Ninth Circuit 2013); rehearing en banc denied, 741 F 3d 1075 (US Court of Appeals, Ninth Circuit 2014). All documents are available at: http://climatecasechart.com/case/washington-environmental-council-v-bellon/.

> *"(...) caused their members to suffer recreational, aesthetic, economic, and health injuries, in violation of the RACT and Narrative provisions."*[89]

The plaintiffs indicated the individual harm suffered by their members: some lamented health injuries, others that the impossibility of practicing outdoor activities such as snowshoeing. The Court did not enter the merits of the alleged injuries, assuming that the 'injury in fact test' under Article III was passed.

### 3.2.2 Causality

The Court found that the causal chain between the defendants' omissions and the plaintiffs' injuries was too attenuated:

> *"Plaintiffs' causal chain—from lack of RACT controls to plaintiffs' injuries—consists of a series of links strung together by conclusory, generalized statements of "contribution," without any plausible scientific or other evidentiary basis that the refineries' emissions are the source of their injuries".*

The Court held that establishing a causal link is difficult in climate change claims considering that the plaintiff's injuries are local, while the source of harm is global.

> *" (...) attempting to establish a causal nexus in this case may be a particularly challenging task. This is so because there is a natural disjunction between plaintiffs' localized injuries and the greenhouse effect. Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime."*

Furthermore, the court recalls its findings in *Kivalina* to reinforce the argument that climate change has been going on for a long time. Hence, the plaintiffs could not establish a sufficient causal link:

> *"Moreover, there are numerous independent sources of GHG emissions, both within and outside the United States, which together contribute to the greenhouse effect. As we noted in Native Vill. of Kivalina, 'global warming has been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are undifferentiated in the global atmosphere.'"*

### 3.2.3 Redressability

The Court also maintained that the plaintiffs did not establish that the court's order would be redressable. The Court cited the U.S. Supreme Court case *Allen v. Wright*, in which it was clarified

[89] *Bellon*, pp. 15-16.

that the traceability and redressability tests overlap and constitute the "two facets of a single causation requirement."[90]

Causality concerns the nexus between the misconduct and the harm, while redressability is the link between the injury and the relief sought by the plaintiffs. Hence, if the state agencies' conduct could not be considered the cause of harm, a judicial order against the defendants would have been unable to restore the injury.

The Court accepted that global issues, such as climate change, cannot be redressed – not even partially – by a single judicial decision. Therefore, the court applied an 'even if' approach: 'even if an order were issued against the defendants, the issue of climate change would not be solved, and the alleged harm would not be redressed:

> *"Even if we assume that RACT standards would eliminate all GHG emissions from the Oil Refineries, plaintiffs have not submitted any evidence that an injunction requiring RACT controls would likely reduce the pollution causing plaintiffs' injuries. To the contrary, the evidence below supports the opposite conclusion. It is undisputed that GHG emissions is not a localized problem endemic to Washington, but a global occurrence."*

While it is obvious that one decision cannot change the course of a global phenomenon, it is also clear that individual court decisions can contribute to tackling climate change.

### 3.2.4 Conclusion

The Court also rejected the plaintiffs' reliance on *Massachusetts v. EPA*, as it found that the "relaxed standing rule" carved by the Supreme Court was reserved for sovereign U.S. states – not for ordinary plaintiffs.

Hence, the Court vacated the District Court's order and instructed the lower court to dismiss the case for lack of standing under Article III.

[90] Allen v. Wright, 468 U.S. 737, 753 n.19 (1984)

## 4. *Verein KlimaSeniorinnen v Switzerland*

## 4.2 Introduction to the Case

The Swiss women's case was filed on November 25th, 2016, by an association representing older Swiss women, whose average age was 73, along with four individual plaintiffs. [91]

The plaintiffs argued that elderly women are especially exposed to climate change effects. In particular, heatwaves caused by anthropogenic climate change, they asserted, were responsible for health issues and deaths. The plaintiffs argued that climate change was negatively affecting the aging population, who were particularly exposed to the risks of prolonged heatwaves. From 1961 onwards, the average temperature in Switzerland had increased three times faster than the general increasing trend registered since 1864.

The plaintiffs maintained that the summers of 2003, 2015, 2018, and 2019 were the warmest ever recorded, with a consequent increase in mortality due to heatwaves. The 2014 IPCC report stated that such an increase in mortality during periods of heatwaves was "likely" attributable to human-induced global warming. Such likelihood was measured as a percentage between 66% and 100%.

Given this context, the plaintiffs posited that women aged 75 years and over were subject to significantly higher risk in hot summers and were more severely affected than the general public. In August 2018 in Switzerland, older women experienced the most significant increase in heat-related mortality compared to the rest of the population. Of all deaths that occurred in that month, nearly 90% (159 of 177 deaths) concerned women over 75 years old. Furthermore, it was argued their well-being was negatively affected to a greater degree.

On the other hand, the plaintiffs based their claim on the allegedly insufficient measures put forward by the Swiss government to prevent the damages deriving from climate change. The plaintiffs argued that a reduction target of less than 25% by 2020, and 30% by 2030 would not sufficiently protect their fundamental rights to life as well as their rights to private and family life.

On a legal level, the cause of action was based on the consideration that such omissions – and the consequent risks to the plaintiffs' fundamental rights – violated the right to life, as laid out by Article 10 of the Swiss constitution, and the right to private and family life, under Article 8 of the ECHR. In such a context, they required the administrative authorities to adopt all necessary measures to ensure that Switzerland contributed to the objective set out by the Paris Agreement to limit global warming to well below 1.5°C.

In particular, the plaintiffs requested the correction of the GHG emissions reduction targets set out by Switzerland's CO2 Act of December 23, 2011, and the beginning of preliminary legislative and/or administrative proceedings to reduce emissions by at least 25% by 2020 (instead of 20%), and of 50% by 2030, compared to the 1990 emission levels. The plaintiffs argued that targets set by the contested Legislative Act would not even be sufficient to limit an increase of 2°C and, *a fortiori*, the new target of 1.5°C set forth by the Glasgow Pact.

[91] All documents related to this case are available ta: http://climatecasechArticlecom/climate-change-litigation/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/

This case is of interest because it reveals an obstacle to standing requirements in order to access climate justice. Along the chain of appeals, the Swiss courts did not discuss the merits of the claims but dismissed the case based on the lack of standing which, according to the applicable Swiss law, is shaped in terms of being individually affected.

As shown in the so-called *People's Case*, it is almost impossible to establish an exclusive relationship between the harm suffered by individuals and climate change. Any time procedural law requires such exclusivity in the setting of a climate case, the doors of justice are closed – courts do not even consider the merits of the case.

## 4.3 The Proceedings and the Multiple Appeals

The complaint was first lodged through administrative proceedings against the Swiss Federal Council, the Federal Department of the Environment, Transport, Energy and Communications, the Federal Office for the Environment, and the Swiss Federal Office of Energy.

The Department of the Environment was the competent authority to decide the case and, on April 25, 2017, it dismissed the case on procedural grounds, finding that the plaintiffs did not have standing as they were deemed to be missing individual concerns.

Following an appeal, the Federal Administrative Court also dismissed the case finding that the elderly women represented by the association were not the only sector of the population affected by climate change: thus, standing could not be granted for lack of individual concern.

Hence, the plaintiffs further appealed to the Federal Supreme Court requesting that the court overturn the decision of the Federal Administrative Court. In this context, the plaintiffs alleged that the Federal Administrative Court incorrectly denied that the Department of the Environment violated the right to be heard and that the Federal Administrative Court had itself also violated their right to be heard under both Article 29 of the Swiss Constitution and Article 6 of the European Convention on Human Rights (ECHR).

In this regard, the plaintiffs affirmed that the Federal Administrative Court did not fully engage with the factual and legal circumstances, which were deemed decisive. In particular, it was argued, the court did not consider how women aged 75 and over were particularly affected by climate change. Failure to engage in this analysis, according to the plaintiffs, resulted in the wrong conclusion being reached in terms of standing because the plaintiffs were, they asserted, sufficiently affected by the respondent's omissions.

On May 5, 2020, the Federal Court dismissed the further appeal on procedural grounds, finding that the appellants' rights to life and private and family rights under Articles 2 and 8 ECHR were not sufficiently affected by the defendants' omissions, and that, therefore, they lacked standing.

## 4.4 Standing and Justiciability in the Swiss Supreme Court's Decision

The Federal Supreme Court, as well as the Administrative Court, dismissed the claim based on a lack of standing. In its decision, however, the Supreme Court also implicitly brought up the issue of justiciability – meaning whether a judicial decision that interferes with the current climate policy

against the state exceeds the province of the judicial branch and infringes upon the separation of powers theory.

In fact, the court mentioned that the plaintiffs should have sought protection for their rights leveraging the democratic mechanism instead of resorting to the judiciary.

### 4.4.1 Standing

In the case at hand, standing was to be measured against the requirements of Article 25a of the Administrative Procedure Act, according to which anyone with an interest worthy of protection may demand that a public authority refrain from, or revoke, unlawful actions and/or eliminate the consequences of said actions. The authorities to which the request is brought shall then issue a ruling. The Swiss Federal Supreme Court mentioned that, under this provision, standing requires, in the first instance, the impossibility of achieving legal protection through other means and, second, a certain degree of intensity in the way such actions or omissions affect the plaintiffs.

On the first point, the court noted that the plaintiffs required an order against the defendants, both legislative and administrative in nature, to have them introduce a wide series of measures which should, in principle, be submitted by way of democratic participation. In this context, the court highlighted the wide variety of tools that the plaintiffs could have used as an alternative to resorting to the judicial system. Moreover, The Swiss Constitution itself foresees a variety of ways to channel democratic participation: such as the election of parliament; the popular initiative for a total or partial revision of the law; for the introduction of a new law; as well as a total or partial revision of the Federal Constitution.

Furthermore, the Supreme Court noted that the plaintiffs could have approached the authorities with no formality according to Article 33 of the Constitution, which allows citizens to launch a petition to any federal administrative authority. The court also mentioned the right to freedom of expression and information, freedom of the media, and freedom of assembly and association. The result of this reasoning is that plaintiffs could have pursued other ways to safeguard their interests. This consideration is linked to the evaluation of standing requirements. However, it is my opinion that the court is implicitly referring to the issue of justiciability here, meaning the problem of determining whether or not policy can be modified to comply with a judicial order.

Secondly, the court asserted that Article 25a of the Administrative Procedure Act requires the plaintiffs to be affected by the act, or by the omission of the Public Authority, with “sufficient intensity”.

On this point, the court affirmed that the limit of well below 2°C, established by Article 2(1) of the Paris Agreement, is not expected to be exceeded in the near future. Furthermore, the IPCC concluded in its Special Report that global warming will reach the limit of 1.5°C around the year 2040. For that reason, according to the court, there was still some time available. The court maintained that the limit of a 2°C increase was only a long-term event, not a present risk for the plaintiffs. The potential rights violation was, therefore, not sufficiently intense according to the court.

### 4.4.2 Justiciability

The court impliedly referred to the notion of justiciability, finding that the claim was not aimed at protecting the plaintiff's individual rights, but rather at strengthening the climate protection measures already in existence at the federal law level.

The line of reasoning was the following: the absence of "sufficient intensity" – in the words of the ECJ in the *People's Climate Case*, the lack of sufficient "individual concern" – determines that the matter falls in the political realm, not in the judicial one. Given that the claim had a clear political intention, the Supreme Court also dismissed the argument based on Article 9(3) of the Aarhus Convention of June 25, 1998, which set forth the following:

> *"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

In other words, according to the court, not only did the plaintiffs lack standing in the sense of eligibility to bring judicial action, but they also fell outside the scope of what is considered justiciable. Their claim – asserted the court – was political, not legal.

## 4.5 The Application to the European Court of Human Rights

On November 26, 2020, the plaintiffs applied to the European Court of Human Rights (ECHR), after having exhausted all national remedies. The plaintiffs attached a cover letter in which they urged that the case be ruled on with priority, as

> *"Climate change is perhaps the most pressing emergency faced by humanity."*

The plaintiffs also reminded the court that, on one hand, the ECHR did have an extended case law record on environmental matters but had never faced the issue of climate change, and, on the other hand, that a decision would be beneficial for the national courts, considering that cases addressing climate impacts and concomitant violations of rights were rising in national jurisdictions.

In their application to the European Court of Human Rights (ECHR), the plaintiffs (called "Applicants" in the application form) complained that Switzerland had violated the following provisions: *(i)*The right to access a court under Article 6 and to an effective remedy under Article 13; *(ii)* Right to life under Article 2; *(iii)* Right to private and family life under Article 8.

### 4.5.1 Articles 6 and 13 ECHR

Concerning the right to an effective remedy and to access a court, the plaintiffs maintained that the Swiss courts did not consider the merits of the claim, based on an arbitrary application of standing

requirements. While the Federal Administrative Court denied standing on the basis that the plaintiffs were not particularly affected, compared to the general public, the Federal Supreme Court denied standing on the basis that there was still time to curb the emissions.

The plaintiffs contended that access to justice translates to a right to have the case heard on the merits, without having it dismissed based on the mechanical and rigid application of outdated standing requirements. Being able to lodge a claim – without any discrimination – is certainly a necessary condition, but it is not sufficient. This line of reasoning requires adopting an evolving conception of what the right to access a court and a fair trial means in our age, where diffuse interests collide with the traditional rules of standing.

### 4.5.2 Article 2 ECHR

Regarding the right to life, the plaintiffs argued that such a right also has a preventive element, in that it should prevent death from occurring. The European Court of Human Rights, in the Öneryildiz v. Turkey Case, found that Turkey had violated Article 2 of the ECHR for not preventing the death of applicants' relatives caused by a methane explosion at a rubbish tip despite prior warnings.[92]

In their application, the plaintiffs argued that climate change is menacing towards their health and life, bringing personal medical evidence and referring to the IPCC 2014 AR5's finding on the effects of climate change on human health.

### 4.5.3 Article 8 ECHR

The plaintiffs also cited the case of *Di Sarno v. Italy*[93] where the court had held that environmental degradation that causes health problems or affects physical integrity and private life, constitutes a violation of Article 8 ECHR. This should apply to climate change as well. Also, the plaintiffs argued that Article 8 ECHR also entailed a right to "aging with dignity" which was, they asserted, being endangered by the Swiss policy on climate.

Concerning both Articles 2 and 8 ECHR, the plaintiffs argued that they were both "direct" and "potential" victims. The fact that the ECHR also protects potential victims is linked to the principle that human rights primarily have a preventive and protective function. Therefore, the plaintiffs qualify for the *status* of the victim even in case of potential threat. The plaintiffs leveraged this provision in conjunction with Article 6.

All Swiss courts dismissed the case for lack of standing: the Federal Administrative Court deemed that plaintiffs were not "particularly affected", while the Federal Supreme Court found that they were not affected with "sufficient intensity".

The plaintiffs argued that the dismissal on procedural grounds breached the right to an effective remedy under Article 13 ECHR, considering that climate change requires preventive protection

[92] Öneryildiz v. Turkey, November 20, 2004, Application no. 48939/99. Full text available here: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67614%22]}

[93] European Court of Human Rights, Di Sarno and others v. Italy, January 10th, 2010, Application no. 30765/08. Full text of the decision available here: https://leap.unep.org/countries/eu/national-case-law/di-sarno-and-others-v-italy

and given that not all damage or harm was yet apparent. Harm and rights violations will surely arise, based on the IPCC science, but are not visible for the time being. However, according to them, this could not trigger a short-sighted application of standing rules and therefore keep plaintiffs out of any judicial resort.

# 5. *Leghari v Federation of Pakistan*

## 5.1 Introduction to Leghari

The *Leghari* case is named after the plaintiff, Mr. Ashgar Leghari, a farmer who sued the federal government of Pakistan and the provincial government of Lahore, arguing that it failed to carry out the measures foreseen by the 2012 National Climate Change Policy and the 2014 Framework for Implementation of Climate Change Policy. Following the claim made by Mr. Leghari, the Lahore High Court issued two orders in 2015 – Leghari I and II – and a final judgment in 2018 – Leghari III.[94]

The three rulings issued by the Lahore High Court are very interesting because of the remedy the court provided and its impact on the issue of justiciability. From a civil law perspective, it redefines what a common law court can grant to a plaintiff under the doctrine of the 'appropriate remedy'. Finding that the federal and provincial governments, and their agencies, were not doing enough to enact climate adaptation policies, the court ordered the establishment of a climate change commission to supervise the government's progress and report back to the court. In 2018 the court noted that, since its 2015 orders, 66% of the priority actions set out by the government's policy documents had been implemented. It therefore dissolved and instituted a standing committee to maintain a link between the court and the government.

## 5.2 Arguments on the Merit and Court Findings

The plaintiff argued that the constitution requires the government to protect its citizen's fundamental rights. In the context of climate change, this translates into the duty to carry out mitigation and adaption measures. The failure to do so puts at risk the right to life under Article 9 and the rights to human dignity and a healthy and clean environment under Article 14 of the constitution. The plaintiff also argued that the government's inaction caused immediate consequences for water, food, and energy security.

In Leghari I, the Court accepted Leghari's arguments. It found that climate change is the defendants were not able to provide satisfactory answers regarding the government's progress to implement the adaption measures required by the policy documents mentioned above. The court also argued for the need to expand the notion of justice – from environmental to climate justice:

> *'From Environmental Justice, which was largely localized and limited to our own ecosystems and biodiversity, we need to move to Climate Change Justice. Fundamental rights lay at the foundation of these two overlapping justice systems'.*[95]

[94] Leghari v. Federation of Pakistan. *Ashgar Leghari* v. *Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015. The second order was issued on September 4th 2015. The second order was issed on April 14th 2015. The final judgment was rendered on January 25th, 2018. All documents regarding the case are available at the following link: http://climatecasechArticlecom/non-us-case/ashgar-leghari-v-federation-of-pakistan/.

[95] Leghari I, p. 6.

The court added that Articles 9 and 14 of the constitutional must be construed with regard to the constitutional values of democracy, equality, and justice, on the one hand, and with the international norms of environmental law. The court mentioned, in particular, the principles of sustainable development, the precautionary principle, the doctrine of public trust, and inter-generational equity.

The court found that the 'National Climate Policy' and the 'Framework' for its implementation show that Pakistan is highly vulnerable to climate change effects. The country is particularly exposed to extreme events. For this reason, such policy documents require adaption measures on '*water, agriculture, forestry, coastal areas, biodiversity, health and other vulnerable ecosystems*'. The court also noted that Pakistan has a minor responsibility for GHGs emissions, compared to other countries. Yet, the government is still obliged to protect its citizens' lives by implementing the plan.

Considering the tangible effects of climate change on Pakistan, the court found that the government's inaction, despite its own policy documents, is a threat to fundamental rights:

> *'In the present case, the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded'.*[96]

Given the lack of progress in implementing the adaption policies set out by the policy documents, the remedy deemed appropriate by the court was the institution of a climate change commission. This is the interesting court's own wording:

> *'I have heard the representatives of the Ministries and the respective Provincial Departments. It is quite clear to me that no material exercise has been done on the ground to implement the Framework. In order to expedite the matter and to effectively implement the fundamental rights of the people of Punjab, Climate Change Commission ("CCC") is constituted by this Court in the following manner: (...)'.*

The task of the commission is to ensure that the order issued by the court is enforced by supervising the government's actions in the months following the ruling.

## 5.3 The establishment of the Climate Change Commission

The first step for the institution of the "climate change commission" was taken in Leghari I. The court ordered the defendants to nominate a focal person responsible for ensuring the implementation of the "Framework" and present a list of actions by December 31st, 2015. In Leghari II, the court instituted the "climate change commission," composed of the aforementioned "focal persons" and representatives of NGOs and experts. The court then added twenty-one people to the commission and vested it with powers:

> *"a) The above Commission shall enjoy the powers under Order 26 of the CPC in order to achieve the objective of the Commission.*

[96] Leghari I, p. 6.

*b) The Commission shall have the power to co-opt any person/expert, at any stage.*

*c) The Commission can seek assistance of any Federal or Provincial Government Ministries/ Department by approaching the concerned Ministries/Departments in writing and the concerned Ministries/Departments are hereby directed to render full assistance to the Commission in respect of the above Terms of Reference."*

The court regulated the *quorum* for its decisions as well as the expenses. The role of the commission is to file reports to the court:

> *"The Commission shall file interim reports as and when directed by this Court."*

In Leghari III, the court acknowledges that 66.11% of the targets have been met and, meanwhile, in 2017, Pakistan passed the "Pakistan Climate Change Act" which instituted a "Climate Change Authority."

> *"19. (...) According to the report submitted by the Commission almost 66.11% of the priority items of the Framework have been completed due to effort made by the Commission. The Chairman submits that the Commission has achieved its goals and now the matters should be left to the respective Governments to take forward. It is also pointed out that (...) the Federal Government has promulgated "Pakistan Climate Change Act, 2017" ("Act"), (...) and establishes Pakistan Climate Change Authority".*

## 5.4 A Similar Case: *Douecet-Boudreau v Nova Scotia*

### 5.4.1 Introduction to the case

This judgment by the Supreme Court of Canada does not concern climate litigation. However, it is relevant as it shows that the common law notion of 'appropriate remedy' proves very helpful in granting effective judicial protection to fundamental rights.

In *Doucet-Boudreau v. Nova Scotia*, the Supreme Court of Canada ruled that section 24 of the Canadian Charter of Fundamental Rights and Freedoms allows Canadian courts to order governments to take affirmative actions and impose reporting duties on the progress made to rectify a Charter's breach. Hence, the Supreme Court of Canada recognized that the judicial power extends beyond the decision, comprising supervisory authority.

The claim was brought under section 23 of the Charter by a group of francophone parents living in five school districts in Nova Scotia. The plaintiffs sought an order against the Province of Nova Scotia and the *Conseil scolaire acadien provincial* to provide, out of public funds, facilities and programs at the secondary school level to learn French.

The case developed over three subsequent decisions issued by the trial judge[97], Nova Scotia Court of Appeal,[98] the Supreme Court of Canada[99].

### 5.4.2 Trial Judge's Decision

The trial judge ruled that the Provincial government did not deny the rights under section 23 of the Charter but failed to take sufficient action despite critical levels of linguistic assimilation. Hence, the trial judge ruled that the government violated section 23 and ordered the government and the *Conseil* to put school facilities and programs in place to protect the French-speaking minority adequately. Further, the judge retained jurisdiction and imposed the government to report back on the efforts made to enforce the ruling.

The decision was appealed with regard to the part in which the trial judge retained jurisdiction.

### 5.4.3 Court Of Appeal

The Court of Appeal accepted the appeal and reversed the first instance decision. The majority referred to the common law principle of *functus office;* they held that, after deciding the claim, the trial judge exhausted their jurisdiction.

The majority also believed that, despite the wide judicial discretionality under section 24 of the Charter, courts cannot extend their jurisdiction beyond the decision.

Based on *Mills v. The Queen*, the majority held that *(i)* only the Parliament, not the judiciary, can determine the limits of jurisdiction, and (ii) the Charter did fit in the existing framework of Canadian constitutional and procedural law, without changing it.[100]

### 5.4.4 Supreme Court of Canada

The Supreme Court ruled that while section 24 requires courts to grant an "appropriate remedy," courts must respect the separation of powers principle. Therefore, in the case at stake, the Provincial government had to report to the court the measures taken to ensure the French minority's education rights.

The Supreme Court of Canada[101] interpreted the notion of an "appropriate and just" remedy under Article 24(1) of the Canadian Charter according to three criteria: *(i)* the remedy must meaningfully vindicate the Charter rights claimed by the plaintiff; *(ii)* the remedy must respect the separation of powers principle; *(iii)* court can only issue judicial remedies meaning that their decision cannot have the substantial content of an administrative or legislative act; *(iv)* the remedy should not impose any unnecessary hardships.

This is the wording of the Supreme Court:

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[97] Doucet-Boudreau et al. v. Nova Scotia (Minister of Education) et al., 2000 CanLII 50591 (NS SC).
[98] Nova Scotia Court of Appeal, Doucet-Boudreau v. Nova Scotia (Attorney General), 2001 NSCA 104 (CanLII)
[99] Doucet-Boudreau v. Nova Scotia (Ministryof Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3. Full text available here: https://www.canlii.org/en/ca/scc/doc/2003/2003scc62/2003scc62.html.
[100] *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, at §§ 952-53.
[101] Doucet-Boudreau v. Nova Scotia, §§ 55-57

> *"First, an appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants. (...) Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. (...) a court ordering a Charter remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. (...) The essential point is that the courts must not, in making orders under* s. 24(1)*, depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes. Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. (...) Fourth (...) The remedy should not impose substantial hardships that are unrelated to securing the right."*

In the case at stake, the Court found that the first instance judge had rightly ordered the Province of Nova Scotia to build school facilities necessary for enforcing the French linguistic minorities, imposing reporting duties on the provincial government. The Court found that the crafted remedy meaningfully vindicated the Charter's rights under Article 24 of the Charter; further, the ruling found that retaining jurisdiction to hear progress reports did not violate the separation of powers principle:

> *"The remedy crafted by LeBlanc J. meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates".*

The Supreme Court of Canada also noted that reporting duties are not new under Canadian and British judicial practice.

Paragraph No. 71 mentioned decisions issued by *(i)* by superior courts, *(ii)* bankruptcy courts, *(iii)* in family law cases; *(iv)* by the Supreme Court of Canada for the implementation of language rights in *(v)* and by lower courts. Courts have retained jurisdiction in all such precedents, showing that the judiciary is sometimes required to take on managerial roles.[102]

Paragraph No. 72 of the ruling further clarifies that *(vi)* equity courts have found that difficulties involved in the ongoing supervision of parties do not impede courts from retaining jurisdiction and hearing on progress made by the parties.[103]

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[102] *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, 1985 CanLII 9 (SCC), [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, 1990 CanLII 35 (SCC), [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 S.C.R. 212.
[103] *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), aff'd [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co*., [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1 (C.A.)).

## 5.5 Similarities with *Leghari*

This ruling is similar to Leghari, as both cases involve the judiciary's role in crafting an effective remedy.

The Supreme Court of Canada noted that *Doucet-Boudreau v Nova Scotia* involved the extent of remedies available under section 24 of the Charter and found that it is the judiciary's role to offer an effective remedy, including the imposition of reporting duties. The imposition of reporting duties over the course of time inevitably extends the jurisdictional power beyond the judgment. Similarly, in *Leghari* the court held that it had jurisdiction to hear how the government was implementing the order issued by the court.

Furthermore, both in Leghari and in Doucet-Boudreau, the courts seem to make the most out of the 'common law' remedial approach. In both cases, the relief granted by the courts is based on a subjective right. Hence, it would not be appropriate to say that the courts applied the logic of *"ubi remedium ibi ius."* It seems, however, that the central role played by remedies in the common law systems – as opposed to civil law jurisdictions – allowed the courts to go as far as, in effect, create a remedy that the substantive law provision did not foresee.

## 6. *Environnement Jeunesse c. Procureur General du Canada (Jeunesse)*

### 6.1 Introduction to the Case

*Environment Jeunesse* is a non-profit organization created in 1979 in Quebec, Canada. It mainly comprises young people, and it promotes environmental education amongst young Quebecers. *Jeunesse* instituted a class action against the Canadian government on behalf of all Quebec residents ages 35 and under as of November 26, 2018.

This case was decided over two levels of jurisdiction: *(i)* the Superior Court of Québec dismissed the case on procedural grounds for the arbitrary class definition but found the subject matter justiciable (*Jeunesse I*);[104] *(ii) f*ollowing an appeal presented by both parties, the Court of Appeal dismissed the case for lack of justiciability (*Jeunesse II*).[105]

*Jeuness I* shows how the widespread effects of climate change-related harm pose a serious hurdle in terms of standing, even when plaintiffs resort to the class action device, which is the most advanced procedural device for allowing a convergence of mass injuries into one single civil claim. The Superior Court of Québec found that the claim was justiciable as the Canadian Charter of Fundamental Rights and the Québec Charter apply to the government's climate policy, but it did not certify the class action, as it considered the class to have been inadequately defined.

*Jeunesse II* reiterates the classic argument of lack of justiciability in the face of politically sensitive matters. The Court of Appeal dismissed the case maintaining that the complexity of climate policy requires multi-level evaluations that a court order cannot impose.

### 6.2 Factual and Legal Grounds

The plaintiff accused the Canadian federal government of gross negligence for its inaction in response to the threat posed by climate change.

On factual grounds, the claim referred to publications by Canadian government agencies. Citing, in particular, Health Canada, *Jeunesse* argued that climate change threatens the health of Canadian citizens. It also alleged that Canada alone is responsible for 1.6% of the world's GHGs despite its population representing only 0.5% of the global population. According to *Jeunesse*, Canada had failed to meet the necessary reduction targets, and the few measures in place were largely inadequate to tackle global warming.

The plaintiffs maintained that the Canadian government's emission targets were insufficient. Such climate inaction, they posited, violated class members' rights to life, inviolability, and security as protected under both Section 7 of the Canadian Charter of Fundamental Rights[106] and Section 1 of the Québec Charter.

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[104] ENvironnement JEUnesse c. Procureur Général du Canada, Cour Supérieure, Province de Québec, District de Montréal (Canada), 26 novembre 2018, also referred to as *Jeunesse I.*

[105] ENvironnement JEUnesse c. Procureur Général du Canada, Cour d'Appel, 13 décembre 2021, also referred to as *Jeunesse II.*

[106] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

*Jeunesse* also claimed that the Canadian Government was violating the right to a healthy environment in which biodiversity was preserved and protected under Section 46(1) of the Québec Charter. Finally, the environmental association also claimed an infringement of the right to equality, given the disproportionate effects that climate change would have on future generations

The class action sought a declaratory judgment and punitive damages, as well as an order to cease any interference with class members' rights.

## 6.3 *Jeunesse I*

In the first instance, the court found that the claim was justiciable, reflecting the findings made in the Dutch *Urgenda* case.

The court that issued the *Jeuness I* decision, however, did not certify the class action for reasons of a flawed class definition, showing how standing poses an issue even in class action settings.

### 6.3.1 Justiciability

The Canadian government resorted to the classic argument of a lack of jurisdiction, arguing that granting the relief sought by the plaintiffs would result in the interference, by the judiciary, with the political power held exclusively by the legislative and executive branches of government.

The government also sustained that basing the claim on the Canadian and Quebec Charters did not make it justiciable. Regardless of the cause of action, Canadian courts cannot impose the introduction of bills over Parliament. Further, the court asserted, the environment was a matter of shared competency between the federal and provincial levels of government.[107]

The court, nonetheless, found that the subject matter raised by the class representative was justiciable. First, the decision noted that the plaintiffs did not ask for the invalidation of Canadian law or regulations. In effect, plaintiffs sought a relief that was declaratory in nature, as they requested that the court recognize that the federal government's inaction had violated class members' constitutional rights.

Second, the court pointed to the relevance of the Canadian Charter of Fundamental Rights for the sake of deciding the issue of justiciability. The Charter, it was noted, is an integral part of the Canadian Constitution and its introduction transformed the Canadian system of government, "from parliamentary supremacy to one of constitutional supremacy".[108]

Citing the Supreme Court's precedent *Operation Dismantle v. The Queen*[109] the Court found that potential political implications did not preclude courts from adjudicating charter rights, considering that governmental power must be exercised within the constitutional framework.

In *Operation Dismantle,* a group of citizen-organizations claimed that the Canadian government had violated the right to life and security of the person, protected under Section 7 of the Canadian Charter of Rights and Freedoms, allowing the US to test cruise missiles in Canadian

[107] See, *Jeunesse* §§18-21.
[108] See, Jeunesse §51.
[109] Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441. Full text available here: https://www.canlii.org/en/ca/scc/doc/1985/1985canlii74/1985canlii74.html.

territory. The Supreme Court entered the merits and denied the claim but, on a preliminary level, considered the matter justiciable.

This is the language that was used in *Operation Dismantle* and cited by the Court in *Jeunesse:*

> *"63. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of 'a court of competent jurisdiction'".*

This reasoning is replicated in the area of climate change. While climate policy and defense policy are not subject to judicial review, the alleged violation of the Canadian Charter – or any potential rights violations - are judicially reviewable. This reflects other European Court decisions, such as *Urgenda* in The Netherlands, where constitutional rights were used to frame the limits of the judiciary in politically sensitive areas.

In *Jenuesse*, the court also affirmed the existence of judicial power over the government in the event of its inaction (rather than action) as the Supreme Court found in *Doucet-Boudreau v. Nova Scotia.*[110] It also denied the government's theory that climate change raises non-justiciable moral and political issues. When a claim is charged with moral or social values it is justiciable nonetheless.

In conclusion, the court ruled that the doctrine of justiciability was not an obstacle to deciding the case.

### 6.3.2 Standing and Class Definition

The court did not certify the class action based on the proposed class definition. According to Section 571 of the Quebec Code of Civil Procedure, class actions are procedural devices that allows one member of the class action to sue on behalf of the whole class:

> *"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"*[111].

Defining the class is a crucial step in identifying the class representative, or the individual granted standing, and determining the impact of the judgment on those who have not opted out. Only class members will be bound by the class action.

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[110] Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3. Full text available here: https://www.canlii.org/en/ca/scc/doc/2003/2003scc62/2003scc62.html. The Canadian Supreme Court, deciding Doucet-Boudreau v. Nova Scotia (Minister of Education) found that, based on Section 24 of the Canadian Charter of Fundamental Rights and Freedoms, Canadian judges may require governments to take affirmative actions and report to courts the progress made to rectify a Charter's breach. Considering that Sections 24 requires courts to grant an appropriate remedy, the Supreme Court ruled that in the context of the separation of powers the charter's rights must not only be declared but also enforced by courts. To do so, the Provincial government was required to report on the measures taken to assure the French minority education rights.

[111] Section 571 of the Quebec Code of Civil Procedure

In climate litigation the issue of standing poses a huge challenge, even in a class action cases. It is, indeed, challenging to define who is harmed by climate change and who is not. This is particularly true when a class action has strategic ambitions: why should only some and not others be bound by the decision, if science shows that anyone is potentially affected by climate change. If we are all possible victims of climate change, it can be difficult to clearly define the boundaries of the class.

*Jeunesse* tried to find a solution to this dilemma by defining the class members as all Quebec residents under the age of 35 as of November 26, 2018, asserting that younger people will suffer more infringements of their human rights.

These considerations led to the first argument that the court issued when rejecting the class action. The court declared that the class definition was arbitrary, as it was launched on behalf of all residents of Quebéc under the age of thirty-five and unreasonably excluded the older population whose rights could also be violated by climate change. There is no real logically sustained reason to exclude other Quebéc residents, the court asserted. According to *Hollick v. Toronto*[112], class definition cannot arbitrarily exclude people with the same interest in common issues. The unreasonable exclusion of the over-35s did not allow for the class action to be authorized.

Second, the class included all minors residing in the Province of Québec but minors did not have the legal power to act in court without their parents' representing them. *Jeunesse,* noted the court, is not instituted by law and could not legally represent all minor Québec residents. It also could not impose upon the parents the burden to opt out from the class action on behalf of their children.

Third, the court found that the class action device was not appropriate given the *erga omnes* effect of the decision on the merits sought by the plaintiff. An individual claim would have had the same generalized effects as the class action. Thus, the court concluded that a class action could not be initiated but individual plaintiffs could still institute individual proceedings.

This decision was, consequently, paradoxical: it was acknowledged that climate change creates harm that is so diffused and widespread that class actions are not appropriate litigation tools.

## 6.4 *Jeunesse II*

*Jeunesse* appealed the Superior Court's decision, maintaining that it had erred in finding the class definition arbitrary. Equally, the government of Canada lodged an interlocutory appeal, arguing that the Superior Court had erred in the analysis of the justiciability issue.

The Court of Appeal dismissed *Jeunesse'*s appeal and found that the claim was not justiciable for the violation of the separation of powers principle.

The Court of Appeal also upheld the decision of the Superior Court regarding the class definition stating that there was no justification for setting the age limit of 35.

[112] Hollick v. Toronto (City), 2001 SCC 68 (CanLII), [2001] 3 SCR 158. Full text available here: https://www.canlii.org/en/ca/scc/doc/2001/2001scc68/2001scc68.html?autocompleteStr=2001%20SCC%2068%20&autocompletePos=1

The plaintiff's argument that another class action representing the Québec residents over 35 is also not accepted as the court finds that the legal system:

> *"is not comfortable with the multiplication of similar actions in a context where the objective of the class action is precisely to promote the accessibility of justice".*[113]

The following sub-paragraph focuses on justiciability, as this was the argument that, alone, formed the basis of the dismissal of the appeal.

### 6.4.1 Justiciability

The Court of Appeal analyzed the two aspects of justiciability: *(i)* in its essence of judicial power to adjudicate a case without stepping into the province of the other branches of government; *(ii)* The legal possibility to enforce a decision once it has been issued.

With regards to the first side of justiciability, the court noted that the appellant "*seeks to compel the legislature to act*". This, it asserted, was a separation of powers issue and raised the question as to whether the court may or not exercise control over the policies chosen by the legislative and executive branches of the government.

In the case at hand, the appellant asked the court to declare that the government had failed to live up to the international climate change commitments agreed upon by Canada and to order the defendant to put measures in place that could ensure sufficient GHG reductions. According to the Court of Appeal, this was equal to asking courts to

> *"(...) tell the legislature what to do. Such is not their role."*[114]

Further to this, the Court of Appeal found that the complexity of facts that must be considered, and their policy implications, required choices that were inherently practical – not merely theoretical. The need for more GHG emission reductions, it highlighted, was undisputed and urgent but it also raised societal issues that a court could not address, asserting that it was for the democratically elected institutions to intervene.

> *"[36] The answers to the common questions raised are clearly at the center of societal issues, both national and international. It is up to the democratically elected government to answer them, not up to the courts to dictate to the state what choices it should make"*[115]

In the similar climate litigation *La Rose*[116] Case, the Supreme Court of Canada found that the subject matter was not justiciable. It stated:

> *"[40] The Plaintiffs' position fails on the basis that there are some questions that are so political that Courts are incapable or unsuited to deal*

[113] Jeunesse II, supra note 62, §44.
[114] *Jeunesse II*, *supra* note 62, §32.
[115] *Jeunesse II*, *supra* note 62, §36.
[116] La Rose v. Canada, 2020 FC 1008, full text available here: http://climatecasechArticlecom/non-us-case/la-rose-v-her-majesty-the-queen/. In this case, fifteen young plaintiffs sued the government of Canada alleging the breach of Charter rights (sections 7 and 15) for its insufficient GHG reductions.

> *with them. These include questions of public policy approaches – or approaches to issues of significant societal concern."*[117]

In *La Rose*, the Supreme Court also stressed that courts could not review the government's policy in its entirety, if the review required by plaintiffs was too broad:

> *"While this is not to say a government policy or network of government programs cannot be subject to Charter review, in my view, the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to Charter review".*[118]

The excessive breadth of the review required in strategic climate cases also arose in the *Jeunesse* case: the court asserted that the plaintiffs referenced the *Greenhouse Gas Pollution Pricing Act* without challenging it. *Jeunesse* requested a declaratory finding that, in the court's view, would have forced the judiciary to step into the realm of the legislative power. According to the court, the request for an order was also inconsistent with the separation of powers principle, as it was the equivalent of forcing the government to act. This led to the finding that the claim was not justiciable.

The issue of justiciability, however, was further developed by the Court of Appeal with regards to the enforcement of a decision. It was argued that the findings would be so general and imprecise that there would be no means to implement the decision.

> *"Moreover, even if it were to be found that the courts could do so, the generality of the findings sought is so imprecise as to give no means for their implementation through enforceable orders. This is the case, for example, with the declaration that the government's failure to put in place the measures necessary to limit global warming to 1.5 °C violates the fundamental rights of the class and the order to stop it. So too does the request to order the government to put in place a remedy to help curb global warming and to order any other remedy the Court deems appropriate, which offers no useful guidance. The Appellant offers nothing concrete, nothing specific".*[119]

In conclusion, the Quèbec Court of Appeal dismissed the appeal for lack of justiciability.

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[117] *Jeunesse II, supra* note 62, §37.
[118] *Jeunesse II, supra* note 62, §37.
[119] *Jeunesse II, supra* note 62, §42.

# 7. *Mathur v Ontario (Mathur)*

## 7.1 Introduction to Mathur

The *Mathur* case[120] was brought to the Ontario Supreme Court of Justice by seven young Ontarians, between the ages of 12 and 24, also acting on behalf of future generations. The plaintiffs alleged that the province had violated their charter rights under Sections 7 and 15 by repealing the *Climate Change Act* with the *Cancellation Act*, and enacting a new *Climate Plan* and reduction target that were insufficiently ambitious.[121]

The plaintiffs outlined how climate change "*impacts lives, liberty and livelihood of current generations of Ontarians*".[122] Thus, they sought declaratory relief and an order against the Province of Ontario to rewrite its *Climate Plan* and the reduction target. At its core, the case was underpinned by whether Ontario violated the plaintiff's Section 7 and 15 rights by repealing *Climate Change Act* and by setting a new, inadequate reduction target.[123] After the defendant filed a motion to dismiss the case, the Ontario Superior Court of Justice, found that: (*i)* the Charter also applied to the plan and the target, and such soft-law legal instruments were, therefore, subject to judicial review; (*ii)* plaintiffs could provide scientific evidence to prove their claim.

After this premise, the court addressed the justiciability issues, finding the claim justiciable at a preliminary stage and standing – regarding whether the plaintiffs had the standing to represent future generations.

## 7.2 Justiciability

[120] Mathur v. Ontario, 2020 ONSC 6918, also referred to as *Mathur*.

[121] In July 2018, Ontario introduced the *Cap and Trade Cancellation Act, 2018, S.O. 2018, c. 13* which canceled the previous legislation and required the Ministry of the Environment, Conservation and Parks to establish GHGs reduction targets and a provincial plan. Both can be revised «*from time to time*».

[122] *Mathur*, p.. 30, §142.

[123]Mathur, p.. 30, §142: «A declaration, under s.52(1) of the Constitution Act, 1982, that the Target violates the rights of Ontario youth and future generations under ss.7 and 15 of the Charter in a manner that cannot be saved under s.1, and is therefore of no force and effect; A declaration, under s.52(1) of the Constitution Act, 1982, that the Target violates the unwritten constitutional principle that governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens; A declaration that s.7 of the Charter includes the right to a stable climate system, capable of providing youth and future generations with a sustainable future; A declaration, under s.52(1) of the Constitution Act, 1982, that ss.3(1) and/or 16 of the Cancellation Act, which repealed the Climate Change Act and allowed for the P. 6 imposition of more lenient targets without mandating that they be set with regard to the Paris Agreement temperature standard or any kind of science-based process, violate ss.7 and 15 of the Charter in a manner that cannot be saved under s.1, and are of no force and effect;

In the alternative, the same declaratory relief sought in the paragraphs above pursuant to s.24(1) of the Charter and/or this Court's inherent jurisdiction; An order that Ontario forthwith set a science-based GHG reduction target under s.3(1) of the Cancellation Act that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5 degrees Celsius above pre-industrial temperatures or, in the alternative, well below 2 degrees Celsius (i.e., the upper range of the Paris Agreement temperature standard); and An order directing Ontario to revise its climate change plan under s.4(1) of the Cancellation Act once it has set a science-based GHG reduction target».

The province of Ontario argued that the case was not justiciable as it was not appropriate for the judiciary to interfere with the complex public policy implications of climate change, citing *Tanudjaja v. Canada*[124] and *Friends of the Earth v. Canada.*[125]

In the first case, the Court of Appeal for Ontario found that a court could not adjudicate on the issue of whether the provinces' housing policies contributed to homelessness, which would be violation of Sections 7 and 15 of the Charter. This conclusion was tightly linked to the nature of the claims, which did not challenge specific legal provisions but rather considered the overall approach to affordable housing.

In *Friends of the Earth*, the case focused on the actions of the Canadian government after the enactment by the Parliament of the *Kyoto Protocol Implementation Act*[126], requiring the Ministry of the Environment to prepare an annual Climate Change Plan. Such a plan had to contain measures that would allow Canada to meet its international commitments on climate change. The Federal Court found that Friends of the Earth's challenge to the plan was not justiciable because a court could not evaluate the content not the adequacy of such a plan – however, had such a plan not been prepared, it was acknowledged, it would have been justiciable for the court to act. Ontario relied on this case to argue that in *Mathur* the questions put before the court were also simply unsuitable for judicial intervention.

The plaintiffs claimed that they were presenting a pressing threat to the court, regarding their charter rights and that, thus, the court could find a violation of such. Even though this would imply the analysis of complex facts with social implications, as found by the Supreme Court of Canada in *Chaoulli v. Québec*[127]:

> *"The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it. In such circumstances, it is the court's obligation to decide the matter".*[128]

Furthermored, the plaintiffs cite the Federal Court of Appeal, maintaining that charter cases erre always justiciable, regardless of the nature of the governmental actions being challenged.[129] The young plaintiffs also referenced case law developing around the world, such as *Urgenda*, *Leghari*, and the Canadian case *Jeunesse*.

The court found that charter claims were always justiciable and that even subordinate legislation, such as the Plan and Target, were subject to judicial review. Further, the court noted that

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[124] Tanudjaja v. Canada (Attorney General), 2014 ONCA 852 (CanLII), full text available here: https://www.canlii.org/en/on/onca/doc/2014/2014onca852/2014onca852.html?autocompleteStr=tanud&autocompletePos=1

[125] Friends of the earth v. Canada, 2008 FC 1183, [2009] 3 F.C.R. 201. Full text available here: http://climate-casechArticlecom/non-us-case/friends-of-the-earth-v-the-governor-in-council-et-al/

[126] Kyoto Protocol Implementation Act, S.C. 2007, c. 30.

[127] Chaoulli v. Québec (Attorney General), 2005, SCC 35, [2005] 1 S.R.C. 791. Full text available here: https://www.canlii.org/en/ca/scc/doc/2005/2005scc35/2005scc35.html?resultIndex=1

[128] *Mathur*, p. 26, §121, citing *Chaoulli v. Québec*.

[129] See, Hupacasath First Nation v. Canada (Minister of Foreign Affairs), 2015 FCA 4, 379 D.L.R. (4th) 737, at para. 61.

*Mathur* ought to be differentiated from both *Tanudjaja v. Canada* and *Friends of the Earth v. Canada* because it was based on charter rights on the one hand and, on the other, it challenged specific pieces of legislation: the *Cancellation Act* and the following *Target* set by the Ministry of the Environment.Conversely, *Tanudjaja v. Canada* failed to identify specific government actions that led to the Charter violation, and *Friends of the Earth v. Canada* did not involve the constitutional context. The case was therefore found to be justiciable.

## 7.3 Standing

The defendant did not contend that the individual plaintiffs had public interest standing for the actions brought on their behalf; rather the Province of Ontario maintained that standing could not be granted on behalf of someone who did not yet exist, i.e. future generations. The Province argued that granting standing on behalf of future generations would excessively broaden the court's discretionary power and that it was unclear as to why the young plaintiffs were in the position to represent the interests of future generations.

Conversely, the plaintiffs argued that their claim differed from cases brought on behalf of unborn fetuses in the context of abortion. In the case at hand, plaintiffs asserted that they had standing because failure to reduce emissions at present would "*lock-in*" the rights of future generations before their lives had even begun. It was, they argued, because of the irreversible effects of climate change that the court should grant them standing.

The court analyzed the matter of standing starting from the premise that a three-part standing test should be considered: *(i)* plaintiffs must raise a serious justiciable issue; *(ii)* plaintiffs must have a real stake or a genuine interest in the outcome of the case; *(iii)* The proposed suit is a reasonable and effective means to bring the case to court.

At the preliminary stage, the court found that all three components of the test were met. With specific regards to the third requirement, the court noted that future generations would probably be unable to bring a similar claim considering that:

> *"The state of the world will likely be different. At this preliminary stage, granting the Applicants standing on behalf of future generations does not preclude future generations from bringing other climate change-related claims against the Ontario government at a future time".*

Further, the Court of the Appeal of Ontario held that standing could be granted even when the harm was only potential and has not yet occurred, as a judicial process could be invoked when someone's legal interest or rights had been "*placed in jeopardy or grave uncertainty*."[130]

In conclusion, the court found that the young plaintiffs had standing, including on behalf of future generations.

[130] See *Mathur*, p. 52, §251, citing *Operation Dismantle*

# 8. A *Sud v Italy*

## 8.1 Introduction to Giudizio Universale

On 5 June 2021, the NGO *A Sud,* together with over 200 plaintiffs, sued the Italian government before the *Tribunale di Roma.*[131]

This case is still on its way and all written pleadings submitted by the plaintiffs are not public yet. So far, parties have exchanged their written summons and the entry of defense. The first hearing was held on December 14th, 2021, while a second hearing was held on June 21st, 2021.

The pleadings submitted by the government, represented by *Avvocatura dello Stato* has are not public. Hence, the only information available are those made public by the plaintiffs. Reportedly, the Italian government argued for the dismissal of the case, based on *(i)* the lack of standing, *(ii)* the *non-justiciability* of the claim, and *(iii)* the inexistence of an individual climate obligation of the state for climate change-related effects. The judge scheduled the next hearing for September 13, 2023.

## 8.2 Plaintiff's Arguments on The Merits and Reliefs Sought

The claim is based on tort law and fundamental rights. The plaintiffs argued that Italian GHG emissions are inconsistent with the Paris Agreement temperature targets, violating fundamental rights protected under the constitution, including the implied 'right to a stable and safe climate'. The plaintiffs sought a declaration that the government's omissions are putting at risk their rights and an order to reduce emissions by 92% before 2030 compared to 1990 levels.

The plaintiffs partially refer to the implied existence, within the constitutional framework of fundamental rights, of a right to live in a stable and safe climate. Climate obligations are rooted in *(i)* the Paris Agreement, *(ii)* the EU regulations Nos. 2018/842, 2018/1999, 2020/852, 2021/241, *(iii)* Article 6 of the Treaty on European Union (TUE), *(iv)* Articles 2, 6 and 8 of the ECHR.

The violation of climate obligations and fundamental rights constitutes a breach of the *neminem leadere principle* and the consequent non-contractual liability under Article 2043 *Codice civile.*

## 8.3 Plaintiff's Arguments on Justiciability

The plaintiff advanced convincing arguments on the government obligation to shape its policies following a binding science-based approach. *A Sud* held that the UNFCCC, and the deriving legal instruments, require signatory parties to pursue a science-based approach. This duty is stated clearly by Article 4(1) of the Paris Agreement:

> *"In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing*

[131] The ENGO A Sud together with over 200 plaintiffs filed on 5 June 2021 a lawsuit against the Italian government alleging the violation of fundamental rights included the right to a stable and safe climate.

*country Parties, and to undertake rapid reductions thereafter in accordance with best available science (…)"*

Acting based on the best available science is, therefore, the binding obligation that states have taken on under the Paris Agreement.

At national statutory level, plaintiffs mentioned law No. 132 of 2016, which instituted a national system for environmental research and protection. Article 3(1), letter c), established that scientific information is a binding reference for any public authority.

The plaintiffs further argued that, under Articles 9(1), 32 and 33 of the constitution, the case law established that public powers must act according to the best available science. This principle is known as *riserva di scienza* and was mentioned in multiple judgements issued by the *(i) Corte costituzionale*, and *(ii)*, at the international level, by the European Court of Human Rights.

### i. *Corte Costituzionale*

In 2018, in a case concerning the constitutionality of a decree-law that extended mandatory vaccination, the *Corte costituzionale* found that the government had acted lawfully under the Constitution, given that it exercised its power based on the best-available science.[132]

The plaintiffs also referred to further judgments of the *Corte costituzionale*, judgment No. 185 of 1998 and No. 282 of 2002, both deciding on the issues relating to new medical treatment methods. Both judgments, concluded that political discretionality is limited by scientific data. Hence the legislator must make decision backed by the best available science. The *Corte costituzionale* also found that the legislator and public authorities must evaluation of scientific knowledge according to national or international scientific and research bodies.[133]

### ii. European Convention on Human Rights

The European Court of Human Rights held that states must act in accordance with science. In *Rees v. United Kingdom*, a case concerning transgender people rights under Articles 8 and 12 of the ECHR, the Court found:

*"The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments."*[134]

The same principle of law was reinforced and cited by the Court in *Cossey v. United Kingdom*.[135]

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[132] *Corte costituzionale*, judgment No. 5 of 2016.

[133] *Corte costituzionale*, judgment No. 282 of 2002, §5: "(…) un intervento sul merito delle scelte terapeutiche in relazione alla loro appropriatezza non potrebbe nascere da valutazioni di pura discrezionalità politica dello stesso legislatore, bensì dovrebbe prevedere l'elaborazione di indirizzi fondati sulla verifica dello stato delle conoscenze scientifiche e delle evidenze sperimentali acquisite, tramite istituzioni e organismi - di norma nazionali o sovranazionali - a ciò deputati, dato l''essenziale rilievo' che, a questi fini, rivestono 'gli organi tecnico-scientifici.'"

[134] *Rees v. United Kingdom*, app. no. 9532/81, § 47.

[135] *Cossey v. United Kingdom*, app. no. 10843/84, § 40.

In *Fretté v. France*, a case concerning child adoption by homosexual parents, the Court made found that political discretionarily is limited by scientific consensus.[136]

Similarly, in *Dubská and Krejzová v. Czech Republic*, the Court held that the discretionary political power on home births policy states is limited by the medical and scientific development.

The case law cited by the plaintiff helps getting a critical argument across: political discretionarily is limited by scientific knowledge, which must be evaluated according to national and international institution. Courts are the appropriate bodies to assess whether the legislator did, or did not, pass the 'test.' If the *Tribunale di Roma* accepts this argument there is a high probability that the objection of justiciability will be rejected by the court.

[136] *Fretté v. France*, app. no. 36515/97, § 42.

## 9. *Milieudefensie et al. v. Royal Dutch Shell plc*

## 9.2 Introduction: the Decision in a NutShell

Ever since the landmark decision issued in the *Urgenda* case,[137] the Netherlands stood out as a fertile legal environment for climate change litigation.

With yet another groundbreaking decision, on the 26th of May 2021, the Hague District Court ordered Royal Dutch Shell PLC (RDS) – the holding company of the well-known oil & gas conglomerate – to cut 45% of its emissions compared to 2019 ([138]). Such a reduction was imposed upon the whole group of companies, given that RDS sets the policy for all its numerous subsidiaries around the world. However, the order was later declared provisionally enforceable.

The plaintiff was the environmental group Milieudefensie and the co-plaintiffs were six other NGOs, and more than seventeen thousand citizens. This case is particularly relevant because it combines human rights and classic tort law against the private sector, arguing in favor of a potential violation of the *neminem laedere* principle for GHG emissions being incompatible with the Paris Agreement.

On the procedural level, it shows the weaknesses of the class action device: climate change effects are so widespread that even class actions face the issue of standing terms of the class definition.

## 9.2 Key Arguments on the Merits: The Factual and Legal Ground

The class action revolved around the argument that RDS's greenhouse gas emissions violated the duty of care that generally prevents anyone – whether a private or public actor – to harm others, as stated in Article 162, §2, Book 6, of the Dutch Civil Code:

> *"Article 6:162 Definition of a 'tortious act'*
>
> *- 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.*
>
> *- 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.*
>
> *- 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which*

([137]) Gerechtshof Den Haag, 9 Oktober 2020, ECLI:NL:GHDHA:2018:2591. The decision available online at the following link: http://climatecasechArticlecom/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/

([138]) Gerechtshof Den Haag, 6 May 2021, ECLI:NL:RBDHA:2021:5339. The decision available online at the following link: http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf (Hereinafter also referred to as «Shell decision»)

*he is accountable by virtue of law or generally accepted principles (common opinion."*

The plaintiffs presented to the court the effects of climate change on the inhabitants of the Netherlands and the Wadden Sea regions, resorting to the climate science reported by the 2019 IPCC Special Report; the IPCC Fourth Assessment Report; and the Royal Netherlands Meteorological Institution. According to such documents the following facts must be considered: *(i)* Climate change is caused by human activities; *(ii)* over the past decade CO2 emissions have increased by 2%; *(iii)* NDCs are insufficient when it comes to keeping the temperature rise under +1.5°C; *(iv)* climate change has irreversible effects if global warming exceeds +2°C, with extreme events and slow onset events and an uneven distribution of impact; *(v)* temperatures have risen on average +0.8°C globally and +1.7°C in the Netherlands; *(vi)* the country will face higher sea levels, wetter winters, more intense precipitation and drier summers; *(vii)* overall, in Europe heat waves will occur with deaths being a likely consequence.

The Court accepted such facts and moved on to the role played by RDS in such a global scenario. RDS, it was noted, was the holding company for one thousand subsidiaries and, thus, was responsible for setting climate policy for the whole conglomerate. A decisive factor lied in the consideration that Scope 1, 2, and 3 emissions attributable to the group were higher than those of the whole of the Netherlands.

The Court found that RSD's aggregate emissions volume endangered the right to life (Article 2 ECHR), the private life, family life, and home (Article 8 ECHR) of Dutch and Wadden region residents. Such emissions resulted, in the Court's view, from a corporate policy that deliberately shunned its responsibility with regards to the well-known consequences of climate change.

RDS argued that there was no liability since its emissions did not violate any statutory limit. However, according to the Court, the *neminem laedere* principle – which originates from Roman private law – does not necessarily require the breach of explicit legal provisions. Even unwritten rules of care are sufficient in this regard. On this basis, the RDS emission policy was deemed unlawful although it did not violate any explicit legal provision.

The unwritten standard of behavior, however, is a blank notion to which courts have to give content. In this regard, the Court based its decision, on the one hand, upon a multitude of climate science sources and on the international conventions that regulate GHG emissions; in particular, the 2016 Paris Agreement which set a maximum of a 2°C temperature rise and required private actors' contribution. On the other hand, the Court referred to the ECHR and soft law principles.[139]

RDS also argued that a court may not impose stricter limits than the EU Emissions Trading Scheme - ETS. In this regard, the Court found that the ETS system only applied to some of the emissions produced by RDS and does not limit the Court's jurisdiction to evaluate whether the overall emissions – including those not covered by ETS and produced outside the EU – violate the above-mentioned duty of care.

([139]) Such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises.

## 9.3 Procedural Law Considerations

From a procedural law perspective, the case at hand raised – at least – five main questions: (i) Is a class action admissible when launched on behalf of the entire world population? (ii) What are the standing requirements for NGOs and individuals that act alongside the class action? (iii) is there any interest in seeking a judicial order to reduce GHG emissions, even though one company alone does is not responsible for the climate crisis? (iv) Can the judiciary order a private company to curb emissions or - considering the pervasive effects of such a decision - is that not the role of another branch of the state? (v) Below details the District Court of The Hague's response to these questions.

### 9.3.1 Class Action Admissibility and Standing

First, the Court tested the admissibility of the class action on the requirements set out by Book 3 Section 305a of the Dutch Civil Code, *rationae temporis*, which was applicable at the time the claim was made. Such a provision allows anyone to establish a foundation with the statutory aim of protecting public interests and then act in court on behalf of the general public. It is up to those represented to opt out of the class action.

This is how the first paragraph of the provision reads:

> "*Article 3:305a Collective actions ('Class actions')* - 1. *A foundation or association with full legal capacity that, according to its Articles of association, has the objection to protect specific interests, may bring to court a legal claim that intents to protect similar interests of other persons."*

Section 305a is the same provision that was also leveraged by plaintiffs in the *Urgenda* case. Aside from climate litigation, other public interest cases were also brought to Dutch courts thanks to this provision which has the effects of substantially widening standing requirements in Dutch procedural law.[140]

In 2019, for example, in the *Mothers of Srebrenica* case the *Hoge Raad* (the Dutch Supreme Court) issued a declaratory judgment against the defendant - the Dutch government - and in favor of a group called *Mothers of Srebrenica*, for the failure of a peace-keeping operation that led to the mass murder of Bosnian Muslims perpetrated by Bosnian Serbs.[141] In those proceedings, the plaintiffs who launched the class action claimed to represent six thousand women whose family members were killed.

In the *Shell* case, the plaintiffs sought protection for the right to a safe climate, compatible with the ECHR. This interest belongs, by definition, to an undefined and unspecified group of people

[140] See, Otto Spijkers, blog post in EIJL:Talk!, available at the following link; https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/#:~:text=Article%203%3A305a%20Civil%20Code,multinational%20based%20in%20the%20Netherlands.

[141] The full text of the decision is available here: https://wetten.overheid.nl/BWBR0005291/2021-07-01/#Boek3_Titeldeel11_Artikel305a

and cannot be individualized. However, the class action still had to comply with the 'similar interests' test: although spread among a vast public, only similar interests can be presented in a class action.

Based on this consideration, the Court found that the plaintiffs could not claim rights on behalf of the entire world population, as their interests could not be bundled together under the 'similar interests' test. The Court held that climate change affects regions in different ways and it is impossible to argue convincingly that everyone all over the world is and will be affected in a sufficiently similar way.

Conversely, according to the court, present and future generations of Dutch residents and the inhabitants of the Wadden Sea area will be affected by climate change in a sufficiently similar way. Hence, standing can be granted only to this sector of the population, regardless of the nationality of the class members, some of whom were Dutch and other Germans.

> *"[…] the interests of current and future generations of Dutch residents and (with respect to the Waddenvereniging) of the inhabitants of the Wadden Sea area, a part of which is located in the Netherlands, as served in the alternative with the class actions, are suitable for bundling, even though in the Netherlands and in the Wadden region there are differences in time, extent and intensity to which the inhabitants will be affected by climate change caused by CO2 emissions. However, these differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population and do not stand in the way of bundling in a class action. The collective claims are therefore declared not allowable insofar as they serve the interest of the world's population, except for the interest of Dutch residents and the inhabitants of the Wadden region."*[142]

These findings highlight the recurring conflict between the existing standing rules and the very structure of climate rights, which ontologically belong to everyone, including future generations. This clash also concerns class actions as class representatives must pursue homogeneous interests in order to have the action not rejected on procedural grounds. Only when the sufficient threshold of commonality is demonstrated can the typical mechanism of a class action – meaning the protection provided to the whole class members – operate.

### 9.3.2 NGOs and Individuals' Standing Requirements

The court then verified whether the NGOs and the individual plaintiffs that participated in the proceedings had standing to bring the same claim to court alongside the class action.

The decision noted that NGOs have sufficient standing only insofar as the class action aligns with their Articles of association and their actual promotional activity. Together with Milieudefensie, another six NGOs were granted standing beside Action Aid, whose Articles of association and operations were mainly geared towards Africa – not the Netherlands and the Wadden Sea area.

[142] See, Shell decision, note 89, §4.2.4.

As for the individual claimants, they were found to be lacking standing. According to Book 3, section 305a of the Dutch Civil Code, in the case of a public interest class action, individuals cannot institute further claims if – as in the case at hand – these are already being covered by the class action.

### 9.3.3 Interest in suing: Would the Decision be Useful?

Third, the court stated that the plaintiffs had a sufficient interest in acting. The plaintiffs sought a judicial order against Royal Dutch Shell to reduce GHG emissions even though a change in RDS corporate policy could not solve the climate crisis alone. RDS argued that other competitors would take their place.

This line of argumentation is similar to the one made by the defendant Dutch Government in the *Urgenda* case: they asserted that the plaintiffs had no interest in acting considering that, even if (miraculously and instantly) it had been possible to eradicate national GHG emissions, climate change would still happen. As in the *Urgenda* case, however, the Hague District Court dismissed the argument that there was no responsibility only because the defendant is not the sole contributor to climate change. Therefore, it was found that plaintiffs do have a sufficient interest in seeking a judicial order to reduce GHG emissions. That goes for the state as well as for any carbon major, such as Royal Dutch Shell.

### 9.3.4 Justiciability

This case shows how justiciability is a twofold matter that requires establishing whether courts may decide a case that presents the risk of political interference and, once a decision is issued, how to enforce the order.

Justiciability, in the sense of power to adjudicate, was addressed by RDS which argued that: *(i)* The Paris Agreement goals needed effort from society as a whole; no obligation on the private sector from the PA or national law; *(ii)* RDS respected the Emission Trade System; *(iii)* No legal basis to impose further reduction obligations on RDS; *(iv)* The solutions to climate change were a matter of political discretion.

The court tackled this arduous issue, finding the fine line between the judicial power to adjudicate rights and the government's political discretion, which is the ultimate expression of democratic consensus. Following the example provided by the *Urgenda* case, the court found that the judiciary may exercise its prerogatives even though the subject matter could potentially spark multiple socio-economic effects. It was decided that there is no infringement of the separation of powers rule as long as courts stick to rights adjudication.

Regarding the second face of justiciability, understood as the power to enforce the decision, it ought to be noted that the order was provisionally enforceable. The court reasoned that the public interests outweigh private interest to maintain the status quo until a final decision, while the appeal is underway.

After the decision, however, the defendant did not comply with the order and there seems to be no enforcement of the proceedings underway. On April 25$^{th}$, 2022, the plaintiffs resorted to

sending a letter of formal notice to the CEO and the board of directors of RDS alleging possible personal liability. The letter stated that Shell had not delineated a target for Scope 3 reductions before 2030. In 2021, 95% of Shell's emissions were Scope 3.

If the defendant company has still not complied with the letter, leaving open the possibility of criminal law consequences. However, it is hard to imagine that a prosecutor could prove the existence of malice as the company's directors could easily argue that, for whatever objective reason, they were not able to achieve the results ordered by the court.

# CHAPTER 4
# LITIGATION TO RECOVER DAMAGES AGAINST THE PRIVATE SECTOR

## 1. *Luciano Lliuya v RWE AG*

### 1.2 Introduction to the Case

The plaintiff in this case is Saúl Luciano Lliuya, a farmer from Huaraz, Perù who sued RWE AG –the largest German energy company – before the Landgericht Essen, Germany.[143]

Mr Lliuya claimed that the GHG emissions attributable to the RWE AG increased glacial melting on the *Cordillera Blanca*. He maintained that Laguna Palcacocha, located just above Huaraz and his property, had grown its volume since 1975; such volume increase accelerated after 2003. As a result, floods and mudslides put his property at risk. Lliuya also argued that the German energy 'giant' RWE AG has knowingly contributed to 0.47% of global GHG emissions measured from 1751 onwards. Accordingly, the plaintiff sought an order against RWE AG to pay 0.47% of the damages he suffered from climate change.[144]

This case does not focus on the procedural issues of standing and justiciability, yet it is particularly interesting. First, it shows that claims for damages face serious issues in terms of proving causation. Second, in case of success it could constitute a breakthrough to attributing human rights liability to the holding companies for the human rights impacts of their subsidiaries.

### 1.3 Landgericht Essen

On December 15th, 2016, *Landgericht Essen* initially dismissed the claim. It found that the first, second, and third claims were not sufficiently specified under § 263, paragraph 2, No. 2, ZPO, as the plaintiff asked the court to determine the RWE's contribution to the alleged harm according to § 287 *ZPO*. This provision, however, cannot be applied to determine liability but only to quantify the exact extent of damages.

The court also dismissed the fourth claim, finding that the legal identity of the association *Waraq* was undetermined. The fourth alternative claim was found admissible yet unfounded. According to the Court, REW could not be considered a "disturber" under German law, as the causal

[143] *Saúl Luciano Lliuya v RWE AG*, judgment of December 15th 2016, case No. 2 O 285/15. http://climate-casechart.com/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision-1.pdf

[144] More specifically, the plaintiff lodged four alternative claims: First, he sought an order to pay, proportionally to its GHG emissions, for the costs to protect his property of the plaintiff from Laguna Palcacocha. Mr Lliuya asked the Court to determine RWE's contribution to climate change and to the damage, under § 287 ZPO. Second, the plaintiff sought an order to take adequate measures to reduce the volume of Laguna Palcococha, in proportion to the defendant's contribution to the causation of the damage. Third, the plaintiff sought an order to pay seventeen-thousand euros to the association of local authorities named Waraq as a contribution to the expenses that the community needs to sustain to assure the protection of the plaintiff. Fourth, he sought an order to pay €6.084.

link between the GHG emissions produced by RWE and the alleged harm is too vague. Applying the *conditio sine qua non* principle, a conduct is causational only if, had it not occurred, the harm would not have happened. In cases of multiple actions attributable to different subjects, co-causation requires that the hypothetical omission of only one action would, *per se,* undo the damages.

The Court found that RWE's emissions were a minor fraction of global GHG emissions mixed up in the atmosphere with multiple other emissions. The court further argued that every living person is a GHG emitter, and climate change could only be solved if all emitters coacted to reduce emissions.

The alleged flood hazard would exist even without RWE's omissions considering that *(i)* the irrelevance of RWE's emissions compared to global emissions and *(ii)* every emission could have caused climate change, and *(iii)* it is impossible – argued the Court – to ascertain the link between RWE's emissions and the threat of floods.

## 1.4 Oberlandesgericht Hamm

Following the plaintiff's appeal, on November 30, 2017, the *Oberlandesgericht Hamm* established the admissibility of the claim, allowing the case to proceed to the evidentiary phase. The appellate Court first addressed the issue of interest in suing, finding that the plaintiff presented a concrete interest in the case since he sought an order for about seventeen thousand euros. Second, it found that continuous omissions allegedly produce harmful conduct; hence time limitations do not apply. Third, the court found that, potentially, RWE could be held liable. In effect, reading the *BGB* and the Federal pollution protection law (*BImSchG*) in conjunction, the Court held that civil liability could be attributed to the defendant even if the latter acted lawfully. Finally, the court found that a causal link could be – potentially – established. Hence, the proceedings should proceed to the evidentiary phase.

The taking of evidence concerns *(i)* whether the plaintiff's property is threatened by floodings or mudslides caused by the *Laguna Palcacocha* and *(ii)* the causal link between the defendant's GHG emissions and the threat of floods and mudslides.

The case is still pending. Yet the admissibility of that claim is considered a victory in principle for the plaintiff and the NGO Germanwatch that supports the plaintiff. In effect, the Court recognized that a company operating worldwide could be held liable for economic damages caused by climate change. This case also highlights that seeking monetary compensation poses the issue of causation, while the hurdles of standing and justiciability seem easily avoidable.

## 2. *Native Village of Kivalina v. ExxonMobil Corp.*

## 2.1 Introduction to Kivalina

Kivalina is an Inupiat Eskimo community and city, inhabited by approximately 400 people. It sits on a coastal reef in northern Alaska above the Arctic Circle. The Native Village of Kivalina, which is the governing body of the community, and the City of Kivalina sued twenty-four major oil, energy, and utility companies.[145]

The plaintiffs aimed to recover the monetary damages for the relocation of the village, which was threatened by climate change. The plaintiffs alleged that the defendants contributed consistently to climate change, which was melting the sea ice that protects the community from storms. The consequent erosion of the thin soil on which the village is located, leading to its destruction, would require the relocation of Kivalina's residents – which would cost, according to the plaintiffs, up to $400 million. The action was based on the tort of public nuisance. This case was dismissed on procedural grounds by the District Court for the Northern District of California and Oakland Division due to a lack of standing and justiciability.[146]

Following an appeal, the United States Court of Appeals for the Ninth Circuit[147] upheld the first instance decision, finding that the claim, based on common law public nuisance tort, was superseded by federal legislation passed with the Clean Air Act. In a concurring decision, Judge Pro found that the plaintiffs lacked both standing and justiciability, as had been found by the District Court.

## 2.2 Kivalina I: The District Court Decision on Standing and Justiciability

Judge Armstrong dismissed the case on procedural grounds, based on the lack of both standing and justiciability. Article III sets both legal thresholds.

### i. Justiciability

First, the Court addressed the lack of jurisdiction under the political question doctrine and the separation of powers principle. According to US Federal Law, the issue of justiciability is framed according to the following principle:

> *"A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."*[148]

[145] Among them, ExxonMobil Corp., British Betroleum p.l.c. and its American subsidiaries, Chevron Corp., Royal Dutch Shell p.l.c., etc.

[146] Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009), also referred to as *Kivalina I*. The full text of the decision is available here: http://climatecasechArticlecom/wp-content/uploads/sites/16/case-documents/2009/20090930_docket-408-cv-01138-SBA_order.pdf

[147] Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) , also referred to as *Kivalina II*. The full text of the decision is available here: http://climatecasechArticlecom/wp-content/uploads/sites/16/case-documents/2012/20120921_docket-09-17490_opinion.pdf

[148] E.E.O.C. v Peabody Western Coal Co., 400 F.3d 774, 785 (9th Cir. 2005).

To test whether a subject matter falls under the notion of a non-justiciable political question, six independent factors apply. These criteria were developed by the Supreme Court, in the Baker v Carr decision, and read as follows:

> *"[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."*[149]

The first three 'Baker Factors' have the function of limiting a court's jurisdiction, while the other three foresee prudential considerations regarding judicial intervention.

The defendants argued that judicial intervention in the case at hand would interfere with US foreign policy, which is attributed to the province of the executive branch of the government. The court recognized that climate litigation does present the issue of justiciability but that the undisputed international dimension of it does not automatically imply the non-justiciability of the claim. The first Baker Factor was, therefore, not implicated.

The second and third Baker Factors were found to be decisive: both led, according to the court, to the dismissal of the case due to lack of justiciability.

The second factor requires "*judicially discoverable and manageable standards for resolving the dispute*". Judge Armstrong framed the issue as whether a court has the legal tools to reach a rational ruling. According to the plaintiffs, climate litigation - in this regard - did not differ from any other nuisance claim, as the salient inquiry was whether the defendants' emissions "contributed to an unreasonable interference with public rights" such as the right to health, public safety, peace, public comfort, and convenience. Judge Armstrong, however, noted that nuisance claims also require balancing the social utility and benefit of the alleged nuisance against the harm caused. In other words, the reasonability criteria refer to what a:

> *"reasonable person, looking at the whole situation impartially and objectively, would consider".*

Given that the GHGs emitted by the defendants did contribute to climate change, and that climate change causes harm, the court had to determine whether the harm caused was unreasonable considering, for example, the energy-producing alternatives to fossil fuels available in the past and in the present, and the possible implications for consumers and business supply. A factfinder, noted the court, should weigh the harm caused to Kivalina against the benefits derived from fossil fuels. In such a context, what are the "*judicially discoverable and manageable standards*"?

[149] See Kivalina I, p. 7.

According to Judge Armstrong, such standards cannot be found in the settled principles of tort and public nuisance law developed in water pollution claims. Water pollution cases cannot be compared to climate litigation, as they involve a geographically definable waterway and legally predetermined permitted amounts of pollutants that can be discharged in the waterway, while global warming is based on emissions from innumerable sources. In conclusion, Judge Armstrong found that the court lacked jurisdiction under the second Baker Factor for lack of judicially discoverable and manageable standards.

The decision then analyzed the third Baker Factor, which requires assessing whether the judiciary can decide a case "*without an initial policy determination of a kind clearly for nonjudicial discretion"*.[150] In the case at stake, the court was called to assess the reasonableness of the emissions produced by the defendants. According to Judge Armstrong, this would imply an evaluation of what constitutes an acceptable level of emissions on the part of the defendants – which, in turn, would require a policy determination that the judiciary is not suited to make.

Further to this, the court found that the claim required a policy decision as to "whom should bear the cost of global warming",[151] given that plaintiffs required the court to make only some GHG emitters pay for the damages suffered by the Village of Kivalina.

### ii. Standing

Under Article III of the US Constitution, standing is granted if a plaintiff can establish:

> *"(1) an injury in fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)"*[152]

Regarding the fair traceability test, plaintiffs conceded that they were unable to trace their harm to any particular defendant and, indeed, they claimed that they did not need to do that based on the case law developed under the Clean Water Act.[153] In such cases, the Fourth Circuit Court found that, to establish standing, "*fair traceability*" only requires plaintiffs to show that there is a substantial likelihood that the defendant caused harm. If many polluters discharge chemicals in a waterway, plaintiffs are not burdened with the task of pinpointing the origins of each molecule, for instance, but rather proving that the defendant discharged a certain pollutant. US courts, only require plaintiffs to prove the "*seed of their injury*".[154]

That being said, the court found that there was a critical distinction between a water pollution case and climate litigation. There are no statuary-based limits as to the discharge of GHGs and, as

[150] See, Baker v Carr, 369 U.S. 186, 210 (1962), cited in Kivalina I at p. 13.
[151] See, Kivalina I, p. 14.
[152] See, Kivalina I, p. 15.
[153] Such as, P.I.R.G. v Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir 1990).
[154] See, Friends of the Earth, Inc. v Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000), cited by Kivalina I at p. 17 and 18.

a result, it was deemed impossible to presume that the defendants likely harmed the city and, thus, the inhabitants of Kivalina.

Conversely, under the Clean Water Act, the excess pollutants allow for a presumption that "*there is a substantial likelihood that defendants' conduct caused plaintiffs' harm*".[155] This consideration must be combined with the fact that plaintiffs conceded that it is impossible to trace a causal link between the specific GHG emissions attributable to the defendants and the harm suffered by Kivalina, as GHGs rapidly mix in the atmosphere.

Using the words of the case law cited in the decision, the harm caused by climate change potentially has "*multiple seeds of injury*". In conclusion, according to the court, it was impossible to satisfy the fair traceability test under Article III of the American Constitution and the claim must consequently be dismissed due to lack of standing.

## 2.3 *Kivalina II*

The first instance decision was appealed at the US Court of Appeal for the Ninth Circuit, which upheld the District Court's decision based on the Supreme Court's *American Electric Power Co., Inc, v. Connecticut (AEP)*[156] precedent and displacement theory.

The Court of Appeal began by setting the context: before even evaluating whether Kivalina's claim was justiciable and whether plaintiffs had to have standing under Article III of the US Constitution, it was necessary to first assess whether the public nuisance theory under federal common law was applicable or, rather, if such action had been displaced by any legislative action.

Citing Justice Ginsburg, the court noted that federal common law applies within the context of federal legislative power, where Congress has so directed or when courts must face issues unresolved by statutes. Federal common law can also apply to trans-boundary pollution suits, which are often based on the theory of public nuisance. However, if Congress has addressed the question raised by a public nuisance suit, there is no scope for courts to implement federal common law. When it comes to GHG emissions, the Supreme Court stated in *AEP* that the Clean Air Act, and the Environmental Protection Agency's actions authorized by the Act, supersede any federal common law right to seek the reduction of GHG emissions. The court was well aware of the fact that, in the case at hand, the plaintiffs did not seek the reduction of emissions but rather the compensation for the economic damages suffered as a consequence of climate change. Nonetheless, Supreme Court jurisprudence states that, if a cause of an action based on tort law is overruled this extends to all remedies.[157]

Thus, the congressional regulation of GHG emissions through the Clean Air Act takes precedence and extinguishes the common law cause of action chosen by the plaintiffs. Considering that the "displacement theory" refers to the separation of powers principle, the court of appeals ended

[155] See Kivalina I, p.. 19.
[156] American Electric Power Co., Inc, v. Connecticut, 131 S. Ct. 2527, 2535 (2011).
[157]See, Middlesex County Sewage Authority v. National Sea Clemmers Ass'n., 453 U.S. 1, 4 (1981), cited in Kivalina II, p. 11655.

up dismissing the case due to lack of jurisdiction once again, but on a different and more preliminary level as compared to the first instance decision.

Some legal scholars have criticized this decision, calling it the "*death of environmental common law*". Such criticism is due to the fact that the Clean Air Act does not allow for compensatory damages, and yet, Kivalina's claim for damages was considered to be displaced by the congressional intervention. As a result, the plaintiffs in Kivalina were left without remedies.[158]

[158] See, PELOFFY, *Kivalina v. Exxonmobil: A comparative Case Comment*, McGill Int'l J. Stust. Dev. & Pol., 2013, 9, p. 121.

## 3. *City of Charleston vs. Brabham Oil Company Inc. et al.*

### 3.1 Introduction to the case

In the *City of Charleston vs. Brabham Oil Company Inc. et al.* (*City of Charleston vs. Brabham Oil*), the City of Charleston sued fossil fuel companies before the South Carolina Court of Common Pleas, seeking compensatory and punitive damages and disgorgement of profits, besides attorneys' fees and costs of suit.[159]

Plaintiff argued that climate change produced land and beach erosion, floods, and higher sea levels, causing social and economic harm. The City of Charleston also maintained that defendants knowingly deceived consumers about the direct connection between their products and climate change harm, well aware of such risks for over fifty years; further, according to the claim, the defendants did not pursue less hazardous alternatives despite being aware of the effects of climate change. *City of Charleston vs. Brabham Oil* is still ongoing, and there is no ruling yet on the issues of standing and justiciability. Yet, it is worth mentioning for three reasons.

First, claiming economic damages suffered by a municipality (or potentially a province) helps prevent standing objections, as local governments are entitled to the public property harmed by climate change.

Second, the City of Charleston wisely based its claim on consumer and public nuisance laws rather than fundamental rights. This strategy should help prevent both standing and justiciability objections. In effect, if a municipality were to rely on its citizen's fundamental rights, defendants could try objecting that local governments lack standing in this realm. Further, anchoring the claim to these areas of law should prevent the argument that, lacking explicit climate-related provisions, courts cannot make the law.

Finally, the *City of Charleston vs. Brabham Oil* represents a growing wave of litigation initiated by municipalities against carbon majors. Trying to recuperate resources from carbon majors seems a reasonable tactic to avoid putting on the taxpayers' tap the expenses caused by climate change. As climate change effects become more tangible, such cases might become more frequent.

[159] City of Charleston vs. Brabham Oil Company Inc. et al., case No. 2:20-cv-03579-BHH

# CHAPTER 5
# STRATEGIC LITIGATION AGAINST THE PRIVATE SECTOR BEFORE ADMINISTRATIVE COURTS

## 1. *Gloucester Resources Ltd. v Ministry for Planning*

### 1.1 Introduction to the Case

The *Gloucester* Case[160] was decided by the Land and Environment Court in New South Wales in administrative judicial review proceedings, which were brought by the mining company Gloucester Resources Ltd. At its core, this case was about the feasibility of new emission-intensive development projects - such as a new open-cut coal mine - under the Paris Agreement in the absence of national legislation explicitly prohibiting new coalmines.

The mining company Gloucester Resources Ltd requested that the Court approve the construction of an open-cut coal mine after the Ministry for Planning rejected their application. The Court, based on the open-ended legal notion of 'public interest,' as well as other legal requirements, denied the project due to its negative visual, social, and environmental impact and its incompatibility with the Paris Agreement.

This case offers interesting insights into how climate litigation can develop in the context of administrative, judicial proceedings and how the procedural issues of standing and justiciability are presented to the Court and, in turn, finally resolved.

### 1.2 Arguments Against a New Coal Mine Under the Paris Agreement

Gloucester Resources Ltd had previously requested that the Ministry for Planning grant permission to construct an open-cut coal mine, which aimed to produce twenty-one million tonnes of coal over 16 years in the nearby area of Gloucester, New South Wales, Australia.

The Planning and Assessment Commission, acting as the delegate for the Ministry, denied approval for the Rocky Hill Coal Project. The company then appealed this administrative decision to the court in its local jurisdiction – therefore taking the place of the Ministry of Planning. Gloucester Groundswell Inc., a local community action group concerned about the impact of the Rocky Hill Coal Project on the environment, joined the appeal proceedings, asking the Court to uphold the Ministry's decision to deny approval for the proposed mining project.

[160] Gloucester Resources Limited v. Minister for Planning, Land and Environment Court New South Wales, Australia, 8 February 2019. Full text available at: http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190208_2019-NSWLEC-7_decision.pdf

Both the Ministry of Planning and Gloucester Groundswell put forward that the mine project had adverse effects on the area around Gloucester. The proposed mine was deemed incompatible with the open-ended notion of 'public interest' foreseen by the applicable planning law.[161] The citizens-group leveraged, in particular, Article 4 of the EPA Act which requires the evaluation of 'the public interest':

> *"Section 4.15(1) of the Environmental Planning & Assessment Act (the EPA)*
>
> *4.15 Evaluation*
>
> *(1) Matters for consideration—general*
>
> *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
>
> *[…]*
>
> *e) the public interest."*

Gloucester Groundswell linked the open-ended notion of public interest to the Paris Agreement temperature goals and with the Australian Carbon budget. As a result, the public interest must be understood as necessarily entailing the Paris Agreement. In such a context, new coal mines are not compatible with the Paris Agreement's attempt to contain temperature increases to less than the threshold of 1.5°C compared to pre-industrial levels, through national carbon budgets and the obligation to reach net-zero by 2050.[162] The public interest was also leveraged by Gloucester Groundswell regarding the planning, social and economic impact of the mine on the local area, which became the main reason for the judicial rejection of the project.

## 1.3 Arguments in Favor of a New Coal Mine

On the other hand, the mining company did not dispute climate change itself. According to the mining company, the Paris Agreement's targets did not affect the proposed Rocky Hill Coal Project. There is no legal restraint on the private sector nor – they claimed - a sufficient basis to refuse the project, as no national law forbid new coal mines. If a policy of 'no new coal mines' were to be determined by the Court, despite the lack of legislation on the matter, it would – they asserted - result in a legislative act of the Court, consequently violating the separation of powers principle.[163]

[161] See §28 of the decision.

[162] This argument was sustained also relying on the expert opinion of Prof. Steffen.

[163] The Court reports this argument as follows: «452. There are no governing structures under the Paris Agreement that predetermine how these reductions should occur. In particular, there are no sectoral or commodity-based emission targets or budgets (referring to the expert report of Dr. Fisher, [8], [107]). Similarly, Commonwealth and State laws do not specify how Australia's NDC emission reductions need to be achieved and, in particular, do not specify that no new coal mines can be approved. GRL submitted that the Court, in determining this appeal, "to adopt a policy of no new coal mines would be to impermissibly legislate a strict rule of general application without jurisdiction to do so" (GRL closing submissions, [249])».

The mining company also argued that parties to the Paris Agreement could not be held responsible for Scope 3 emissions. In the case at hand, Scope 3 emissions would be produced outsides the State's jurisdiction. Australia only accounts for those emissions that happen in its territory – in the present case only Scope 1 and 2 emissions.

Furthermore, Gloucester Resources Ltd contended that the temperature goals could be met in different ways: not approving the Rocky Hill Coal Project was not, they asserted, the only way to reduce emissions.[164] Also, the company asserted that emissions must be reduced efficiently and considering the whole economic context. In the company's view, cutting the coal production would destabilize the Australian economy with the eventual effect of reducing the nation's capacity to develop alternative sources of energy. Not only that, the company also developed two arguments that can be labeled as 'market substitution' and 'carbon leakage'. Both share a general premise: not all coal is the same – there is cooking coal and thermal coal – and not all coal can be efficiently substituted by other sources of energy.

The mine would produce cooking coal, which is meant for steel production and not for energy production. Steel demand is increasing and, for its manufacturing, coal is a critical raw material that is hardly replaceable by renewables. Therefore, the demand for cooking coal would need to be met by either by this (Australian) coal mine, or a foreign one.

That being considered, the market substitution argument concludes that, if this mine were not approved, elsewhere another mine would be approved anyway, driven by the 'natural' forces of the market. By this logic, coal demand will trigger supply – regardless of the Paris Agreement - and nothing would change in terms of overall global GHG emissions.

The subsequent argument is the carbon leakage one. If the new mines are developed outside Australia, they will likely emit even more GHGs as Australia has some of the most stringent environmental regulations for the mining sector.[165]

These two arguments, combined, support the following reasoning: the proposed mine responds to market-driven forces that cannot be stopped. There is a sense of inevitability that comes through: if it does not happen here, it will happen somewhere else, with the downside of damaging the national economy and even producing even more GHGs. So, if the test of "public interest" also includes the GHG emissions produced by the mine, the proposed project ought to be approved for the sake of both the economy and the temperature targets.

[164] See § 458: «GRL contended, whilst not approving new coal mines might be consistent with reducing GHG emissions, it is not the only way to achieve the desired emission reduction targets».

[165] See §484, «Sixthly, GRL submitted that economic, social and environmental rationales for banning development of individual coal mines on the basis of GHG emission are poor. Dr Fisher explained this argument:
"On an environmental front, Australian coal mines operate to some of the highest environmental standards in the world (AusTrade 2018). Aside from the strong commercial incentive to limit energy use in the operation of the Project, regulations ensure a strict recognition and accounting of emissions. This is not the case in all countries where coal mining occurs. Moreover, Australian coking coal is amongst the highest quality in the world, making it relatively less emissions intensive. Higher energy content and lower impurity coal results in higher quality coke, which in turn requires less coke input and higher productivity per unit of steel produced (World Steel Association 2016)».

## 1.4 The Court's Ruling

The Courts refused approval for the project, accepting that national law must be construed in accordance with international climate legislation. Considering the link between the national legal notion of public interest, on the one hand, and the obligation under the Paris Agreement on the other, the Court maintained that existing coal mines needed to be phased out and that new coal mines must not be approved.

This case shows how the Paris Agreement has a recurrent function: it provides revised content to those general clauses that are, and have long been, codified in our legal systems. Firstly, the Court established that all emissions, including Scope 3 emissions, must be taken into consideration - meaning those produced by the use of the final product.[166] Secondly, the decision highlights that the project would contribute to climate change even though climate change is the result of multiple local actions – each of them proportionally small:

> *"516. Many courts have recognized this point that climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by the abatement of the GHG emissions from these myriad of individual sources."*

Despite the fragmented nature of climate change, single large sources of emissions – such as a coal mine – are still relevant contributors to climate change. On this matter the Court cited the Australian *Gray v Minister for Planning* precedent:

> *"518. In Gray v Minister for Planning, Pain J held: "Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to the causation of an environmental impact is insufficient."*

[166] Under section 4.38(1) of the EPA Act and the Ecologically Sustainable Development, any State-significant development applications must be tested on the precautionary-, inter-generational equity, conservation of biological diversity, and ecological integrity principles. These principles include climate change. Furthermore, section 4.15(1)(a) of the EPA Act requires the consent authority to consider any applicable planning instrument. In the case at stake, the instrument "Mining SEPP" applies. Its Clause 14(2) requires the assessment of the GHG emissions, including "downstream emissions". Scope 3 emissions are downstream emissions. Other so-called instruments also include the notion of Scope 3 emissions. The EPA Act also mentions the necessity for the evaluation of the «likely impacts» of the development. These impacts are both direct and «indirect». The public interest, which includes the precautionary principle and inter-generational equity also speaks, according to the Court, for the inclusion of Scope 3 emissions.

Thirdly, the Court rejected both the 'market substitution' and the 'carbon leakage' arguments.

The court asserted that the former argument was flawed because it is based on the assumption that other countries are not taking steps to implement the Paris Agreement's obligations. The court argued that there was no inevitability that, in the event of denied permission for one coal mine, another coal mine would appear elsewhere in its place. Countries like India, for instance, have introduced a coal tax and introduced legislative and investment frameworks to develop renewable energies. The Paris Agreement individualizes the responsibilities of each country and nothing proves that another mine, in substitution of the Rocky Hill Project, would appear somewhere else.[167]

Regarding the latter 'carbon leakage' argument, the Court stated that there was no evidence that a replacement coal mine, causing more pollution, would be developed somewhere else such as in a county with weaker environmental regulatory protection. On the contrary, both parties' experts agreed that the currently operating mines, and those already approved, were sufficient to meet the demand for cooking coal. Therefore, there was no evidence that new mines were going to replace the Rocky Hill Mine project.[168]

The Court posited that the market substitution argument was further logically flawed: such argumentation assumed that the hypothetical project that would substitute the denied coal mine – equally unacceptable in terms of emissions – would change the fact the project's emissions were not consistent with the Paris Agreement reduction targets. The unacceptability of further coal emissions remained, despite the market forces.[169]

It was determined that any new development project should be evaluated individually, taking into consideration both projected GHG emissions as well as planning, visual, economic, social, and environmental consequences. These other criteria must be considered alongside GHG emissions.

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[167] See §538: «The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project. As both Professor Steffen and Mr Buckley explained, countries around the world are increasingly taking action to reduce greenhouse gas emissions in their countries, not only to meet their nationally determined contributions but also to reduce air pollution. Mr Buckley listed the energy, climate and environmental policies being implemented in the key countries heavily reliant on coal, including China, India, Japan and South Korea. India, one of the countries in which Dr Fisher suggested market substitution and carbon leakage might occur, has imposed a coal tax on all coal, both thermal and coking coal, and both domestic and imported coal (Buckley report, [106]); introduced controls to deal with chronic and rising air pollution, including new emissions control regulations on its power sector and plans to greatly expand renewable energy capacity (Buckley report, [110]); and launched a Green Power Corridor investment program to build grid transmission capacity for renewable energy projects (Buckley report, [123])».

[168] See §536. «I reject this third reason. On carbon leakage, GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted. Although there was some disagreement between the experts on coal demand, Mr Buckley and Mr Manley, they did agree that there were other coking coal mines, both existing and approved, in Australia that could meet current and likely future demand for coking coal, including coking coal with the properties of the coal from the Project. This would mean that the demand for coking coal would be met by Australian coking coal of the highest quality in the world from Australian coal mines operating to the highest environmental standards in the world. There is, therefore, unlikely to be a moving of coal mining abroad or carbon leakage».

[169] See 545. «There is also a logical flaw in the market substitution assumption. If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless of where it is caused».

In the case at hand, the Rocky Hill Coal Project would surely have caused a great deal of GHG emissions; thus, a denial for permission – the court stated – could rely on this fact alone. However, the project also had unacceptable planning, social, economic, and visual consequences. The latter ended up being the main reasons for the denial of the project.[170]

## 1.5 Standing

Standing was considered in this case in its nuance of having an 'interest in acting,' or 'in suing' meaning an interest in a decision that can have an impact on climate change as a whole.

The market substitution and carbon leakage arguments aimed to argue that denying the proposed project would be useless, if not detrimental. Gloucester Resources Ltd claimed that a rejection of the project would be futile to protect the interests brought forward by the citizens-group and the New South Wales Ministry of Planning. These objections were rejected by the court.

Regardless of the positive outcome, this case displays how the issue of standing – having an interest in acting – is defined differently in administrative judicial review (planning decisions) as opposed to rights-based cases before ordinary courts. In planning decisions, cases are not about the effective protection of individual rights: there are no rights involved, just mere interests. The Court has to decide on the correct interpretation, made by administrative authorities, of those statutory standards that regulate planning decisions. When such norms require considering GHG emissions, as in the Gloucester Mines case, the utility of the decision is to be measured only by the impact of the refusal on the carbon budget.

Consequently, plaintiffs only need to bring evidence regarding the impact of the project's refusal on climate change. On the contrary, in rights-based litigation before ordinary courts, plaintiffs only have standing if the petition to reduce emissions can effectively protect the individual rights that are endangered by climate change – which is a much more difficult task. The solution, however, comes from *Urgenda* where the Dutch courts recognized that contributing to the solution is enough as far as the interest in acting is concerned. [171]

[170] See §556: «In the case of the Rocky Hill Coal Project, the aggregate GHG emissions over the life of the Project are sizeable, although the Project is not one of the largest coal mines in Australia. The Minister noted that the proposed production of the Rocky Hill mine appears to be about a third of the production of the average coal mine in NSW (Minister's closing submissions, [423]). Refusal of consent to the Project would prevent a meaningful amount of GHG emissions, although not the greater GHG emissions that would come from the refusal of a larger coal mine. However, the better reason for refusal is the Project's poor environmental and social performance in relative terms. As I have found elsewhere in the judgment, the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone».

[171] See *Urgenda*, §523: «The Court, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change».

As a matter of fact, the Paris Agreement allocates a fragmented responsibility to each country. This allows courts to argue that their decisions do not need to have global effects (which would be impossible); it is sufficient to achieve a meaningful GHG reduction for the decision to be useful.[172]

Conversely, in the realm of judicial review, the usefulness of the decision – or interest in acting – is measured only in terms of the impact of the decision on the carbon budget with a much lighter burden of proof.

## 1.6 Justiciability

The defendant's objection on justiciability stemmed from the lack of legal basis for a judicial denial of the mining project. The mining company noted that no national law forbids new coal mines and, therefore, contended that the Court did not have jurisdiction to refuse the project based on the Paris Agreement temperature targets alone without violating the separation of powers principle.[173] The lack of legal basis should have had the effect of forcing the Court towards the approval of the project.

This first consideration allows for a comparison with what usually happens in civil cases before ordinary courts, based on fundamental or human rights. In the latter category, the lack of justiciability would cause the case to be dismissed on procedural grounds without the consideration of the merits. In this case, however, the mining company sought the judicial review of a previous administrative decision. For that reason, in the *Gloucester* case, the lack of justiciability cannot be framed in strictly procedural terms but in a way that is connected to merit.

In the company's view, it was not in the proper province of the judiciary to rule that new coalmines were not allowed under the Paris Agreement. Lacking statutory legislation on this matter, the Court's decision would have been of policy nature. The Court, however, rejected this objection leveraging the concept of 'public interest' under Section 4.15(1), EPA.

One a final note on justiciability, considered in its nuance of judicial power to enforce the decision: *Juliana* showed how the enforcement of rules is critical to establish justiciability. In strategic rights-based litigation, the argument is often that there is no way to enforce the decision without interfering with the political process. In planning cases, on the other hand, this argument cannot be replicated. Planning cases present an advantage: the issue of justiciability only concerns the link to a provision that, explicitly or implicitly, requires the rejection of projects with high emissions.

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[172] PRESTON, The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II), Journal of Environmental Law, 2020, 00, p. 5.

[173] See § «452. First, GRL contended at the outset that Gloucester Groundswell's argument of "no new coal mines, anywhere" is not required by any international agreement (the Climate Change Convention or the Paris Agreement) or Commonwealth or State law. Internationally, countries have the discretion to determine how, by their nationally determined contributions, reductions in GHG emissions will be achieved. Australia's NDC is to reduce its emissions by 26 to 28% below 2005 levels by 2030. There are no governing structures under the Paris Agreement that predetermine how these reductions should occur. In particular, there are no sectoral or commodity-based emission targets or budgets (referring to the expert report of Dr Fisher, [8], [107]). Similarly, Commonwealth and State laws do not specify how Australia's NDC emission reductions need to be achieved and, in particular, do not specify that no new coal mines can be approved. GRL submitted that the Court, in determining this appeal, "to adopt a policy of no new coal mines would be to impermissibly legislate a strict rule of general application without jurisdiction to do so" (GRL closing submissions, [249])».

Once that has been established, there is no need to further verify whether the decision is enforceable within the limits of the judiciary. The decision does not need any further implementation.

## 2. Similar Cases: *Earthlife Africa Johannesburg and Vienna Third Runway*

## 2.1 Earthlife Africa Johannesburg

In *Earthlife Africa Johannesburg*, the Plaintiff challenged the government's permit to develop a coal-fired energy plant for the project's negative climate change impacts.

Although national statutes did not expressly mention climate change as part of the legal criteria for environmental assessment, the South African High Court held that the Ministry's environmental review was unlawful for not adequately considering climate change impacts.

Further, the Court found that national environmental assessment provisions require the public authority to evaluate whether highly emitting development projects are compatible with the NDCs and the overall obligations accepted by the government of South Africa signing the PA.[174]

## 2.2 Vienna Airport Third Runway

In the Austrian Vienna Airport Third Runway case, the Federal Administrative Court quashed the government's permission to construct a third runway at the Vienna Airport in light of the PA's obligations to mitigate climate change. The case revolved around the notion of "public interest" in the context of planning permits and climate change. As a result, the Federal Administrative Court held that the PA's obligations must be considered by public authorities when issuing permits for development projects that impact the carbon budget.

The Austrian Constitutional Court overturned this decision in 2017. The Constitutional Court held that the Federal Administrative Court erred in balancing the climate change and land use concerns with the other public interests at stake in constructing a third runway. The most relevant point is that the Constitutional Court found that the Kyoto Protocol and the Paris Agreement are sources of international law that cannot directly be applied in the context of planning review decisions. The judgment rendered by Austrian Constitutional Court greatly limited the possibility of enforcing climate obligation through administrative review jurisdiction in Austria. However, despite this setback, the Vienna Third Runway case stresses that international climate obligations are a potentially relevant criterion that public authorities should evaluate when issuing permits for development projects.

[174] See *Earthlife Africa*, par. 91

# CHAPTER 6
# RESULTS OF THE COMPARATIVE ANALYSIS: EMERGING TRENDS ON STANDING AND JUSTICIABILITY

## 1. Introduction: Comparing Cases, Not Jurisdictions

The case law analyzed above allows drawing some conclusions on how standing and justiciability obstacle access to justice for plaintiffs bringing climate litigation to court. While each jurisdiction defines such legal concepts differently, standing and justiciability have similar meanings in all legal systems.

Standing filters who can bring a case to court. In most jurisdictions, standing requires some form of entitlement to the rights the plaintiff claims. Hence, the plaintiffs must show that the law allows them to make a claim. In some jurisdictions, such as Italy, standing rules also require evaluating the utility of the judgment for the plaintiffs. Under Article 100 of the Italian Code of civil procedure, plaintiffs are granted standing only if they can show actual interest in suing. Other Countries foresee similar concepts. For example, in the United States, under Article III of the constitution, plaintiffs must show that their claims are 'redressable' by a court's ruling. In Germany and Austria, the same concept is expressed under the notion of *Rechtsschutzbedürfnis*.

Justiciability sets the boundaries of the judiciary both in terms of power to adjudicate and enforce the remedy.

Chapter 3 will further develop these two concepts, but at this point, it is sufficient to note that standing and justiciability are the primary legal gateway to justice, which has the potential to restrict access to justice. Traditionally, comparative law identifies commonalities and divergences juxtaposing different domestic laws. It seems, however, that in the realm of climate litigation, it is easier to spot common trends based on the case categories. There are more similarities between cases that fall into the realm of, for example, tort law rather than between claims launched in the same jurisdiction but on different legal foundations. Hence, this chapter outlines some emerging tendencies combining three criteria: the legal foundations, the jurisdiction level chosen by plaintiffs, and the identity of the defendants. As a result, this chapter proposes some considerations on standing and justiciability with regard to the following categories of climate litigation: *(i)* strategic litigation based on fundamental rights before constitutional or international courts; *(ii)* strategic litigation based on fundamental rights against governments or the private sector before ordinary courts; *(iii)* litigation for damages against the private sector; *(iv)* strategic litigation against the private sector before administrative courts.

This chapter also argues that climate litigation is a fertile cross-contamination environment for courts; this is probably because courts lack a body of domestic case law on climate-related claims.

Therefore, they look for solutions beyond national borders. This dialogue between courts confirms the validity of the method proposed in this chapter: now, comparing similar cases from different jurisdictions rather than within the same legal system makes more sense.

## 2. Strategic Litigation Before Constitutional and International Courts

Some critical strategic cases have been brought to constitutional and international courts based on fundamental rights recognized by constitutional or treaty provisions. Strategic climate litigation against governments is potentially very effective when plaintiffs have standing to resort directly to the constitutional or international courts. Accessing such courts allows seeking a decision with 'top-down' effects on the executive and legislative branches of government. These cases' potential is linked to how constitutional and international courts function in most legal frameworks.

This category is exemplified by the German *Neubauer* case, which was brought directly before the *Bundesverfassungsgericht* and sought a partial declaration of the unconstitutionality of the federal law regulating GHG emissions.[175] Likewise, the European Court of Justice was involved in the *People's case*, which had also aimed at a ruling to modify EU climate legislation. [176] Finally, the most recent case is *Duarte Agostinho*, which resorted directly to the European Court of Human Rights, skipping national jurisdiction, assuming that only an international court can effectively remedy climate change.

All such strategic cases seek rulings with top-down binding effects for one or more governments. Despite the inevitable significant differences that characterize access to each court, aiming high seems beneficial to solve the issue of justiciability and enforcement.

[175] *Neubauer et al. v Germany*, BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.

[176] In *Carvalho and Others v. Parliament and Council* (*People's case*), the plaintiffs were families living throughout the EU. They alleged the violation of their fundamental rights due to climate change and sought the annulment of the EU legislative package regulating emissions,[2] under Article 263 TFUE, as well as compensation in-kind for breach of non-contractual liability, under Article 340 TFUE. The claim was dismissed by the General Court of the European Union (GC) 3, and then appealed to the European Court of Justice (ECJ). The case was dismissed on procedural grounds, for lack of standing. Regarding the action for annulment, the Applicants were found missing sufficient "individual concern," under Article 263(4) TFEU, as shaped by Plauman.5 In this case, the ECJ, handling a matter of clementine's import, construed the notion of individual concern as necessarily entailing an element of exclusiveness. Applicants must be personally and exclusively concerned by the act. Despite the right to an effective remedy under Article 47 of the European Charter of Fundamental Rights (EUCFR) and Article 9(2) of the Aarhus Conventions, the ECJ maintained their previous position according to which Applicants are not entitled to standing if they do not prove to be exclusively impacted. This creates a paradox: the wider the effects of a supposedly harmful act are, the more restricted the access to justice will be. In the action for damages, Applicants sought compensation in kind for the extra-contractual liability of the EU institutions, in the form of an order to the Council and the Parliament to modify the legislative package. The ECJ noted the substantial equivalence to the action for annulment as both aim at the modification of the EU legislation. Therefore, the lack of standing for the first action affects the second and all claims were dismissed.

## 2.1 Constitutional Courts

In the European continental legal systems, constitutional courts are established to grant supremacy of the constitution over legislation, exercising judicial review of legislation and adjudicating disputes between constitutional powers.[177] In the United States (U.S.), a similar principle was first declared by the 1787-1788 Federalist Papers and later by the 1803 Supreme Court landmark decision *Marbury v Madison*.[178] This case recognized the existence of a hierarchical order between legislative acts and constitutional law in the U.S. constitutional system: congressional acts cannot override the Constitution. Furthermore, this decision established the power of the U.S. Supreme Court and any federal court to review the constitutionality of legislative acts.

When it comes to how the judiciary exercises its checks for constitutionality, the *summa divisio* is between the centralized and decentralized systems. Italy and Germany belong to the first category, as the constitutional court's power to review the law's constitutionality is only attributed to the judicial body. Whereas the U.S. judicial review of legislation is decentralized, any federal court can disapprove of the law when it conflicts with the Constitution.

In centralized systems, it is necessary to differentiate further based on how constitutional courts can be accessed. For example, the German Basic Law allows for direct access to individuals to court, while the Italian Constitution foresees an indirect access mechanism.

The chance for individuals to directly access the Constitutional court greatly benefitted the plaintiffs in the *Neubauer* case, in which fundamental rights were actioned directly before the German *Bundesverfassungsgerich* requesting a declaration of unconstitutionality on the specific national provisions regulating GHG emissions.

Conversely, Italy adopted a system in which courts can only raise a constitutional claim of judicial review if a question of constitutionality arises while deciding a case.[179] An Italian version of the *Neubauer* case would only be possible if, during civil or administrative proceedings which required the application of legislation regulating emissions, the court maintained that such a law could be unconstitutional. The lower court should first evaluate whether constitutionality is rele-

[177] Hans Kelsen argued that the responsibility to preserve the constitution had to be attribute to a special judicial body – the Constitutional Court – as, in his view, the constitution was the basic law from which any lower source of law derived its validity. The constitution is the «presupposed» norm that grants the validity of any other norm, whose validity must be found in another norm. This system can only function if there is a constitution – a basic norm – which validity cannot be questioned. If the basic law in immutable by ordinary legislation, an independent judicial body – the constitutional court – had to supervise over the statutory production. See, KELSEN, *Pure Theory of* Law, Clark, New Jersey, 2004, p. 193. The book was published under the German title of *Reine Rechtslehre* first in 1934, then in 1960. Opposite to Kelsen, Carl Schmitt conceived the constitution as expression of the political will. Therefore, the guardian of the constitution had to be a politically elected power, such as the head of state. Regarding the function of the so-called *Grundnorm* elaborated by Kelsen to fund his pyramidal conception of the law, see FARALLI, *Le grandi correnti della filosifia del diritto – Dai greci a Hart*, Torino, 2011, pp. 57-61.

[178] ENGLE, Constitutive Cases: Marbury v. Madison Meets Van Gend & LoosI, in Hanse Law Review, 5(1), pp. 33-48, in HeinOnline.

[179] Pursuant to Article 127 of the Italian Constitution, a direct claim to the Constitutional Court can only be made by the central government against regional laws or by regional governments against national laws or other regional laws, based on the violation of competency.

vant to the decision of the case at hand and not merely theoretical and if it is not manifestly groundless. If it were impossible to interpret the law in a way that would fit the constitutional provisions, the court should raise the issue to the Constitutional Court and suspend the proceedings until it has issued a verdict on the case.

Provided that the law grants standing to access the Constitutional Court, a constitutional court's decision best serves the interests of a strategic claim directly. If plaintiffs can find solid grounds in their national constitutions, they can seek scrutiny over the national legislation concerning GHG emissions. Moreover, in strategic litigation, resorting to constitutional courts allows for directly modifying the piece of legislation deemed incompatible with fundamental rights and the Paris Agreement. Directly impacting the statutory law is probably the most effective remedy to achieve strategic results.

There is another significant advantage: governments cannot argue that Constitutional Courts lack jurisdiction and cannot influence climate policy, as it is precisely the role of Constitutional Courts to supervise the legitimacy of statutory law in light of higher-ranking sources of law.

Further, there is no need for further implementation, contrary to what happens in a tort law case before an ordinary court.

## 2.2 International Courts

Some important climate-related human rights cases have been brought to supra-national courts and human rights tribunals based on fundamental rights recognized by international or regional legal instruments. For example, in the case known as the *Innuit Petition*, plaintiffs resorted to the Inter-American Commission on Human Rights (IACHR) against the United States and Canada for their omissions in preventing climate change. [180] However, the IACHR rejected the petition due to insufficient information. Other cases mentioned above are the *People's case* and *Duarte Agostigno*.

Besides the unfortunate outcomes of the *Inuit Petition* and the *People's case*, supranational courts offer one substantial advantage: if plaintiffs reach a positive outcome, the decision rendered by such courts binds all governments that are parties to a treaty or organization. For example, in the *People's case*, if the ECJ had ruled in favor of modifying the EU climate 'legislative package,' all member states would have been bound by more stringent targets. Conversely, domestic Constitutional courts only bind one national government.

Considering the need for global action, this is certainly a meaningful advantage in terms of resource allocation, as one claim has the potential to replace several separate national claims. However, what might be somewhat problematic is that some international courts, such as the ECHR, issue rulings that cannot be enforced within member states and do not affect domestic legislation immediately.

[180] Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States. All related documents are available here: http://climatecasechArticlecom/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/

## 3. Strategic Litigation Before Ordinary Courts

Plaintiffs have increasingly resorted to claiming their fundamental rights in cases against governments and the private sector.[181] Some legal scholars called it a 'rights-turn' in climate litigation, following a first wave based on statutory avenues.[182]

This shift might reflect the growing realization that anthropogenic climate change involves people and rights – before the environment. Leveraging fundamental rights also makes sense from the plaintiffs' perspective to establish standing and justiciability. However, depending on the applicable legal framework, plaintiffs face different challenges. In other words, the extent to which such procedural hurdles should worry plaintiffs mostly depends on the applicable legal setting providing for such rights and the jurisdiction level. This section focuses on claims before ordinary courts.

The case law analyzed in the second chapter referred to constitutional or treaty provisions contained in documents conceived at different times. Some are as old as the 1787 American Constitution.[183] Many others, like some European constitutions, result from the post-second world war. The United Nations General Assembly adopted the *Universal Declaration of Human Rights* on December 10, 1948. The Japanese Constitution was promulgated in 1947; the Italian Constitution was enacted in 1948; and the German Basic Law the following year; the *European Convention on Human Rights* (ECHR) was adopted in 1950. In the sixties, countries across the globe agreed on the *International Covenant on Civil and Political Rights* (ICCPR)[184] and the *International Covenant on Economic, Social, and Cultural Rights*.[185] Other constitutions, such as the 1996 South African one, are more recent or, as in the case of the German Basic Law, the constitutional text was recently amended in 2014. The Italian Constitution was also amended in 2022. Its new Article 9 cost. foresees the protection of the environment, biodiversity, and ecosystems to be in the interest of future generations. Article 41 cost. states that free enterprise cannot be conducted in such a way that threatens the right to health or the environment.[186]

Standing and justiciability objections pose different hurdles depending on the applicable legal framework that provides for the protection of fundamental or human rights. Treaty or constitutional provisions that explicitly recognize the right to a safe climate or environment facilitate plaintiffs

[181] PRESTON, The Evolving Role of Environmental Rights in Climate Change Litigation, in Chinese Journal of Environmental Law, 2, 2018, pp. 131–164.
[182] Peel, J., Osofsky, H. 2018. A Rights Turn in Climate Change Litigation?. *Transnational Environmental Law* 7(1): 37-67. doi:10.1017/S2047102517000292. For an analysis of claims based on a healthy environment see DE VILCHEZ, SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in Yearbook of International Environmental Law, Oxford, *2023*, pp. 1-18. https://doi.org/10.1093/yiel/yvac064.
[183] The last state that ratified the American Constitution was Rhode Island in 1790.
[184] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. https://www.refworld.org/docid/3ae6b3aa0.html.
[185] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Also, see Atapattu, Environmental Rights and International Human Rights Covenants: What Standards Are Relevant?, in Environmental Rights: The Development of Standards, edited by Turner, Shelton, Razzaque, McIntyre, pp. 17-40. Cambridge: Cambridge University Press. doi:10.1017/9781108612500.002
[186] Constitutional Law No. 1, February 11, 2022.

establishing standing and arguing that courts can adjudicate the case. Conversely, older texts require plaintiffs to resort to interpretative tools to argue that the environment and the climate are protected. Alternatively, plaintiffs must rely on traditional individual rights – such as the rights to health, life, and property – claiming that they are impacted by climate change. Traditional fundamental rights are constantly confronted with evolving sensitivities and novel threats. Environmental and climate protection are among those new societal urges in search of constitutional recognition. In jurisdictions where constitutions do not explicitly recognize the right to a safe environment, plaintiffs and courts have proven their creativity in linking climate and environmental claims to national constitutional frameworks.

Considering the diversified legal context that characterizes each jurisdiction, rights-based climate litigation can be divided into three sub-categories: *(i)* claims based on individual fundamental rights; *(ii)* claims based on the implied right to a safe climate, *(iv)* claims based on the explicitly recognized right to a safe climate in a written legal provision. In each category, plaintiffs face challenges to overcome standing and justiciability objections.

## 3.1 Individual Fundamental Rights

These cases refer to fundamental rights protecting the individual by constitutional or treaty provisions, such as the right to human dignity, life, health, private property, etc. The argument is that governments, or carbon majors, are contributing to climate change with their actions or omissions in such a way that harms the plaintiff's rights.

Urgenda, Shell, and Mathur exemplify this category of cases. In *Urgenda*, plaintiffs based their claim on Articles 2 and 8 of the ECHR, protecting life and private and family life, and sought an order to reduce Dutch emissions by 40% compared to 1990 levels. Similarly, the *Shell* case was also based on Articles 2 and 8 of the ECHR combined with the Dutch tort law provisions. The argument was that the GHG emissions, including Scope 3 emissions, violated the duty of care that generally prevents anyone – private or public actor – from harming others, as stated in Article 162, § 2, Book 6 of the Dutch Civil Code. In *Mathur,* the plaintiffs sought declaratory and mandatory orders against the Province of Ontario to set more stringent emission targets and a more ambitious plan for combating climate change over the coming ten years. They argued that the government's initiative to repeal the *Climate Change Act* through the *Cancellation Act* constituted a violation of the plaintiffs' rights to life, liberty, and security of the person under Section 7 and equality under Section 15 of the Canadian Charter of Fundamental Rights.[187]

While climate change is a key component of the causes of action in all these cases, the primary objective is to protect individuals' fundamental rights – not the climate itself. As reinforced by AR6 issued by the IPCC, climate change primarily affects human rights – before the environment. That is also why the scientific community is calling for more action.

[187] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Establishing standing in cases based on individual fundamental rights seems to be an effective tactic to link the generalized consequences of climate change mass harm to a specific number of individual or class plaintiffs. Nonetheless, standing still represents a threat to successful access to justice when procedural law provisions require establishing a relationship of exclusivity with the harm claimed by the plaintiffs. This happened in the Swiss Klimaseniorinnen case, where all courts deemed that climate change did not affect plaintiffs sufficiently intensely and exclusively. The same findings were made in the *Peoples' case* before the European Court of Justice. In conclusion, anchoring the claim to individual fundamental rights might be advantageous, but plaintiffs must be aware of the standing rules applicable before domestic courts, which sometimes require establishing an exclusive connection with the rights claimed by plaintiffs.

Leveraging individual rights seems incompatible with remedies sought on behalf of future generations. Most domestic legislations only grant rights to existing people. Unborn people do not enjoy fundamental rights. Nonetheless, the IPCC clarified in AR6 that future generations would be disproportionally exposed to climate change. This paradox produced its effects in *Shell* as the court excluded that the plaintiff could represent future generations. The Ontario Superior Court of Justice in the *Muthur* case expressed an opposite view.[188]

Relying on fundamental rights might pose some challenges to plaintiffs when domestic standing rules require courts to assess whether their ruling can benefit the plaintiffs effectively. In other words, plaintiffs should be prepared to argue that the ruling issued by an ordinary court brings a significant contribution to reducing climate change harm might. The case law analyzed in chapter two shows that there are some ways around this objection. All courts involved in *Urgenda* found that, although the Dutch government is responsible for only 0.5% of global emissions, it still had an obligation to enforce the Paris Agreement's commitments. Therefore, the Dutch judiciary held that a domestic court's order can still contribute to mitigating climate change effects.

Individual rights can also help plaintiffs argue that ordinary courts have jurisdiction to adjudicate a claim. As put by the Dutch courts in the *Urgenda* and *Shell* cases, the ordinary courts must adjudicate claims against governments or the private sector alleging the violation of the plaintiff's fundamental rights; this is, indeed, the classic role of courts in democracies inspired by the separation of powers principle. Hence, courts be leveraged in strategic claims against governments and the private sector. What an ordinary court cannot do is dictate what exact measures governments and companies must take to mitigate climate change. Such a restriction is particularly strong in civil law countries, while common law jurisdictions seem more flexible. The iconic Pakistani *Leghari* case showed that, in some jurisdictions, courts could expand their power to impose reporting duties and even institute a climate change commission to supervise government action. This topic will be explored in the following chapters.

In conclusion, from the plaintiffs' perspective, it makes sense to link strategic litigation before ordinary courts on fundamental rights that are, by nature, traditionally individual. While this might seem a paradox, it helps argue that judicial relief might provide effective protection for individual

[188] The *Mathur* case was, however, dismissed for lack of justiciability.

plaintiffs and that a court's order would not interfere with the separation of powers theory. However, courts might find it difficult to allow standing on behalf of future generations.

## 3.2 The 'Implied' Right to a Safe Climate and the 'Public Trust Doctrine.'

In jurisdictions lacking explicit constitutional provisions that establish a right to a safe environment or climate, some plaintiffs have developed arguments based on the implied existence of a right to a safe climate or on the public trust doctrine. The common characteristic is the extensive interpretation of existing rights, or legal theories, to achieve climate protection through the judiciary.

The recent Italian case A Sud et al. v. Italy is partially based on the implied existence of a right to a safe climate. [189] The plaintiffs leverage Article 2 of the constitution, which imposes upon the government to duty to protect what the provision calls 'inviolable rights.' The Italian *Corte costituzionale* has interpreted Article 2 as an open source for the constitutional protections of new rights. On such a legal base, in *Giudizio Universale*, plaintiffs requested an order against the government to reduce national emissions according to the Paris Agreement obligations. Similar arguments were developed in the Dutch *Shell* case. In *Juliana*, besides their rights to life, freedom, and private property, the plaintiffs claimed that the defendants knowingly endangered the atmosphere, which was a vital component of public trust. Since the nineteen-seventies, prominent American scholars have favored using the public trust doctrine – which has its roots in Roman law – to protect natural heritage and legitimize 'court activism.'[190] *Juliana* is an example of 'atmospheric trust litigation' launched in the United States.[191]

Resorting to the implied right to a safe climate or the public trust might be advantageous to establish standing; plaintiffs can present themselves as entitled to such rights and simultaneously pursue the protection of the public interest. This tactic may also help to sustain the burden of proof, as plaintiffs would be dispensed from proving the causal link between climate change mass harm and their own person. However, similarly to what happens when leveraging individual rights, arguing that the sought remedy would tangibly benefit plaintiffs' rights is still necessary.

If courts were to accept the existence of an implied right to a safe climate, the hurdle of justiciability would be significantly lowered. Such a right would constitute the legal bases to justify a judicial order to reduce emissions.

What might be problematic, even in civil law jurisdictions, is that ordinary courts tend to follow the case law of the higher courts. Thus, it might be challenging to require lower courts to accept creative interpretative solutions and, *de facto,* ask them to recognize new rights.

[189] The ENGO A Sud together with over 200 plaintiffs filed on 5 June 2021 a lawsuit against the Italian government alleging the violation of fundamental rights included the right to a stable and safe climate.
[190] See Sax, Joseph L. 1970. The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention. *Michigan Law Review* 68(3): 471–566. https://doi.org/10.2307/1287556.
[191] See https://www.ourchildrenstrust.org/mission-statement. Accessed on March 11, 2022.

## 3.3 Expressed Constitutional Recognition of the Right to a Safe Climate

Some jurisdictions allow plaintiffs to refer to provisions that explicitly recognize the right to a safe climate. This scenario best establishes standing and the justiciability of the claim.

For example, in *La Jeunesse*, the plaintiffs alleged that there had been a violation of the right to live in a "*healthful environment in which biodiversity is preserved*" under the explicit provision of Article 46(1) of the Québec Charter of Human Rights and Freedoms. [192]

Provisions granting individuals the right to a safe environment help plaintiffs secure access to justice, as they provide a legal basis to establish standing and prevent objections relying on the supposed lack of sufficient individual concern. Consequently, the claim would also be justiciable as parties and courts could rely on a legal justification for the court's intervention. However, Court rulings in strategic claims, whatever their legal basis, are always faced with the need for active cooperation of the defeated defendant, which has to comply with the order to reduce GHG emissions. So, while the chance to explicit provisions might surely help reaching a positive outcome, the problem of enforcement remains unsolved.

# 4. Strategic Litigation, Class Actions, and Future Generations

Class actions offer a helpful procedural tool to vindicate class members' rights or interests. Hence, it might seem that class actions are the way to pursue strategic ambitions in climate litigation and overcome standing objections. However, the case law showed that class definition is problematic, given the unprecedented breadth of climate change-produced mass harm.

Climate science, as recently summarized by the IPCC in AR6, indicates that climate change affects potentially anyone anywhere but with significant differences across the geographical and social spectrum. In other words, some regions might suffer from floods and others from wildfires. Considering these elements, it might make sense to bring a class action on behalf of the world population; as unreasonable as it seems, this is the most logical conclusion.

The IPCC, however, also reported that the magnitude of climate change impacts varies. Hence, not anybody is automatically harmed by climate change in the same way or with the same intensity.

The features of climate change make it difficult to define the class. However, the case law shows two opposite risks that plaintiffs might face. There seem to be three elements that plaintiffs must consider before launching a class action. First, the class definition might be too broad. Second, it might be too narrow. Third, the class may include future generations.

## 4.1 Broad Class Definition

Based on the IPCC reports, in strategic climate litigation, the class could include every living human being – and even future generations. Yet this breadth has caused some issues for plaintiffs in

[192] ENvironnement JEUnesse c. Procureur Général du Canada, Cour Supérieure, Province de Québec, District de Montréal (Canada), 26 nov. 2018

the *Shell* case. On the one hand, climate change is so extraordinary that it makes sense to act on behalf of the entire world population. On the other, however, class actions need to represent interests that can be bundled together.

In the Dutch *Shell* case, the class plaintiff claimed to act on behalf of Dutch and the Wadden Sea area residents and the world's population. While the rights protected under the ECHR, and the right to living in a safe climate, belong to anyone, the class action had to come to terms with the 'similar interests' test. The Court found that the interests and rights of the world population could not be bundled under the 'similar interests' test, as it could not be argued that everyone – everywhere – is affected in a sufficiently similar way.

## 4.2 Narrow Class Definition

Plaintiffs chose an opposite – narrow – approach in the Canadian *La Jeunesse* case, launched on behalf of Quebec residents under 35.[193] Both courts involved in *La Jeunesse I* and *La Jeunesse II* held that limiting the class action to Quebec residents under 35 was arbitrary. The court held that there was no reason to exclude older people and refused to certify the class action.

## 4.3 Class Actions on Behalf of Future Generations

Finding legal pathways to represent future generations is critical in strategic climate litigation. In *Shell*, the plaintiffs successfully leveraged Article 305:a of the Dutch Civil Code to include future generations of Dutch and Wadden Sea area residents. The Court accepted the assumption that current and future residents would be affected by climate change in a sufficiently similar manner.[194]

# 5. Strategic Litigation Before Administrative Courts

Administrative law complaints aimed to prevent carbon-intensive projects from being approved by public authorities represent one very prolific field for climate litigation. The Australian Gloucester case well exemplifies this category, as the South African *EarthLife Africa Johannesburg* case and the Austrian *Vienna Third Runway* case.[195]

[193] ENvironnement JEUnesse c. Procureur Général du Canada, Cour Supérieure, Province de Québec, District de Montréal (Canada), 26 nov. 2018

[194] See, Shell decision, note 89, §4.2.4: "[…] the interests of current and future generations of Dutch residents and (with respect to the Waddenvereniging) of the inhabitants of the Wadden Sea area, a part of which is located in the Netherlands, as served in the alternative with the class actions, are suitable for bundling, even though in the Netherlands and in the Wadden region there are differences in time, extent and intensity to which the inhabitants will be affected by climate change caused by CO2 emissions. However, these differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population and do not stand in the way of bundling in a class action. The collective claims are therefore declared not allowable insofar as they serve the interest of the world's population, except for the interest of Dutch residents and the inhabitants of the Wadden region."

[195] Id., note 23. South Africa experienced a similar case, EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others (Earthlife Africa Johannesburg). Earthlife Africa Johannesburg v. Minister of Environmental Affairs and others, Case no. 65662/16 (2017).

Plaintiffs resorted to statutory administrative law to prevent public authorities from approving carbon-intensive projects. Domestic statutes did not explicitly provide provisions that referred to climate change. Yet plaintiffs could argue that open-ended legal concepts – such as 'public interest' – encompass climate change concerns.

*Gloucester*, *EarthLife Africa Johannesburg*, and *Vienna Third Runway* leave a legacy behind, as they indicate that national administrative law should be interpreted in a way that considers the impact of a development project on the carbon budget. Therefore, statutes and administrative courts can be leveraged to secure strategic climate ambitions and indirectly protect fundamental rights, mainly to prevent emissions from being released into the atmosphere.

Recurring administrative law to pursue strategic climate ambitions presents excellent advantages in terms of standing and justiciability.

Regarding standing, plaintiffs should not face particular issues as long as, under their national law, they are entitled to challenge a specific administrative act or participate in the public decision-making process. Contrary to what happens in cases leveraging fundamental rights, environmental assessment and planning law do not require to show that plaintiffs have a uniquely personal interest at stake. In effect, administrative law is, by definition, concerned with protecting the public interest rather than individual rights. This setting, geared towards the general interests, benefits plaintiffs who can focus on making the case that a proposed project – e.g., a new coal mine – is incompatible with the Paris Agreement temperature goals. Conversely, in fundamental rights and tort law cases, standing rules require plaintiffs to establish a relationship of exclusivity between climate change harm and their ownership.

In some jurisdictions, such as in Italy, standing also requires establishing that plaintiffs are genuinely interested in the judgment's effects. In other words, the judgment must effectively be able to redress the violation of plaintiffs' rights or interests. In climate litigation, this translates into arguing that the ruling can help mitigate climate change. Administrative law cases are not immune from the objection that one single court ruling cannot tackle the global issue of climate change.

This argument was developed by the mining company Gloucester Resources Ltd under the 'market substitution argument.' The reasoning goes as follows: if the challenged mining project is not approved, another mine will inevitably be built to fulfill the markets' coal needs. In the *Gloucester* case, the Court rejected this objection, arguing that the Paris Agreement's obligations place individual responsibility on governments and the private sector. In Court's view, assuming the inevitability of GHG emissions cannot be a legally valid argument.

The 'market substitution' argument generally shows that, even in administrative court cases, whether the judgment can offer effective redress to plaintiffs is relevant. However, in planning or environmental assessment decisions, objections based on 'interests' primarily refer to a matter of merits rather than procedure. Balancing different legally relevant public interests, courts might find that the interest to reduce GHG emissions is recessive compared to other interests, such as developing a certain industry; this happened in the *Vienna Third Runway* case, where the Austrian Supreme Court quashed the previous rulings finding that the Federal Administrative Court erred in

balancing the GHG emissions and land use considerations with the public interests in a third runway. Such findings, however, relate to the merits. Hence, it is not a matter of access to justice.

Regarding justiciability, administrative law claims are advantageous for plaintiffs compared to claims brought before ordinary civil courts. First, in most jurisdictions, the administrative court system is designed to supervise government-issued acts' legality. Hence, in this context, it is much harder to argue that it is inappropriate for courts to impact the government's climate policy. However, companies proposing carbon-intensive projects have proposed such arguments in the *Gloucester* case. The mining company argued that denying the project without an explicit provision banning new mines would result in courts creating legislation. The Court overcame the objection, finding that the notion of public interest enshrined climate change evaluations of the project.

Administrative courts' findings present further advantages when enforcing judicial orders. In most cases, when plaintiffs succeed in preventing a carbon-intensive activity from happening or continuing, they do not need to rely on the defendant's cooperation or enforcement mechanism proceedings. The judgment that denies the permit to develop a new coal mine is, in a way, self-executing as it prevents emissions from happening or continuing. Conversely, even if mandatory, civil law court's orders need the defendant's cooperation as their full execution involves multiple non-fungible conducts that only the defendant can objectively undertake.

## 6. Litigation to Recover Damages Before Ordinary Courts

Cases against the private sector to recover damages rely on the fact that 'carbon majors' have knowingly contributed to climate change producing more GHG emissions than most countries through their operations or consumer products.

Ever since 1957, the North American oil industry was on notice of the adverse impacts of climate change. According to research, carbon majors have actively prevented an earlier shift to sustainable energy leveraging various tactics: by patenting new technologies, sponsoring biased scientific research or spreading disinformation. In other words, energy companies have been well aware of their dangerous impact all along and yet tried to cover up their responsibility or even mislead the public about it.[196]

Such facts, if properly backed up by evidence, are relevant under tort law and plaintiffs can claim economic damages before ordinary courts. It seems likely that, as the consequences of climate change are emerging and increasing, this branch of litigation will become more relevant. This trend is already visible. While a case such as Luciano Lliuya might be principally moved by ideal motives, as the compensatory damages sought are quite modest, there are cases where economic stakes are much higher. For example, litigation launched by municipalities puts enormous resources on the line. In the *City of Charleston* case, the plaintiff sought compensatory and punitive damages

[196] See *Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis* published in 2017 by The Center for International Environmental Law available at the following link: https://www.ciel.org/wp-content/uploads/2019/01/Smoke-Fumes.pdf. Also, see ORESKES-CONWAY, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*, New York, 2011.

and disgorgement of profits, besides attorneys' fees and costs of suit on the argument that the defendants knowingly contributed to land and beach erosion, floods, and higher sea levels, causing social and economic harm. [197] This new wave of cases aim to recover much larger sums of money. Moreover, considering that the practical need to recover resources to sustain public expenses for climate change adaption, it is plausible that more and more local authorities will sue carbon majors to offset on them the cost of climate adaption.

This category does not pose particular issues in terms of access to justice. Plaintiffs can easily argue that they have standing to sue based alleging the loss caused by climate change or the cost of adaption measures that must be adopted to prevent harm. Even standing laws that include an assessment of the practical benefit of the ruling – such as the Italian and German codes of civil procedure – do not constitute a problem, as a court order to pay damages is automatically beneficial to plaintiffs.

It is also unlikely that the defendants could succeed in raising the issue of justiciability as courts are faced with a tort case for damages, rather than with a public interest suite. After all, adjudicating claims for economic damages and property rights is the classic role that civil courts have played throughout history.

Recent case law showed that cases to recover damages are not immune from procedural hardships, as plaintiffs are faced with the challenge of proving the causal link between the harm they suffered, climate change and the defendants' conducts. The proof of causation is possible through attribution science. Yet the case law analyzed in the second chapter of this thesis showed that proving the causal link can be complex for plaintiffs.

In *Luciano Lliuya*, the plaintiff argued that there was a causal correlation between the defendant's GHG emissions and the fact that a glacial lake threatens to flood and destroy his property located in Huaraz, Perù.[198] The first instance court rejected the claim based on lack of sufficient evidence on the causal link. The District Court of Essen reasoned that it is impossible to attribute the alleged damage to RWE AG, given the multiple factors that cause climate change and the alleged injury. After a successful appeal, plaintiff obtained to move the case forward to the evidentiary phase. It will be further necessary to quantify RWE's contribution to the alleged risk. Despite plaintiff successfully managing to avoid an early dismissal, this case shows that establishing causality is a major hurdle for those who want to make claims against the private sector aimed at recovering damages.

Similarly, in *Kivalina* the inhabitants of the Alaskan village of Kivalina filed a public nuisance claim against ExxonMobil and other companies. They sought compensatory damages arising from the urge to relocate inland the village threatened by climate change-induced coastal erosion. Applying the fair traceability test, as a threshold for causality, the Court ruled that plaintiffs failed to demonstrate a substantial likelihood that the defendants' emissions caused the alleged injuries. In

[197] City of Charleston vs. Brabham Oil Company Inc. et al., case No. 2:20-cv-03579-BHH

[198] *Saúl Luciano Lliuya v RWE AG*, judgment of December 15th 2016, case No. 2 O 285/15

the Court's view, climate change results from innumerable emissions sources produced over the years and could not be traced back to the individual defendants.[199]

In conclusion, cases aimed to recover damages are generally note exposed to standing or justiciability objections. Rather, they face significant complexities to sustain the burden of proof on the causal link between the specific harm claimed by plaintiffs and the conduct of the defendant. Proving the causal link requires a skillful use of attribution science and entails long preparation to convene attribution science in accessible terms for the court. Attributions science identifies emitters' marginal contribution to extreme weather events or slow-onset changes that cause injuries to the plaintiffs. A recent study analyzed 73 climate litigation cases and proved how there seems to be a disconnect between what up-to-date attribution science can prove and the facts presented to courts or the content of judicial decisions.[200] Given the scientific feasibility of allocating individual responsibilities for climate change-related injuries, it is necessary to present the correct facts scientifically attributable to climate change and submit evidence demonstrating a causal link. Therefore, cooperation between scientists and lawyers is critical.

[199] The case developed into two subsequent rulings: Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009), *Kivalina I*, and Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012), *Kivalina II*. Both rulings rejected the claim.

[200] See STUART, SMITH, OTTO, SAAD, LISI, MINNEROP, CEDERVALL LAUTA, ZWIETEN, WETZER, *Filling the evidentiary gap in climate litigation*, in Nature Climate Change, 11, pp. 651–655.

# THIRD PART
# OVERCOMING OBJECTIONS ON STANDING AND JUSTICIABILITY IN ITALY

# CHAPTER 7
# INTRODUCTORY CONSIDERATIONS ON STANDING AND JUSTICIABILITY IN ITALY

## 1. Introduction

The previous chapter brings to the conclusion that climate litigants must face and overcome the issues of standing and justiciability to effectively access justice and have their cases decided on their merits. Justice is only effectively accessed if plaintiffs have a chance to have their case decided on the merits. Climate litigation, however, shows how that is seldom the case when parties try to bring to the court's attention the broad fundamental rights violations attributable to climate change. Even when parties can hear the merits of their case, this happens only after strenuous and time-consuming legal "battles" on the procedural ground.

The reason why standing, and justiciability impair access to climate justice could be explained in two different ways. The first reason amounts to a subjective impression. In contrast, the second one is correlated to the objective conception of legal rules of standing and justiciability.

On the one hand, these difficulties may be related to the overall impression that courts consider climate litigation ideologically biased and instrumental to achieve through a court's ruling what politicians failed to deliver. Judges might be more inclined to refuse a decision and toss the plaintiffs out of court based on lacking procedural requirements. At first sight, this concern could seem reasonable as part of the academic literature describes some strategic cases intended to bring the public's attention to climate change. In the U.S., for example, the *Juliana* case had considerable media coverage by the cable television *CBS* in its *60 Minutes* show.[201] Major newspapers, such as the Washington Post, the New York Times, and the Guardian, also covered the case. Therefore, it is fair to say that one of the effects of such an ambitious lawsuit was to bring public attention to the concerns raised by climate change. The impression, though, is that extreme weather event are alone a sufficient contributor to climate change awareness. In other words, the global political debate is focused on climate change regardless of court cases, and judges should feel somewhat relieved by that.

On the other hand, and on a more objective ground, the reason for all these struggles can probably be attributed to the objective structure of standing and justiciability rules.

Concerning standing, Mauro Cappelletti pointed out decades ago how standing rules are designed for a dual conflict: creditor against debtor, for example. Mass harm is, however, unable to fit into these stereotypes. The dynamics within our society create the conditions for "mass harm."[202]

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[201] See, https://www.cbsnews.com/news/juliana-versus-united-states-the-climate-change-lawsuit-that-could-stop-the-u-s-government-from-supporting-fossil-fuels-60-minutes/.

[202] Many thinkers of the 20th century developed the «mass society» theory. This notion was developed between at the end of the 19th century, parallel to the increasing industrialization. The mass society theory was influenced by the work of the French Psychologist Gustave Le Bon who, in 1895, wrote *Psychologie des foules*.

In mass torts, the binary concept of societal conflicts – and litigation – does not match reality. It requires standing rules that evade this abstract dual structure. Indeed, there are still creditors and debtors; proprietors and tenants; employers and employees, and so on. Traditional conflictual patterns still characterize the daily job of lawyers and courts. But as notions such as the one of 'common goods' and 'mass harm' are getting more tangible well outside the academic discussion, it is a fact that not all civil proceedings adjust to such a dual-party structure.

With regard to justiciability, courts are faced with an even more profound question. It involves the boundaries of the judiciary when mass harm is attributable to complex state and correlated private responsibilities while national Parliaments struggle to keep up with the quickly evolving societal and scientific changes. All this is in multi-layered legal sources that include national and international commitments that require the legal protection of fundamental rights.

Therefore, the question is whether, even in civil law countries, the legislative and executive powers of government can regulate every aspect of human life with the consequence of restraining the role of courts. In other terms, is it desirable that the courts remain the mere '*bouche de la loi'* in the face of the escalating complexity of our society?

Conversely, courts face the dilemma of whether it is appropriate to inflate the judiciary's power to effectively and timely protect fundamental rights. In practical terms, is it possible for a court to decide that the emissions produced by a large multinational infringe the general duty of care foreseen by virtually any civil code? This is what happened in the *Shell case.* Likewise, can an administrative court interpret the general *public interest clause* in a way that includes climate change and the Paris Agreement goals? This was one of the major topics of discussion among the parties involved in the *Gloucester case.*

Prominent scholars, such as Stefano Rodotà, fostered the idea that contemporary democracies require an active role of the judiciary to enforce fundamental rights, while the legislative should dictate the general principles that serve as a boundary for judicial intervention. In no way, according to Rodotà, can contemporary Parliaments analytically regulate any aspect of societal life and its multi-faced conflicts. Instead, the Parliaments and the judiciary should find a new alliance based on the adequate protection of fundamental rights.[203]

The cases mentioned in chapter three also show that plaintiffs must adapt to each legal system to overcome such hurdles, as each court case is subject to national rules of civil procedure. According to their legal tradition, each country has a peculiar conception of the same notions of standing and justiciability. Different is consequently also the way the parties and judges address these topics.

The present analysis is mindful of the necessity to solve each legal issue based on the specific and existing national law. Hence, this chapter summarizes the Italian rules on standing and justiciability. It starts from the relevant provisions provided by the *Codice di procedura civile* to, then, retrace the scholarly dogmatic elaboration throughout the 20th century and the judicial reception of such theories by the Italian *Corte di cassazione*.

[203] RODOTA', *Il diritto di avere diritti*, Roma, 2017, p. 54-66. See, also, CASSESE, *Il governo dei Giudici*, Roma, 2022. See also, AZZARITI, *Verso un governo dei giudici? Il ruolo dei giudici comunitari nella costruzione dell'europea politica*, in Riv. Dir. Cost., 2009, p. 3-28.

This chapter then concludes pointing at the arguments that plaintiffs could leverage to overcome, in the existing Italian legal framework, objections based on standing and justiciability.

## 2. Lost in Translation?

Standing and justiciability are legal arrangement with similar functions across the spectrum of national jurisdictions. This fact is demonstrated by climate litigation case law, which often pivots about such procedural issues with similar arguments. However, at a closer look, it is also clear that each legal system provides different definitions, depending on the legal traditions and conceptual elaboration by Scholars and courts.

Before diving into the provisions of the Italian code of civil procedural law that regulate standing and justiciability, the following subsections determine the Italian translation for "standing" and "justiciability" of the content of the relevant legal provisions. It is not just a matter of translation. It is also a way of extrapolating the concepts hidden behind words to highlight the exact meaning of these procedural requirements in Italy, according to the theory and praxis of law. Ultimately, defining the Italian meaning of standing and justiciability is the only way to point out some practical solutions for Italian litigants.

In Italian procedural law, standing entails two legal concepts: *legittimazione ad agire* and *interesse ad agire*. Justiciability resonates with the Italian legal concept of *possibilità giuridica*. These three legal arrangements are the conditions that must be met to give rise to the right to sue—namely, the so-called "*diritto d'azione,"* which will be analyzed later.

### 2.1 Standing as "*Legittimazione ad Agire*"

*Legittimazione ad agire* is a requirement established by Article 81 c.p.c., which states:

| *Article 81 c.p.c.*<br>*Legittimazione ad agire* | *Article 81 c.p.c.*<br>*Legal Standing* |
|---|---|
| *"Fuori dei casi espressamente previsti dalla legge, nessuno può far valere nel processo in nome proprio un diritto altrui".* | *"Outside the cases expressly provided for by law, no one may assert in his own name in the trial a right of others.'* |

In a strictly literal sense, *legittimazione ad agire* identifies who is entitled to bring an action to the court. However, for now, it is sufficient to mention that this condition functions as a filter to select who, among many potential parties, is entitled to be the active and passive party to the procedural relationship established by the court's application. In other words, such a filter helps determine who can rightly be the plaintiff(s) and the defendant(s) in such a way that the court can adjudicate the merits of the claim.

### 2.2 Standing as "*Interesse ad Agire*"

If standing is, in effect, a filter to select who can be the plaintiff and who can be the defendant with regard to a specific claim, it also concerns the requirement of having sufficien interest in suing.

Only those who show to have such interest can sue. This legal arrangement is called, in Italian, *interesse ad agire* and is regulated by Article 100 c.p.c.:

| *Art. 100*<br>*Interesse ad agire*<br>*"Per proporre una domanda o per contraddire alla stessa è necessario avervi interesse".* | *Art. 100*<br>*Interest in suing*<br>*"To bring a court claim or to contradict it, it is necessary to have an interest in it".* |
|---|---|

Being entitled to bring a claim is not enough to ensure that the court decides it on its merits. The plaintiffs must also have sufficient interest in instituting the judicial proceedings and its eventual decision. Such interest to sue is conceived as the objective need to resort to the civil proceeding and the court's decision to remedy the injury suffered by the plaintiff.

## 2.3 Justiciability as "*Possibilità Giuridic*a"

Justiciability corresponds to "*possibilità giuridic*a", translates litteraly as "legal possibility." It refers to the existence of the right claimed and the availability, within the legal system, of the remedy sought by the plaintiff. This requirement is not explicitly provided by any legal provision. Justiciability also evokes the limits of judicial power in consideration of the other branches of government. This falls under the notion of giurisdizione

## 2.4 Conclusive Remarks

Considering the translations identified above, to evaluate if the present Italian legal context allows for climate litigation, both against governments and the private sector, it is necessary to analyze the following legal arrangements *(i) legittimazione ad agire* (Article 81 c.p.c.*), (ii) interesse ad agire* (Article 100 c.p.c.), *(iii) possibilità giuridic*a and giurisdizione.

As noted above, these three legal arrangements are considered the conditions to give rise to the right to sue (*diritto d'azione*). Therefore, standing and justiciability are called "*condizioni dell'azione*": conditions for the existence of the right to sue (*diritto d'azione*).

For a better understanding of the role played by *legittimazione ad agire, interesse ad agire, and possibilità giuridica*, it is helpful to distinguish them from the concept of *presupposti processuali.* The next section will introduce the meaning of *presupposti processuali*, while the following sections will focus on the dogmatics of the right to sue – *diritto d'azione*.

## 3. Procedural Preconditions: Presupposti Processuali

Everyone can institute a legal proceeding by filing a judicial application. By doing so, anyone can become a plaintiff. In its basic structure, there is at least one defendant to each plaintiff, as the civil proceeding requires at least two parties. Not every court application, however, can lead to a decision on its merits.

The law requires the existence of certain procedural preconditions provided by the law. Courts must determine if the party has the legal capacity to sue or needs representation, assistance, or authorization. The court then has to determine whether it has jurisdiction with regard to the other

branches of government and other national special jurisdictions and if it has international jurisdiction; it must also evaluate whether the plaintiff made the right choice of venue.

These requirements are called *presupposti processuali*. They are preconditions for a decision on the merits. These procedural preconditions must exist to have the case decided on its merits. Their missing is a cause of nullity for the whole proceeding, and the court must reject the claim. In such a case, the decision has strictly procedural content. It does not preclude the resubmission of the claim in a subsequent proceeding initiated by the same party.

The main practical difference between *presupposti processuali* and *condizioni dell'azione* is that missing the former, courts remain accessible to the plaintiff. A new application, integrated with the missing requirement, solves the procedural problem. Alternatively, the lack of *presupposti processuali* can be remedied during the proceedings, according to the provision of Article 182, §2, *c.p.c.*

For example, the lack of legal representation of the minor can be remedied with the appearance before the court of the parents, while issues of venue can be overcome by reinstating the action in the proper venue, according to Article 50 c.p.c.

In any case, it must be noted that the lack of *presupposti processuali* has no impact on the right of action, which will be analyzed in the following paragraph. The rationale behind *presupposti processuali* is to have the case decided according to given procedural criteria redetermined by the law: jurisdiction, venue, procedural capacity by the parties, etc.

Conversely, the rationale of *condizioni dell'azione* is to verify the existence of the right of action, which is separate from the underlying substantive right. Consequently, the lack of *presupposti proccessuali* does not impact the right of action and its conditions, meaning the *condizioni dell'azione*. [204]

[204] The foundation of civil procedurral law in Italy, and foremost of the 1942 *Codice di procedura civile*, are attributable to Giuseppe Chiovenda, who in 1933 distinguished between *presupposti processuali* and *condizioni dell'azione* arguing their differennt nature and conceptual independece. See, CHIOVENDA, *Istitutioni di diritto processuale civile*, I, Napoli, 1933, p. 61: «*Negando la esistenza dei presupposti processuali non si nega la esistenza dell'azione, che resta impregiudicata. Si nega che l'azione, nell'ipotesi che esista, possa farsi valere in questo processo: ma non si nega che possa farsi valere anche subito in un'altro processo. La sentenza dunque che che pronuncia solo sui presupposti processuali, che cioè o dichiara che si può provvedere sulla domanda o assolve dalla osservanza del giudizio, non è favorevole né all'attore né al convenuto: non accorda e non nega alcun bene perciò vedremo ch'essa di solito non deve contenere condanna le spese (...) e non produce la cosa giudicata sostanziale (...)*». Further, on the relation between *presupposti processuali* and *condizioni dell'azione*, Chiovenda argued that *presupposti processuali* have in common with the *condizioni dell'azione* the fact that the first are a condition for a judgement on the merits, while the second for a favourable judgement on the merits. They both share to be, in a way, a condition for a favourable judgement on the merists, as lacking the *presupposti* processuali no judgement can be issues. Chiovenda expressed his view as follows, at p. 61: «*le condizioni dell'azione sono le condizioni di un provvedimento favorevole all'attore; il presupposti processuali sono alle condizioni di un provvedimento qualsiasi sulla domanda. In un certo senso pertanto anche i presupposti processuali sono condizioni dell'azione, perché se mancano impediscono una pronuncia favorevole. Ma la differenza si rende manifesta se si pensa che le condizioni dell'azione sono soltanto condizioni del provvedimento favorevole, i presupposti processuali sono condizioni anche del provvedimento sfavorevole*». Most legal scholars and the case law of the Italian Supreme Court – *Corte di cassazione*, do not share Chiovenda's theory regarding the notion of the right of action and the fact that it is a right to a favorable judgement anymore. Both academics and courts argue argue, as it will be later discussed, that the right of action – *diritto d'azione* – is not the right to a favourable judgement but rather the right to a judgement on the merits, regardless of its content. In this perspective, *presupposti processuali*

As outlined above, however, further conditions characterize the party and its relationship with the subject matter of the claim – the conditions to give rise to the right to sue or right to action – named *condizioni dell'azione.*

Climate litigation clashes against the rules on *condizioni dell'azione*. Hence, chapter III focuses on them and on the *diritto d'azione.*

and *condizioni dell'azione* share the feature of being both conditions for a judgement on the merits – not for favorable decision.

## 4. The right of Action: Diritto d'Azione

### 4.1 Constitutional and Statutory Provisions

The right of action is the right to bring a case before a court of law to protect rights or legitimate interests under civil or administrative law. The right of action is protected by Article 24(1) of the Italian Constitution, which states the following:

| | |
|---|---|
| *Articolo 24*<br>*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi.*<br>*La difesa è diritto inviolabile in ogni stato e grado del procedimento.*<br>*Sono assicurati ai non abbienti, con appositi istituti, i mezzi per agire e difendersi davanti ad ogni giurisdizione.*<br>*La legge determina le condizioni e i modi per la riparazione degli errori giudiziari.* | *Article 24*<br>*Everyone can take legal action to protect their rights and legitimate interests.*<br>*Defense is an inviolable right at every stage and level of proceedings.*<br>*Means for acting and defending oneself before every jurisdiction are assured to the indigent through special institutions.*<br>*The law determines the conditions and methods for the redress of miscarriages of justice.* |

At the subjective level, the core of the provision is to be found in the pronoun 'anyone', which includes any person or legal entity regardless of them of their citizenship. At the objective level, the right to sue encompasses both subjective rights and legitimate interests. The latter category is peculiar to the Italian system, in which the administrative jurisdiction is separate from the ordinary one. Administrative tribunals are the venue for the protection of *interessi legittimi* (legitimate interests) claimed against public administrative authorities. Subjective rights, on the other hand, find protection in ordinary civil courts.[205]

At the statutory level, the right of action is disciplined both by Article 2907(1) of the *Codice civile* and by Articles 99 and 112 *c.p.c.* These three provisions further develop the right of action into a general principle that governs the exercise of the right of action linked to alienable rights, called *principio dispositivo.* According to such principle, in the field of alienable rights, civil jurisdiction requires the exercise of the action by the plaintiff through filing a court application. A civil proceeding cannot be commenced if no claim is made by the person or entity entitled to a subjective right.

Article 2907 of the *Codice civile* (c.c.) states the following:

| | |
|---|---|
| *Articolo 2907 Codice civile*<br>*Alla tutela giurisdizionale dei diritti provvede l'autorità giudiziaria su domanda di parte e, quando la legge lo dispone, anche su istanza del pubblico ministero.*<br>*(...)* | *Article 2907 Codice civile*<br>*Jurisdictional protection of rights shall be provided by the judicial authority upon application by a party and, when the law so provides, also upon application by the public prosecutor*<br>*(...)* |

This provision was drafted before the 1948 Italian constitution – and its Article 24(1). Nonetheless, Article 2907 c.c. provides details the content of the constitutiona provisions under Article

[205] For an analysis in English, see LUPOI, *Civil procedure in Italy*, Alphen aan den Rijn, 2018, p. 22-24.

24(1). Article 2907 c.c. clarifies judicial protection can only be granted if a court application is filed. A partial departure from this general principle can only happen when the law attributes an extraordinary right of action – extraordinary standing – to the public prosecutor to protect publicly relevant interests in the context of a civil proceeding. The substantive law, as required by article 69 c.p.c. must foresee such cases, and they deal with inalienable rights.[206] Conversely, in the field of alienable rights, the party has unlimited power both on the substantive and procedural level. In the field of substantive law, alienable rights can be sold and purchased, leased, lent, donated etc. Anyone can dispose of such rights through the means of a contract or will. Similarly, at the procedural level, parties of the proceeding can dispose of their rights by making a claim or raising an objection or, conversely, by not making or not raising claims or objections.

Article 2907 c.c. finds specular and more detailed regulation at the procedural level by Articles 99 and 112 c.p.c.

Article 99 c.p.c. foresees the principle of the claim with the following wording:

| | |
|---|---|
| *Articolo 99 c.p.c.*<br>*Principio della domanda*<br>*Chi vuole far valere un diritto in giudizio deve proporre domanda al giudice competente* | *Article 99 c.p.c.*<br>*Principle of the claim*<br>*The party willing to claim a right in a proceeding shall file a complaint before the competent judge.*[207] |

Consequently, it is made clear that there can be no civil proceeding and no decision if the plaintiff, alleging the existence of a substantive right, by way of filing a complaint, does not exercise the right of action. The complaint, or court application, constitutes the commencement of the civil proceeding and the factual precondition for the existence of a proceeding.

| | |
|---|---|
| *Articolo 112 c.p.c.*<br>*Corrispondenza tra il chiesto e il pronunciato*<br>*Il giudice deve pronunciare su tutta la domanda e non oltre i limiti di essa; e non può pronunciare d'ufficio su eccezioni, che possono essere proposte soltanto dalle parti* | *Article 112 c.p.c.*<br>*Correspondence between the claims and the judgment*<br>*The judge shall decide upon all claims and within its limits; he shall not through a spawned decide upon objections which may be raised only by the parties.*[208] |

Completing the provisions analyzed above, Article 112 c.p.c. sets the limits of the judiciary with regard to an already commenced proceeding. Once the court application has been filed and the claim made, courts must decide within the limits of the claim. It cannot grant a different and further remedy, as it has to stick to deciding on the remedy that has been asked. Therefore, for example, if the plaintiff asked the court to merely ascertain the existence of the right to compensatory damages, the court cannot extend its reach to an order to pay the damages. If they want, the party exercising the action must ask for an order.

[206] For example, in the field of family law, in case of opposition under article 102 *Codice civile* to a marriage that cannot or could not be celebrated for lack of legal preconditions.

[207] English translation provided by GROSSI-PAGNI, *Commentary on the Italian Code of Civil ProcedureI*, Oxford, 2010, commentary on article 99, p. 149.

[208] English translation provided by GROSSI-PAGNI, *ibidem*, commentary on article 112, p. 158.

Similarly, courts can not raise objections that the parties can only put forward. So, for example, courts cannot reject a contractual claim based on a time limitation, given that such objections are reserved only for the parties.

Finally, Article 112 sets a provision that responds to the Latin principle "*ne eat iudex ultra petita partium"*. In modern civil procedural law, such a restraint to the power of civil courts is justified by the strictly personal nature of the right of action. As mentioned above, the exercise of the right of action is reserved by Article 2907 *Codice civile* and Article 99 *c.p.c.*, only to the party entitled to the underlying subjective right, which, again, is freely alienable through the means of a contract, universal succession or bequest.

## 4.2 Three-fold Nature of the Right of Action

The right of action is divided into three areas of operations: *(i)* proceedings aimed at ascertaining the existence of a subjective right (*processo di cognizione*), *(ii)* Enforcement proceedings *(processo esecutivo)*, (*iii)* Interim and provisional jurisdiction (*processo cautelare)*.

In all such fields, civil jurisdiction is always connected to a subjective right provided by the law or the Constitution and is instrumental its protection.

The *processo esecutivo* and the *processo cautelare* are instrumental to the enforcement and effectiveness of the *processo di cognizione*. The latter is instrumental to protecting subjective rights, as the judgment determines the existence of the subjective right and the consequences of its violation with mandatory effects for the parties of the proceeding.

A closer look at how this system works should help understand the context better. While the substantive law grants a subjective right (e.g., the right to property or health), the *processo di cognizione* is the means to adjudicate the existence of such a right concerning a specific plaintiff towards a particular defendant. The court verifies the existence of the facts alleged by the plaintiff and declares the right's existence.

In a tort law case for the violation of the right to property or health, the court must ascertain that an illicit fact caused unlawful damage, the existence of a causal link, and the negligence of malice of the wrongdoer. Suppose the plaintiff gathers enough evidence to sustain their burden of proof, and the preconditions foreseen by the substantive law of torts are satisfied. In that case, the judge can establish a right to compensation and order the payment of a sum of money or in-kind compensation if the latter option is practically viable. The judicial order to compensate damages is, under Article 474 c.p.c., a title empowering the winning plaintiff to levy the execution proceedings (*processo esecutivo*).[209] If the defendant does not pay spontaneously, the plaintiff can enforce the decision through the execution proceeding. In the time needed to get from the court application to the court order that ends the *processo di cognizione*, reality can change due to natural or human actions in such a way that frustrates the final court order. For example, the defendant could divest themselves from their assets to avoid any payment and the execution proceeding, given that any

[209] For a summary of the enforcement proceedings, and its various categories, see CAPPELLETTI - PERILLO, *Civil procedure in Italy*, The Hague, 1965, pp. 318-341 and LUPOI, *Civil Procedure in Italy*, Alphen aan den Rijn, 2018, pp. 233-258.

enforcement of the order would be impossible without sufficient assets. In such a case, provisional measures through the interim and provisional jurisdiction – *processo cautelare* – are needed. Under these circumstances, the plaintiff might want to consider asking the court for a conservative seizure under Article 671 c.p.c. Following a seizure, the defendant loses the freedom to dispose of their assets, and the law considers any act of disposition ineffective towards the plaintiff. The further consequence is that the seized assets will be subjected to the execution proceeding – in the form of forced execution.

As this exemplary case shows, the right to action is always instrumental to the protection of a substantive right. When exercised in the context of ordinary proceedings – *processo di cognizione* – it is instrumental to adjudicating subjective rights. The execution proceeding – *processo esecutivo* – is instrumental to implementing the order issued in the *processo di cognizione*. Finally, the *interim* and provisional proceeding – *processo cautelare* – is instrumental to the successful outcome of the execution proceeding. In all cases, however, the civil proceedings – thus, the right of action – serves the purpose of protecting subjective rights grated by the substantive law.

In all three cases, the plaintiff exercises the right of action, which, as stated above, has a threefold nature. Although in different ways, all three kinds of proceedings are instrumental to the protection of the subjective right to compensation for the violation of the right to property or health.

The first and essential level of jurisdiction is given by the *processo di cognizione*, as without it, the other three could not logically exist. Hence, the following considerations on the right of action and its preconditions – standing and justiciability – will refer to *processo di cognizione*. However, it is crucial to remember that the other two proceedings – processo esecutivo and cautelare – also express the right of action. Consequently, in these proceedings standing and justiciability are also a precondition that needs to be met.

The relationship of instrumentality between the right of action and the subjective right of the plaintiff is a constant feature, regardless of the specific action that the plaintiff exercises: be it *processo dichiarativo, cautelare* or *esecutivo*.

## 4.3 Right of Action and its Conditions: Condizioni dell'Azione

The right of action has an ancillary – instrumental – nature compared to the subjective one. It is, therefore, autonomous from the underlying substantive right claimed by the plaintiff. Moreover, the right of action exists even if the substantive right the claim is based upon does not exist. For these reasons, Italian scholars have labeled the right of action "partially abstract."

Understanding why the right of action is partially abstract helps figure out the functions and practical consequence of the legal arrangements of *legittimazione ad agire*, *interesse ad agire*, and *possibilità giuridica*, which are the conditions for the insurgence of the right of action.

Whether the plaintiff is actually entitled to the subjective right is a matter that concerns the merits of the claim, while the right of action is a procedural right that consists of the right to obtain a decision on the merits. In this sense, the right of action is instrumental and autonomous from the substantive rights provided by the law.

With regard to its contents, the right of action is the right to get the case decided by the judiciary. Therefore, its content differs from the underlying subjective right, which is addressed to the counterparty. On a subjective level, the counterparty – the 'debtor', if you will – of the right to sue is the judiciary and the court, while the content of this procedural claim is the adjudication of the claim in its merits.

On a practical level, this means that assessing the existence of the *condizioni dell'azione* differs from verifying if preconditions foreseen by the subjective law for the insurgence of the subjective right are in place. In other words, the court must first ascertain the existence of the right of action considering, for such purpose, the *condizioni dell'azione*. If this abstract right exists, the court can decide the merits, as the decision on the merits revolves around the preconditions set forth by the substantive law.

## 4.4 "Be Real!": It is not Necessarily a Partially Abstract Right

The considerations expressed in the previous subparagraph are correct in the sense that they distill what most textbooks of Italian procedural law convey to readers. The right of action is a partially abstract right and the preconditions for its insurgence are the *condizioni dell'azione*: *legittimazione ad agire, interesse ad agire* and possiblità giuridica.

The 1942 Italian code of civil procedure also accepted this "truth" as such. But it is essential to mention that it is not the only possible truth if this word even makes any sense in the field of law given that legal notions do not exist in the natural world as, for example, a molecule or an animal species could. What is being taught in universities and stated by the law is rather the crystallization of a debate in which results can be questioned anytime. Embedded in the discussion are concepts that transcend the field of law and step into the province of philosophy. The right of action implies a prior definition of the relationship between citizens and the state's power, of the latter's role in conflicts among individuals, and the ways the law is created.

The debate around the right of action occurred from the nineteenth century onwards and sank its deepest roots in ancient Roman law. However, it seems dormant nowadays, given that the recent reforms do not directly touch upon its abstract nature. Nor does the latest reform change the provisions regulating the claim and the *condizioni dell'azione.* Instead, the focus is geared toward conjugating the effectiveness of the right of action and procedural efficiency.[210]

Legal scholars participating in the 1940 codification transformed relative concepts and ideas into law. As of today, Articles 99 and 112 *C.p.c.* and 2907 c.c. regulate the right of action, which, in 1948, was further recognized by Article 24 of the Constitution. Likewise, Article 81 c.p.c. recognizes the notion of *legittimazione ad agire,* and Article 100 c.p.c. the one of *interesse ad agire.*

[210] The challenge of the recent reform of the *Codice di procedura civile* is to conjugate the right of action with the legitimate aspirations of individuals and businesses to a faster justice and the equally constitutionally relevant right to of defence. The provisions that imply its partially abstract nature remained untouched by the so-called *riforma Cartabia*, by the name of Marta Cartabia, the Ministryof justice and *ex* judge of the Constitutional court that promoted the reform. The reform was promulgated with the legislative decree n. 149 of October 10th, 2022.

These conditions are standards that plaintiffs must meet, and courts must deal with them – it is not just theory.

While it remains crucial to understand the practical implications of these provisions, it is equally helpful to appreciate the complexity of the theoretical background that led to the conclusions crystalized by the law and – conclusively – accept the relativity and potential caducity of their substance. What appears to be inevitably true is not necessarily immutable.[211] The right of action has been conceived differently or even denied.

Influential scholars contributed to the academic debate by disagreeing with the theories accepted by the Italian code of civil procedural law. Among many, this section focuses on Salvatore Satta[212] and Enrico Redenti. Their view of the right of action and the *condizioni dell'azione* could be helpful for climate litigants – if the Codice di procedura civile had accepted them.

### 4.4.1 The Teachings of Salvatore Satta

In Satta's view, the subjective right of action dichotomy is based on the false premise of the actual existence of the subjective rights provided by substantial law. He argued that, in the natural world, subjective rights do not exist. Reality only knows interests that arise from factual situations. Rights are those interests whose existence has been recognized by the law. Only starting from the idea that the idealized subjective right "A" actually exists is it possible to conclude that another subjective right, "B," namely the right of action, also exists and has different content.[213]

According to Satta, the action is an integral part of the legal order. The latter cannot exist without the action and the judicial decision. Satta conceives the norms as existing for the individuals whose interests are at stake only through the binding effects of the judgment.

Therefore, the action is essential for the realization of the legal order and the interests recognized by it. However, the author refuses the duality and abstraction proposed by nineteenth-century German legal scholars and accepted in Italy, most famously by Chiovenda and Calamandrei, as well as by the provisions of the code of civil procedure. Satta disregarded this bionomy as an overly theoretical worldview which he deemed useful for didactic reasons but inconsistent with reality, where rights are the legal vest of real interests, and the latter need the compulsory effects of the judgment to be materialized. Therefore, in Satta's view, it would be absurd to speak of subjective rights separately from the action, given that the latter constitutes the only way to materialize the right. And the right is a fictional figure that provides legal recognition to substantial interests. Therefore, denying the dichotomy of subjective right-right of action leads to the consequence that

[211] See CALAMANDREI, La relatività del concetto di azione, in Rivista diritto processuale civile, 1929, I, p. 29 as well as CAPPELLETTI, Processo e ideologie, Bologna, 1969, p. 313.

[212] Salvatore Satta operated before and after the second world war. His views were divergent from other scholars of his time, such as Chivenda and Calamandrei, especially on the fundamental notion of action. Despite the prominence of his thought, he was excluded from the ministerial commission whose work led to the 1943 code of civil procedural law. Throughout his academic career, he has consistently offered in many ways a 'voice out of the chorus' on the right of action.

[213] SATTA, *Diritto processuale civile*, Padova, 1967, pp. 103-109. The duality subjective right-right of action wa salso denied by PEKELIS, *Azione*, in *Nuovo digesto italiano.*

there is no separate right of action and speaking of its preconditions – *condizioni dell'azione* – is useless.

Consistently with his view, Satta denied the duality between *legittimazione ad agire* and *interesse ad agire* and their existence at the procedural law level beyond the substantive right. Satta maintained that there is no distinction between personal rights and personal interest. Hence, the classic definition of *interesse ad agire* is flawed as it assumes that rights violations cannot impact the plaintiff's substantial interest. In reality – he argued – any alleged infringement also concerns the plaintiff's interest protected under the substantive law provision. Any adverse finding on the interests involves the existence of the subjective right claimed by the defendant. Hence, judicial findings on the *interesse ad agire* are, truthfully, findings on the merits.[214]

Satta also denied the autonomy of the notion of *legittimazione ad agire*. In his view, standing to sue is granted by the substantive law provisions. It is not an abstract procedural concept. The substantive law determines what interests are protected. Hence, the lack of *legittimazione ad agire* should be regarded as a ruling denying the claim on the merits. According to Satta, all hypotheses of 'extraordinary standing' (legittimazione straordinaria) are cases where substantive law provisions recognize an interest to someone.

In conclusion, Satta thought that *legittimazione* and *interesse ad agire* converge in the substantive law notion of interest recognized and protected under a substantive law provision. Moreover, the only condition Satta recognizes as needed is justiciability. This is consistent with his view, as there could be no materialization of the legal order in the absence of judiciary power in the specific case.[215]

### 4.4.2 The Teachings of Enrico Redenti

On the *interesse ad agire*, Redenti argued that Article 100 c.p.c. is a superfluous provision, as an abstract 'interest' does not exist.[216] The plaintiff's 'interest' is inevitably entailed by the claim and the right of action. The source of the right of action is an asserted violation of a subjective right. In practical terms, according to Redenti, plaintiffs should not be required to show that they have an abstract interest in the judgment, different from the substantial one that moved them into bringing a claim to court. The same goes for the objections, hence for the defendant's interest to object. The source of the objection is the plaintiff's claim. Objections are the 'natural' antithesis of the action.

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[214] SATTA, *Diritto processuale civile*, Padova, 1967, p. 113.

[215] SATTA, Diritto processuale civile, Padova, p. 113: "*A ben considerare le cose, l'azione non può avere altra condizione che la norma che la istituisce: ma questo è un giudizio di merito e niente altro. E del resto non si tratta mai di istituzione formale, non esistendo un catalogo delle azioni nel nostro ordinamento. E se mai si può prospettare l'ipotesi che esista e debba esistere un'astratta possibilità di giudizio nell'ordinamento, senza la quale non potrebbe neppure concepirsi l'azione. Questa sarebbe la sola condizione accettabile perché in tal caso il giudice dovrebbe addirittura rifiutare il giudizio*."

[216] REDENTI-VELLANI, Diritto processuale civile, I, Milano, 2011, p. 39. "*L'art. 100 del codice di rito sembrerebbe richiedere (...) un altro elemento necessario per la proponibilità della domanda o dell'eccezione, o almeno per il loro successo. (...) Ma questo ulteriore elemento-requisito non ha ragione d'essere distinta ed autonoma. L'interesse in realtà è fin dall'origine elemento integrante essenziale anzi primordiale, non solo del diritto soggettivo primario sottostante, ma anche della stessa azione. (...) Lo stesso (invertendo i termini) si può ripetere in fondo per l'eccezione (...).*"

There is no need for defendants to establish an interest to object (*interesse a contraddire*) under Article 100 c.p.c.

### 4.4.3 The possible impact on climate litigation

Applying his view to climate litigation would lead to considering the notion of interest to sue – meaning interest in a judgment to a helpful decision – as an issue of merits rather than procedure. Interestingly, critical cases such as *Urgenda* and *Gloucester* di, in fact, consider the objections raised by plaintiffs as a matter of merits.

However, the Italian code of procedural law requires under Article 100 c.p.c. that plaintiffs show that the decision is useful to them. Hence, in the Italian legal context, regardless of international case law, arguments about the impossibility of individual judgments in solving the climate crisis must be treated as a procedural issue. Theoretically, if Satta and Redenti's views had been accepted in Italy, as in other legal systems, the objections on the uselessness of climate litigation claims would be a matter of merits – not procedure. However, the arguments expressed by these scholars point out that the issue of standing must be first addressed at the substantial law level. The substantive law must establish the scope and entitlement of climate-related rights

The following subparagraphs try to account for the rich cultural debate around the right of action to understand better why it can be conceived as an abstract right and its practical implications in the praxis of civil litigation in Italy – including for climate litigants.

## 4.5 The Right of Action and the Ancillary Role of Jurisdiction

One reason behind the partially abstract nature of the right of action can be traced back to the role played by civil jurisdiction as means to solve disputes and keep social peace.

Historically, the judiciary system has been instrumental in protecting individual interests. Consequently, in civil law systems, the right of action has been conceived as ancillary, therefore different in content from the underlying and more tangible, subjective right. This subparagraph further analyzes this topic.

In developed legal systems, private revenge cannot remedy the infringement of a subjective right. Feud systems are, unfortunately, still in place in some parts of the world with devastating social consequences. Most, if not virtually any, modern legal system, however, criminalizes the arbitrary exercise of one's rights.[217] Consequently, the violation of a subjective right can only be remedied through the justice system's intervention. This principle sinks into the ancient Roman law and Emperor Marcus Aurelius' D*ecretum Divi Marci*. Such imperial decree punished the loss of the right of the creditor who used violence against their debtor. Consequently, the creditor had to seek protection for their right through the judiciary without resorting to violence. The ban on self-

[217] Articles 392 and 393 of the Italian criminal code punishes the arbitrary exercise of one's rights with violence on goods or people. Article 294 of the criminal code was repealed in 1999: It punished the challenge to a duel even if such a challenge was not accepted. This offense was part of the so-called knighthood crimes. This provision, in place until a couple of decades ago, shows how the duel, and more generally a system of private violent revenge, was conceived as a metaphorical ADR system reserved to the privileged aristocratic class. For a historical and comprehensive analyses of the duel see CAVINA, *Il sangue dell'onore – Storia del duello,* Bari, 2005.

protection of one's rights disappeared in the Middle age, during which barbaric legal traditions brought back the use of the duel as a means to solve controversies even in civil law.[218]

In modern constitutional regimes, the state has the task of keeping social peace; for this purpose, the judiciary has a monopoly on jurisdiction.[219] In return, the state must allow anyone to access justice lodging a claim, while the judiciary must adjudicate with strict impartiality. In this context, state jurisdiction is the counter-performance granted by the public power in return for the ban of the arbitrary private initiative. The result of the intervention in a private controversy by the judiciary is a decision that dictates the law's effects on the case at hand. Civil law courts apply the syllogism that leads from the general and abstract provision set forth by the substantive law to the specific rule of conduct that binds the parties in the specific case. The binding force of the res judicata characterizes that decision.[220]

The right of action can therefore be considered a power attributable only to the private party entitled to the subjective rights to get impartial and fair judicial protection of the subjective rights. And there would not be an impartial decision if the court itself could exercise the right of action on behalf of the individuals whose subjective rights are infringed. The Latin principle "*nemo iudex sine actore"* expresses this system.[221]

In conclusion, historically, the judiciary's role has been to offer protection – common law lawyers would say, a "remedy" – in case of infringement of a subjective right provided by the law. As mentioned above, granting anyone the right of action is the necessary consequence of the state monopoly of justice in modern states. The right of action, geared towards the state, is the key to accessing justice.

## 4.6 The Main Legal Theories About the Right of Action

The right of action is strictly linked to the subjective right – yet it transcends it. There could be no action in the absence of a subjective right, and the latter would remain unprotected if there were no right to the action. This dualism is the key connotation of the right of action. It is also the only common ground among most legal scholars. Yet not anyone agrees on the distinct nature of the right to action compared to the subjective right, and the following subparagraphs will account for the different views.

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[218] See, CALAMANDREI, Istituzioni di diritto processuale civile secondo il nuovo codice, Padova, 1943, p. 96.

[219] This must be coupled with the alternatives foreseen by law to public jurisdiction. Modern legal orders, allow for the exercise of a private justice managed by arbitral tribunals and for other means of alternative dispute resolution, such as mediation, that do not tend to adjudication but rather to solving the dispute finding common ground and transactional getaways. Nonetheless, all such methods are provided by the law and are an alternative to public jurisdiction, without replacing it.

[220] See SCIALOJA, Sulla funzione della IV Sezione del Consiglio di Stato, in Foro Amministrativo¸ 1989, 2, p. 419, first pubblished in Giustizia amministrativa, 1901, 4, p. 61.

[221] As a result, civil jurisdiction is limited by the existence of a court application made by the plaintiff. Any civil court may only decide a case in presence of – and within the limits – a claim made by the individual or entity entitled to the subjective rights for which protection is sought, as stated by article 2907 *Codice civile*, article 99 and 112 *Codice di procedura civile* analyzed above. The only cases when the public prosecutor can make a civil claim on behalf of someone are exemptions that must be foreseen by the law, as stated by art. 69 *Codice di procedura civile*.

The academic literature is, in fact, rich in possible alternative interpretations of the right of action and its nature. It is fair to say that each Italian major procedural law scholar tried to elaborate their own theory.[222] It would be almost impossible to reconstruct the detailed content of each of them and, probably, unnecessary in the context of this thesis. Moreover, each legal theory is also consequential to the time and political framework in which they were conceived, considering that the right of action touches upon the relationship between the individual and the state's authoritative power. In effect, the quality of a theory on the right of action can only be measured in relative terms, considering the surrounding cultural and political milieu.[223]

### 4.6.1 Right of Action as the "Subjective Right on a War Footing"

The first legal theory denies the binomial subjective right – the right of action. In nineteenth-century German civil lawyers, such as Friedrich Karl von Savigny, denied the duality of the subjective right-right to action. Savigny's 'monistic' approach rejected the duality of subjective right-right of action.[224] He viewed the right of action as an extension of the subjective right, expressed by the power to obtain the performance – due from the debtor – through the intervention of the state jurisdiction.

Savigny conceived the action as the extension of subjective rights to the performance of an obligation and the court's intervention as the mere means to achieve the end. The right to action would be nothing else than the "*subjective right on a war footing*." In this conception, the right of action is part of the private law system; the civil proceeding is a mere service to the private interests and, after all, a mere parties matter – "*Sache der Partaien."*[225]

Such a liberal conception of the right of action was adopted in Italy by the 1865 Code of civil procedural law, which was influenced by the classic liberal ideology and, as a consequence, provided a system where the role of the judge in managing the proceedings and the principle of orality were still heavily restricted compared to 1879 German and 1898 Austrian codes.[226]

### 4.6.2 Right of Action as a Public Law Right Toward the State

German civil procedural law scholars developed a second and opposite legal theory in the nineteenth century. Keeping "classic era" Roman procedural law as a reference point, Bernhard Windscheid worked out the theory of the right of action as a right *vis-à-vis* the state to get judicial

[222] SATTA, Diritto processuale civile, Padova, 1967, pp. 104-105: «(…) onde si può ben dire che esistono tante dottrine dell'azione quanti gli scrittori che ne se ne sono occupati».
[223] CALAMANDREI, *La relatività del concetto di azione*, in *Rivista Diritto Processuale civile*, 1929, I, p. 29; see also, from the same author, CALAMANDREI, Istitutzioni di diritto processuale civile secondo il nuovo codice, I Premesse storiche e sistematiche, pp. 115-117. Also consider, CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, p. 313.
[224] PEKELIS, in *Novissimo Digesto*, voce *Azione (teoria moderna)*, vol. II, Torino, 1968, p. 38.
[225] CARRATTA, V*ittorio Scialoja* e il *processo civile*, in Rivista di diritto processuale, 2013, 1, p. 97.
[226] CAPPELLETTI, Processo e ideologie, Bologna, 1969, p. 321: "Il codice del '65 è entrato in vigore in un periodo che, sul piano ideologico, era caratterizzato da un liberalismo accentuatamente individualistico. E' dunque naturale che questa ideologia dominante sia riflessa nelle leggi dell'epoca, oltreché nella stessa dottrina e nella prassi dei tribunali".

protection for the subjective right claimed by the plaintiff. The civil proceeding was therefore seen as the means to apply and enforce the substantive law.[227]

Oskar von Bülow and Adolf Wach developed this public law approach.[228] From their perspective, the action does not always suit the breach of an obligation. Moreover, the right of action is not always the flip side of the subjective right. Some claims are brought to court regardless of a previous actual infringement. As pointed out by Aldof Wach in his monograph *Der Feststellungsanspruch*[229], merely declaratory actions provide a clear example of the autonomous nature of the right of action and the function of the civil proceeding as the means to enforce the will of the law. Declaratory actions, in effect, are brought when the defendant disputes the existence – or the extension – of a subjective right. In such cases, the action is, in Wach's view, the only means to carry out the will of the law. For this reason, the right of action should be conceived as the individual's right towards the state – not the other private counterparty – to get judicial protection. Another somewhat surprising example of a declaratory action, beyond the case of uncertainty because of parties' actions, comes from recent years of Italian case law. The *Corte di cassazione* maintained the admissibility of a merely declaratory claim to interpret, in a new proceeding, a judgment issued in a previous proceeding that has formally become *res judicata* – therefore binding. The rationale that supports this case law orientation of the supreme court is the idea that the judicial decision dictates a *lex specialis* for the case at hand.[230]

The court's decision expresses the public power to concretize the substantive right's provisions in the case at hand. The action serves, therefore, a private interest limited to the plaintiff's subjective and public rights. Applying the judicial syllogism, the court dictates the law for the specific case, starting from the general provisions codified by the law. Bülow used an effective metaphor, saying that the court draws from the treasure accumulated in the code and produces spendable coins marked by the state minting.[231]

The German keyword used by the authors mentioned above is *Rechtsschutzanspruch*, which expresses the idea of a relationship between the individual and the state marked by the individual demand for the state's authoritative intervention.[232] The right of action is not an extension of the

[227] WINDSCHEID, Die Actio römischen civilrechts vorn Standpunkte des hentigen Rechts, Düsseldorf, 1856.
[228] WACH, *Handbuch des deutschen Zivilprozessrechts*, Leipzig, 1885, p. 119. According to some accounts, however, the autonomy of the right to action was already being conceived in the 18th century in the context of natural law philosophy. See, DENTI, *Dottrine del processo e riforma giudiziaria tra illuminismo e codificazioni*, in *Riv. dir. proc.*, 1981, p. 217, as well as TARUFFO, *La giustizia in Italia dal '700 ad oggi*, Bologna 1980. All these sources are cited by MANDRIOLI-CARRATTA, *Diritto processuale civile, I – Nozioni introduttive e disposizioni generali*, Torino, 2022, p. 48, footnote 26.
[229] WACH, Der Feststellungsanspruch. Ein Beitrag zur Lehre vom Rechtsschutzanspruch, in Festgabe der Leipziger Juristenfakultät für Bernard Windscheid zum 22.12.1888, Leipzig 1888.
[230] See *Corte di cassazione*, judgement n. 5339, April 26th 2000, published in *Foro Italiano*, 2001, I, p. 1005 commented by CAPONI. The admissibility of such declaratory claims was the confirmed by *Corte di cassazione*, judgement n. 21069, November 3rd 2004, published in *Giurisprudenza italiana*, 2001, p. 726, commented by TURRONI.
[231] BÜLOW, *Gesetz und Richteramt*, Leipzig, 1885, p. 209.
[232] WACH, Handbuch des deutschen Zivilprozessrechts, Leipzig, 1885, p. 19. See, also, WACH, Der Feststellungsanspruch. Ein Beitrag zur Lehre vom Rechtsschutzanspruch, in Festgabe der Leipziger Juristenfakultät für Bernard Windscheid zum 22.12.1888, Leipzig 1888, p. 73.

subjective right but rather a completely different subjective right geared towards the state. Exercising the right of action institutes a three-folded relationship involving the plaintiff, the court, and the defendant. In this relationship, which somewhat mirrors a contractual relationship, the plaintiff is the creditor, and they have the right to the judicial protection of the subjective right. The court owes the 'performance,' which consists of the claim adjudication, and judgments bind the defendant if the claim is accepted.[233] Hence, the right of action mirrors the creditor-debtor pattern – but in the realm of public law.

The abstract and distinct nature of the right of action allowed German scholars to create the notion of 'procedural relationship.' The latter presented practical advantages. The 'procedural relationship' helped justify the possibility for one party to enter the proceeding as the successor of a party in case of death or alienation of the disputed subjective right. Further, it also contributed to the principle according to which the judgments are effective from the time of the claim.[234] Additionally, the notion of procedural relationship also justifies the representation of those who lack the free exercise of their own rights and need to be represented, by a tutor or a guardian, according to the rules applicable to their *status*. In addition, the same notion grounds the attribution of the quality of the party to those participating in the procedural relationship.[235]

At the theoretical level, and for what this and the following subparagraphs are concerned, this concept is relevant because it displays the separate nature of the right of action from the subjective right and its public law nature.

### 4.6.3 Chiovenda: the Right of Action as a Potestative Right

A third legal theory, promoted in Italy by Giuseppe Chiovenda, criticized the viewed notion of the right of action as a subjective right 'against' the state. Chiovenda moved from the thories of Adolf Wach but, in his view, the state cannot be considered as the 'debtor' that owes the plaintiff a performance, given that the exercise of the right of action and the consequent judicial decision does not compromise the public interests. When the individual files a court application, the state exercises one of its functions – jurisdiction – realizing its aspirations to ensure the substantive law's respect.

Therefore, in Chiovenda's view, the right of action is the tool to achieve two separate but compatible goals; the state enforces the subjective right assuring its respect, while the individual acting in court obtains the protection sought. Exercising the right of action – through the claim – is like a key that turns on the engine; it is the condition for realizing both public and private interests. This theory abandons the creditor-debtor pattern. It conceives the right of action as a potestative right

[233] For the notion of civil proceeding as a legally binding relationship, see KOHLER, *Der Prozess als Rechstverhältnis*, Mannheim, 1888. See also, BÜLOW, *Die Lehre von den Prozesseinreden und die Prozessvoraussetzungen*, Giessen, 1868.

[234] This is the moment from which the procedural relationship was first established, and the consequences of the decision retroact to that point in time.

[235] All these examples are provided by MANDRIOLI-CARRATTA, *Diritto processuale civile, I Nozioni introduttive*, Torino, 2022, pp. 30-31.

that serves the plaintiff acting against the defendant and the state's interest to impose the substantive law coercively.[236]

### 4.6.4 The Right to a Favorable Decision or Just to a Decision on the Merits

Accepting the second and third theories summarized above, the right to action is separate and different from the subjective right. This duality, however, still leaves a question open. It remains uncertain whether the right of action entails the right to a favorable decision on the merits or, instead, only to a decision, whatever its content will be. In practical terms, in the first instance, the right of action only exists if the subjective right does; in the second scenario, the right of action is independent of the underlying right, and the positive outcome of the proceeding is a mere aspiration of the plaintiff, not the condition for the existence of the right of action. The further consequences impact the function of the conditions for the existence of the right of action – standing and justiciability – the *condizioni dell'azione.* If the right of action is attributable only to the party whose claim is grounded in the merits, the *condizioni dell'azione* – standing and justiciability - are the conditions for a grounded claim.

Conversely, if the right of action is only the right to a decision on the merits, regardless of its content, standing, and justiciability (*condizioni dell'azione*) must be evaluated separately from the merits. Hence, there could be an unfavorable decision on the merits and yet a positive one on standing and justiciability – *condizioni dell'azione.* But it would not be possible to have a reversed situation: a decision on the merits is impossible without a favorable judgment regarding the *condizioni dell'azione.*

The practical relevance of this debate concerns the moment in which the court should ascertain the existence of the *condizioni dell'azione*. There are two alternatives: when the plaintiffs made a claim or when the court issues the judgment.

Those who conceive the right of action as necessarily linked to a favorable decision think they can come to exist even after the claim is filed in court. Conversely, those who believe that the right of action amounts to the right to make a claim, regardless of its merits, conclude that the *condizioni dell'azione* must exist when the plaintiff applies. The reason for such a different approach is that, in this view, lacking the condizioni dell'azione, no judgment whatsoever can be ever issued in the case brought by the plaintiff.

The debate has inflamed civil procedural law scholars ever since the nineteenth century.

Famously, in Germany, Windscheid opposed Murther.[237] Windscheid argued that the right of action only exists if the claim is grounded in the merits. Conversely, Murther made the opposite point based on the Roman formulary system, which was divided into two phases. First, the parties

[236] CHIOVENDA, Istituzioni di diritto processuale civile, Napoli, 1933, p. 20: "Quanto a me, che presi ad occuparmi di questi problemi quando la categoria dei diritti potestativi era già largamente studiata nella dottrina, ebbi facile la vita, profittando di questi studi, a ricondurre per primo l'azione in questa categoria; accettando il lato sostanziale della teoria del Wach, definii l'azione come un diritto potestativo" (1903)."

[237] WINDSCHEID-MURTHER, *Polemica intorno all'«actio»*, translated in Italian by Heinitz and Pugliese Firenze, 1954.

made their allegations to a public official named '*praetor,'* who did not decide the case but only framed the '*formula.'*

The second phase would occur before a private party, the '*iudex,'* who decided the merits based on the '*formula'* provided by the '*praetor*.' Murther observed that the '*formula'* contained the action, which was provided before discussing the merits. This separation proved the difference between having the right of action – receiving a '*formula'* – and being victorious on the merits. There could be, therefore, a right of action regardless of the case's merits. Dagenkolb then further sustained this thesis.[238]

In Italy, Chiovenda[239], Calamandrei[240], and Redenti[241] argued for the right of action as the right to a favorable decision on the merits. Opposed to them, other scholars such as Carnelutti[242], Rocco[243], and Liebman[244], supported the notion that the right of action is only the right to a judicial decision, while the content of it is a matter of the merits to be decided. Liebman summed up this theory brilliantly in a punchy phrase: "*the right of action is the right to the means* [meaning to accessing the civil proceeding], *not to the reach the end* [a favorable decision]."[245]

The Italian *Corte di cassazione*[246] also intervened in this debate, accepting that the right of action is an abstract right to bring a case before the court and have the case decided on the merits – not the right to a favourable decision. This solution to the dilemma is also more practical, given that the issue of the right of action is relevant at the early stages of the civil proceedings. Once the parties have started arguing the merits, the focus is on the existence of the subjective right, not the right of action.

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[238] DAGENKOLB, *Einlassungszwang und Urteilsnorm*, Leipzig, 1877, p. 30.

[239] CHIOVENDA, Istitutioni di diritto processuala civile, Padova, p. 20. For a comprehensive study of Chiovenda's work, see TARUFFO, Considerazioni sulla teoria chiovendiana dell'azione, in Rivista trimestrale di diritto e procedura civile¸2003, p. 1139.

[240] CALAMANDREI, Istitutzioni di diritto processuale civile secondo il nuovo codice, I Premesse storiche e sistematiche, pp. 111-114.

[241] REDENTI, Profili pratici del diritto processuale civile, Milano, 1939, p. 82.

[242] CARNELUTTI, Titolarità del diritto e legittimazione, in Rivista di diritto processuale, 1952, II, p. 122.

[243]ROCCO, *La sentenza civile*, Torino, 1906, p. 31.

[244] LIEBMAN, Manuale di diritto processuale civile, Milano, 2007, p. 141.

[245] LIEBMAN, L'azione nella teoria del processo civile, in Rivista trimestrale di diritto e procedura civile, 1950, p. 54: «L'azione è dunque il diritto al mezzo, non al fine (…)». Also, see LIEBMAN, Manuale di diritto processuale civile, Milano, 2007, p. 141.

[246] See, *Corte di cassazione*, judgment No. 4524 of 1983, which stateted the following principle: "La legitimatio ad causam (o *legittimazione ad agire*), che costituisce una condizione dell'azione, va intesa come il diritto potestativo non già di ottenere una sentenza favorevole, bensì una decisione di merito, e si risolve, perciò, nella titolarità del potere di promuovere (o del dovere di subire) un giudizio in ordine al rapporto sostanziale dedotto in causa, indipendentemente dalla questione dell'effettiva titolarità, dal lato attivo o passivo, del rapporto controverso, la quale attiene, invece, al merito della decisione ed è riservata all'apprezzamento del giudice del merito, insindacabile se immune da vizi logici o giuridici". Consider also, *Corte di cassazione*, judgment No. 21192 of 2006: "Tale motivazione appare invero confondere la legittimazione ad causam, che è il diritto potestativo ad ottenere una decisione di merito (la cui carenza è rilevabile d'ufficio) con la effettiva titolarità del rapporto sostanziale dedotto in causa (rilevabile solo su eccezione di parte) (Cass. 6420/00; Cass. Sez. un 8573/90) e risulta non conforme a principi stabiliti da questa Corte e dianzi citati", in the online database Leggi d'Italia. This judgement and its view on the right of action as the potestative right to a judgement on the merits, not a favourable decision, was cited by T.a.r. Veneto Venezia, judgement No. 198 of 2011, in the online database Leggi d'Italia.

In conclusion, today's academic literature agrees that the right of action is the 'partially abstract' right to a judicial decision on the merits – whatever its content will be. Further, the right of action is linked to the underlying subjective right, yet it is a distinct right. The plaintiff must affirm their entitlement to the subjective right, regardless of its actual existence. Whether the claim is grounded pertains to the merits. Hence, the existence of the right of action depends only on the *condizionio dell'azione*, independently from the subjective right.[247]

## 4.7 Roman Law, Common Law, Civil Law

This paragraph aims to understand why the theory of action has been developed in continental civil law systems and the similarities between common law and classic Roman law. Finally, this section lays out the practical consequences of the common law 'remedial' approach in the field of climate litigation.

The theories on the right of action went well beyond the academic debate, as they pervade the 1942 Code of civil procedure and Article 24 of the Constitution. Such theories impacted the 'daily business' in modern courts. The word '*azione*' – understood as a partially abstract right to a decision on the merits – can be heard daily in Italian courts. And yet, what has become standard vocabulary, is the outcome of a long historical evolution that ties Roman-, common- and civil law systems. It is not a linear development, but both the common- and civil law jurisdictions present similarities with ancient Roman law.

The nineteenth-century German legal scholars helped conceive civil procedural law as an independent field of law – not just a practical matter for court clerks – and the theory of action is its cornerstone. In civil law countries, such views propelled a renaissance of the theory of action, whose roots can be found in ancient Roman law.

The ancient Roman civil procedure law is traditionally divided into three periods governed by a different system. First, the system of *legis actiones*, which was in place up to the first century B.C.; second, between the first century BC and the third century A.C., the *formulary system*; third, after the third century B.C., the *cognitio extra ordinem* of the post-classic and the later Justinian era. [248]

[247] BALENA, Elementi di diritto processuale civile, Princìpi, Bari, 2006, p. 51: "La concezione oggi più diffusa è però, in un certo senso, una via di mezzo tra le due opinioni fin qui esaminate, giacché definisce l'azione come il diritto ad ottenere un provvedimento di merito, ossia una pronuncia che decida sulla fondatezza della domanda, ancorché, se del caso, in modo sfavorevole all'attore, e dunque rigettandola. Accogliendo siffatta definizione, l'esistenza del diritto d'azione dedotto in giudizio dall'attore viene svincolata, evidentemente, dalla concreta esistenza del diritto dedotto giudizio dall'attore e dipende, invece, (oltre che, naturalmente, dalla circostanza che sia stata proposta una domanda) da due elementi, che si è soliti definire condizioni dell'azione: la *legittimazione ad agire* e l'*interesse ad agire*." Also, see MANDRIOLI-CARRATTA, Diritto processuale civile, I Nozioni introduttive e disposizioni Generali, Torino, 2022, p. 50.

[248] For further analysis, see MARRONE, *Istituzioni di diritto* romano, Palermo, 2006, pp. 57- 117, and DALLA-LAMBERTINI, *Istituzioni di diritto romano*, Torino, 2006, pp. 137-193.

### 4.7.1 Legis Actiones

*Legis actiones* constituted the oldest procedural model and included five distinguished proceedings. Cognisance jurisdiction was exercised under the *(i) legis actio sacramenti, (ii) per iudicis arbitrive postulationem, (iii) per condictionem*. Such *actiones* had in common that the proceedings developed in two phases. The first phase *in iure* would unfold before a public official – the *praetor*. The second one, *apud iudicem*, happened before a private citizen that served as a judge – the *iudex* or *arbiter*.[249] Moreover, there were two enforcement actions: *(iv) legis action per pignoris capionem, (v) per manus iniectionem*.

According to Gaius, in *Institutes of Roman Law* (4.30), the *legis actiones* were gradually abandoned given their exasperated formalism.[250] In the most archaic *legis actiones*, the parties had to pronounce specific words and even perform gestures. Gaius (4.11) mentioned a case where the plaintiff lost the case for using the wrong words: he said *de vitibus succisis*, while the twelve tables would have required him to sue *de arboribus sucisis*.[251]

The excessive rigidity of the *legis actiones* could not cope with new claims; moreover, it was inapplicable to foreigners, with whom Roman citizens were doing business with increasing recurrence. Starting from the second century B.C., there has been an attempt to adjust this system without changing its core feature, meaning its inapplicability to foreigners. In 242 B.C., the *praetor peregrinus* was instituted to grant judicial remedies in cases involving foreigners. This institution contributed, with the *praetor urbanus*, to the development of the formulary proceedings. For a while, the *legis actiones* were applied by the *praetor urbanus* in proceedings involving Roman citizens in the field of *ius civile*. The same *praetor urbanus would* apply the *formulae* – meaning the more flexible formulary proceeding, in cases concerning Roman citizens but outside the field of *ius civile*. Conversely, the *praetor peregrinus* would always apply the formulary proceeding in cases involving only foreigners, a foreigner, and Roman citizens. According to Gaius, the *legis actiones* system was largely disregarded by the population and, in his account, it was abrogated by the law Ebutia around 130 A.C. According to contemporary authors, however, the *legis actiones* maintained their validity until the *lex Iulia iudiciorum privatum* passed in 17 B.C.

### 4.7.2 'Classic' Roman Procedural Law

The civil proceedings were divided into two phases in such a system that followed the overly formal one of *legis actiones*. The first one would develop before a public official, the *praetor*, while

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[249] MARRONE, *Istituzioni di diritto* romano, Palermo, 2006, p. 61.

[250] Gai. 4, 30: "*Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate veterum, qui tunc iura condiderunt, eo res perducta est, ut vel qui minimum errasset, litem perderet; itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones, effectumque est, ut per concepta verba, id est per formulas, litigemus."*

[251] MARRONE, Istituzioni di diritto romano, Palermo, 2006, p. 60, footnote No. 6. Gai. 4, 11: "*Actiones, quas in usu veteres habuerunt, legis actiones appellabantur vel ideo quod legibus proditae erant, quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur, vel ideo quia ipsarum legum verbis accommodatae erant et ideo immutabiles proinde atque leges observabantur. unde eum qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est, rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur*."

the second one, called *apud iudicem*, took place before a private citizen (*iudex*) chosen by the parties to issue the ruling, similar to modern days arbitrators.

The *praetor* would hear the claims made by the plaintiff (*editio actionis*) and the defenses raised by the defendant. Then, without deciding the case, the *praetor* would provide a *formula* to the plaintiff. The *formula* was the rule of law the *iudex* had to apply after taking the evidence. The *praetor* could also provide the defendant with an objection (*exceptio*).

The first phase, before the *praetor*, would end with the parties receiving the *formula* and with the *litis contestatio*, meaning the identification of the factual and legal terms of the dispute.

Each *formula* would correspond to an *actio.* Every *actio* consisted of a specific remedy. The key feature of the formulary system was the flexibility of the remedy – the *formula* and the consequent *actio.* In fact, the *formula* could be chosen from a previously existing set of remedies, but it could also be created for the specific case. This way, the remedies system would evolve and adapt to the new needs. Further, it is worth noting that, given the practical approach of the formulary system, both *formulae* and *actiones* were conceived as the logical antecedent of the subjective right.

This practice-oriented approach is quite different from the civil proceedings of the following 'post-classic' era: the *cognitio extra ordinem.*

### 4.7.3 *Cognitio Extra Ordinem*

This procedural model, however, is not a 'post-classic' invention. Instead, *cognitio extra ordinem* was initially conceived under emperor Augustus (63 B.C. – 14 A.D.), who introduced them for succession law matters. Given its limited application, *cognitio extra ordinem* meant judicial cognizance 'beyond' – *extra* – the other two procedural models – *legis actiones*, which were disappearing then, and the formulary proceedings.[252]

In Diocletian's time (244-313 A.D.), in the empire's provinces, the *cognitiones extra ordinem* gradually substituted the formulary proceedings, while the latter remained in force in the city of Rome. Then, in 342 A.D., under the emperors Constance and Constant, the *cognitio extra ordinem* became the only procedural model allowed. Such a procedural model featured a more decisive public power role than the formulary proceedings. First, the *plaintiff* summoned the defendant through a public body. Second, the proceedings were not divided into the two parts *in iure* and *apud* iudicem: the whole procedure *would* take place *before* a public judge. The emperor could also exercise jurisdictional powers. Third, new rules to rigidly guide the *iudex* were introduced in the field of evidence law. Forth, in the post-classic and later Justinian eras, the *cognitio extra ordinem* became more rigidly regulated: mandatory written deeds replaced orality as a means to submit claims and raise objections. Hence, the role of orality was significantly reduced with a loss in procedural flexibility. Finally, and more in general, the legislator tended to centralize and lower margins of discretion for the judiciary.[253]

Judicial protection was not granted based on evolving *formulae* created over time, as the *praetor* did under the formulary proceedings, but accordingly to the written law. Law-making went

[252] MARRONE, *Istituzioni di diritto* romano, Palermo, 2006, p. 110.
[253] MARRONE, *Istituzioni di diritto* romano, Palermo, 2006, p. 113.

from a case-based approach to a centralized system pivoting around the written law. Until then, substantive and procedural law were conceived as overlapping concepts as the substantive rights developed parallel to new remedies – *formulae* – being granted.

### 4.7.4 The Impacts of the *Corpus Iuris Civilis*

The tendency to reduce margins of judicial discretion continued in the later justinian era. Emperor Justinian (482-565 A.D.) aimed to unify Roman law. The *Corpus iuris civilis* crystalized his lawmaking activity. The *corpus iuris civilis* would provide subjective rights, while the procedural law would regulate how judicial protection for subjective rights would be granted. Justinian's law subverts the remedy-rights relationship existing under the *formulary proceedings*, and substantive and procedural law became two separate bodies[254].

### 4.7.5 The Canonical Proceedings

The post-classic, then byzantine, *cognitio extra ordinem* proceedings influenced first the middle age and canonical procedure and then the continental systems, up to the nineteenth-century codifications.

In both archetypes, the law predetermines the scope of judicial protection. Further, proceedings were primarily written, and there is a preference for written documents in evidence law. These features are still present today, while others have partially faded away.

In the canonical proceeding, witness testimony was evaluated based on rigid criteria rather than on the "quality" and credibility of the witness: for example, socially more elevated witnesses would have more weight than lower-class people. There were also numeric criteria that would bind the court: two male witnesses were conclusive evidence, but proving certain facts would require a specific higher number of witnesses. The judge had no direct contact with both the witnesses or the parties. All pleadings were subjected to strict formal requirements and had to be submitted in writing according to the principle *quod non est in actis non est de hoc mundo*.[255] All procedural steps were taken according to predetermined periods, regardless of the needs of the case. The formalism of such a system seems archaic, yet it was a great leap forward compared to the Germanic rules that foresaw the duel or the ordeal – 'trials' before God to solve disputes.[256]

According to scholars, formal requirements and legally predetermined criteria for evaluating the evidence protected parties against abuses and corruption.[257] Consequently, courts had minimal discretion, and the principle of orality, the concentration of the proceedings before the same judge, and the immediacy of the judgment were annihilated. Over time, such pedantic formalities proved

[254] MARRONE, Istituzioni di diritto romano, Palermo, 2006, p. 115. The Author notes that: "Emerge la tendenza a prospettare il diritto soggettivo indipendentemente dall'actio corrispondente. In definitiva, processo e diritto sostanziale così saldamente compenetrati finché fu in uso il processo formulare acquistarono, nel nuovo diritto, reciproca autonomia e si posero le premesse per farne oggetto di separate discipline."
[255] CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, p. 311.
[256] CAPPELLETTI - PERILLO, *Civil procedure in Italy*, The Hague, 1965, p. 34.
[257] ENGELMANN, *A History of Continental Civil Procedure*, translated and edited by R. W. Millar, Boston, 1927, p. 478 and 480. See also, L. von BAR, *Recht und Beweis im Civilprocesse*, Leipzig, 1867, pp. 32-33. Both citations are quoted by CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, p. 311, footnote 65.

to be unfit to handle the social changes propelled throughout the Middle Ages and the following centuries.

### 4.7.6 Nineteenth-Century Codifications: a Return to 'Classic' Roman Law

In continental Europe, the nineteenth century has been an era of codification in civil and procedure law. The French 1806 *Code de procedure civile*, the Italian 1865 *Codice di procedura civile*, the German 1879 *Zivilprozessordnung*, and the Austrian 1898 *Zivilprozessordnung* tried to return to the "classic" Roman civil procedure law.[258]

According to Chiovenda's account, the German and Austrian codes achieved this result more successfully than the French and Italian reforms.

The French code of 1086, which later influenced the Italian code of 1865, departed from the previous system abolishing particular and discriminatory jurisdiction systems, such as the ecclesiastic, feudal, and royal jurisdictions. Further, the French code instituted the principle of separation of powers, and, in the field of evidence law, it allowed the court to discretionally evaluate the evidence gathered during the proceedings, departing from numeric or cast-based criteria of evaluation. Yet, in many other ways, both the French and the Italian codes were still partially influenced by the 1667 *Ordonnance civile*, old Germanic rules, and, as far as Italy, by the fragmented legislation of the pre-unification states.[259]

### 4.7.7 The Role Played by the 'Theory of Action'

The studies conducted on Roman law by German scholars – such as Oskar von Bülow and Adolf Wach – aimed to depart from the post-classic, justinian, and later canonical procedural law model.[260]

The 1879 German and 1898 Austrian codes restored the principles of orality, the proceedings' concentration, and the decision's immediacy. Further, these reforms reinforced the rule that the judge who hears the case should be the same person who decides and should also have direct contact with the means of evidence. Further, the court was granted greater freedom in evaluating evidence and was expected to manage the case based on its needs.

The theories around the right of action served more than one purpose.

First, the action, as an abstract right separated from the underlying substantive one, was a means to grant access to justice to any right foreseen by the substantive law.[261]

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[258] CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, p. 288.

[259] CHIOVENDA, *Istituzioni di diritto processuale civile*, I, Napoli, 1935, p. 105. The Italian 1865 code was considered to be still influenced by the legislation of the pre-unification States, as well as by the French 1667 *Ordonnance civile* passed by King Louis the 14th and old Germanic rules. Also, see CAPPELLETTI- PERILLO, *Civil procedure in Italy*, The Hague, 1965, p. 38 and footnote No. 152.

[260] See, BÜLOW, *Die Lehre von den Prozesseinreden und die Prozessvoraussetzungen*, Giessen, 1868 and WACH, Handbuch des deutschen Zivilprozessrechts, Leipzig, 1885.

[261] PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, p. 53.

Second, aspiring to restore the classic Roman origins, the "right of action" helped revive the principles of orality, concentration, and immediacy of the decision. In other words, it was a theoretical tool to – partially – heal the rift between modern and the formulary proceedings of the "classic" Roman law era.

Conceiving the right of action as directed toward the state and the procedural relationship - between parties and courts – subjected to public law reinforced the court's authority and discretion. The principle of orality, concentration, and immediacy of the decision requires rules that allow the court to direct the proceedings freely.

Cappelletti explained the mortification of the court's role in the canonical proceedings citing Arthur Engelmann, according to whom

> *"the same fear of judicial arbitrariness (...) necessarily led, also, to a minimization of the judicial power to direct the proceedings (...) It was, therefore, deemed proper to assign to the judge a purely passive role, or, in other words, to exaggerate what we now call the 'principle of party-presentation' ('Verhandlungsprinzip'). For both tendencies support was found in old Germanic procedure".*[262]

Conversely, in the Roman formulary proceedings, in their respective phases, the *praetor* and the *iudex* would have complete control over the procedure, while the parties could freely determine their submissions to the court. As mentioned above, the action as a public law right helped restore the flexibility of the classic roman law civil proceedings.

## 4.8 Similarities Between Common Law and Classic Roman Law

Scholars point to a correspondence between the formulary proceeding of 'classic' Roman procedural law and common law. This is not to say that there is a direct historical link. However, similarities are quite evident.[263]

The first similarity concerns the stages of the proceedings. In traditional English procedural law, the proceedings were divided into "issue making" – now the "pre-trial" – and "trial," similarly to the phases *in iure* and *apud iudicem*.

The second similarity concerns the role of orality during the trial phase. Both the Roman *iudex* and the common law judge have direct access to the witnesses and the parties during the hearings. Further, in the *apud iudicem* phase, lawyers would orally examine and cross-examine witnesses, as in modern common law systems. The common law technique of examination and cross-examination, absent in continental systems, is similar to the *altercatio* between the parties and the methods of witness examination used in the *formulary proceedings.*[264] Overall, both procedural models greatly value the role of orality.

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[262] See, CAPPELLETTI, in *Processo e ideologie*, Bologna, 1969, p. 323, who cites ENGELMANN, *A History of Continental Civil Procedure*, translated and edited by R. W. Millar, Boston, 1927, p. 447.
[263] CAPPELLETTI - PERILLO, *Civil procedure in Italy*, The Hague, 1965, p. 26.
[264] SCIALOJA, *Procedura civile romana*, Roma, 1936, p. 171. See also, ENGELMANN, *A History of Continental Civil Procedure*, translated and edited by R. W. Millar, Boston, 1927, p. 361: "The witness was sworn before giving

Conversely, the canonical proceedings disregarded oral interrogation. Oral examination reemerged after the nineteenth-century codifications. Yet, still today, questions are drafted in writing by the parties' lawyers, and the judge is the interrogator.

Third, the Roman *interrogation in iure* is similar to the United States common law discovery of facts. [265] In the United States, interrogatories developpe into a discovery procedure and have an evidentiary function in a limited set of cases. Conversely, interrogatories have an evidentiary function in Italy; if answers contain an admission, they can be used against the party. In this respect, scholars argue that current Italian law is similar to medieval and Justinian time law.[266]

Fourth, a significant similarity concerns the primacy of the remedy. In the 'classic' Roman era, the remedy was created 'judicially' by the *praetor* before the subjective right itself, according to the principle: *ubi remedium ibi ius.* The *praetor* created new actions and objections based on the specific cases. Similarly, common law is traditional "judge-made law," and the court is required to grant an effective remedy.

The remedial approach triggers a fifth similarity concerning the way 'classic' Roman and common lawyers conceive the relationship between substantive and procedural law. Piero Calamandrei, visiting Cambridge University, was surprised to learn that English universities did not teach a specific course in civil procedure law.[267] However, the impression that procedural law is ignored in common law jurisdictions does not consider the relationship between substantive and procedural law in common law systems. Civil lawyers think in substantive law and translate it into procedural law, recurring to the legal arrangement of the right of action. Conversely, traditionally, common lawyers, similarly to the 'classic' Roman lawyers, would think in procedural terms from a remedies perspective.

Schultz, in *Principles of Roman Law*, argued that:

> *"Roman lawyers view the law mainly from the standpoint of actiones (...)."*

and that

> *"there was no (...) isolation of private substantive law from procedural law."*[268]

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his evidence, and was subjected to cross-examination by the parties". Both sources are cited by CAPPELLETTI, in *Processo e ideologie*, Bologna, 1969, p. 294, footnote 17 and 18.

[265] BUCKLAND-MCNAIR, *Roman Law, & Common Law*. *A Comparison in Outline*, 2nd edition by F. H. Lawson, Cambridge, 1952, p. 404, which is cited by CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, pp. 294, footnote 10.

[266] CAPPELLETTI - PERILLO, *Civil procedure in Italy*, The Hague, 1965, p. 26.

[267] CALAMANDREI, Processo e democrazia, Padova, 1954, p. 39: "In Italia l'udienza rischia di somigliare ad uno spettacolo teatrale: In Inghilterra assomiglia piuttosto ad una funzione religiosa. Recentemente, in una mia visita all'università di Cambridge, ebbi la sorpresa di apprendere che nelle università inglesi non si insegna il diritto processuale: il modo di comportarsi dinanzi ai giudici non è materiale di studio; si impara nella pratica professionale, perché è materia non di scienza ma di galateo."

[268] SCHULTZ, *Principles of Roman Law*, translated by Margharet Wolf, Oxford, 1936, pp. 32 and 41-42. The wording cited in the text is mentioned and quoted by CAPPELLETTI, *Processo e ideologie*, Bologna, 1969, pp. 299-300.

In this perspective, reality seems to be very different from first impressions. Traditionally, the common law view on law incorporates the procedure – the remedy – before substance, similar to the formulary system.

To this day, common law is much more similar to classic Roman law, in this respect, compared to continental civil law systems. Traditionally, common law is not familiar with the concept of subjective rights. Consequently, in the absence of subjective rights, there can be no right of action, given its ancillary function and independent nature. Moreover, common law has experienced no real reason to develop the theory of action, as civil proceedings have always been geared towards a great deal of orality, the concentration of the proceedings before the same judge, and the immediacy of the decision.

To sum up, it can be said that traditional common law is based on the primacy of the remedy, replicating the Roman law pattern action-remedy-right: '*ubi remedium ibi ius.'*[269] Conversely, the continental civil law systems put the right before the remedy, and the formula is reversed: '*ubi ius ibi remedium*,' understanding the word 'remedy' as the result of exercising the right of action.

## 4.9 'Disclaimer'

It is fairly certain that post-classic Roman law, and its middle age developments, influenced continental civil law systems.

However, the same linear historical link can not be established between the Roman *formulary proceedings* and the common law remedial approach. Nonetheless, scholars such as Mauro Cappelletti have pointed out that common law features characteristics that make it similar to the Roman classic procedural law. 'Open' legal systems adapt to the evolving needs of judicial protection beyond what is pre-established by the written law. The practical consequence is – at least theoretically – greater flexibility of the common law system when granting flexible remedies based on new cases.

[269] SMORTO, *Sul significato di "rimedi"* , in *Europa e diritto privato*, 2014, 1, p. 164. The author points out that the common law is not entirely stranger to the concept of rights, on the one hand, and the civil law system also embraces the notion of remedy. The two systems are deeply different, as pointed out in the text above. Any rigid characterization, however, would be a stereotyped and inaccurate representation of reality. Regarding the recognition, to a certain extent, of the notion of rights by the common law Smorto mentions POUND, *A textbook of Roman Law from Augustus to Justinian*, in *Harvard Law Review*, p. 119. According to Pund, the modern common law on torts had become, from the 19th-century a system of rights and duties, rather than of remedies: «*It was a system of remedies in Coke's Day and, although a radical change took place in the seventeenth and eighteenth centuries, appeared to be one at the opening of the nineteenth century, end in the law of torts until the last quarter of that century. In the 19th century it was restated in terms of a system of rights and duties*». Smorto reminds that, even if the centrality of the notion of remedy remains a pillar or the common law system, the remedies have often been elaborated about specific entitlements. Consequently, the notion of entitlement – which can be considered like the one of subjective right – set the guideline for finding the appropriate remedy. In this framework the entitlement is relevant and logically precedent to the remedy, even though the starting point of the reasoning is the remedy. Smorto offers a few examples. In the field of tort law, the article mentions the case *Mayor of Bradford v. Pickles* (1895), AC 587, 594: «*It was a lawful act, however ill the motive might be, he had a right to do it. It was an unlawful act, however good his motive might be, he would have no right to do it*». This case shows how British case law accepted a rights-based approach, over a remedy-based approach, to argue the prevalence of the lawfulness of an act over its motives. The fact that an act is permitted by a right is sufficient to exclude its tortious nature.

Contemporary authors, such as Cavallini, Gobardi, and Smorto, pointed out that a too rigid distinction between remedies and rights risks be grotesque nowadays, as the two systems partially overlap.[270] Civil law courts also refer to the notion of remedy to grant judicial protection beyond the scope of written law. On the other hand, the common law witnessed an expansion of the notion of subjective rights established by statutes and constitutional charters of rights. An example is provided by the *Canadian Charter of Rights and Freedoms,* introduced in 1982, which laid down the premises for cornerstone fundamental rights litigation in Canada.

## 4.10 Consequences for Climate Litigants

Despite the due caution that the paradigm of 'remedies vs. rights' requires, it is a fact that the common law remedial system resembles classic Roman law. Whether there are, historical roots is a whole other issue. Further, it should not be too far-fetched to argue that the common law remedial approach is the reason why climate litigants might be better off in common law systems.

The 'open' and adaptive nature of the common law approach has been shown by the Pakistani *Legahri case,* in the context of climate litigation, and by the Canadian *Doucet-Boudreaut* ruling of the Supreme Court of Canada, in a case involving the protection of French linguistic minorities in Nova Scotia. In both cases, the courts found that the appropriate remedy would be to impose reporting duties on the defendant to supervise its conduct after the judgment was issued. Only in an 'open' and remedy-based system could a court conceive such extensive – and creative – judicial protection.

On the other hand, it is not automatic that courts in any common law jurisdiction can freely establish new remedies similar to the rulings in *Leghari* and *Doucet Boudreau*.

## 4.11 Contemporary Perspectives on the Right of Action

The continental nineteenth-century theories on the right of action – *diritto d'azione* – reflected the spirit of the times. The abstract conception of the right of action allowed generalized access to justice for the protection of any right, matching the ideal of formal equality of each citizen before the law – typical of the nineteenth-century liberal, individualistic, bourgeois, and post-French revolution era.

Moreover, the theory on the right of action reaffirmed the courts' central role in directing civil proceedings, similar to what happened in the 'classic' Roman civile procedure.

It is now helpful to consider the role of the theory of action in the current legal framework, marked by post-second world-war constitutions.

Article 24(1) of the Italian Constitution of the right of action.[271] This provision must be read in conjunction with Article 3 of the Constitution, which, and a different constitutional setting, marked by the notion of substantial equality, goes beyond the formal one. While merely 'formal'

[270] CAVALLINI-GABARDI, Rights vs. Remedies: Toward a Global Model, in U.C. Davis Journal of International Law & Policy, 2022, p. 172. SMORTO, Sul significato di "rimedi" , in Europa e diritto privato, 2014, 1, p. 164.

[271] Art. 24(1) of the Constitution foresees the following provision: «Everyone can take legal action to protect their rights and legitimate interests».

equality – Article 3(1) – prohibits any form of discrimination, the idea of 'substantial' equality – Article 3(2) – requires the law to consider the social and economic burdens that put some individuals in place weaker place compared to others.

Article 3(2) is one of the fundamental constitutional provisions, if not the one, that founds the idea of a welfare state. The nineteenth-century theory of action has worked in the setting of liberal democracies and mirrored that view of the world. In that *Weltanschauung*, justice had to be granted to anyone by allowing indiscriminate court access. The justice system, and the "right of action" at its forefront, did not consider the issue of 'substantial' inequality.

Conversely, under Articles 3(2) and 24 of the constitution, the right of action must be effective and work for anybody. The right of action cannot ignore economic inequality and the different interests that come into play. It cannot hide behind the – metaphorical – finger of formal inequality.[272] In conclusion, Article 24 of the 1948 Italian Constitution recognized the right of action, but it evolved it, requiring the legislator to make it "effective" regardless of the parties' socio-economic conditions. Mass torts, mass harm, and multiparty litigation provide a critical test for the right of action in today's scenario.

For example, an ordinary proceeding can remedy an individual breach of contract by another individual. However, the same breach of contract caused in the vaster setting of a mass tort looks very different from the perspective of the individual plaintiff. In the setting of mass torts, the right of action is only truly effective if it adapts to the substantial reality in which it is dropped and transforms from 'individual' to 'class' action.

Another scenario of substantial inequality in a breach of contract case is the hypothesis of a labor law dispute: the economic and informational asymmetries are relevant and cannot be ignored. So much so that under Articles 3(2) and 24(1) of the constitution, the right of action is effective only if the procedural law considers the substantial inequalities between the two contractual parties.

These are some examples that show that the right to action still has an important role to play. In the face of novel societal needs, its renewed task is to make justice effective through the means, if necessary, of 'differentiated procedural protection'. Climate litigation, and public interest litigation, test the boundaries of the right of action under Article 24 of the constitution.

[272] PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, pp. 50-53.

# CHAPTER 8
# POSSIBILITA' GIURIDICA AND GIURISDIZIONE

## 1. Introduction

The first of the three conditions for the insurgence of the right of action is constituted by '*possibilità giuridica*,' which would translate literally as 'legal possibility.' This concept resonates with the 'justiciability' – often leveraged by plaintiffs in climate litigation, both strategically and for damages. Such legal possibility refers to the action exercised by the plaintiff, which must be possible under the existing legal framework.

*Possibilità giuridica* can be considered from two perspectives that partially overlap. First, in its 'classic' version of requiring the plaintiff to link its claim to a substantive righ.

Second, in a more complex light, combined with the notions of jurisdiction and its limits with the political domain. The paragraphs below will analyze both sides.

Climate litigation case law shows how complex it is for parties to overcome the objections raised by defendants in "strategic" cases. For example, private defendants and governments object that courts cannot adjudicate climate cases as this subject matter involves political considerations. Other times, they argue that the judiciary cannot issue any order as it would not be enforceable through the existing enforcement rules.

This paragraph explores the realm of justiciability. The aim is to explain what objections defendants could raise in climate litigation and how to overcome them in light of the existing provisions and case law.

## 2. The 'Classic' Role Played by "*Possibilità Giuridic*a"

The right claimed by the plaintiffs should be – abstractly – worthy of legal protection under the existing legal framework.

The Italian system is, in fact, open to the recognition of new rights – especially in the field of fundamental rights, under Article 2 of the constitution.[273] There is no system of form of actions as in the old Roman Law formulary proceeding system where actions were predetermined by the '*formula'* granted to the parties by the *praetor.*

In other words, the right of action's abstract nature and the legal system's evolutionary nature allow the plaintiff to seek protection for new rights. However, *Possibilità giuridica* limits such freedom, as claims satisfy such a condition only if – abstractly – allowed by the legal framework. Hence, the plaintiff must link the claim to one or more subjective rights.

[273] See, BARBERA, *Costituzione della Repubblica italiana*, in *Enc. dir.*, annali VIII, 2015, p. 326. MARTELLI, *I nuovi diritti*, in *Diritti e doveri*, edited by Luca Mezzetti, 2013, Torino, p.. 609. In the contect of tort law, reagrding the relationship between Article 2 of the constitution and Aticles 2043 and 2059 c.c., see NAVARRETTA, *Diritti inviolabili e responsabilità civile*, in *Enc. del dir.*, annali VII, 2014, p. 343; Moreover, see NAVARRETTA *Ripensare il sistema dei danni non patrimoniali*, in *Respesponsabilità civile e previdenza*, 1, 2004, p. 3.

Cases when plaintiffs lack justiciability, are quite abstract as the merits usually absorb the issue of justiciability. Most times, claims are dismissed on the merits rather than procedural grounds for lack of *possibilità giuridica*. Let us consider a contract- and a tort law example.

The first example is a plaintiff bringing an action for the judicial termination of the contract, maintaining to have lost interest in it. The law, however, does not attribute any relevance to the personal motives for the conclusion of an agreement. Consequently, the court should dismiss the claim on procedural grounds, for lack of *possiblità giuridica* – therefore, for lack of justiciability. But this outcome is more theoretical than practical. Most times, the decision is about the merits. Italian civil law has been exposed to external influences and internal evolution, resulting in new 'remedies' that ended up granting relevance to the parties intentions. The common law principle of 'frustration of purpose' – famously stated in the 'coronation case' *Krell v Henry* – is somewhat mirrored in Italy by the recognition of the motives of the contract (*causa in concreto*).[274] The plaintiff could argue in either direction: maintain that the claim lacks *possibilità giuridica* or that it is groundless in its merits. However, it is relevant to point out that the issue of justiciability, at least in its classic version, easily overlaps with the merits of the claims. Therefore, the case will probably be decided on merits rather than procedural arguments. This example shows how, most of the time, *possibilità giuridica* is irrelevant.

Another example is provided, in the field of tort law, by the case of someone seeking compensation for strict liability in a case where the law requires a certain degree of negligence. Here, again, in theory, the claim should be dismissed on procedural grounds for lack of standing, but it is more probable that the court dismisses it on the merits.

The case law confirms this approach, downplaying the role played by *possibilità giuridica*. *Corte di cassazione* took the view that when the claim seems to fall outside the scope of what is legally relevant, it should be dismissed on the merits – not on procedural grounds.[275]

The same principle of law was reinforced by the plenary sessions of the *Corte di cassazione* in 2022.[276] In the case at stake, the plaintiffs sought the restitution to the state property (*demanio*

[274] The concept of *causa in concreto* – similar to the 'frustration or purpose' or, other times, to the 'hardship', was revelavant in covid-19 related contractual claims. See, *Tribunale Verona*, May 18, 2022, judgment No. 938.

[275] The case at stake dealt with the question whether there is jurisdiction over a judgement issued within the Italian football national associations – *Federazione Italiana Gioco Calcio* or *FIGC.* After an interim judgement by an administrative court – *tribunale amministrativo regionale* or *TAR* – the FIGC raised an incident in the procedure before the *Corte di cassaazione* to solve an issue of jurisdiction, under article 41 c.p.c. This procedural device is called «*regolameno di giurisdizione*». It is not an appeal, as the issue is brought to the court before a judgement on the issue of jurisdiction by the first insstance court. *Corte di cass*azione, sezioni unite, No. *18052* of *2010*, found that: «*Nella giurisprudenza di queste Sezioni Unite è stato da tempo affermato, infatti, che questione della configurabilità, o meno, di una situazione giuridicamente rilevante e tutelatale non rientra tra le questioni di giurisdizione, costituendo, invece, questione di merito, che deve essere pertanto rimessa alla valutazione del giudice del merito (Cass. S.U. 15 giugno 1987 n. 5256, ribadito in motivazione dalla già citata Cass. S.U. 23 marzo 2004 n. 5775). Il principio è stato sviluppato, in particolare, con riferimento alle federazioni sportive ed è stato dichiarato che la censura diretta ad escludere ogni forma di tutela giurisdizionale nei confronti di provvedimenti della FIGC, costituisce questione di merito (Cass. S.U. 29 settembre 1997 n. 9550)*». The judgement is available in *Foro Italiano*, 2011, 1, 1, p. 125 and in the on-line database *Leggi d'Italia.*

[276] *Corte di cassazione, sezioni unite,* judment No. 26038 of 2022.

*pubblico)* of a piece of land owned by an individual. The defendant argued that she was the legitimate owner of the land base on the implementation of a law passed in 1927. [277] According to her, the claim aimed to restore the 'status' of state property of a piece of land that had been rightfully commuted into private property, pursuant to the law. She held that the plaintiffs tried to achieve through a court action what the legislature and the administrative acts of the local authorities had already determined—arguing that the claim was not justiciable.

The *sezioni unite* found that there was no absolute lack of jurisdictional power (*difetto assoluto di giurisdizione*), rather a *difetto relative di giurisdizione*, because law No. 1766 of 1927 attributed the *Commissione per gli usi civici*. Second, the Court held that justiciability is lacking only when courts step into the province of the other branches of government; a claim lacking legal bases is a matter concerning the merits – not justiciability.

As a result, the condition of *possibilità giuridica* seems to have a rather theoretical nature. Most of the time, what could be considered a lack of justiciability is rather seen in the light of an objection on the merits. Yet it is helpful to 'close' the system and filter what actions are admissible, given that the Italian law rejects the system of forms of actions.

## 3. *Possibibilità Giuridica* and Jurisdiction: an Overview

The second and more extensive side to *possibilità giuridica* concerns a judicial power to decide the claim by ordinary civil courts. This notion of *possibilità giuridica* overlaps with one of jurisdiction and its limits and touches upon the boundaries of the judiciary toward the other branches of government.[278] This paragraph explores the limits of jurisdiction and the ways this issue has been considered so far, keeping in mind that one of the critical objectives raised by decedents in climate litigation is that courts cannot influence climate policy.

In the Italian legal system, jurisdiction is not a *condizione dell'azione* but a *presupposto processuale*. The difference between the two categories is clear, in theory: If the plaintiff lacks the right of action, no action can be brought to court, while a lack of *presupposti processuali* does not prevent the same action from continuing if the missing precondition is fulfilled: for example, a power of attorney is properly issued or the proceeding continues before the appropriate court. In praxis, however, the difference is much smaller. The consequences for the parties involved in the proceeding are mostly identical. In both cases, the court cannot decide the claim's merits and issues a decision that dismisses the case on procedural grounds. In both cases, the decision does not produce the *res iudicata* effect. Consequently, the parties can bring the same action again without the *ne bis in idem* preclusion blocking the claim. In this context, the concepts of jurisdiction and *possibilità giuridica* will be considered jointly, as in the praxis, climate litigants present them as overlapping.

It is now time to consider the three limits of civil jurisdiction: Foreign jurisdictions, administrative or special courts; Other branches of government.

[277] Article 9 of Law No. 1766 of 1927.
[278] TISCINI, *Le categorie del processo civille*, 2017, Bologna, p. 39.

The case law commented on in the previous chapter shows that the third category is surely the most relevant in the context of climate litigation. In the Italian context, however, marked by the distinction between civil and administrative courts, the second kind of conflict might also be leveraged by defendants to argue for the dismissal of the claim on procedural grounds. Further, the way defendants may object that the civil courts have no jurisdiction, based on the second or third limit, resonates with the notion of justiciability.

## 4. International Jurisdiction

Foreign jurisdictions limit civil jurisdiction. Any time the dispute has a foreign element to it, for example, the residence of one of the parties, the court must assess if it has international jurisdiction. National-, treaty- or EU regulation provisions solve this conflict. The national provisions set out by law No. 218 of 1995 provide connecting factors that apply residually when the EU regulations do not apply. In civil and commercial matters, jurisdiction is provided by the EU regulation 1215/2012, which replaced EC regulation 44/2000.[279]

In the field of climate litigation, international jurisdiction is relevant in cases against the private sector, which operates in multiple countries and is set up in the form of a complex group of companies. As in the Shell case, the plaintiffs might have suffered damages in different jurisdictions or argued that the holding company is liable for conduct in multiple countries. The defendant might be interested in breaking down the action into multiple national proceedings, discouraging plaintiffs from starting new proceedings all over again.

The defendant could also be interested in avoiding jurisdictions that already have the body of case law in the field of climate litigation. The EU regulation No. 1215/2012 has a role to play in climate litigation against the private sector to avoid predicting or solving controversies on the issue of international jurisdiction and 'forum shopping.'[280]

## 5. Administrative Jurisdiction

The case law analysis undertaken in the second chapter of this thesis shows that climate litigation has been brought before both ordinary and administrative courts. This constitutes the first reason to consider the scope of administrative jurisdiction in Italy. Tort law cases – such as *Urgenda, Juliana,* and *Shell* – against the private sector or the government must be brought before ordinary courts, while judicial review claims – such as *Gloucester* - are adjudicated by administrative courts.

[279] In other fields of law, different European regulations apply. For example, international jurisdiction to start an insolvency proceeding is granted by EU regulation No. 848/2016, which replaces CE regulation No. 1346/2000. This regulation is commented thoroughly, in Italian, in DE CESARI-MONTELLA, *Il nuovo diritto europeo della crisi d'impresa*, Torino, 2017.

[280] The topic of transational litigation, *forum shopping* and conflicts of jurisdiction has been analyzed in LUPOI, Conflitti transnazionali di giurisdizioni, I Policies, metodi, criteri di collegamento, Milano, 2002. See, also, LUPOI, *International Jurisdiction in Civil Justice in Italy,* p. 307 et seq., edited by De Cristofator and Troker, Jigakusha, 2010.

However, there is a further and deeper reason for an in-depth analysis of the administrative jurisdiction. Climate litigation case law and academic writing sometimes mention notions such as 'collective interests,' 'diffuse interests, 'homogeneous rights,' and 'subjective rights.'

The sections about the right of action mentioned the meaning of 'subjective right'; it is now necessary to dig into the rules that regulate the administrative jurisdiction to highlight the legal meaning of 'interests' and 'legitimate interest.' Further, considering the scope of administrative jurisdiction allows venturing into the realm of 'diffuse' and 'collective' interests, as opposed to 'homogeneous rights,' which find application in the context of class actions.

This third chapter aims to charter the Italian legal framework that, directly or impliedly, applies to climate litigants. Consistently with this proposition, the following subsections consider: *(i)* the historical background of the dual jurisdiction system, *(ii) o*ther special administrative jurisdictions, *(iii)* areas of administrative jurisdiction: *giurisdizione di legittimità*, *esclusiva*, *di merito, (iv)* the theories around the concept of *interesse Legittimo, (v)* diffuse" and "collective" interests.

## 5.1 Historical Background of the Dual Jurisdiction System

Based on the distinction between ordinary and administrative jurisdiction, the present system is the result of a historical process that started before the 1861 Italian national unification and developed up to the present day.

The pre-unification states had various systems of administrative justice, as well as France, Spain, Portugal, Greece, and Romania.[281] After the unification in 1861, the Italian legislator chose to centralize the judicial protection of the individual against the public administration before the ordinary judge. As a result, law No. 2248 of 1865 abolished the previously existing systems of administrative jurisdiction (Article 2). That ordinary courts could adjudicate disputes involving public administration was inspired by the British 'rule of law' principle and the 1831 Belgian constitution. The public power was to be judged by ordinary courts similarly to claims among privates.

Law No. 2248 of 1865 also established the limits of the ordinary judges towards the public administration. Under its Article 4(2), ordinary courts cannot modify or annul administrative acts – they can only disapprove them. Such limits are still in place even though, in the present scenario, a dual jurisdictional system is in place, and the annulment of an administrative act can be sought before administrative courts.

Despite the 'good intentions,' the paradoxical result of Law No. 2248 of 1865 was a diminished judicial protection for the individuals *vis-à-vis* the public power, given that courts could not annul the administrative acts and the administrative jurisdiction was abrogated.

After an intense debate, this system was changed all over again by law No. 5992 of 1889, which re-introduced the administrative jurisdiction instituting the fourth section of the *Consiglio di Stato.*[282] The latter already existed and had – and still has – advisory functions. The fourth section was granted jurisdictional power to oversee administrative acts' legality. In case of violation of a legitimate interest (*interesse legittimo*), individuals could seek an annulment to restore the factual

[281] CLARICH, *Manuale di diritto amministrativo*, Bologna, 2015, p. 469.
[282] CASETTA, *Manuale di diritto amministrativo*, Milano, Milano, 2011, p. 688.

and legal situation as it was before the unlawful act. Despite the many developments that happened in the following decades, the law of 1889 set the basic framework that is still in place today: Ordinary courts have jurisdiction in the field of subjective rights, while administrative courts adjudicate over legitimate interests.

Law No. 42 of 1907 instituted the fifth section of the *Consiglio di Stato*. Under specific circumstances and within a given set of subject matters, the law granted the fifth section the power to go beyond the annulment of the administrative acts and modify their content.

Royal decree No. 2840 of 1932 attributed to the *Consiglio di Stato* exclusive jurisdiction, including over subjective rights, in certain subject matters, such as public employment, recognition, and transformation of public bodies and entities. In these areas, the border between legitimate interest and subjective rights was blurry and caused great uncertainty. Therefore, the legislator chose to allocate predetermined subject matters under administrative jurisdiction.

Further development followed suit after the end of fascism and WWII. Article 103(1) of the 1948 democratic constitution confirmed the dichotomy between subjective rights and legitimate interests on the one hand and ordinary and administrative jurisdiction on the other. Mindful of the legislation under the fascist dictatorial regime, Article 113(2) requires that any administrative action is subjected to judicial review, regardless of the context in which it is issued. Article 113(3) grants the legislator the freedom to determine when ordinary courts have the power to annul administrative acts. The general principle is still dictated by Law No. 2248 of 1965, under which ordinary courts cannot annul administrative acts but only disapply them. However, thanks to the flexibility of Article 113(3), in specific fields of law, ordinary courts can annul an administrative act. It is the case of administrative pecuniary fines that can be challenged before the peace judge. Article 125(2) requires establishing a system of administrative courts in each Italian region (*Regione).* This provision was enacted only in 1971 when law No. 1034 of 1971 established the regional administrative tribunals (*Tribunale amministrtaivo regionale – Tar*). The same piece of legislation established that each *TAR* is the first instance court for claims that fall under administrative jurisdiction, while the only appellate body is the *Consiglio di Stato.* This setting is consistent with Article 125(5) of the constitution and with Article 111, which states that the decision issued by the *Consiglio di stato* can be appealed before the plenary session (*sezioni unite*) of the *Corte di cassazione* only on jurisdiction grounds.

Law No. 205 of 2000 reformed the administrative proceeding to ease access to administrative justice. Such law reformed, among other aspects, the *interim* judicial protection, introduced special proceedings, modified the phase of evidence taking, and extended the scope of exclusive jurisdiction of administrative courts in matters involving subjective rights. The *Corte costituzione* partially declared the partial unconstitutionality of the latter part of the law with decision No. 204 of 2004. The court held that the legislator had violated Article 103(1) of the constitution, which allows the legislator to grant administrative courts jurisdiction over subjective rights only in residual cases.[283]

[283] *Corte costituzionale*, judgement No. 204 of 2004, available in in the on-line database Leggi d'Italia.

It also attributed the subject matter of compensation for damages caused by an illegitimate administrative act to the administrative jurisdiction.[284]

After a series of rhapsodic interventions by the legislator, in 2010, the Parliament passed the legislative decree No. 104 of 2010, also known as *Codice del processo amministrativo* or *c.p.a.* This piece of legislation introduced, for the first time in Italy, a comprehensive code of the administrative, judicial proceeding.

## 5.2 Other Special Administrative Jurisdictions

The administrative jurisdiction entails some sub-systems of jurisdiction for special fields of law: public budget management, tax law disputes, and use of public waters. Some of them are mentioned explicitly by the constitution, while the statutory law establishes others.

Articles 100(2) and 103(2) of the constitution mention *Corte dei conti*. Besides having non-judicial advisory and control functions towards the government on public budgetary issues, it also has jurisdiction over public budget matters.

Legislative decree No. 545 of 1992 introduced *Commissioni tributarie provinciali e regionali*, which are courts with jurisdiction in cases involving fiscal matters. The specific scope of their jurisdiction is defined by the legislative decree No. 546 of 1992.

For disputes revolving around the use of public waters, royal decree No. 1775 of 1933 instituted a special jurisdiction composed of eight first-instance tribunals, an appellate body called *Tribunale superiore delle acque pubbliche*.

These separate 'special' court systems fall within the macro-category of administrative jurisdiction. Yet, the law restricts their scope of action and concerns only specific subject matters. Therefore, while it is useful to know about their existence, for this thesis, it is important to keep in mind that any reference to the administrative jurisdiction is to the *tribunal amministrativi regionali – Tar* and *Consiglio di stato*. *Tar* and *Consiglio di stato* are the 'general' forum in administrative jurisdiction.

## 5.3 *Giurisdizione di Legittimità, Esclusiva, di Merito*

Under the *Codice del processo amministrativo*, the administrative jurisdiction of the *Tar* can be divided into three areas: general, exclusive, and on the merits.

The general jurisdiction concerns all disputes between individuals or private entities against the public administration that concern legitimate interests (*interessi legittimi*), as opposed to subjective rights (*diritti soggettivi*), which fall under the ordinary jurisdiction. This dichotomy is the

[284] In 1999, before the aforementioned reform, the *Corte di cassazione* in plenary session held that the right to monetary compensation following an illegitimate act is a subjective right and its adjudictation is up to the ordinary jurisdiction. The latter could therefore ascertain that an administrative act was illegitimate as an incidental question for the purpose of the compensation of economic damages. As a consequence, the administrative courts had lost their supremacy over the legitimity of administrative acts. The reform of the judicial administrative proceedings made sure to overcome such inconsistency. See, *Corte di cassazione*, sezionni unite, judgement No. 5000 of 1999, availble in the on-line database Leggi d'Italia, commented among other by CARBONE, *La cassazione riconosce la risarcibilità degli interessi legittimi*, in *Danno e Responsbilità*, 1999,10, p. 965.

fundamental criterion to distinguish between ordinary- and administrative jurisdiction. Disputes concerning subjective rights are decided by ordinary courts (*Tribunale ordinario*), while claims involving legitimate interests must be made before the administrative courts (*Tar*). In the field of general jurisdiction, the plaintiff seeks the annulment of an unlawful administrative act that violates a legitimate interest.

Article 103(1) allows the legislator to broaden the scope of administrative jurisdiction, including in cases involving subjective rights. Articles 7(5) and 113 *Codice processo amministrativo* implement this constitutional provision setting out the specific subject matters that, even concerning subjective rights, fall under administrative jurisdiction. In these cases, the plaintiff seeks judicial protection for their legitimate interests and subjective rights. The consequent decision on the merits produces its *res iudicata* effects on both. Among many others, the exclusive jurisdiction comprehends disputes involving public employment, measures issued by the Italian Central Bank (*Banca d'Italia*), damages compensation for the delay of the administrative process, controversies for public procurement, and administrative acts in the area of urban planning and construction. It is not easy to draw a straight line between legitimate interests and subjective rights in all these cases.

Nevertheless, the need for legal certainty justifies the erosion of ordinary jurisdiction. Mindful of this, the legislator chose to attribute all disputes to the administrative courts. In 2004, the *Corte costituzionale* set a limit to the expansion of the exclusive jurisdiction, ruling that Article 103(1) is subject to restrictive interpretation and the legislator can only choose those areas that involve the exercise of public power by the administration, while its mere involvement is not sufficient.[285]

The third area of jurisdiction is regulated by Articles 7(6) and 134 *Codice del processo amministrativo*. It involves only five cases where courts can enter the merits and replace the public administration in exercising its power. The most relevant hypothesis provided by Article 134(a) is *giudizio di ottemperanza*, meaning a judgment that is started to obtain the enforcement of a ruling favorable to the individual that the public administration is not implementing. This mechanism can be used to enforce both ordinary- and administrative courts' decisions.

### 5.3.1 The Theories Around the Concept of *Interesse Legittimo*

The function of legitimate interests is linked to the interactions between privates and the public administration. It comes into play when the latter acts are exercising public power to pursue public interest. When someone – an individual or entity – is subjected to public administration, subjective right is not appropriate because "right" equates to a 'power' or 'pretense.' Being subjected to public power is incompatible with having a 'right' toward the public body. In such cases, the individual has a mere 'interest' which can be protected before an administrative court when 'legitimate' – hence, *interesse legittimo*. The notion of *interesse legittimo* only applies when the public administration exercises public power.

[285] *Corte costituzionale*, judgment No. 104 of 2004, available in the on-line database *Leggi d'Italia.*

In many circumstances, the public administration interacts without subjecting individuals to its power and uses the "toolkit" offered by private law. In such cases, individuals are entitled to subjective rights.

The practical consequence is that ordinary courts adjudicate subjective rights unless the subject matter falls under the scope of exclusive jurisdiction provided by Articles 7(5) and 113 *Codice processo amministrativo*. The fact that the legislator felt the need to establish the arrangement of exclusive jurisdiction, which includes both subjective rights and legitimate interests, shows how uncertain this distinction can be in certain areas of law. Regardless, it is now useful to summarize the three theories on the scope of *interessi legittimi*.

*Interessi legittimi* are distinguished in two categories: "*interessi legittimi pretensisvi*" and "*oppositivi*". The first type refers to situations in which the private interest can be achieved through the active conduct of the public administration, while in the second, the private interest requires an omission by the public power. A few examples should help clarify this distinction.

Someone who participates in a public examination has an interest that can only be achieved through the action of the public body that manages the test. This is an *interesse pretensivo*. Candidates lack a subjective right toward the public administration to pass the exam: nobody has the "right" to pass an exam or get a certain grade. Likewise, candidates may have plenty of good reasons to be interested in a good grade or pass the test, but personal motives are irrelevant to the law. However, on top of the personal interest in passing the exam, the individual has a legally relevant interest that the public power is exercised lawfully – fairly and impartially.

The second category is exemplified by the case of eminent domain proceedings, which the public administration can leverage when it is necessary to build public infrastructure. The private owner of the land does not have a right towards the public administration, but they have an interest that the public power is exercised lawfully by the authority. This is a case of *interesse opposition*.

In both cases, the individual interacts with the public administration while having a personal interest in achieving or preventing something and is subjected to public power. This means that they are not entitled to a subjective right. However, they may seek judicial protection of their legitimate interest if the authorities do not exercise their power lawfully. For example, if the exam was rigged and, for such reason, the candidate did not pass the exam, or if the owner of the house was unjustly expropriated due to a wrong application of the planning law, the administrative court can annul the administrative acts that concerned the exam or the eminent domain proceedings.

The notion of *interesse legittimo* (legitimate interest), opposed to the one of *diritto soggettivo* (subjective right), is critical to distinguish between ordinary- and administrative jurisdiction and Articles 24, 103, 113 of the constitution mention *interesse legittimo*. Yet, no provision defines this legal arrangement. Therefore, scholars have stepped in to develop a series of possible definitions and theories.[286]

[286] ORLANDI, Le situazioni giuridiche soggettive e passive, edited by L. Mezzetti, Diritti fondamentali, Torino, 2013, p. 150.

According to a first view, worked out in the late nineteenth century, legitimate interests are an interest that is protected occasionally by the law when the private interests overlap with the public one to the legality of the acts issued by the public administration.[287]

A second theory, developed in the early decades of the 20th century, held that legitimate interests exist only as a consequence of the illegitimate administrative act. When the public authority issues an unlawful act, the individual has the right to sue and seek its annulment. Legitimate interests would be a mere procedural power that follows an illegitimate act. However, this conception has been surpassed by time and does not fit into the present normative scenario. Law No. 241 of 1990 provides private stakeholders great powers to intervene and influence public authorities in how they exercise their power – private interests are relevant when the administrative process is still ongoing and before any act is issued.

A third view sets out by considering that the laws that attribute powers to the administration (*norme di relazione*) explicitly or impliedly take into account private interests. Whoever is entitled to those interests can interact with the public administration before and after any administrative act is issued and, as a last resort, seek judicial review and annulment. Legitimate interests consist of this set of powers nested in the realm of public power and its exercise.[288] This theory was also accepted by a 1999 landmark ruling issued by the plenary session of the *Corte di cassazione*, which found that the violation of legitimate interests by the public administration can determine the insurgency of a right to compensatory damages under tort law.[289] In this perspective, *interesse legittimo* exists before the authority has exercised its power. It has a material nature, making it look similar to the subjective right.

## 5.3.2 'Diffuse' and 'Collective' Interests

Both subjective rights and legitimate interests amount to an individual situation, legally recognized by the law. Despite their differences, they share the fact of being attributable to one specific individual. The same cannot be said for those supra-individual interests that concern consumers, workers, and those who use the public transportation system or live in a specific environment. Their interests inevitably transcend the individual.

Prominent Italian scholars have debated whether the collective interest is the 'sum' of individual interests or, instead, a new interest that exists, as such, only in a collective dimension and consists of the combination of individual interests.[290]

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[287] RANELLETTI, Ancora sui concetti discretivi e sui limiti della competenza giudiziaria e amministrativa, in Foro italiano, 1893, I, 470.

[288] M. NIGRO, *Giustizia amministrativa*, edited by E. Cardi and A. Nigro, Bologna, 2002.

[289] *Corte di cassazione*, sezioni unite, judgement No. 500 of 1999.

[290] For an in-depth analysis see DONZELLI, *La tutela giurisdizionale degli interessi collettivi*, Napoli, 2008, p. 302 : "*possiamo concludere diccendo che quando l'interprete si confronta con azioni e rimedi giurisdiozionali posti a tutela di interessi collettivi, l'interesse materiale tutelato è costituito da un'insieme di interessi individuali compatibili concorrenti. (...)* The Author further (p. 304) argued that: *"Possiamo concludere, quindi, rilevando che la stessa distinzione-contrapposizione tra interesse individuale e interesse collettivo appare fuorviante, in quanto in entrambi i fenomeni abbiamo a che fare con interessi, che – in quanto tali – non possono che essere individuali, ossia appartenenti all'individuo. Sarebbe più corretto, quindi, per differenziare, distinguere tra interessi (individuali) esclusivi e interessi (individuali) collettivi*"

Nonetheless, the supra-individual dimensions of collective interests poses questions of standing, consistently with the lack of a relationship of exclusivity with one specific individual and potential plaintiff. It has already been mentioned how standing rules reflect the theories on the right of action, reflecting classic nineteenth-century individual conflict situations. Historically, the need for collective redress emerged in the 1960' as a consequence of society's 'massification.'[291]

Italian scholars have addressed this realm, distinguishing between "diffuse" and "collective" interests: *interessi diffusi* and *interessi collettivi.*

*Interessi diffusi* are inherently collective and non-exclusive.[292] They concern "common goods" that anyone can enjoy without limiting others' access to them. At the same time, nobody can establish a relationship of exclusivity. Consequently, some authors maintain that they are irrelevant in the eyes of the law, while others think of them as a *tertium genus* alternative to the categories of subjective rights and legitimate interests.[293]

*Interessi collettivi* are an evolution of *interessi diffusi* when the latter are explicitly contemplated by the statutory law, which grants standing to certain entities for their judicial protection. Granting extraordinary standing (*legittimazione straordinaria*) to associations representative of a particular group triggers collective redress mechanisms that this thesis considers in the paragraphs concerning the issue of standing.

Examples of *interessi collettivi* are provided by *(i)* Art. 28 of law No. 300 of 1970 and by Article 18(5) of law No. 349/1986.

In the field of labor law, Art. 28 of law No. 300 of 1970 grants standing to unions associations for the vindication of the collective trade union rights to which the unions and each individual worker are entitled.

Under Article 18(5) of law No. 349/1986, environmental associations can join civil proceedings commenced by the state to vindicate environmental harm. In addition, under Articles 13 and 18(5) of the same law, environmental associations can also seek the judicial review of illegitimate administrative acts in administrative jurisdiction.

This distinction between *interessi diffusi* and *interessi collettivi* was proposed by Guido Alpa.[294] In his view, when the law grants standing to an entity for the protection of general interest, such interest classifies as 'collective.'

The distinction between the two categories was further addressed by *Corte di cassazione* in its landmark decision No. 1463 of 1979[295], which opened the courtrooms' doors to individual plaintiffs for environmental. The court found that common goods are either 'divisible'" or 'indivisible.'

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[291] DENTI, Relazione introduttiva al Convegno di studio svoltosi a Padova nel giugno del 1974, published in Le azioni a tutela collettiva, Padova, 1976, p. 17 and in the journal Rivista di diritto processuale, 1974, p. 533.

[292] In general on the notion of *interessi* diffusi, see: VOCINO, *Sui cosiddetti interessi diffusi*, in *Studi in memoria di Salvatore Satta*, II, Padova, 1982, p. 1879; DENTI, *Interessi diffusi*, in *Novissimo Digesto italiano*, App. IV, 1983, p. 305; PUNZI, *La tutela degli interessi diffusi e degli interessi collettivi*, in *Rivista di diritto processuale*, 2002, p. 647; TROCKER, *Interessi collettivi e diffusi*, in *Enciclopedia giuridica Treccani*, Roma, 1989, p. 1.

[293] CLARICH, Manuale di giustizia amministrativa¸ Bologna, 2022, p. 90.

[294] ALPA, Interessi diffusi, in Digesto delle discipline privatistiche, IX, Torino, 1993, p. 610.

[295] Cassazione civile, sezioni unite, No. 1463 of 1979.

Divisible common goods can be enjoyed separately by each individual and collectively, e.g., the environment. Indivisible goods are inherent to the structure of society; they do not exist outside societal institutions and cannot be enjoyed individually: e.g., national security or public order. Concerning this category of common goods, there are mere *interessi diffusi*. There is no place for subjective rights or legitimate interests. These interests can only be pursued and protected by the executive and legislative branches of government. No individual or entity can take action for their judicial protection. According to the court, divisible common goods also have an individual side to them. They are, therefore, compatible with individual or group-led judicial protection. Remember that this decision was issued in the "stone age" of environmental law. The environmental code passed in 2006 conceived the environment as an indivisible common good, and the law grants standing only to the Ministry of environment. This evolution is reported in length in the paragraphs that deal with standing and environmental harm.

If we apply Alpa's definition strictly, combined with the findings of the 1979 judgment of the *Corte di cassazione*, the only cases when *interessi diffusi* have judicially protected the plaintiff is a public institution. For example, under law No. 198 of 1989, the Ministry of the University can seek the judicial review and annulment of administrative acts issued by the dean.

In other words, a strict application of Guido Alpa's definition and the 1979 case law should lead to the conclusion that *interessi diffusi* can only be protected by the state, either through its administrative action or judicially. Individuals seem never to be admitted to the judicial protection of *interesse diffusi*. If law grants standing to an entity representing a social group, e.g., environmental or consumer associations, it is a matter of *interessi collettivi*, not *interessi* diffuse. When such interests relate to "divisible" common goods, according to the *Corte di cassazione*, individuals can claim them because they can be divided into a multitude of *interessi legittimi* (legitimate interests) or *diritti soggettivi* (subjective rights).

In any other case, when it is not the state itself to seek judicial protection for the common good, it is incorrect to use the term "*interessi diffusi,"* as these cases fall under the scope of *interessi collettivi.* Unfortunately, the legislator itself seems to confuse these two notions sometimes. This seems to happen in the case of the presidential decree No. 670 of 1972, under which the regional councilors of the region *Trentino-Alto Adige-Südtirol* can seek judicial review and annulment of any administrative act that violates linguistic minorities' rights to equal treatment. The same goes for Articles 7 and 9 of law No. 241 of 1990, which allows entities representing "diffuse interests" – *rectius, collective interests* – to participate in the administrative proceeding that leads to an act that could impact such interests. Both provisions mention "*interessi diffusi*," but they should write "*interessi collettivi*."

### 5.3.3 Conclusive Remarks for Climate Litigation

Any rigid definition of diffuse and collective interests is doomed to fail and might not even be helpful. In the context of climate litigation, however, it is relevant to look into what category could fit the climate system. In other words, it is critical to determine how the interest in living in a

sustainable climate qualifies in the Italian legal framework. This sub-section proposes four alternatives.

First, *interessi legittimi* involve an interaction with the public administration and its exercise of power through an administrative act. They must be personal and individualized. The collective nature of climate change is not compatible with the *interessi legittimi.*

A case like *Gloucester* could, however, could only replicate if people found an association and used the tools of administrative law to either participate in the administrative procedure that leads to the issuance of permits required by infrastructure projects under Articles 7 and 9 of law No. 241 of 1990; or by seeking the judicial review and annulment of the administrative acts that lead to the unwanted development project.

Second, living in a sustainable climate could qualify as a 'diffuse interest.' There would be no legal basis for its judicial protection in this case.

Third, the law could grant standing to environmental associations and transform the interest in a safe climate from 'diffuse' to 'collective' – hence, justiciable.

The fourth option is to argue that it is a subjective right justiciable before ordinary courts. More specifically, it could be argued that it is a homogeneous right under Article 840-bis c.p.c., which regulates the class action device. The section on class action will further develop this perspective.

## 6. Political Non-Justiciable Acts Under Article 7 c.p.a.

Climate litigation causes a clash between the judiciary and other branches of government, as governments argue that courts cannot "judge" their climate policies. These arguments were raised, among other cases, in Urgenda and Juliana. The same issue arises in strategic claims against the private sector, although only in an indirect way. Companies argue that they do not breach any law by emitting GHG, and the court cannot "make" the law. This objection was raised in *Shell*, as the plaintiffs based their claim on tort law and the duty of care.

This section focuses on the arguments advanced by the governments. Following the considerations expressed above on the difference between subjective rights and legitimate interests, this section aims to propose possible counterarguments based on Article 7, last sentence, c.p.a. The latter provision states the following:

| Articolo 7 c.p.a. | Article 7 c.p.a. |
|---|---|
| *"(...) Non sono impugnabili gli atti o provvedimenti emanati dal Governo nell'esercizio del potere politico."* | *"(...) Acts or measures issued by the government in the e-exercise of political power cannot be challenged."* |

In strategic climate litigation before ordinary courts, claims rely on tort law, and plaintiffs do not challenge one specific act. Nevertheless, how the case law construed the notion of "political act" could be of interest to climate litigants to argue in favor of the justiciability of their claims. Indeed, in strategic litigation, governments argue that their conduct is the expression of a policy decision, hence of non-justiciable political acts.

The point is that administrative justice's definition of a "political act" could also apply before ordinary civil courts. In both cases, the political nature of the government's conduct leads to a lack of jurisdiction, hence the dismissal of the case on procedural grounds.

In general terms, the breadth of the notion of "political act" determines the scope of the jurisdictional power towards the government. Article 113 of the constitution mandates that public authorities are subjected to judicial review. Further, the constitution recognizes the principle of the" rule of law" to which the government is subjected. In light of this constitutional setting, scholars and courts have tried to limit the definition of "political act."

Starting from an opinion issued by *Consiglio di stato* in 2019, the following subsections then pinpoint the limits of what a non-justiciable political act means under Article 7 c.p.a., according to the milestone judgments of *Consiglio di stato, Corte di cassazione,* and *Corte costituzionale.*

The ways such courts have construed Article 7 c.p.a. defined the boundaries of the judiciary vis-à-vis the executive branch of government. The rulings mentioned by *Consiglio di stato,* issued by *Corte costituzionale* and *Corte di cassazione,* offer compelling arguments that climate litigants could use to overcome the hurdle of justiciability.

## 6.1 Consiglio di Stato, Opinion No. 2483 of 2019: Summary of the Case

The case concerned a dispute between the Austrian honorary consul in Torino and the Italian Ministry of foreign affairs. The Austrian ambassador in Italy requested the Italian authorities to renew the so-called *exequatur* in favor of the honorary consul in Torino to confirm his appointment. Following such a request, the Italian Ministry denied the *exequatur*. At that point, the ex-honorary consul challenged the act the Italian Ministry of foreign affairs issued.

The case was finally brought to the *Consiglio di stato,* which is the apex judicial body in the realm of administrative jurisdiction. The Italian Ministry of foreign affairs objected that granting or denying the *exequatur* under Article 12 of the 1963 Vienna Convention on Consular Relations is a non-justiciable "political act" under Article 7 c.p.c.

Article 12 of the 1963 Vienna Convention provides the following:

> *"1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization.*
>
> *2. A State which refused to grant an exequatur is not obliged to give to the sending State reasons for such refusal. (...)"*

The *Consiglio di stato* found that granting the *exequatur* under Article 12 of the 1963 Vienna Convention is purely discretional, and no normative standard constrains the assessment of the Italian authorities in this matter. Indeed, the entire process involves the participation of the two sovereign states exclusively. Further, the host state is not even required to justify its decision to the other country. It found, therefore, that the Ministry of Foreign affairs act was a political and non-justiciable act under Article 7 c.p.a.

Besides the dismissal of the case, as this thesis is concerned, it is helpful to retrace the arguments developed by the *Consiglio di stato*. Its opinion, indeed, map the historical evolution of the case law on the notion of a non-justiciable political act.[296]

## 6.2 *Corte Costituzionale*, Judgment No. 81 of 2012

Judgment No. 81 of 2012, issued by the *Corte costitutionale,* was mentioned by *Consiglio di stato* to argue in favor of a restrictive notion of political act.

The case that gave rise to the Constitutional court's judgment opposed the Campania Region against a woman who did not get appointed as a regional council member by its president.[297] The gender of the plaintiff matters, as she challenged the appointment act before an administrative court based on anti-discrimination principles of law. More specifically, she alleged that the appointment of a man violated the gender ratio under the gender balance rules provided by Articles 1, 5, 22, 35, 46, and 47 of the Statute of the Campania Region. The Campania Region argued that the appointment of a council member is a non-justiciable political act under Art. 7 c.p.a.

The first instance court (*T.a.r. Campania*) dismissed this argument. The court ruled that the decree issued by the President of the regional country was found to violate the gender-balance provisions of the statute. Hence, the decree was annulled.[298] The judgment was upheld by the appellate body – *Consiglio di stato*.[299] After exhausting all ordinary appeals, the Campania Regions resorted to the *Corte costituzionale* claiming a "conflict of attribution" between the judiciary and the Campania Region under Article 122(5) of the Constitution. Once again, the Region argued that the court lacked jurisdiction on matters concerning political discretion. The appellant noted that a council member's appointment is based on *intuitus personae*. Therefore, there is no need for further reasons besides a political assessment. The appellant argued that a court intervention on the validity of a decree appointing the Regional Council undermines the constitutes an undue interference with the powers assigned by the constitution to the president of the regional council.

The President of the Council of Ministers joined the proceedings before the constitutional court, seeking the appeal's dismissal.

The *Corte costituzionale* declared the appeal inadmissible because it was leveraged as an improper means of appeal against the judgments of the administrative judge. Further, it found that the circumstance that the president of the regional counsel is a political body who exercises political power does not mean that their acts are all, and in every respect, non-justiciable. The issue of justiciability under Article 7 c.p.a. must be evaluated with regard to the existence of a legal provision or principle that limits discretionary political power. In the case at stake, explicit provisions

[296] *Consiglio di stato* notes that Article 7(1), last sentence, c.p.a. is a controversial provision, as it seems to conflict with Article 113 of the constitution. The court mentions that Article 7 c.p.a. takes up Article 31 of the royal decree No. 1054 of 1924 (*testo unico Consiglio di stato Stato*), which itself reflected Article 24 of the previous law No. 6166 of 1889. Further, the judgment exposes how some scholars have called for its repeal, following the entry into force of Article 113 of the constitution, which provides for the appealability of all acts of the public administration in the courts without exclusions or limitations for certain categories.

[297] *Corte costituzionale*, judgment No. 81 of 2012, avallale in the online database *Leggi d'Italia.*

[298] *T.a.r. Campania*, judgment No. 1985 of 2011.

[299] *Consiglio di Stato*, judgment No. 4502 of 2011.

on gender-balance applied to the political choice, limiting the discretionary power of the president of the regional council. Hence, administrative courts found the decree of appointment reviewable to the extent that it violated a legal norm.[300]

## 6.3 *Corte di Cassazione*, Sezioni Unite, No. 18829 of 2019

The case that led to the ruling of the plenary session of the *Corte di cassazione* concerned a project for constructing a chairlift in the alpine mountains around Livigno. The Italian government had issued a decree to formally recognize an agreement between the Lombardia Region and several Ministries and national authorities concerning the project. The environmental organization *Legambiente ONLUS* challenged such a decree.

The first instance court – *T.a.r. Lombardia* – noted that the project included dismantling the existing two-seater chairlift, expanding the skiable area, constructing new parking lots, and requiring complementary plant works and structures. As a result, the court qualified it as a new plant rather than a mere technological upgrade of the pre-existing facility. The regional and provincial landscape territorial plans prohibited a new plant in that area. *T.a.r. Lombardia* found that this administrative was not adequately supported in terms of preliminary investigation. Hence, the court declared annulled the government's decree, the additional grounds improper due to the annulment of the preliminary act.

After *Consiglio di stato* upheld the first instance court's decision, the company that proposed the project and the municipality of Livigno appealed to the plenary session of the *Corte di cassazione*, arguing that the administrative courts had violated the separation of powers by annulling a political and non-justiciable act, issued by the national government.

*Corte di cassazione* dismissed the appeal, finding that the lower courts had rightly found the case justiciable under Article 7 c.p.a. The ruling relied on case law of *Corte di cassazione* – No. 21581 of 2011, No. 10416 of 2014, and No. 10319 of 2016, and No. 3146 of 2018 - and Corte costituzionale – No. 81 of 2012 and No. 339 of 2007. It found that the areas exempted from the judicial review must be confined within strict limits. In fact, an act is political only if it is impossible to identify a legal parameter - be it rules of law or principles provided by the legal system – based on which to conduct judicial review. Any time the statutory law predetermines canons of legality, policy-makers must conform to such standards despite being at the apex of the public administration. The court held that this principle is consistent with a system based on the 'rule of law.' The court further noted that this principle applies even in the case of discretionary power. In such cases,

[300] *Corte costituzionale*, judgment No. 81 of 2012, § 4.3: "*La circostanza che il Presidente della Giunta sia un organo politico ed eserciti un potere politico, che si concretizza anche nella nomina degli assessori, non comporta che i suoi atti siano tutti e sotto ogni profilo insindacabili. Né, d'altra parte, la presenza di alcuni vincoli altera, di per sé, la natura politica del potere esercitato dal Presidente con l'atto di nomina degli assessori, ma piuttosto ne delimita lo spazio di azione. L'atto di nomina degli assessori risulterà, dunque, sindacabile in sede giurisdizionale, se e in quanto abbia violato una norma giuridica.*"

despite a margin of directionality, provisions, and principles bind government and lower authorities.301 Further, the decree the Council of Ministers issued resulted from an administrative procedure under Article 14-quarter of law No. 241 of 1990 and found that such an act could not be considered a "political act." Conversely, it qualified it as an "act of high administration" under Article 14-quarter (2) of such law.[302] Concluding that the Council of Minister's decree is subject to judicial review, the court dismissed the appeal.

## 7. The Lack of Enforcement Proceedings

A significant objection against "strategic" climate litigation is that any judicial order, even if issued, cannot be enforced. There is no procedural mechanism in Italian law – and probably in any law – to force the government to change policies. As mentioned in the first chapter of this thesis, the most significant judicial result on the national laws that regulate climate change can be achieved by the *Corte costituzionale* (constitutional court), which can annul or require changes to the law. In Itlay, however, there is no direct access to the court, as cases are brought to the court by the ordinary or administrative courts when a serious question of constitutionality is posed by the legal provisions relevant to the case at stake. After the constitutional court decides, the case continues before the court of merits. Although it seems unlikely that a climate case will be brought to the constitutional court, the objection of lack of justiciability remains.

The defendant raised this objection in the *Juliana case*. While the first judge maintained that the claim would be redressable, the Court of appeals decided to dismiss the case for lack of redressability under Article III of the constitution.

The impossibility to enforce the order concern two of the three *condizioni dell'azione*: *possibilità giurdidica* (justiciability) and *interesse ad agire* (interest to sue). It can be argued that if an order cannot be enforced, there is no jurisdiction to protect the plaintiff fully. In other words, the remedy would fall outside the scope of jurisdiction. At the same time, it can also be convincingly said that the plaintiff lacks the interest to sue if its order cannot be enforced. The order would be useless. Hence, the plaintiff has no interest in suing under Article 100 c.p.c. and the claim must be dismissed on procedural grounds.

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[301] *Corte di cassazione, sezioni unite*, judgment No. 18829 of 2019, available in the online database *Leggi d'Italia*. The court expressed the principle summarized above as follows: "(…) *queste Sezioni unite (cfr. Cass. civ., sez. un., n. 21581 del 2011; n. 10416 del 2014; n. 10319 del 2016; n. 3146 del 2018) hanno già avuto modo di porre in rilievo, in consonanza con l'orientamento della Corte costituzionale (Corte cost. n. 81 del 2012; n. 339 del 2007), che l'esistenza di aree sottratte al sindacato giurisdizionale va confinata entro limiti rigorosi. Ed, infatti, per ravvisare il carattere politico di un atto, al fine di sottrarlo al sindacato del giudice, occorre che sia impossibile individuare un parametro giuridico (sia norme di legge, sia principi dell'ordinamento) sulla base del quale svolgere il sindacato giurisdizionale: quando il legislatore predetermina canoni di legalità ad essi la politica deve, appunto, attenersi, in ossequio ai principi fondamentali dello Stato di diritto. In concreto, quando l'ambito di estensione del potere discrezionale, quale che esso sia, sia circoscritto da vincoli posti da norme giuridiche che ne segnano i confini o ne indirizzano l'esercizio, il rispetto di tali vincoli costituisce un requisito di legittimità e di validità dell'atto, sindacabile, appunto, nei modi e nelle sedi appropriate.*"

[302] Law No. 241 of 1990 was amended by decree-law No. 133 of 2014, art. 25 converted with amendments by law No. 164 of 2014.

The Italian scholarly tradition and case law consider these issues as a matter that concerns Article 100 c.p.c. For this reason, this topic will be further analyzed in paragraph 8.9.

Nevertheless, this paragraph considers the matter of 'remedies' in civil and common law traditions. The case law analysis in the chapter includes the *Leghari* and *Doucet-Boudreau* cases.

The Pakistani *Leghari* case dealt with strategic climate litigation for implementing adaptation measures foreseen by the government's policy documents. The plaintiff sued the government of Pakistan based on constitutional rights to life, health, and others. He sought and obtained an order against the government to implement certain adaptation measures against the effects of climate change. As part of the remedy, the court order went as far as creating a commission to supervise the implementation of the order. Such a degree of 'creativity' is hard to imagine in civil law countries.

The Canadian *Doucet-Boudreau* involved the protecting French-speaking linguistic minorities in the context of NovaScotias' school system. The Supreme Court found that the court, in addition to issuing an order, can also impose reporting duties (back to the same court that decided the case) on the defendant:

> "*The judge found a section 23 violation and ordered the province and the Conseil to use its 'best efforts' to provide school facilities and programs by specified dates. The judge also said he retained jurisdiction to hear "reports" on the status of such efforts."*

In the context of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada interpreted the notion of "appropriate and just" remedy under Article 24(1) of the Canadian Charter according to three criteria:

> *"First, an appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant.*
>
> *Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. (..).*
>
> *Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedents.*
>
> *Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made."*

Based on such an extended notion of remedy – hence of jurisdiction – the Supreme Court ruled that the first instance court had rightly imposed reporting duties to the government of Nova Scotia

to supervise the progress made in compliance with the order issued by the court to remove discrimination against French-speaking minorities. Despite the rigorous examination of the matter by the Supreme Court of Canada, in the eyes of a European civil law layer, it is still surprising to learn about the flexibility of common law remedies.

In Leghari and *Doucet-Boudreau*, the courts imposed reporting to the defendants, and such orders retained their jurisdiction. These rulings show the high potential of the notion of "appropriate remedy" that guides ordinary law courts, as opposed to civil law courts which are bound to the scope of the subjective rights provided by the substantive law.

This flexibility seems to be the direct consequence of the influence of the Roman formulary proceedings on the traditional common law. In addition, the primacy of the remedy, even in cases where written constitutional provisions were applied, helped conceive such creative remedies.

## 8. Justiciability and Ethical Issues in the Italian *Englaro* Case

The conflict between the judiciary and the legislative powers is not a prerogative of public interest litigation. Instead, it occurs any time courts are asked to deal with new legal issues that the legislative or executive branches of government have not addressed.

The Italian legal order experienced a clash between the judiciary and the political power on the issue of 'passive euthanasia' and 'the living will.' This conflict arises from the fact that medical science's development created the conditions to preserve human life even when patients lie in vegetative states for years – yet the legislature did not regulate this matter until 2018. [303] However, before 2018, in the absence of legislative or government guidelines, courts dealt with the legal implication of such practices.

In such a context, the *Englaro* case stands out as the most significant conflict between ordinary civil courts and the other branches of government. Courts involved in the case dealt with ethical questions concerning the nature of the right to life, dignity, and self-determination. Yet, simultaneously, the government and the parliament interfered several with the pending judicial proceedings, assuming that it was inappropriate for the judiciary to address such issues.

A car crash had left a young woman – Eluana Englaro – in an irreversible vegetative state. Before the accident, she had informally expressed to her friends the will to avoid medical treatment in case of irreversible vegetative conditions. Thus, to respect her will, the father – acting as her guardian – sought an order from the tutelary judge to interrupt the ongoing medical treatments.

*Giudice tutelare* di Lecco and the *Corte d'appello* di Milano rejected the request made by Eluana's father on the ground that the right to life must be protected regardless of the will of the unconscious patient. Then, in 2007, the *Corte di cassazione* finally reversed the lower courts' rulings, finding that Eluana had the right to have the medical treatments interrupted, according to her will.[304]

[303] Law No. 2019 of 2018 allows someone to pre-determine the treatments they are willing to accept.
[304] See, Cassazione civile, judgment No. 21748 of 2007.

More in detail, the Court ruled that the guardian of an unconscious patient may seek a judicial order to interrupt treatments under two circumstances: first, the patient's vegetative state must be irreversible, and second the request made to the court is backed up by evidence that the patient expressed, throughout their life, the will to avoid such life-preserving medical therapy, including the use of feeding-tube. Following such principle, in 2008, the *Corte d'appello* di Milano finally allowed the interruption of the medical treatments and the force-feeding that kept Eluana alive.[305]

Despite the tragic implication of this case, it sparked a heated – and often disrespectful – political debate, which resulted in an unprecedented clash between the judiciary and the legislative and executive branches of government.

Both chambers of Parliament – Camera dei Deputati and Senato della Repubblica – initiated a proceeding before the *Corte costituzionale*, requesting it to annul the judicial rulings rendered by the *Corte di cassazione* and *Corte d'appello* di Milano, based on the separation of powers doctrine.[306]

The Italian Parliament argued that the ordinary courts had violated the separation of powers by stepping into the province of discretionary political power. In the Parliament's view, the judiciary *de facto* created new legislation on a politically sensitive issue – such as the ethical problem of defining the 'right to die' – despite the absence of explicit provisions. Further, the judiciary did so while political parties were discussing proposed legislation. Finally, the rulings relied on constitutional provisions that are not self-executing and need the 'mediation' of the legislative power.

The *Corte costituzionale*, however, dismissed the claims; it found that the judiciary had rightfully exercised its power by applying the statutory and constitutional law.[307] *Corte di cassazione* and *Corte d'appello* did not step into the political province using the *façade* of a judgment to, in effect, create legislation. Furthermore, in the Court's view, the Parliament used the proceedings before the Constitutional Court as an inadmissible 'extra appeal' on the merits of the decisions. The political branches of government, however, cannot challenge the logic applied by the judiciary before the Constitutional Court. The Parliament must accept the content of a decision as long as the judiciary applies the law. Only the parties to the proceedings can appeal a ruling using the means of appeal provided by civil procedural law. In conclusion, the *Corte costituzionale* found that in the *Englaro* case, the judiciary exercised its function and dismissed the proceedings initiated by the two chambers of Parliament against the rulings of the *Corte di cassazione* and *Corte d'appello* di Milano.[308]

Despite this setback, the Italian government did not give up in its clash against the judiciary and proposed a bill that, if passed into law, would have stopped the enforcement of the judgments

[305] See, *Corte d'appello* di Milano, judgment of July 9, 2008. This ruling, as well as Cassazione civile, judgment No. 21748 of 2007, are analysed by CASABURI, *Autodeterminazione del paziente, terapie e trattamenti sanitari salvavita* and by ROMBOLI, *Il conflitto tra poteri dello Stato sulla vicenda E.: un caso evidente di inammissibilità*, both articles in *Foro Italiano*, 2009, Vol. 132, 1, pp. 35-100.

[306] Under Article 37 of Law No. 87 of 1953, the two branches of Parliament (Camera dei Deputati and Senato della Repubblica) initiated two separate proceedings based on similar arguments

[307] *Corte costituzionale*, judgment No. 334 of 2008.

[308] CAPONI-PROTO PISANI, Il caso E.: brevi riflessioni dalla prospettiva del processo civile, in Il Foro Italiano, 2009, Vol. 132, No. 4, pp. 984-987.

issued in the *Englaro* case. From a constitutional- and procedural law perspective, the political motives of this draft law are concerning in many ways. It is outrageous that, while a judicial case is pending, the political branches of government try to interfere by passing legislation meant to apply to that very case. However, they could not have been applied to Eluana Englaro, as her 'right' to interrupt medical treatments and forced feeding had already been recognized by a judicial decision, which produced the *res judicata* binding effect. The draft law was presented on February 6, 2009. Eluana Englaro died three days later.

This case is relevant in the context of the present analysis as it shows that the scope and actual meaning of fundamental rights in a fast-changing society, driven by technology developments, has the potential to create friction between the judiciary and the other branches of government at risk. The reason is that citizens resort to courts when their rights or interests are infringed, and the judiciary cannot ignore the claims made by plaintiffs; judges must decide the case. Conversely, political bodies can procrastinate a debate. However, fundamental rights violations sometimes require quick action and cannot wait for parliaments to reach an agreement.

The same pattern is repeated in climate litigation against governments or the private sector. Today, science – and Dutch case law – proves that the board of directors of a carbon major can have a measurable impact on the harm suffered by people worldwide. The same applies to government policies. Yet people are resorting to Court as the government and corporate action are not preventing climate change harm. Courts are between the hammer and the anvil.

# CHAPTER 9
# LEGITTIMAZIONE AD AGIRE

## 1. Standing: *Legittimazione ad Agire*

As mentioned above, standing has a two-fold nature in the Italian legal system: *legittimazione ad agire* and *interesse ad agire.* The first serves as a filter for who can bring a claim to court, while the second allows only those with an actual interest in the proceeding to start a court case. Together with the *possibilità giuridica* – justiciability –, both are the condition for the insurgence of the right of action – in Italian, the *condizioni dell'azione.* If one of these preconditions is found missing, the case's merits cannot be heard and decided because, as described in the previous paragraphs, the plaintiff lacks the right of action.

Article 81 *c.p.c.* regulates *legittimazione ad agire* indirectly. It does not provide a definition nor state when such precondition can be ascertained. Conversely, the provision sets forth that no one may claim someone else's right unless otherwise provided by the law. It states a prohibition from which a general rule and an exception can be deduced. Hence, the general rule is that the plaintiff may only seek judicial protection for their rights. Only in exceptional and legally predetermined cases may the plaintiff bring an action to protect third-party rights. Such hypotheses are referred to as 'procedural substitution' or extraordinary standing – *legittimazione straordinaria.*

The following subparagraphs will unpack the topic to explore its nuances better, giving an account for *(i)* The rationale of Article 81 c.p.c., *(ii)* The cases of so-called procedural substitution or extraordinary standing, *(iii)* Standing in case of environmental harm, (iv) *Legittimazione ad agire* for the protection of diffuse interests and the class action device in Italy.

This paragraph aims to map the normative scenario that climate litigants have to deal with in the realm of standing, understood as 'entitlement to sue.'

## 2. "Mind your Own Business": The Rationale of Article 81 c.p.c.

Article 81 *c.p.c.* states that there must be a coincidence between the active and passive parties to the underlying substantive right and, on the other hand, the corresponding active and passive parties to the proceeding. The plaintiff must affirm to be the party entitled to the right claimed and that the defendant is the passive subject of the substantial right or the person who, anyways, violated such right. This precondition is satisfied as soon as the acting party states such correspondence exists. Standing – in its side of *legittimazione ad agire* - is granted as soon as the such statement is made.

The principle is that nobody can replace the right holder in the act of suing, given that such an act is a way of disposing of one's rights. In has been described before that one of the pivotal principles that regulate the right of action is the *prinicpio dispositivo*, expressed by Articles 2907 c.c., 99, and 112 c.p.c. In disposable rights, the individual entitled to whatever right is the only person

who may exercise such rights. So, for example, the owner of good can sell, lend, lease, or donate it. They can ignore the good or, within certain limits, even destroy it. The owner is also the only person entitled to seek judicial protection for their property right – nobody else is allowed to act on his behalf. Such protection of the individual private sphere by any public power, including the judiciary, has been constitutionalized by Article 24 cost. cch states that anyone 'may' act before a court to protect 'their right.'

Seen in this light, Article 81 *c.p.c.* is the consequential implementation of the '*principio dispositivo'*, which roots back to Articles 24 cost., 2907 c.c., 99 and 112 c.p.c.[309]

Article 81 requires first determining the substantial underlying relationship is and who are the active and passive parties with regard to a specific right. Then, the plaintiff must first affirm to be entitled to the 'active' position arising out of the substantive right and, second, that the defendant is entitled to the 'passive' one. From a procedural perspective, any thoughtful court application must start from this determination. Once the plaintiff affirms this relationship, the lack of actual entitlement is a matter of merits and determines the succumbing – it is not, however, a procedural issue. This is due to the partially abstract nature of the right of action, explored in the previous paragraphs.

Let us consider an example based on tort law to highlight the difference between the issue of standing – *legittimazione ad agire* – and one of the merits. The parties involved are plaintiffs *A* and *D* on one hand and defendants *B* and *C* on the other. The factual premise is that only plaintiff *A* is the actual owner of the good *X*, which has been damaged by defendant *B*. *A*, *B*, *C*, and *D* are involved in four different scenarios that highlight the cross-overs between the procedural issue of standing – *legittimazione ad agire* – conceived as a procedural matter and precondition for the right of action, under Article 81 c.p.c., and the actual entitlement to the substantive right *X*, which concerns the merits of the decision.

### i. First-Case Scenario

Plaintiff A sues defendant B. A maintains to be entitled to the property right on the good X and that B has violated their right by damaging X.' In this case, A has *legittimazione ad agire*, as they have presented themselves as the owner of the good X and B as the debtor for damaging X. By correctly representing the active-passive relationship at the procedural level, A has the right of action. Meaning the right to a decision on the merits. The content of the latte will depend on whether A can sustain the burden of proof and whether B does not come up with objections to A's rights that the court accepts. These are matters for the merits, however. A has standing under Article 81 c.p.c.

### ii. Second-Case Scenario

*D* is a close friend of *A* and decides to help them out and sues *B* for damaging the good *X*. *D* states that *A* is the owner of the good *X*. Plaintiff *D* has no standing under Article 81 c.p.c. because they

[309] See, LUPOI, *Civil Procedure in Italy*, Alphen aan den Rijn, 2018, p. 106.

did not present themselves as the right holders. The absence of standing causes *D* to have no right of action; consequently, the case cannot be decided on its merits.

### iii. Third-Case Scenario

*A* sues *C*. In the claim, *A* states that *B* has damaged the good X. A presented defendant C as someone who is not the passive subject in the substantive law relationship regarding X. The lack of standing concerns the passive side of the substantive law relationship concerning the good *X*. *C* lacks *legittimazione passiva*. Consequently, the court cannot decide the claim on its merits because the defendant has been presented as a stranger to A's right concerning the good X.

### iv. Fourth-Case Scenario

*C* sues *B*. Plaintiff *C* presents themselves as the owner of the good *X* and states that defendant B infringed their right. As we know from the factual premise, *C* is not the actual owner of *X*. However, C affirmed to be entitled to the good *X*, which is enough to grant *C legittimazione ad agire* –the right of action. Hence, a decision on the merits is possible, but the court will reject the claim on the merits, given that the plaintiff cannot sustain the burden of proof without fabricating evidence.

These patterns can be repeated for any other right.[310] The core takeaway is that the right of action requires the mere appearance of the entitlement to the substantive right. The right of action requires the existence of *legittmazione ad agire*, which does not require the actual entitlement to the substantive right.

Conversely, only a favorable decision on the merits requires the actual existence of the right claimed by the plaintiff. In this sense, *legittimazione ad agire* serves as a filter that excludes from a decision on the merits of the claims made by or against someone who is not affirmed as being party to the underlying substantive law relationship.

As Luiso put it, *legittimazione ad agire* responds to the logic that anyone should "mind their own business" – "*ognuno si faccia gli affari suoi".*[311]

This rationale is perfectly logical and works in classic one-to-one substantive relationships. But, at the same time, it is somewhat problematic when the right of action arises out of a situation where it is unclear who the active and passive parties of the relationship are and what such a substantive relationship is about.

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[310] Such patterns are perfectly compatible with the hypothesis of voluntary or legally required representation, assistance, or authorization. Because of their condition, some plaintiffs need to be represented for lack of judicial capacity. The classic example is provided by the case of minors. They can be a party to the proceeding only in the sense that they can be affected by the judicial decision. However, as they cannot dispose of their rights at the substantive law level, neither can they file a court application on their own. According to the Italian civil code, parents represent their children up to the age of 18. The parent acting in court on behalf of their child is a mere representative – which is different from extraordinary standing – *legittimazione straordinaria* – because the parents bring a claim on behalf of someone else, the minor, not on their behalf.

[311] LUISO, *Diritto processuale civile, I Principi generali*, Milano, 2019, p. 221. The author explainsd the rationale of article 81 c.p.c. using the saying "mind your own business": "*Si capisce bene quindi che l'istituto della legittimazione ad agire vuole garantire il titolare di una situazione sostanziale protetta dalle ingerenze altrui; vuole riservare a costui la scelta sul se, come e quando chidere la tuitela giurisdizionale dei propri diritti. Insomma, in termini molto semolici, la regola della legittimazione ad agire coincide con il detto popolare: 'ognuno si faccia gli affari suoi'".*

Climate litigation offers a great example. This realm can be labeled as public interest or diffuse interests' litigation. One big issue with standing in climate litigation is that it is impossible to restrict liability to one country or business alone on the passive side. Not only that. Climate litigation is puzzling even on the active side of the equation of substantial right-right of action, given that the diffuse nature of climate harm makes it hazardous to individualize the 'creditor' of the 'climate obligation.' The following paragraphs will consider how the class action device offers a viable solution to this problem, as it allows any class member or certain entities to seek the protection of the individual right of each class member.

## 3. Cassazione, Sezioni Unite, Judgment No. 2951 of 2016

The four case scenarios considered in the previous paragraph highlight how the partial autonomy of the right of action is cause for a clear distinction between the procedural issue of *legittimazione ad agire* and the one of actual entitlement, which is an issue of merits.[312]

Such a theoretical setting seems to be relatively straightforward. In the dynamics of day-to-day litigation, however, these issues of procedure and merits may sometimes overlap, causing uncertainty for the parties and impacting the final decision.

This paragraph considers a critical decision by the Italian Supreme Court in its plenary session: *Cassazione, sezioni unite, decision No. 2951 of 2016*.

The court was required to establish the procedural rules that apply when the defendant argues that the plaintiff is not entitled to the right they claimed. In other words, the decision faces two consequential topics: First, whether such a defense concerns the procedural issue of standing or, rather, the merits. Second, if it is a defense regarding the merits of the case, whether a time limit applies or not.

In the context of this thesis, the findings made by the supreme court are interesting because it confirms the theoretical framework concerning the role played by *legittimazione ad agire* against the background of the right of action and its practical consequences in the course of litigation.

Before considering the findings of the *Corte di cassazione*, it is useful to make a premise. The *Codice di procedura civile* provides a different regulation of the possible defenses raised by the defendant.[313] Combining Articles 2697 c.c. and 115 c.p.c., defenses are distinguishable in three categories: *(i) mere difese, (ii) eccezioni di merito, (iii) Eccezioni di rito*'. Each of them is considered by the following sub-sections. Finally, the text explores *(iv)* the findings of the *Corte di cassazione.*

[312] As mentioned above, standing – *legittimazione ad agire* – is granted as soon as the plaintiff merely affirms to be entitled to the right claimed, regardless of the actual entitlement. The same applies vis-à-vis the defendant: The plaintiff must state in their claim that the defendant is the party subjected to the duty that arises out of the subjective right.

[313] For a comprehensive explanation in English of the topic summarized in the text above, see LUPOI, *Civil Procedure in Italy*, LUPOI, *Civil procedure in Italy,* Alphen aan den Rijn, 2018, p. 113-114.

## 3.1 M*ere Difese*

The first line of defense consists of the mere denial of the facts presented by the plaintiff. This defense category is labeled as '*mere difese'* or '*eccezioni improprie,'* which would translate into 'mere defenses' and 'improper objections.' If the defendant contests and rejects the truth of the plaintiff's allegations, the plaintiff must consequently sustain the burden of proof vis-à-vis the facts that ground the claim, named *fatti costitutivi*.

Let us consider an example regarding a claim seeking compensatory damages for a breach of contract. The factual elements that qualify as *fatti costitutivi* are the existence of a valid contract, the breach of a contractual obligation, the damages, and the causal link between the breach of contract and the economic loss. Under Article 2697(1) c.c., the plaintiff has to sustain the burden of proof for each of those facts.[314] Failing to do that, the court rejects the claim.

Under Article 115 c.p.c., the burden of proof is lifted if the defendant does not contest their truth. In other words, the defendant must contest the plaintiff's factual allegations if they do not want the court to consider the uncontested facts as accepted by the defendant, with the result of lifting the burden of proof for the plaintiff.[315] Such denial must regard every factual element. In the example of a contractual claim, the burden of proof concerns*: (i)* the existence of a valid contract, *(ii)* the breach of a contractual obligation, *(iii)* the damages, and *(iv)* the causal link between the beach of contract and the economic loss. Suppose the defendant fails to contest, for example, the breach of a contractual obligation under Article 115 c.p.c. This fact does not need to be proven.

Given that *mere difese* or *eccezioni improprie* consist in the very denial of facts that the plaintiff has presented, there is a further consequence. There is no period of limitation to raise these defenses. Hence, the defendant could raise them at any given time: even after the evidence-gathering phase or during the appeals proceeding. The lack of time limitations to raise *mere difese* is due to the consideration that denying the facts does not require the presentation of new facts.

Besides denying the facts alleged by the plaintiff, the defendant can also put forward a different legal argument based on the same facts. This line of defense falls under the notion of *mere difese in diritto,* which can be proposed at any time with no limitations.

In the example set above, the defendant might argue that the claim is ungrounded by interpreting the clauses of the agreement or the law differently. Again, the party that raises this defense does not present new facts to the courts.

[314] Article 2697 c.c. states the following: «The party who wants to claim a right in court must prove the facts on which the right is based.
The party who wants to assert the ineffectiveness of such facts or object that the right has been modified or extinguished must prove the facts on which the objection is based.»

[315] Article 11 c.p.c. states the following: «Except for cases provided for by law, the court must sould consider as bases for its judgement the evidence proposed by the parties or the prosecutor as well as the facts not specifically contested by the party entered into the proceedings.
However, the judge may, without the need for proof, consider as basis for the judgement the notions of fact that are within common experience».

## 3.2 *Eccezioni*

The defendant may also present new facts to the court incompatible with the right claimed by the plaintiff. Objections on the merits are '*eccezioni di merito.'* Objections concerning the regularity of the proceeding are '*eccezioni di rito'*.

Raising objections on the merits causes an impact on the factual background that the court must ascertain, adding more facts. Such additional facts are either incompatible with the right claimed by the plaintiff or deny or modify it.

For example, in the field of contractual liability, the defendant could allege that they have fulfilled the obligation. This would be a fact that is incompatible with the right to claim monetary damages for breach of contract. Alternatively, the defendant could state that they have partially fulfilled their obligation. This new fact modifies the right claimed by the plaintiffs in that the credit claimed by the plaintiff is reduced compared to what was originally requested.

Based on who can raise the objections and when this can be done, objections are divided into two categories: '*eccezioni in senso stretto'* and '*eccezioni rilevabili d'ufficio.'*

Under Article 112 and 167(2) c.p.c., e*ccezioni in senso stretto* can be raised only by the parties and within strict time limits set by the rigid preclusion system in place. Most objections fall into this category, as the *principio dispositivo* – discussed above – reserves the full availability of the rights of action and defense to the parties and tends to limit any decision *ex officio* by the court.

*Eccezioni rilevabili d'ufficio* can also be raised by the court and the parties and is immune from the time limits of the preclusion system. This category of objections can be raised for the first time even before the court of appeals.[316]

## 3.3 *Eccezioni di Rito*

Parties can also object to the correctness of the proceeding; the consequence is its nullity, which is also a reason for appealing the decision. The lack of procedural preconditions (*presupposti processuali*), such as the wrong choice of territorial venue, can be raised only by the defendant and within the first hearing.

Conversely, the lack of the conditions for the insurgence of the right of action (*condizioni dell'azione*) can be raised at any time – even by the court.

Therefore, the lack of *legittimazione ad agire, interesse ad agire* or *possibilità giuridica* can be raised by the party, or by the court *ex officio*, for the first time even before the *Corte di cassazione.*[317]

[316] This conclusion is corroborated by the fact that article 345 c.p.c. prohibits to raise new objections before the court of appeals only if such objections are reserved to the party – *eccezioni in sense stretto.* Objections that can be raised also by the court can be proposed by the parties of the proceeding in their notice of appeal.

[317] In case one of the *condizioni dell'azione* are found missing by the *Corte di cassazione*¸ it strikes out the case with the consequence that no other court can decide the case.

## 3.4 The Findings of Cassazione, Judgement No. 2951 of 2016

The decision issued by the plenary session of the *Corte di cassazione*[318] originated from a case dealing with compensation for damages caused to a piece of real estate composed of a hill and a house built on it. The plaintiffs are both the owner and the usufructuary of such real estate.

They sued ANAS s.p.a, the public-owned company that owns and manages state roads and highways. The plaintiffs argued that the defendant undertook construction work near their hill that caused the collapse of the house.

The defendant did not part-take to the first instance proceeding before the *Tribunale di Firenze*. Therefore, the court ordered the defendant to compensate for the damages caused to the plaintiffs by its conduct.

After the first instance decision, the defendant filed an appeal. In the notice of appeal, ANAS argued for the first time that the two plaintiffs validly brought the real estate, with a public deed, in 1995, one year after the damages had already occurred.

As a consequence, the appellant claimed that the plaintiffs could not seek compensation for the damages to the real estate considering that: first, the right to compensation is different from the property right; second, the plaintiffs became owners of the damaged real estate in 1995, while the damage occurred in 1994; third, the right to compensation did not pass along with the property rights.

Therefore, in its appeal, the defendant maintained that the plaintiffs were not entitled to the right they claimed.

The *Corte d'appello di Firenze* accepted the defense raised by the defendant in its appeal and reviewed the first instance decision rejecting the claim.

The plaintiffs petitioned the *Corte di cassazione* for a review of the decision.

In procedural terms, they argued that the defendant objected to the lack of actual entitlement, an *eccezione di merito in senso stretto* that only the parties can raise. Moreover, ANAS did so in its appeal, well beyond the strict timelines set by the preclusions system. Consequently, in their

[318] *Corte di cassazione*, judgement No. 2951 of 2016 availabe in the on-line database Leggi D'Italia. The judgement stated the following principle: "La *legittimazione ad agire* attiene al diritto di azione, che spetta a chiunque faccia valere in giudizio un diritto assumendo di esserne titolare. La sua carenza può essere eccepita in ogni stato e grado del giudizio e può essere rilevata d'ufficio dal giudice. Cosa diversa dalla titolarità del diritto ad agire è la titolarità della posizione soggettiva vantata in giudizio. La relativa questione attiene al merito della causa. La titolarità della posizione soggettiva è un elemento costitutivo del diritto fatto valere con la domanda, che l'attore ha l'onere di allegare e di provare. Può essere provata in positivo dall'attore, ma può dirsi provata anche in forza del comportamento processuale del convenuto, qualora quest'ultimo riconosca espressamente detta titolarità oppure svolga difese che siano incompatibili con la negazione della titolarità. La difesa con la quale il convenuto si limiti a dedurre, ed eventualmente argomentare (senza contrapporre e chiedere di provare fatti impeditivi, estintivi o modificativi), che l'attore non è titolare del diritto azionato, è una mera difesa. Non è un'eccezione, con la quale si contrappone un fatto impeditivo, estintivo o modificativo, nè quindi, un'eccezione in senso stretto, proponibile, a pena di decadenza, solo in sede di costituzione in giudizio e non rilevabile d'ufficio. Essa, pertanto, può essere proposta in ogni fase del giudizio (in cassazione solo nei limiti del giudizio di legittimità e sempre che non si sia formato il giudicato). A sua volta il giudice può rilevare dagli atti la carenza di titolarità del diritto anche d'ufficio". The same principle was the confirmed by the recent judgement Casssazione civile, judgement No. 30330 of 2021.

view, the defendant had lost the power to raise this objection and the court of appeals. Further, by admitting the late objection, *Corte d'appello di Firenze* violated Articles 112 c.p.c. and 345 c.p.c.

Article 112 c.p.c. provides that the court cannot decide upon objections raised only by the parties – *eccezioni di merito in senso stretto*. This is a logical consequence of the *principio dispositivo* discussed above, according to which making a claim and raising objections and defenses fall within the exclusive parties' power.

Article 345 c.p.c. deems inadmissible raising *eccezioni di merito in senso stretto* for the first time before the court of appeals.[319]

In other words, the issue at stake was whether the defense raised by the defendant concerned the lack of standing or actual entitlement to the right to compensation claimed by the plaintiffs. And if it is a defense on the claim's merits, can it be raised for the first time before the appeals courts?

The court started by confirming the theoretical framework designed by Chiovenda in the early decades of the 20th century, accepted by the provision of Article 81 c.p.c. and further developed by scholars.

*Legittimazione ad agire* is one of the three *condizioni dell'azione.* It is, in other words, the precondition that must exist for the insurance of the right of action. And the right of action is the condition to get the case decided on the merits, regardless of the outcome. The plaintiff fulfills this requirement as soon as they assert to be entitled to the right claimed. The lack of *legittimazione ad agire* is a procedural objection – *eccezione di rito* – that can be raised at any stage of the proceeding by both the parties and the court.[320] If the plaintiff lacks standing (*legittimazione ad agire*), the court must declare the inadmissibility of the claim leaving the merits untouched. Such a judgment has a procedural content; it does not produce *res iudicata* effect.

The standing issue must be considered separately from the one of actual entitlement. The latter concerns the merits and gives rise to a decision adjudicating on the existence of the claimed right.

In the case at stake, the plaintiffs stated to be the owners of the real estate damaged by the defendant and that they were, consequently, entitled to the right to compensation. According to the court, the plaintiffs had *legittimazione ad agire*.

The issue concerned, rather, the merits and whether the defense raised by the defendant consists of a mere denial of the facts presented by the plaintiff (*mere difese)* or of an objection concerning the merits (*eccezionie di merito*). Both lines of defense concern the merits. But denying the facts presented by the plaintiff (*mere difese)* can be done at any time, as it does not require adding new

[319] The substantive law side to the issue of actual entitlement was decided by the *sezioni unite* reversing the findings of the previous courts. At the substantive level the legal question to be answered concerned whether a contract of sales that transfers property rights must be concluded in the form of a public deed or if it is sufficient that the agreement has a written form. *Corte di cassazione* opted for the second, and less formal option. In the case at stake, the damage occurred in 1994 and the public deed was dated 1995. However, the plaintiffs had bought the real estate with a private deed in 1988. When the damage occurred, they were already the owners of the damaged property and were, therefore, entitled to the right to compensation.

[320] See the wording used by the court at §60 of the decision: "La *legittimazione ad agire* attiene al diritto di azione, che spetta a chiunque faccia valere in giudizio un diritto assumendo di esserne titolare. La sua carenza può essere eccepita in ogni stato e grado del giudizio e può essere rilevata d'ufficio dal giudice".

facts. Conversely, objections – '*eccezionie di merito*' – implies the allegation of new facts which must be proved. Hence, they are subjected to strict preclusions.[321]

The issue is now restricted to determining what line of defense ANAS put forward. The *Corte di cassazione* noted a profound disagreement on this matter. There are two opposing bodies of case law within the very same *Corte di cassazione.* To solve this contrast, the court decided the case at hand in a plenary session: '*Corte di cassazione a sezioni unite.'*[322]

The first body of case law considered that claiming the lack of one of the entitlement concerns the factual foundations of the claim. It undermines the claim. It is, therefore, an objection that can be raised only by the parties – within the timelines of the preclusion system.[323]

A different body of case law takes the opposite view that denying the facts presented by the plaintiff is not an objection, as it does not imply new facts. '*Mere difese*' can therefore be presented at any time, and their effect is that the plaintiff must prove the facts contested by the defendant.

The plenary session of the *Corte di cassazione* accepted the second view and concluded that: first, contending that the plaintiff is not the actual right holder does not concern standing but rather the merits; second, it must be considered as a *mera difesa* and can consequently be raised at any time, even in the notice of appeal.

## 4. Legittimazione Straordinaria

Article 81 c.p.c. allows for a departure from the general rule according to which anyone should only make claims related to their own rights only in cases explicitly provided by the law. The basis for *legittimazione straordinaria* can be found both in procedural and substantive law. In all cases, the attribution to someone else of the power to claim someone else's right is the fruit of a specific

[321] See §§ 61-62: "61. Cosa diversa dalla titolarità del diritto ad agire è la titolarità della posizione soggettiva vantata in giudizio. La relativa questione attiene al merito della causa. 62. La titolarità della posizione soggettiva è un elemento costitutivo del diritto fatto valere con la domanda, che l'attore ha l'onere di allegare e di provare".

[322] See §18 of the decision: «E' su questo problema che la terza sezione ha chiesto l'intervento delle sezioni unite, rilevando: 'la giurisprudenza di legittimità non è unanime in materia di contestazione della reale titolarità attiva o passiva del diritto sostanziale dedotto in giudizio. La tesi minoritaria sostiene che essa costituisce una mera difesa, con le ovvie conseguenze, tra le quali quella che incombe alla parte, la cui titolarità è contestata, fornire la prova di possederla. L'orientamento maggioritario, invece, afferma che contestazione della reale titolarità attiva o passiva del diritto sostanziale dedotto in giudizio costituisce un'eccezione in senso tecnico, che deve essere introdotta nei tempi e nei modi previsti per le eccezioni di parte, con l'ulteriore conseguenza che spetta alla parte che prospetta tale eccezione l'onere di provare la propria affermazione'".

[323] See § 20: "Le motivazioni delle sentenze che esprimono l'orientamento maggioritario seguono, di massima, questi passaggi. Partono dalla distinzione tra legittimazione ad agire ed effettiva titolarità del rapporto, puntualizzando che la carenza della legittimazione ad agire è rilevabile in ogni grado e stato del giudizio, anche d'ufficio dal giudice, mentre, per contro, la questione della titolarità del rapporto (tanto attiva che passiva) attiene al merito della decisione e quindi alla fondatezza della domanda in concreto proposta. Da questa premessa fanno derivare l'affermazione che la relativa questione rientra nel potere dispositivo e nell'onere deduttivo e probatorio della parte interessata, con la conseguenza che il difetto di titolarità attiva e passiva del rapporto non può essere rilevato d'ufficio dal giudice, ma deve essere dedotto nei tempi e nei modi previsti per le eccezioni in senso stretto (…) e che, al contrario della 'legitimatio ad causam', non è rilevabile d'ufficio essendo collegata al potere dispositivo e all'onere deduttivo e probatorio della parte interessata'".

choice by the legislator, according to whom, in such cases, the *prinicpio dispositivo* – meaning the full individual disposability of rights by its holder – can be derogated to favor one particular party.

When the law requires procedural representation, it is aimed at protecting someone who is in a status of diminished capacity (Article 75 c.p.i.), while in cases of voluntary representation (Article 77 c.p.i.), the rationale is to allow the right holder to act in court through a proxy.[324] In both cases, the represented party is the only one who is going to be bound by the *res iudicata* effect.

Conversely, *legittimazione straordinaria* departs from the *principio dispositivo* and its blunt sub-principle of 'minding your own business.'[325] In effect, in cases of *legittimazione straordinaria,* the plaintiff acts on his own behalf but claims someone else's right. At the same time, in procedural representation, the representative is only a formal party, while the substantial one affected by the result of the proceeding is represented. Some examples will clarify the difference between legittimazione straordinaria and procedural representation, starting from a couple of hypotheses foreseen by the *Codice civile*.

Article 2900 c.c. grants standing – *legittimazione ad agire* – to the creditor to vindicate their debtor's right against another debtor. In other words, this mechanism requires a creditor-debtor chain relationship composed of at least three parties: creditor A – debtor-creditor *B* – debtor *D*. *A* is *B*'s creditor, while *D* is *B*'s debtor. *B* is both debtor towards A and creditor towards *D*. If B does not take action to protect their right, A can sue C claiming not their right but *B*'s right to take advantage of the court's decision in favor of B. This case shows how *legittimazione ad agire* allows A to bring an action in which content is not A's right but rather someone else's right – *B*'s.

In the realm of contractual law, Article 1421 c.c. This provision works in the realm of contractual nullity. It allows anyone, not only the contractual parties, to bring an action of nullity as long as the plaintiff has an interest related to the contract's invalidity.

In the field of rights '*in rem*,' Article 1012 (2) c.c. grants *legittimazione straordinaria* to the usufructuary to sue anyone claiming a right of way on the land; in an opposite case, they may sue to establish the existence of a right of way in favor of land on which the usufructs exists.[326] The rationale behind this provision is to provide the usufructuary standing in case the land owner does not exercise their right of action.

In the field status rights, Article 117 c.c. allows the ancestors, the public persecutor, and anyone else who shows sufficient interest in the case to seek the annulment of a marriage stipulated in violation of Articles 86, 87, 88 c.c. Meaning in cases where the law forbids someone to get married because they are still married or in a civil union (Article 86 c.c.), the spouses are acquainted (Article 87 c.c.), or for a conviction for the murder or attempted murder of the previous spouse of the other partner. Here, gain, there is no procedural representation. Rather, standing is granted to someone extraneous to the underlying substantive rights to pursue public and private interests.

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[324] For a commentary on both Articles, see GROSSI-PAGNI, *Commentary on the Italian Code of Civil ProcedureI*, Oxford, 2010, commentary on Articles 75 and 77, pp. 134-135.

[325] This expression in used ironically by [325] LUISO, *Diritto processuale civile, I Principi generali*, Milano, 2019, p. 221.

[326] These two actions root back to ancient Roman law and, still today, go by the name of *actio confessoria servitutis* and *actio negatoria servitutis.*

These cases, provided by the civil code show that the legislator can leverage standing rules to the extent of protection when private relationships between individuals present public or general interest. According to some authors, this use of standing is consistent with progressive restriction of the private domain.[327] In effect, the amplification of standing restricts the individual autonomy to choose if and how to protect substantive rights according to the *principio dispositivo*.

At the procedural level, *legittimazione straordinaria* is granted by Article 111 c.p.c. when disputed rights are transferred from one person to another during the civil proceeding.

When such a transfer happens due to one party's death, the proceedings are continued by the universal successor for the right transferred to the legatee.

In case of contractual disposal of the right, the original right holder continues to be a party to the proceeding. In both cases, the person vested in the right is not a party to the proceeding. The universal successor and the party who disposed of the right by means of a contract are the parties of the proceeding – both entitled to *legittimazione straordinaria*. The person entitled to the right can remain outside the proceeding, but it will be affected by its result. Therefore, the actual right holder may join or spontaneously join the proceeding, replacing the party to whom the law attributes *legittimazione straordinaria*.

## 5. Standing and 'Collective Interests'

Standing rules offer a tool to grant collective redress mechanisms in favor of certain social groups in the context of supra-individual disputes. Substantive or procedural law attributes *legittimazione straordinaria ad agire* to someone who is not entitled to the rights claimed – which is rather owned by individuals – but who represents a certain social group. This can lead to the law granting *legittimazione straordinaria* to certain associations for the benefit of its members.

The following sub-sections consider examples provide by the Italian law – both in the realms of public and private law. The legislator used standing rules to amplify judicial protection of supra-individual interests.

### i. Labour Law

Article 28 of law No. 300 of 1970 grants extraordinary standing to unions to seek the protection of workers' rights in cases of anti-union behaviors attributable to the employer. The acting union pursues not only its own interest but also the protection of individuals' rights. The rationale is that workers are likely less keen to expose themselves personally in a lawsuit against their own employer.

### ii. Electoral Law

Under Article 70 of the *Testo Unico Enti Locali*, any citizen or the local head of police (*Prefetto*) to sue the elected mayor and other local government elective offices in case of invalid local elections.

[327] See PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, p. 290.

### iii. Finance Law and Investors' Protection

The third collective redress mechanism is provided by Article 32-bis of the legislative decree No. 59 of 1998, also known as consolidated law on finance – *Testo unico della finanza or TUF*.[328] Article 32-bis TUF aims at protecting investors' diffuse and collective interests in the field of financial law. Once again, the tool chosen by the legislator is standing. The provision grants *legittimazione straodinaria* to consumer associations enrolled in a public registry who fulfill certain legal standards of representativity. In recent years there has been a strong contrast within the administrative justice case law concerning the scope of standing granted to consumer associations by Article 32-bis TUF. The *Consiglio di stato*, which is the court of appeals in the administrative jurisdiction system, had to determine whether they could seek the annulment of administrative acts through judicial review.

*Consiglio di stato* was further required to clarify whether both collective and individual legitimate interests could find judicial protection within the same proceeding. In other words, consumer associations could bring an action for the protection of the collective interests of investors, while at the same time, individual investors could join the proceeding seeking the same judicial review but based on their individual legitimate interests.

Concerning the first issue, there has been a strong disagreement within the *Consiglio di stato* which took two opposite approaches in recent years.

In 2016 it found that while Article 32-bis TUF does grant *legittimazione straordinaria* to consumer associations, the scope of standing is restricted by Article 81 c.p.c. The latter provides, as a general principle, that *legittimazione straordinaria* is an exception to *legittimazione ordinaria* and should be granted only in the specific cases foreseen by the law. According to this restrictive approach, Article 32-bis TUF does not concede a generalized *legittimazione straordinaria* to consumer associations. Consumer associations may sue to protect investors' collective interests only in cases provided explicitly by 32-bis TUF, which recalls Articles 139 and 140 cod. cons. Hence, consumer associations can only bring collective inhibitory actions. Such actions aim at an injunction to stop conducts that collectively damage investors. In other words, standing does not extend to the action of judicial review for the annulment of administrative acts. In the case decided by *Consiglio di stato*, the Court denied standing to a consumer association that sought the annulment of a judgment issued by CONSOB.[329]

[328] The provisions states the following:
«Article 32-bis Protection of the collective interests of investors
1. Consumer associations included in the list referred to in Article 137 of legislative decree No. 206 of September 6, 2005, have stading to act for the protection of the collective interests of investors, related to the provision of investment services and activities and ancillary services and collective asset management, in the forms provided for in Articles 139 and 140 of the aforementioned legislative decree».

[329] Consiglio di stato, fourth section, judgement No. 3303 of 2016. The judgement is extensively commented by SOLINA, *Legittimazione ad agire per la tutela di interessi collettivi*, in *Giornale di diritto amministrativo*, 2017, 2, p. 249.

In 2020, the plenary session of the *Consiglio di stato*[330] returned to the matter reversing the prior decision. The plenary session of *Consiglio di stato* stated that the consumer associations mentioned by article 32-bis TUF have a generalized *legittimazione ad agire* and can bring any judicial review action, regardless of a further law provision. As a result, under article 32-bis TUF, consumer associations have standing to seek, before the administrative jurisdiction, the judicial review of public acts issued by public regulatory institutions that impact the collective interest of investors.

Consumer associations can, for example, seek the annulment of an act issued by the Italian central bank – Banca d'Italia – or by the regulatory body for the Italian stock exchange – CONSOB. The same decision also solved the second issue mentioned above concerning the coexistence of both collective and individual interests in the same proceeding. The answer to this question was positive, in consideration of their different nature.

### iv. Anti-Gender Discrimination Law

Legislative decree No. 186 of 2006 reformed the anti-gender discrimination law in the workplace. Its Article 24 instituted the figure of "anti-discrimination councilors", which are nominated at a national and local level by means of a decree of the Ministry of Labour: *consiglieri di parità*.
Under Articles 36 and 37(2) *consiglieri di parità*, have standing to seek relief for individual workers' right or for the protection of collective interests. They might seek seek compensation for damages, as well as an injunction to draft a plan to prevent further discrimination. The claim is directed either to the ordinary courts or to the administrative courts, depending on whether the issue involves public law work contracts or private employment.

It is worth noting the use of standing rules to implement antidiscrimination laws. Workers also maintain individual standing.

Further, the reference of plans for preventing future gender discrimination is also an innovative tool. This law will be further considered in the section regarding non-enforceable orders.

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[330] Consiglio di stato, plenary session, judgement No. 6 of 2020 available on the database *Leggi d'Italia.* The judgement stated the following general principle: «*"Gli enti associativi esponenziali, iscritti nello speciale elenco delle associazioni rappresentative di utenti o consumatori oppure in possesso dei requisiti individuati dalla giurisprudenza, sono legittimati ad esperire azioni a tutela degli interessi legittimi collettivi di determinate comunità o categorie, e in particolare l'azione generale di annullamento in sede di giurisdizione amministrativa di legittimità, indipendentemente da un'espressa previsione di legge in tal senso*"». The same judgement makes clear that Article 32-bis TUF allows also the action of annulment: *«Deve quindi ritenersi che un'associazione di utenti o consumatori, iscritta nello speciale elenco previsto dal codice del consumo oppure che sia munita dei requisiti individuati dalla giurisprudenza per riconoscere la legittimazione delle associazioni non iscritte, sia abilitata a ricorrere dinanzi al giudice amministrativo in sede di giurisdizione di legittimità. La legittimazione, in altri termini, si ricava o dal riconoscimento del legislatore quale deriva dall'iscrizione negli speciali elenchi o dal possesso dei requisiti a tal fine individuati dalla giurisprudenza. Una volta "legittimata", l'associazione è abilitata a esperire tutte le azioni eventualmente indicate nel disposto legislativo e comunque l'azione generale di annullamento in sede di giurisdizione amministrativa di legittimità».*

### v. Anti 'Racial'-, Ethnical, National-, Linguistic- (and other forms of) Discrimination

Legislative decree No. 286 of 1998 regulates the status of foreign citizens on Italian soil and immigration law. Those who are discriminated against, from private entities or public bodies, can seek a judicial order to remove the discriminatory measures and compensate damages.

Regarding the workplace, Article 44(19) foresees very interestingly standing provisions to protect against "collective" discrimination. In the case of "collective" discriminatory behaviors perpetrated by the employer, local trade union organizations can request the court to issue orders and injunctions even though it is impossible to identify the victims of discrimination.

It is worth reading the provision of Article 44(10):

| Articolo 44, comma 10, d.lgs. n. 286/1998 | Article 44(10) Legislative decree No. 286 of 1998 |
|---|---|
| Qualora il datore di lavoro ponga in essere un atto o un comportamento discriminatorio di carattere collettivo, anche in casi in cui non siano individuabili in modo immediato e diretto i lavoratori lesi dalle discriminazioni, il ricorso puo'essere presentato dalle rappresentanze locali delle organizzazioni sindacali maggiormente rappresentativi a livello nazionale. | Where the employer engages in a discriminatory act or conduct of a collective nature, even in cases where the employees affected by the discrimination are not immediately and directly identifiable, the complaint may be filed by the local representatives of the most nationally representative trade union organizations. |

Not only does this provision grant extraordinary standing from the operational standpoint of the action (*legittimazione ad agire attiva*), but it also allows for suing regardless of the exact identification of the victim of the right infringement.

### vi. Environmental Law

Under Article 311 *Codice dell'ambiente*, only the Ministry for the environment has standing to seek the protection of the environment. The Ministry can leverage its public law powers to prevent or restore harm or bring a claim for damages before ordinary courts. Little space is left for both environmental groups and local public authorities (*Province* and *Comuni*).

It is critical to remember that these restrictive standing rules only apply to 'strict' environmental harm, while under Article 313(7), cod. amb. 'reflex damages' can always be claimed by individuals, private or public entities. Anyone can claim compensatory damages for their property fol-

lowing environmental pollution; however, only the Ministry of the environment can vindicate environmental harm itself. However, the scope of 'reflex damages' under Article 313(7) cod. amb. is uncertain and needs careful assessment based on the evolving case law.[331]

Article 18(5) of law No. 349/1986 is the only provision that the *Codice dell'ambiente* has not abrogated. Article 18(5) leverages standing rules to promote the participation of environmental associations to the judicial protection of the environment.

In the field of ordinary civil jurisdiction, it allows environmental associations to join civil proceedings commenced by the Ministry of the environment seeking damages for environmental.

In the realm of administrative law, the same provision grants standing to environmental associations to seek judicial review of administrative issued in environmental matters. Administrative case law maintained that the notion of the environment should be considered broadly. Consequently, environmental associations can also seek judicial of the administrative acts that have an indirect impact on the environment or harm the 'quality of life'. The urban planning administrative decision impacts the natural or urban landscape. Further, courts found that Article 18(5) allows any association to bring such a claim regardless of its connections with the territory where the harm took place.[332]

On behalf of their community, local public authorities can only seek the state's intervention by lodging a complaint to the Ministry of the environment. Further, they can seek judicial review of administrative acts

## 6. Class Actions in Italy

In 2019, group litigation found a solid anchor in Italian legislation by introducing class actions. Before then, the Italian legal system experienced class action in the restricted realm of consumer

[331] The scope of Article 313(7) cod. amb. is however debated. *Corte di cassazione*, judgment No. 16575 of 2007, ruled that a hotel owner could not seek damages for the pollution of the environment if they have not sustained expenses for the maintainment of the environment. Hence, in the loss of clients was not considered relevant. The judgment is commented by SALANITRO, *Il nuovo regime del danno ambientale - danni temporanei all'ambiente e tutela degli interessi privati: un problema di ingiustizia del danno*, in *Danno e Responsabilità*, 2008, 4, p. 406.

[332] T.a.r. Campania, judgment No. 2965 of 2018, available in the online database Leggi d'Italia: "*la legittimazione ex lege delle associazioni ambientaliste può esser riconosciuta non solo nel caso di atti inerenti la materia ambientale, ma anche per quelli che "incidono sulla qualità della vita in un dato territorio" (Cons. Stato, sez. IV, 14 aprile 2011, n. 2329; T.A.R. Lombardia Milano Sez. II, 22 ottobre 2013, n. 2336); tali associazioni sono state ritenute legittimate ad agire in giudizio non solo per la tutela degli interessi ambientali in senso stretto, ma anche per quelli ambientali in senso lato, comprendenti la conservazione e la valorizzazione dell'ambiente, del paesaggio urbano, rurale, naturale e dei centri storici "intesi tutti quali beni e valori idonei a caratterizzare in modo peculiare ed irripetibile un certo ambito geografico territoriale rispetto ad altri" (Cons. Giust. Amm. Reg. Sic., sentenza n. 811/2012). (...) gli atti che costituiscono esercizio di pianificazione urbanistica, la localizzazione di opere pubbliche, gli atti autorizzatori di interventi edilizi, nella misura in cui possano comportare danno per l'ambiente ben possono essere oggetto di impugnazione da parte delle associazioni ambientaliste, in quanto atti latamente rientranti nella materia "ambiente" (...) Né può sostenersi, contrariamente a quanto sostenuto dai controinteressati, che manchi la legittimazione per mancanza di uno specifico legame dell'associazione col territorio della penisola sorrentina. Infatti, come ritenuto da giurisprudenza costante, quando si è in presenza di una legittimazione riconosciuta ex lege (...) non è necessario accertare la sussistenza dei requisiti che, in mancanza del riconoscimento ex lege, sono ritenuti necessari per poter radicare, in capo all'associazione, la legittimazione a ricorrere in base ad una valutazione caso per caso (...)"*

law under the legislative decree n. 206 of 2005. Then, law No. 31 of 2019 generalized the application of class action, expanding this tool to any possible subject matter – beyond consumers' rights. Law No. 31 of 2019 added sixteen articles to the *Codice di procedura civile* – articles 840-bis – 840-sexiesdecies. The 'new' class action applies across the spectrum of civil liability: from contractual to tort law.[333]

The Italian class action is largely inspired by the U.S. under rule 23 of the 1938 *Federal Rules of Civil Procedure*, reformed in 1966, 2003 and in 2005.[334] Despite this reference, the Italian law does not foresee presents two core legal principle, dear to the U.S. system: first, the Italian class action rejected the 'opt-out' mechanism, under concornes that the opt-out would be incompatible with Article 24 of the constitution; second, punitive damages are not allowed under the existing law, as civil liability has only a restorative function – not a punitive one.

Access to justice is the main rationale of the class action device, in Italy as elsewhere. The benefits in terms of access to justice may be traced back to the economic and information asymmetrical relationship between individual class members and the defendant, which is usually an entity with significantly more resources.

According to the theory of rational decisions, mass torts are situations in which it is not convenient for any individual to act, as costs are a too high burden to carry for any individual alone. Further, the more numerous a social group is the less likely cooperation between individuals.[335] Consequently, even though the class members share a common goal – terminating a situation that causes a mass tort – and have individual rights depending on it – for example, the right to monetary compensation – nobody likely takes the lead.[336] This is not, however, a good reason to ignore individuals' need for justice: As eloquently put by Calamandrei, "*injustice is poisonous even in homeopathic doses*".[337]

Such stasis may be overcome in the case of a socially close group that is able to cooperate and share costs in informal ways or if the group is not too wide. However, the notion of 'mass tort' is, in most cases, antithetical to the possibility of social cohesion among class members. The only option left is to rely on 'individual heroism'.[338]

The class action is the procedural device that allows one to channel in one proceeding individual rights and tackle the mass tort. The multitude of parties and the need to ascertain the existence of a mass tort and, second, the existence and extension of individual rights make class action more

[333] SASSANI, *Lineamenti del processo civile italiano*¸Milano, 2019, p. 963.
[334] GIUSSANI, *L'azione di classe*, in *Enciclopedia del diritto*, p. 132. The author mentions that the origins of the U.S. class action rule root back to the British 'representative suits' before the Court of Chancery. Footnote No. 1 cites STREET, *Federal Equity Practice*, New York, 1909, 342.
[335] AXELROD, *The evolution of Cooperation*, New York, 1984.
[336] See, OLSON, *The Logic of Collective Action*, Cambridge, 1971, p. 14.
[337] CALAMANDREI, *Elogio dei giudici scritto da un avvocato*, Firenze, 1959, p. 340: "*Il buon giudice mette lo stesso scrupolo nel giudicare tutte le cause, anche le più umili; egli sa che non esistono grandi cause e piccole cause, perché l'ingiustizia non è come quei veleni di cui certa medicina afferma che presi in grandi dosi uccidono, ma presi in dosi piccole risanano. La ingiustizia avvelena anche in dosi omeopatiche*".
[338] GIUSSANI, Azioni collettive risarcitorie nel processo civile, 2008, p. 34.

complex than the traditional individual proceeding. But such complexity increases overall procedural efficiency. Adding the class action device to a legal system that only offered individual proceedings has been compared to the introduction of the bus as a new way of transportation in a city where people only used taxis or private cars. Therefore, participating in a class action is the equivalent of hopping on a bus. The bus is notoriously slow and cumbersome but, if people get on the bus, the number of individual cars and the intensity of traffic jams are reduced. The whole transportation system benefits from efficient public transport. Citizens also benefit from a lower cost of transport.

Outside this punchy bus metaphor, the class action is in effect a cumbersome procedural device, but it helps people – right holders – to get to the destination – justice.[339]

The Italian legislator designed two kinds of class actions, depending on their aim: *(i) azione di classe risarcitoria and (ii) azione di classe inibitoria.*

Plaintiffs can leverage the first one seeks compensation for economic damages to individual homogeneous rights caused by a business or a public entity managing a public service. A*zione di classe risarcitoria* is regulated by articles 840-bis and 840quinquiesdecies c.p.c.

The second class action type aims for injunctive relief, consisting of an order against the defendant to cease the commissive and omissive conduct that causes the infringement of homogeneous individual rights. This class action – *azione di classe inibitoria – is* regulated by article 840-sexiesdecies c.p.c.)

## 7. Azione di Classe Risarcitoria under Article 840-bis c.p.c.

The class action is devised to protect all individuals composing the class harmed by a mass tort. To filter who can bring a class claim and in what cases, Article 840-bis c.p.c. foresees standing multi-layer standing rules. Its provision determines who can bring a class action – individual class members or associations. However, this first standing requirement is not sufficient, as Articles 840-bis and 840-ter allow the class action to proceed only if class-plaintiffs seek protection for 'homogeneous rights' (*diritti omogenei*). However, the law does not define the notion of *diritti omogenei*. Likewise, the consumers' class actions under the legislative decree n. 206 of 2005 also did not define *diritti omogenei.*

The scope of *diritti omogenei* is undefined; Nonetheless, this legal arrangement is critical with regard to both class plaintiff's and class-members 'standing. In effect, class actions can be certified by the courts only if the class plaintiff pursues judicial relief for *diritti omogenei*. Furthermore, under Article 840-sexies c.p.c., the court's judgment on the mass tort must also determine the features of the *diritti omogenei*: only class members claiming a homogeneous right have standing to opt-in.

Hence, defining the *diritti omogenei* determines the scope of standing. For this purpose, analyzing Article 840-bis c.p.c. is not sufficient. It is further necessary to consider the case law developed under the consumer class action, which also referred to *diritti omogenei.* Additionally, the

[339] This metaphor has been used by GIUSSANI, *Azioni collettive risarcitorie nel processo civile*, 2008, pp. 76-77.

meaning of *diritti omogenei* is indirectly defined by the complex structure of the 'new' class action. First, articles 840-bis and 840-ter link the meaning of *diritti omogenei* to the notion of mass tort. Second, Article 840-quinquies (4) c.p.c. allows for the use of statistical data. Thus, homogeneous rights must be somewhat 'standardized'. Third, joining class members must submit their personal claims by filling out a form and can only bring documentary evidence.

This section explores *(i)* the structure of class actions seeking compensatory damages, *(ii)* standing rules, *(iii)* the notion of homogeneous rights, *(iv)* the First phase: the mass tort, *(v)* the first phase: the class-plaintiff and the opt-in mechanisms, *(vi)* Evidence gathering in the first phase, *(vii)* The decision on the mass tort, *(viii)* The second phase: ascertaining the individual rights.

Finally, the following section will consider the *azione di classe inibitoria* (class actions seeking injunctive relief).

## 7.1 The Structure of Class Actions Seeking Compensatory Damages

The first-class action type is the one aimed at both ascertaining the existence of a mass tort and obtaining compensation for the damages suffered by individual class members. For this reason, it is called, in Italian, *azione di calsse risarcitoria.*

The need to ascertain both the mass tort and the individual rights leads to a two-phased proceeding, which will be discussed hereafter to highlight the main features of Italy's newly introduced class action. Analyzing the two phases also allows an understanding of how standing is regulated.

## 7.2 Standing Rules

Under Article 840-bis c.p.c. a class action may be instituted by any individual class member or by an entity whose articles of association foresee the protection of the class. Legal entities must also be enrolled in a registry held by the Ministry of Justice. In other words, the plaintiff may be either individual or institutional.

The notion of 'class' entails the existence of a mass tort, on the one hand, and the existence of a multitude of individuals entitled to 'homogenous rights' infringed by the defendant's tortious conduct, on the other.

The individual class, the plaintiff, brings an action that involves both their right as well as the individual homogeneous rights of their fellow class members. In such a case, the class plaintiff has ordinary standing for their right and extraordinary standing for the benefit of other class members' rights.

In the different and more frequent cases of an institutional plaintiff, the class action is promoted by an entity that has extraordinary standing only. The entity seeks protection for the class and its members, not for itself.

For example, an environmental organization does not suffer directly from environmental or climate change damages. The entity rather represents individuals whose rights are infringed by the degradation of the environment or the climate. The entity can institute a class action if it has the formal requirements foreseen by article 840-bis c.p.c.. The rights for which the action is brought

are not the entity's rights. Neither is there a representative power in place conferred to the institutional plaintiff. This is, in fact, a crystal-clear case of *legittimazione straordinaria* (extraordinary standing).

The latter consideration helps us understand the difference between 'class plaintiff' and 'class representative.' These two subjects operate in different scenarios based on different legal mechanisms.

The class plaintiff, individual or institutional, is always entitled to extraordinary standing, as just seen above. With a twist, in the case of the individual plaintiff, as in such a case, they also seek protection for their own right as well as for the other class members. The class plaintiff leads the first phase of the class action, aimed at the judicial finding over the mass tort. Up to that point, the metaphorical glue that sticks the class together is the *legittimazione straordinaria* attributed by article 840-bis c.p.c

The class representative's functions enter into play in the second phase of the proceeding when the mass tort has been ascertained already, and it is time to find the extent of every individual right. As it will be later discussed, this happens through an adversarial proceeding supervised and decided by a delegated judge that opposes the class representative to the defendant. In this phase, under article 840-septies (2)(h) c.p.c., the class representative acts as a proxy based on an expressed power of attorney granted by every joining class member. Conferring such a power of attorney is a mandatory requirement for the admissibility of class members' joinder.

In other words, the class plaintiff leads the class action in its first phase based on the *legittimazione straordinaria* given to them by article 840-bis c.p.c, while under article 840-septies (2)(h) c.p.c., the class representative represents the class members who joined the proceedings based on a power of attorney.

Let us consider now who can be the defendant in a class action, looking at article 840-bis c.p.c. As mentioned in the previous paragraphs, *legittimazione ad agire* (standing) has both an active and passive side: *legittimazione attiva* and *passiva.* To be entitled to the right of action (*diritto d'azione*), the plaintiff must state to be entitled to the right they claim, on the active side, and, on the passive one, that the defendant is the subject obliged and bound by the substantive law provision. While the notion of *legittimazione passive* might seem a bit foggy in ordinary cases, it becomes clear in a class action. Article 840-bis c.p.c. states that only enterprises and entities managing public interests[340] – not the state nor the public administration – may be sued through a class action

This provision restricts the array of possible defendants with relevant consequences for climate litigation. Climate litigants may only leverage the class action device against private entities. In case a class action were to be instituted against a public authority or the state, the actions would be dismissed for lack of passive standing (*legittimazione passiva*).

[340] These categories encompass state- or city-owned companies that carry out services such as public transportation or the postal service.

## 7.3 The Notion of 'Homogeneous Rights'

The notion of 'homogeneous rights' is the cornerstone of the class action device under Article 840-bis, lett. b), c.p.c. The class plaintiff is, in fact, required to seek the protection of homogeneous rights; lacking this requirement, the class action must be dismissed under Article 840-ter, lett. b), c.p.c. Yet the law does not provide a definition. Similarly, Article 140-bis (12) cod. cons., regulating consumers' class action did also not give a description of 'homogeneous rights.'

The issue revolves around the necessary degree of commonality among class members' rights. Class members cannot share strictly identical rights. 'Identity' would be impossible because each class member is a different party and is personally harmed by the mass harm. Rather, homogeneous rights entail the notion of connected rights. The intensity of such a connection is, however, an open concept. A broader interpretation facilitates justice access but could also jeopardize procedural efficiency.

Comparative scholars pointed out that North and South America offers two different approaches. Rule 23, lett. b, No. 3 of the U.S. Federal Rules of Civil Procedure sets the 'predominance' principle, according to which the common issues must be predominant over the individual ones. The 2004 *Código modelo de procesos colectivos para Iberoamérica* takes a more liberal approach, requiring a mere "*origen común"*.[341]

According to a widely accepted opinion, homogeneous rights include rights that are, *per se*, different but caused by unitary conduct and feature identical issues of law.[342] For example, in a consumer class action launched against a train company for its repeating delays, the *Corte d'appello di Milano* found that class actions are admissible even though each class member claimed a different number of damages caused by unitary conduct.[343]

Similarly, in the Italian chapter of the *Dieselgat*, the *Tribunale di Venezia* ruled that rights were homogeneous if the event that caused the damage was identical, while the consequences suffered by individual plaintiffs may differ. Accordingly, the Court awarded each class member 15% of the car cost. On the side of the non-pecuniary damages, the Court awarded only damages under Article 515 c.p., meaning non-pecuniary damages consequential to the commission of criminal activity. The plaintiffs, however, also required the compensation of further non-pecuniary damages for the harm caused by false advertisement. The court found that such harm was too individually personalized to fit into a class action. Critics of this decision argued that, *per se*, non-pecuniary damages are compatible with the class action; only strictly personal non-pecuniary damages cannot be bundled together. Hence, non-pecuniary damages deriving from fraudulent advertisements could fall under 'homogeneous rights.'[344]

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[341] GIUSSANTI, Ancora sulla tutelabilità con l'azione di classe dei soli diritti "omogenei", in Giurisprudenza Italiana, 2014, 8-9, p. 1910.

[342] GIUSSANI, Il nuovo art. 140 bis c. cons., in Rivista di diritto processuale, 2010, p. 597.

[343] *Corte d'Appello* Milano, sez. II, judgment of March 3rd, 2014, commented by GIUSSANTI, Ancora sulla tutelabilità con l'azione di classe dei soli diritti "omogenei", in Giurisprudenza Italiana, 2014, 8-9, p. 1910.

[344] Tribunale di Venezia, judgment of July 7th of 2021, commented by RUGGIERO, Responsabilità civile - class action, pratiche commerciali scorrette e danni non patrimoniali: la recente pronuncia del tribunale di Venezia, in Nuova giurisprudenza civile, 2021, 6, p. 1335.

The ruling issued by the *Tribunale di Venezia* was also criticized because it seemed to ignore a 2019 ruling by the *Corte di cassazione.* The Italian Supreme Court found that non-pecuniary claims are admissible insofar as the plaintiffs prove common elements' existence to each class member. Such commonalities must be presented to the court and proved to avoid the risk of 'punitive damages,' a category the Italian legal order does not foresee. Further, the Court held that the shared features of non-pecuniary damages among class members must justify the use of the collective redress.[345]

The regulation of consumer class action required the court to determine a calculation criterion to determine individual damages. This inevitably led to maintaining that homogeneous rights needed to fit into this narrow mechanism. Consequently, class actions were deemed applicable only to those rights that did not require individual inquiry. Along this logic, the right to health was considered unfit for the class action device, as evaluating the health issues of every class member requires individual evidence.[346] Under Article 840-bis, lett. b), c.p.c. courts must not establish such a calculation mechanism; however, the code of civil procedure requires joining class members to prove their rights based on documentary evidence. While the first phase, concerning the mass tort, allows for wide means of evidence, the second phase foresees an evidentiary restriction that influences the scope of homogeneous rights. As a result, the class plaintiff can seek protection only for those rights that pass through this evidentiary filter.[347]

In conclusion, any individual subjective right – pecuniary and non-pecuniary – can potentially fall under the category of 'homogeneous rights '; Article 840-bis c.p.c. requires that it is traceable to a mass tort and that, following the opt-in, each right holder's claim can be proved by means of documents without further inquiry. Regarding climate litigation, it seems that the issue is not what rights can be bundled up into a class action but how the class is composed. Claiming the right to health is probably too vague; the class plaintiff should link the claim to specific diseases so that each class member can produce documents to prove their right to compensation if the mass tort is ascertained. Alternatively, scholars have imagined the outline of sub-classes.[348]

## 7.4 First Phase: Ascertaining the Existence of a Mass Tort

The first phase starts with a complaint filed by a class member or an entity before the court and ends with the decision on the existence of a mass tort.

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[345] *Corte di cassazione*, judgment No. 114886 of 2019, available on the on-line database Leggi d'Italia: "(…) nei casi di danni non patrimoniali rivendicati nelle forme dell'azione di classe (e proprio al fine di scongiurare un'inammissibile declinazione in chiave punitiva della responsabilità risarcitoria, in assenza di indici legislativi suscettibili di giustificarla: cfr. Sez. U -, Sentenza n. 16601 del 05/07/2017) dell'allegazione e della prova dei profili concreti dei pregiudizi lamentati capaci di valorizzarne i tratti condivisi da tutti i membri della classe, non personalizzabili in relazione a singoli danneggiati, bensì accomunati da caratteristiche tali da giustificarne, tanto l'apprezzamento seriale, quanto la gestione processuale congiuntamente rivendicata."

[346] GABELLINI, Accesso alla giustizia in materia ambientale e climatica, in Rivista di diritto e procedura civile, 2022, p. 1124.

[347] GABELLINI, Accesso alla giustizia in materia ambientale e climatica, in Rivista di diritto e procedura civile, 2022, p. 1125.

[348] This possibility is mentioned by GABELLINI, Accesso alla giustizia in materia ambientale e climatica, in Rivista di diritto e procedura civile, 2022, p. 1128.

The issue at stake here is the mass tort, meaning the commissive or omissive conduct those damages high numbers of individuals – the class. The mass tort is the precondition for individual rights to compensatory damages. For this reason, the first phase of the proceeding focuses on the mass tort, while the second phase only happens after the court finding over the mass tort.

However, there is an exception to this that applies when the class action is brought by a class member and not by an entity. In such circumstances, the decision that ends the first phase (*sentenza*) also states the existence and scope of the individual right of the class plaintiff.

As considered hereafter, the class member may join the class action both in the first phase as well as in the second one after the courts have issued the decision that ascertains the existence of a mass tort. However, given that the second phase of the class action proceeding focuses on individual rights, it makes more sense for individual class members to wait for the start of the second phase and join then.

## 7.5 First Phase: The Class-Plaintiff and the Opt-In Mechanisms

In the first phase of the proceedings, all procedural initiatives are brought forward by the 'class plaintiff,' and individual class members can join the proceeding and become parties to it, but they have no actual procedural powers.

Regarding class composition and effects of the decision, it is worth noting that the Italian class action chose the opt-in mechanism contrary to what happens in the U.S. system, which applies the opt-out rule.

The opt-in system requires the decision of each class member to take action and join the class action. The joinder (*adesione*) equals the exercise of the right of action.

By choosing this mechanism, the Italian legislator decided to differentiate the rules on standing applicable for the adjudication of the mass tort on one side and to the individual rights on the other.

Concerning the adjudication on the existence of the mass tort, the class plaintiff has *legittimazione straordinaria* (extraordinary standing), given that the mass tort is the source of harm for each class member. Therefore, the court can decide on the mass tort, although class members join the class action.

Conversely, class members are still in full control of their substantive rights and right of action when it comes to individual rights. To get compensatory damages, they have to exercise the right of action by joining the class action. Class members must actively choose to be involved. Those who do not want to participate can remain uninvolved. Regarding the individual right to compensation, there is no departure from the *principio dispositivo* (articles 2907 c.c. and 24 *cost.*) and the general rule set by Article 81 c.p.c.[349]

The only purpose of their joinder – *adesione* – in the first phase is probably due to the possibility that the class plaintiff enters into a settlement agreement with the defendant with the result of ceasing the class action.[350] In that case, the class members who joined the class action may step

[349] In favour of the opt-out mechanism in the Italian system, see GIUSSANI, *Azioni collettive risarcitorie nel processo civile*, 2008, pp. 47.

[350] See Articles 840-quinquies combined with 840-*septies* c.p.c.

into the shoes of the class plaintiff and continue the proceeding. And that is pretty much all the power they have, as joining, class members cannot even appeal the decision over the mass tort with ordinary means of appeal – they can only pursue extraordinary means of appeals.[351]

According to Article 840-septies c.p.c., class members can join by filling out a form available online, and they do not need to be represented by a certified lawyer. The same applies if the class members join in during the second phase. This provision departs from the general rule stated by Article 82 c.p.c., applicable to individual claims, which requires the assistance of a lawyer for any judicial claim with a value higher than one thousand hundred euros. This class action provision, aimed at minimizing costs and facilitating access to justice, is also favorable in the context of climate litigation as it would allow anyone, as long as they have internet access, to participate in a climate change-related class action.

## 7.6 Evidence Gathering in the First Phase

Ascertaining the mass tort inherently requires an evidence-gathering phase. Given the complexity of mass rights violations, the law grants the class plaintiff a vast array of means of evidence, including novel ones, that are aimed at facilitating the class plaintiff because of the economic and information asymmetries that divide, at the substantive level, the class members, and the defendant. This is an example of what legal scholars in Italy called 'differentiated procedural protection.' Meaning rules of procedure that derogate the strict formal equality among parties favoring one of them in consideration of the substantial inequality that exists in real life.

Under Article 840-quinquies (4) c.p.c., the mass tort can be proved by leveraging statistical data combined with rebuttable presumptions.[352] This is a useful evidentiary toolkit in cases of complex causal chains that make it virtually impossible to prove every causal link and when factual analysis requires the processing of high volumes of data. The combination of both statistical analysis and rebuttable presumptions is necessary because statistics is concerned with uncertainty and variation and draws statistically proven conclusions to the extent of probability that does not necessarily reach 100% certainty. In the class action setting, the class plaintiff is now able to establish a fact as statistically proven and reach an evidentiary conclusion within the proceeding, thanks to the mechanism of a rebuttable presumption.[353]

For example, the plaintiff can bring statistical data that shows how, over certain thresholds, the concentration of heavy metals in drinking water increases the probability of people suffering from

[351] See Article 840-decies c.p.c.

[352] See, MENGALI, *La fase istruttoria nella nuova azione di classe*, in La Class action riformata, edited by CARRATTA, in *Giurisprudenza* italiana, 2019, p. 2310. The use of statistical data is not completely new, as its use was allowed under Article 28 of legislative decree No. 150 of 2011 to prove discriminatory conducts attributable to the employer in the workplace. This is the wording of Article 28(4): "*Quando il ricorrente fornisce elementi di fatto, desunti anche da dati di carattere statistico, dai quali si puo' presumere l'esistenza di atti, patti o comportamenti discriminatori, spetta al convenuto l'onere di provare l'insussistenza della discriminazione. I dati di carattere statistico possono essere relativi anche alle assunzioni, ai regimi contributivi, all'assegnazione delle mansioni e qualifiche, ai trasferimenti, alla progressione in carriera e ai licenziamenti dell'azienda interessata.*"

[353] GIUSSANI, La prova statistica nelle class action, in Rivista di diritto processuale, 1989, p. 1029. Aso, see TARUFFO, La prova scientifica nel processo civile¸ in Rivista di diritto e procedura civile, 2005, p. 1079.

certain health issues. Suppose the plaintiff can prove that the heavy metals exceed the safe limit in a specific geographic area and that the defendant caused such water pollution. In that case, they can consequently and automatically prove the defendant's liability for the violation of the right to health based on the statistical analysis and the rebuttable presumption mechanism. This evidentiary tool exonerates the plaintiff to prove the specific link between the illnesses suffered by every member of a group of people and each water pollutant. The defendant must overcome the presumption and prove that, for instance, the pollution has other sources, that the statistical data is faulted, or that another statistical rule applies, or any other fact to rebut the presumption. This mechanism has a high potential for environmental and climate litigants that seek compensation against private entities.

Under Article 840-quinquies (5) and (6) c.p.c., the class plaintiff may obtain an order against the defendant to present documents or pieces of evidence pertaining to certain categories.

Some scholars noted how this provision picks up on the EU Directive No. 104 of 2014, which set out provisions in competition law litigation, implemented in Italy with legislative decree No. 3 of January 19th, 2017**.**

[354] In particular Article 5(1) foresees that:

> *"*Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence*."*

While the directive foresees that the same procedural power also benefits the defendant, in the Italian class action device, only the class plaintiff can obtain on the order of disclosure.

Article 840-quinquies (5) aims to overcome the information asymmetry between class members and the defendant. In the context of individual claim proceedings, Article 201 c.p.c. foresees a similar provision for individual suits. In that case, however, the order can be issued in favor of any party and is subjected to the condition of being 'necessary' for the decision. In the class action context, the standard to meet is much more relaxed as the court may issue such an order against the defendant even when the exhibition is simply 'useful.' The class plaintiff may also indicate certain facts or evidence categories, and the court can determine what evidence has to be brought from the defendant. It could be a series of documents.

For example, all the company resolutions that have been made in a certain period by the board of directors concerning specific topics. But the order could also require a written testimony under oath by the company's employees.

[354] See, MENGALI, *La fase istruttoria nella nuova azione di classe*, in La Class action riformata, edited by CARRATTA, in *Giurisprudenza* italiana, 2019, p. 2311.

If the defendant refuses to deliver the ordered evidence, the court issues a monetary penalty and may, in light of the circumstances of the case, consider the facts as proven – even though no evidence has been provided. In other words, the defendant risks that their silence is treated as a *ficta confessio.*

Again, this is an evidentiary tool with high potential for climate litigants that might want to prove, for example, that the company has knowingly ignored the negative consequences of its business conduct for the climate and human rights.

Under Article 840-quinquies (3) c.p.c., an expert witness chosen by the court can be ordered at the defendant's cost. This rule subverts the normal principle according to which the expenses for expert evidence disposed of by the court – by its motion or upon request by the parties – have to be paid by both parties.[355]

In the context of mass torts, gathering expert evidence can be very expensive due to the complexity of the facts and the involvement of scientific or technical knowledge. The expert witness may also have to do on-site work, which adds to more expenses. This provision aims to overcome the economic asymmetries between individual class members, including the class plaintiff and the defendant.

Climate litigants could benefit from this provision, especially if a citizens-based entity with scarce economic resources brings the class action. The case law comment in chapter 2 of this thesis shows that the collaboration of an expert witness to help the court appreciate the many technical and scientific aspects of climate litigation is necessary. This rule would not change the fact that expert witnesses siding with the plaintiff – *consulente di parte* – would still operate at the expense of the class plaintiff alone.

Under Article 840-quinquies (1) combined with Article 840-septies c.p.c., joining class members can prove their rights by submitting a third-party written testimony statement rendered before a certified lawyer. [356] For this purpose, the lawyer serves as a public officer and undergoes criminal liability in case of forgery. In the context of individual claim proceedings, Article 275-bis c.p.c. already foresees such a possibility but under strict conditions that are not required in the case of class actions.

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[355] This principle has been stated by *Corte di cassazione, judgement* , n. 25179 of November 8th, 2013, available in the online database *Leggi d'Italia,* which found that the activities of the expert witness appointed by the court are performed in accordance with a common interest of the parties, who are therefore jointly liable for the payment of the fee regardless of the allocation of the burden of court costs made by the final decision: «*La prestazione del consulente tecnico d'ufficio è effettuata in funzione di un interesse comune delle parti del giudizio, le quali sono solidalmente responsabili del pagamento delle relative competenze anche dopo che la controversia nella quale il consulente ha prestato la sua opera sia stata decisa con sentenza passata in giudicato, indipendentemente dalla ripartizione in essa operata dell'onere delle spese processuali. Ne consegue che sussiste la responsabilità solidale delle pari anche nell'ipotesi di sentenza non passata in giudicato ancorché contenga un comando giudiziale diverso da quello di cui al decreto di liquidazione emesso ai sensi dell'art. 11 della legge 7 agosto 1980, n. 319, in quanto le relative statuizioni rilevano solo nei rapporti interni tra le parti».*

[356] Article 840-quinquies (1) combined which states that, even in this first phase, joining class members may prove their individual rights with by the means foreseen by article 840-septies which allows a written testimony under oath rendered to a lawyer.

Climate litigants could benefit from this provision as it reduces the complexity of procedural rules for taking witnesses-based evidence.

## 7.7 The Ruling on the Mass Tort

If the court accepts the claim, the judgment issued at the end of the first phase has a different content, depending on who brought the class action. If the court finds that the claimed mass tort is unfounded, there can also be no adjudication on the individual right to compensation. If the unfavorable ruling is not appealed, the *res iudicata* binds the plaintiff, but another class action might be brought for the same facts by another class member or entity. Due to the opt-in system, there is no binding effect for the whole class.

Let us consider the content of the favorable decision on the mass tort. Besides the possible order to compensate damages in favor of the individual class member who brought the class action[357] under Article 840-sexies c.p.c., the ruling has the following content[358]: *(i)* a finding on the mass tort caused by the defendant; *(ii)* definition of the features of the homogeneous rights for the sake of class members joinder; *(iii)* description of the documents that must be submitted to the court from each class member that opts in to prove their rights; *(iv)* a declaration that the joinder procedure is open and a term for joining the class action; *(v)* appointment of a delegated judge responsible for managing the second phase of the class action; *(vi)* appointment of a joint class representative tasked with representing class members in the second phase of the proceeding; *(vii)* the amount of money that class members must deposit for the foreseeable expenses of the class representative for the management of the proceeding.

## 7.8 The Second Phase: Ascertaining the Individual Rights

The second phase starts off after the decision that ascertained the existence of a mass tort and is handled by three subjects: the delegated judge, the class representative who acts on behalf of each class member, and the defendant. The class representative represents individuals based on power directly – and mandatorily – attributed to them by the joining class members. Based on the individual claims made by the class members, the class representative proposes a draft project for the compensation of individual rights. The defendant can object to it and request changes are made. After this adversarial kind of proceeding, the final project is presented to the delegated judge, who decides on every single individual right by means of a decree. Class members may appeal the decree before the court. Until the time period for the appeal has not expired, individual class members may decide to exit the class action and propose an individual action. This is quite a strong guarantee for the individual class members who, in the bus metaphor, may ‘get off the bus’ even after a decision that denies or reduces their right to compensation.

Under Article 840-quaterdecies c.p.c., the class representative can also enter into a settlement agreement. Class members, here again, can ‘get off the bus.’

[357] The class plaintiff would at this point exit the proceedings under Article 840-sexies (1)(a) c.p.c., as their right has been satisfied.
[358] Article 840-sexies (1)(b)(c)(d)(e)(f)(g)(h) c.p.c.

Once the delegated judge's decree is final, the defendant can either comply with it under Article 840-duodecies c.p.c. or face a collective enforcement procedure.

The spontaneous fulfillment of the order triggers a sub-procedure in which the defendant deposits the sum due, and the representative presents a distribution plan. The latter can be opposed by individual plaintiffs or lawyers representing the class representative. If no opposition is being made, the class representative distributes the sums owed to each member. If the defendant remains non-compliant, the class representative alone can start the enforcement proceeding.

## 8. *Azione di Classe Inibitoria*

Article 840-sexiesdecies c.p.c. a class action aimed at injunctive relief to prevent mass harm from continuing.

The *azione di classe inibitoria* does not aim to compensate for individual rights infringements. Therefore, the claim and the consequent injunction focus only on the termination of the mass tort. Once the order is issued, compliance with it satisfies the class in the sense that individual rights are not compensated, but the source of damages is stopped. Therefore, this procedural 'remedy' has an intrinsic *interim* nature and cannot lead to a *res judicata*, given that individual homogeneous rights are not even considered. The court may, however, order the payment of a penalty for every day of delay in implementing the order. It can also order the defendant to take the necessary actions to eliminate or reduce the negative effects of their conduct on the class.

In terms of standing, both individual class members and entities are representative of the class, and with the formal requirements foreseen by Article 840-bis c.p.c., they may institute the class action. Extraordinary standing – *legittimazione extraordinary* – is granted to any class member or to the entities that fulfill the requirements already stated by Article 840 bis c.p.c. in the context of class actions seeking damages compensation. The defendant can be either a business or a public entity managing a public service.

The potentially decisive difference with the class action for damages under Article 840-bis is that Article 840-sexiesdecies c.p.c. allows the judicial protection of collective interests – not necessarily homogeneous rights. As considered above, there is a critical difference between rights and interests: subjective rights, including homogeneous rights, are necessarily subjected to private ownership, and diffuse interests are necessarily ownerless. Indeed, by 'attacking' the mass tort and requiring an injunction for its termination, individual rights are not vindicated directly.

Considering the feature of climate litigation, this class action device, too, cannot be used in climate litigation against the state. However, the *azione di classe inibitoria* might be very helpful in suit against the private sector seeking an injunction to reduce dangerous emissions.

The new class action, including the *azione di classe inibitoria*, only apply to violations that happened after the law entered into force. While this might be a limit for claims pursuing subjective rights under Article 840-bis c.p.c., claims under Article 840-sexiesdecies c.p.c. are not impacted by this time limitation, as they seek the prevention of future harm or the continuation of harmful

conduct. Under this perspective, there is no need to come to terms with the puzzle of standing for future generations, which would require modifying the law or coming up with creative theories to arguing that unborn people have rights. Tackling the mass tort based on a class action that seeks protection for *diffuse interests* seems to solve this cumbersome issue.

## 9. *Azione Rappresentativa*: The New Project on Consumers' Class Action

On December 9th, 2022, the Italian Council of Ministers approved a legislative decree implementing the EU Directive 2020/1828.[359] The decree is now under parliamentary scrutiny. It should enter into force on June 25th, 2023, under the name "*azione rappresentativa*" – representative action. This law would modify the *Codice del consume,* adding Articles 140-bis to 140-quaterdecies. This new piece of legislation aims to protect consumers from national or international wrongful conduct and avoid distortion of competition.

In brief, the *azione di classe rappresentativa* offers consumers a tool to seek *(i)* compensatory measures (Article 140-*novies*) or *(ii)* injunctive relief (Article 140-*octies Cod. cons.*). Further, *(iii)* it aims to protect 'collective interests,' and only marginally subjective rights, in specific consumer-related fields of law. Finally, *(iv)* the new provisions grant standing only to consumer associations registered in a special registry under Article 137 *Cod. cons.*

### 9.1 Representative Actions for Compensatory Measures

In case of compensatory actions under Article 140-*octies,* individual class members can join under Article 840-*septies* c.p.c. Class members must prove their individual right to compensation and the damages they suffered. In this case, the class action ends up seeking judicial protection for subjective rights rather than collective consumers' interests.

The remedy could be the compensation of damages, contractual termination in favor of the consumers, or the performance of in-kind compensation, such as the replacement of a product. Most probably, actions under Article 140-*octies Cod. cons.* are helpful if the harmful conduct has already ceased. Article Art. 140-*ter* (3) and (4) allow the commencement or continuation of an action even though the harmful behavior is terminated.

Furthermore, the class representative can enter into a settlement under Article 840-*quaterdecies* c.p.c.

### 9.2 Representative Class Actions Seeking Injunctive Relief

However, it seems probable that the new device's most 'natural' use will concern actions for injunctive relief under Article 140-*octies Cod. cons.* In this realm, Article 140-*octies Cod. cons.* greatly facilitates the burden of proof for the class plaintiff, which does not have to prove the defendant's fault or intent nor the harm caused to individual consumers.

[359] Directive (Eu) 2020/1828 Of The European Parliament And Of The Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

Article 140-*terdecies Cod. cons.* establishes provisions to 'indirectly enforce the injunction. The termination of tortious conduct requires, indeed, the undertaking of non-fungible performances. Hence, in such hypotheses, the enforcement issue is rather severe and requires coercive measures to be tackled. Replicating Articles 614-*bis* c.p.c. and Article 840-*sezxiesdecies* (6), Article 140-*terdecies Cod. cons.* allow the court to order the payment of a sum between €1.000 and €2.000 for each day of delay or for every unfulfillment. The payment benefits the Ministry of Enterprises and Made in Italy and the Ministry of Justice.

## 9.3 Private Enforcement of Consumers' Collective Interests

The new *azione rapppresentativa* protects consumers' 'collective interests' from regulations and directives violations concerning the subject matters listed in annex II of the legislative decree. Hence, consumer associations can sue in a vast array of fields, such as product liability; unfair terms and conditions in consumer contracts; air carrier liability, including denied boarding flight cancellation and delay; consumer price displays; electronic commerce; product safety; violations of the electronic communications code; personal data protection; consumer credit; unfair commercial practices; misleading advertising.

Notably, this procedural device allows pursuing the 'private enforcement' of consumers' collective interests and statutory duties. Similar to the environmental *action popularis*, this is another case of a procedural device that departs from subjective rights.

## 9.4 Standing Provisions

Under the new Articles 140-*quarter* and 140-*quinquies Cod. cons*., standing is granted to entities enrolled in a special registry instituted under Article 137 *Cod. cons*. Consumers' associations can sue even without a mandate from individual consumers whose interests are 'represented.'

Article 140-*quinquies*, consumer associations can also get registered to bring cross-border suits against defendants residing or seated in other EU countries.

Unlike in-class actions under Article 840-*bis* c.p.c., under the new *azione rappresentativa*, an individual class member cannot sue individually. This setting reinforces the fact that the subject matter of the claims is mostly the consumers' collective interests. Subjective rights are protected only in the case of compensatory action.

Consumer representative actions may be brought against natural persons or entities, both public or private, who operate for purposes relating to their trade, business, craft, or professional activity. The consumer association can also bring an action against an entity that operates through another entity. This opens the doors for the holding company's liability for the conduct undertaken by their subsidiaries.

## 10. Standing Rules for Environmental Harm

Standing rules (*legittimazione ad agire*) for vindicating environmental harm have changed over time. Moreover, the scope of standing has changed consistently with the different legal conceptions of what 'environment' is and how it can be better protected.

The following subsections summarize the evolutionary steps of environmental law in Italy and its effects on standing rules for the protection of the environment: *(i)* 1980' case law, *(ii)* Article 18 of law No. 349 of 1986, *(iii)* Article 18 of law No. 265 of 1999, *(iv) Codice dell'ambiente*.

## 10.1 1980' Case Law

Before law No. 349 of 1986, when the first piece of legislation was passed to protect the environment comprehensively, the case law had to step in and find pathways to assure sufficient protection, in view of Articles 2, 32, and 24 of the constitution. From a procedural point of view, the first issue to be solved was to identify who had standing.

The plenary session of the *Corte di cassazione* intervened with the two landmark judgments No. 4172 and No. 1463 of 1979. The court developed a theory about the judicial protection of "collective goods" and their judicial protection. This approach touches upon both the issue of standing and the one of justiciability. According to these findings, some collective goods are 'divisible' while 'indivisible.' The latter category includes national security and public order. These goods are connected to the social organization and cannot be conceived outside. Therefore, besides the government, nobody can take care of them and seek judicial protection.

Conversely, the first category concerns goods that pre-exist in the social order and to which people are individually entitled. Among these, the court mentions the environment. Such "divisible" common goods are subject to a "collective interest" (*interesse diffuso*), which, despite its collective nature, also encompasses individual claims which can either be legitimate interests (*interessi legittimi*) or subjective rights (*diritti soggettivi*). The "divisibility" of the common good allows the individual to have a direct connection to the good – e.g., the environment – and therefore seek judicial protection before the administrative court, in the field of legitimate interests, and before the ordinary courts, in the realm of subjective rights.[360]

Conversely, in the court's view, *interessi diffusi* pertaining to the first domain cannot be individualized and cannot be protected before any court.

The environment, however, was conceived as a divisible common good that could therefore be protected before ordinary courts when it amounts to a subjective right. In other words, the court

[360] Cassazione, sezioni unite, judgment No. 1463 of 1979: "Il riconoscimento dell'autonomia della funzione amministrativa non toglie, in tesi generale, che nell'ambito dei beni collettivi (intendendo con tale espressione i valori che sono propri delle società organizzate e cui sono riferibili interessi che vanno oltre l'individuo) sia possibile distinguere beni che sono indivisibili (per i quali non è configurabile una forma differenziata di fruizione da parte dei singoli) e beni divisibili. (…) La nozione d'interesse diffuso è propriamente riferibile solo alla prima specie di beni, in relazione ai quali, se di fruizione può parlarsi, essa riguarda la collettività considerata unitariamente come soggetto. Applicata alla seconda specie di beni essa evidenzia, prima che un interesse generale, una pluralità d'interessi individuali dello stesso contenuto, relativi alla fruizione di una utilità determinata. In tale ipotesi la nozione (che assume il diverso significato di interesse che si ripete e si estende fra i componenti della collettività) non esclude le posizioni d'interesse legittimo o di diritto soggettivo dei singoli. Si attua il fenomeno della coesistenza, su piani diversi, di due distinte attività di gestione del medesimo bene. La prima, affidata ai poteri pubblici, opera la mediazione tra esigenze diverse in base alla valutazione complessiva degli interessi della società organizzata. La seconda, propria dei singoli, si occupa della tutela del potere di fruizione dell'individuo, come area a lui riservata entro limiti più o meno estesi". The text of the judgment is partially available in Il Foro Italiano, 1979, Vol. 102, Parte prima: giurisprudenza costituzionale e civile (1979), pp. 939/940-943/944.

found that the individual had to stand before an ordinary court to protect the right to a safe environment.

## 10.2 Article 18 of Law No. 349 of 1986

Law No. 349 of 1986 instituted the Ministry of the environment, which set new rules for the judicial protection of the environment, including for the attribution of standing.

Article 18 of law No. 349 of 1986, the right to compensation for environmental harm was attributed only to the state. Consequently, the state and local authorities such as municipalities and provinces (*enti territoriali*) could pursue the judicial protection of the environment before ordinary courts. While sta state had 'ordinary standing,' municipalities and provinces had 'extraordinary standing' under article 81 c.p.c., given that only the state was entitled to the environment.

Under Article 18(5), associations and individual citizens could join civil proceedings before ordinary courts. Moreover, they could also seek judicial review of illegitimate administrative acts in environmental matters.

Article 18(4) required public authorities to exercise their power to protect the environment.

## 10.3 Article 9 Legislative Decree No. 267 of 2000

Article 9 of the legislative decree No. 267 of 2000 regulates the *action popularis* in environmental matters. Any citizen residing in a municipality or province may replace the local authority and bring an administrative or ordinary claim to protect the 'diffuse interest' to a healthy environment.

| Articolo 9 comma 1 | Article 9(1) |
|---|---|
| Ciascun elettore puo' far valere in giudizio le azioni e i ricorsi che spettano al comune e alla provincia. | Each voter may assert the actions and appeals pertaining to the municipality and the province in court. |

This provision leverages 'extraordinary standing' (*legittimazione straordinaria*) to allow citizens to step in and take legal action in case the local athoties is lethargic. (*legittimazione straordinaria*) for the claims that the local authorities could make. The latter would benefit from the compensatory damages awarded by the court, while the acting environmental association had to bear all costs, including those ordered by the court. Under Article 9(2), the joinder of the 'substituted' local authority is necessary. The latter can adhere to the claim and bear the costs of the proceedings.

The legislator used the tool of extraordinary standing to protect a common good – the environment – and broaden access to justice.

## 10.4 Codice dell'Ambiente

The scenario changed again. Legislative decree n. 152 of 2006 introduced the environmental code (*Codice dell'ambiente*), which entails a comprehensive regulation of the environment, including standing. In its field, it is a *lex spcialis,* and it has, therefore, predominance over the civil code and the code of civil procedure.

Standing, as usual, reflects substantive law. In the case of the environment, standing rules reflect the conception of the environment envisioned by the legislator in the *Codice dell'ambiente*. According to the new code, the environment is conceived as a unitary good composed of a multitude of elements – wildlife, plants, mountains, bodies of water, etc. While it includes all such elements, it also transcends them.

Consequently, specific forests or land may be subject to private property, but the environment itself cannot. It is a *res communes omnium* that evades the scheme of private ownership. The code departed from the perspective offered by the *Corte di cassazione* in its 1979 landmark decision. The environment is now considered an "indivisible" common good. Hence, the environment is subjected to mere *interessi diffusi.* As mentioned in the section exploring this concept, *interessi diffusi* cannot be claimed by individuals or private entities in court.[361]

The legal definition of environment had direct consequences on standing provisions, which differ based on the subject matter of a claim related to environmental harm.

In the case of "strict" environmental harm – meaning harm that concerns only the environment and nothing else – Article 311 cod. amb. assigns standing only to the Ministry of the Environment. In case of environmental harm, the Ministry has two choices, *(i)* it can leverage the public law measures to prevent environmental harm or obtain the restoration of the environment, and *(ii)* it can sue the polluter for damages before ordinary courts. Either way, Article 311 cod. amb. only grants standing to the Ministry. The rationale for restricting standing rules for protecting the environment is linked to its feature of being a 'common good' to which individuals or groups cannot claim exclusive ownership.[362]

Under art. 313(7) cod. amb., local authorities or individuals may only bring a claim to protect their individual rights when they are somehow affected by environmental damage. In such cases, the environmental damage is a mere condition for the individual claim, meaning that it is one of the factual elements of the cause of action – not the only one, though. The individual claim remains restricted to individual subjective rights, such as the rights to human dignity, life, health, property, etc., which are infringed because of environmental damage. For example, water pollution might damage farming or diminish real estate value in a certain area. In Italian, this injury category is called '*danno riflesso*,' meaning harm that is the "reflection" of a previous harmful event.

In conclusion, while the state is entitled to the environment itself and the Ministry of the environment has standing (*legittimazione ad agire*) to sue the polluter, local authorities and individuals are only entitled to their own subjective rights and to the consequential vindication of the compensation of the so-called 'reflected damage' – which is distinctly different from the environmental damage.

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[361] ALPA, La natura giuridica del danno ambientale, in Il danno ambientale con riferimento alla responsabilità civile, edited by PERLINGIERI, Napoli, 1991. See also, NIGRO, Le due facce dell'interesse diffuso: ambiguità di una formula e mediazione della giurisprudenza, in Foto italiano, 1987, V, p. 7.

[362] See, TARUFFO, Legittimazione ad agire e le tecniche di tutela nella nuova disciplina del danno ambientale, in Rivista critica del diritto privato, 1987, p. 432, and DONZELLI, La tutela giurisdizionale degli interessi collettivi, Napoli, 2008, p. 675.

Conceiving the environment as a public good that falls outside the pattern of private ownership leads to further consequences in terms of jurisdiction. Under Article 113(7) cod. amb., individual lawsuits are attributed to the jurisdiction of ordinary courts.[363]

The Ministry of the environment may follow two alternative pathways in terms of jurisdiction. First, it may recur to the ordinary jurisdiction. Under Article 111(1) cod. amb., the Ministry of the environment may seek compensation for environmental damage in a civil or criminal proceeding. Alternatively, the Ministry may institute an administrative procedure issuing an immediately enforceable order against the wrongdoer to restore the environment.

If the polluter fails to comply, a second order may order compensation for monetary damages equivalent damages. All such charges are issued under Articles 313, 304, and 314(6) cod. amb. May be appealed before the administrative courts.

## 10.5 *Corte Costituzionale*, Judgment n. 126, June 1st, 2016

The current setting and the attribution of standing for the protection of the environment exclusively to the Ministry of the environment was highly debated and led, in 2016, to a decision of the *Corte costituzionale*.[364]

The decision originated from the constitutional claim raised by the *Tribunale di Lanusei*, which had a pending criminal case against some high-ranking military officers accused of having caused environmental pollution in a military firing range in Sardinia.[365]

The regional government of Sardinia (*Regione Sardegna*) joined the criminal proceeding submitting a civil claim for compensation for the environmental damage caused by the military activities performed on that part of the island. Considering that Article 311(1) cod. amb. grants standing (*legittimazione ad agire*) only to the Ministry of environment, the first instance court raised a constitutional claim to the *Corte costituzionale,* maintaining that Article 311(1) cod. amb. introduces a centralized judicial protection system that excludes individuals and local authorities in a way incompatible with the constitutional setting.[366]

At the core of the claim was the idea that granting standing only to the Ministry of the environment is incompatible with the diffuse nature of the environment, for whose protection anyone should be able to access courts.

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[363] This was confirmed by *Cassazione civile, sezioni unite*, judgement No. 8092, April 23rd, 2020.

[364] *Corte costituzionale*, judgement n. 126, June 1st, 2016, available in DeJure. See, BETZU-ARU, Il risarcimento del danno ambientale tra esigenze unitarie e interessi territoriali, in Giurisprudenza costituzionale, 3, 2016, p. 987. On the overall topic of standing for environmental damage claims consider also, VISINTINI, Responsabilità civile e danni ambientali, in Enciclopedia del diritto, Annali IV, 2011, p. 1012, and GIUSSANI, Giustizia civile e tutela dell'ambiente: una pagina ancora da scrivere, in LUPOI (editor), Emergenze ambientali e tutela giuridica, Sant'Arcangelo di Romagna, 2017, p. 191. With respect to the European legal context, see GALANTI, Quale spazio per *la legittimazione ad agire* dei singoli in materia ambientale: considerazioni alla luce della normativa europea, in LUPOI (a cura di), Frontiere di tutela dei diritti fondamentali (A settant'anni dalla Costituzione italiana), San Giustino, 2019, p. 79.

[365] The defendants were accused of «environmental disaster» - *disastro ambientale* – foreseen by Article 437 *Codice penale.*

[366] More specifically, the court claimed that such an exclusion was arbitrary and that it caused a diminished protection of the environment.

The court recalled the legislative developments for the protection of the environment both at the national and international levels. The EU Directive 2004/35/CE of April 21st, 2004, requires EU member states to grant effective environmental protection through mechanisms aimed at restoring the environment.

The national legislation, including the *Codice dell'ambiente*, is receptive to such an approach and attributes to the Ministry of environment the choice – discussed above – between ordinary jurisdiction for monetary compensation and administrative action, after which a claim to the administrative jurisdiction may arise. The focus is, however, on the restoration of the environment rather than on monetary damages, and the activities that lead to restoration must be coordinated by one central authority – the Ministry of environment. Consequently, standing, also for monetary damages, is centralized as well. According to the *Corte costituzionale*, such a choice is also compatible with the UNFCCC and the 2015 Paris Agreement.[367] Following this reasoning, the *Corte costitutionale* rejected the constitutional claim. In the specific case, the practical consequence was that *Regione Sardegna* could not participate in the criminal proceeding seeking the compensation of monetary damages following the environmental damages. At a general level, the consequence is that no private entity or individual has standing for the protection of the environment itself. Individuals may only pursue compensation for their own damages consequential to environmental damage.

[367] The judgement, at §8.1, stresses the primacy of the environmental restoration over the monetary compensation for damages and the need for a unitary and centralized action. To sustain this argument, the court makes reference to the 2015 Paris Agreement: "*In effetti, una volta messo al centro del sistema il ripristino ambientale, emerge con forza l'esigenza di una gestione unitaria: un intervento di risanamento frazionato e diversificato, su base 'micro territoriale', oltre ad essere incompatibile sul piano teorico con la natura stessa della qualificazione della situazione soggettiva in termini di potere (funzionale), contrasterebbe con l'esigenza di una tutela sistemica del bene; tutela che, al contrario, richiede sempre più una visione e strategie sovranazionali, come posto in evidenza, oltre che dalla disciplina comunitaria, dall'ultima Conferenza internazionale sul clima tenutasi a Parigi nel 2015, secondo quanto previsto dalla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici*".

# CHAPTER 10
# INTERESSE AD AGIRE

## 1. Introductory Considerations

It is now time to explore the second of the three *condizinoi dell'azione*, meaning the one of *interesse ad agire.* In general terms, *interesse ad agire* can be understood as the usefulness and necessity of the decision with regard to the rights claimed by the plaintiff.

*Interesse ad agire* is regulated by article 100 c.p.c. Such provision is the direct successor of article 36 of the 1865 Italian code of civil procedural law drafted shortly after the Italian unification.[368] The various previous codes, existing under the multiple separate pre-unification states, did not mention the legal arrangement of *interesse ad agire*. Likewise, neither did the French, German or Austrian legislation. The reason for its introduction in the 1865 code, is linked to the French scholarly and case law mid-nineteenth century developments, expressed by the expression '*point d'intérêt, point d'action*' or '*l'intérêt est la mesure des actions*.'[369]

Let now us consider the relationship between *legittimazinone* and *interesse ad agire*, starting from the consideration that, in the Italian system, standing is composed of two separate concepts: *legittimazione ad agire* (article 81 c.p.c.) and *interesse ad agire* (article 100 c.p.c.). They share the fact of being both necessary conditions for the existence of the right of action – *condizioni dell'azione* – therefore, the right to have the case decided on the merits of the claim. Similarly, both must be evaluated separately from the merits based on the claim filed to the court and before entering the merits. If they were to be decided after the merits, the claim would be decided, but it has been stressed already that the right of action is partially abstract and separate vis-à-vis the substantive right. Moreover, it would not be logical to assess standing requirements when the court has already ascertained whether the plaintiff is actually entitled to the right claimed and if the violation of the rights has happened.[370] Finally, both *legittimazione* and *interesse ad agire* can be found

[368] The geographical area always known as Italy, that stretches from the southern side of the Alps down along the peninsula and encompasses the islands of *Sardegna* and *Sicilia* was fragmented in separate states and kingdoms. Following the military initiatives lead by Vittorio Emanuele II, King of Piemont and Sardinia, the prime ministryof Piemont Camillo Benso di Cavour and, famously, Garibaldi and his troops, the *Risorgimento idea* of Italian national unity got to a first milestone achievement on March 17th, 1861 when the Parliament of Turin proclaimed the esyablishment of the Kingdom of Italy. Rome and the area of Triveneto were still missing. Today's capital of Italy was still part of Papal State and was concquere in 1870. *Venezia* was annexed after the Third War of Independence in 1866. *Trento* and *Trieste*, still belonging to the Austro-Hungarian empire despite their Italian cultural and geographical roots, were annexed 1918 after the first World War.

[369] PROTO-PISANI, *Lezioni di diritto prcessuale civile*, Napoli, 2014, p. 309

[370] This is clearly explained in MANDRIOLI-CARRATTA, Diritto processuale civile, I Nozioni introduttive e disposizioni generali, Torino, 2022, p. 41: "*(…) l'interesse ad agire, come le altre condizioni dell'azione di cui ci occupiamo, non è altro che una modalità della domanda, ossia un contenuto della domanda. D'altra parte, e ovvio che nel momento in cui il giudice si pone il quesito se sussistano le condizioni dell'azione, annulla l'altro si potrebbe riferire se non alla domanda e a quanto in essa è affermato, essendo chiaro che se in quel momento potesse già riscontrare la verità di quanto è affermato nella domanda stessa, il processo di cognizione sarebbe già concluso, poiché già si saprebbe se*

missing by the court *ex officio* at any time and stage of the proceeding, without a specific objection made by the parties.[371] The decision that finds the lack of *interesse ad agire* has a merely procedural content and leaves room for a new action: '*sentenza definitive di rito*', under article 279, No. 2, c.p.c.

Concerning the differences, *legittimazione* is a matter of asserted entitlement, not an actual entitlement; *interesse* is a procedural condition for a decision on the merits and is measured on the usefulness of the outcome of the decision.

Given that they are both *condizioni dell'azione*, one has to established after the other. The notion of *legittimazione* concerns the relationship between the parties and the substantive right. It has a legal connotation and must be ascertained first. First, it must be evaluated if the plaintiff has *legittimazione ad agire*. Only if this condition is met is it logical to consider the factual element of *interesse ad agire*. The issue of *legittimazione* is precedes the one of *interesse*. [372] In other words, the plaintiff could have *legittimazione* but then have no *interesse* if the decision is not necessary for the protection of the right claimed.

The two concepts are distinct, yet they seem to overlap when substantive law provisions grant *legittimazione straordinaria* to anyone who has an 'interest' or a 'sufficient interest' in someone else's rights. Despite the use of the very same word '*interesse*', such provisions mean the word *interesse* in a completely different way compared to article 100 c.p.c.

This is, among many, the case of the actions of contractual nullity, where anyone who shows sufficient interest in the matter may seek the nullity of the contract. Such use of the word 'interest' has nothing to do with the one set by article 100 c.p.c. When standing provisions refer to someone's 'interest,' they refer to situations in which a party is entitled to a right dependent on another one, and, based on such dependency, has *legittimazione straordinaria* to sue for the protection of someone else's right. In the case of contractual nullity, the requirement of 'having an interest' in the claim is set by article 1421 c.c. and refers to the fact of holding a right connected to the null contract. If the court finds that the plaintiff lack interest under article 1421 c.c it is to say that the claim is ungrounded in its merits. Such a decision on the case's merits is not a procedural decision. The practical consequence is that a decision in the merits produces the *res iudicata* effect, and the plaintiff is precluded from bringing the same claim again. Conversely, procedural decisions, both on *presupposti processuali* as well as on the *condizioni dell'azione*, leave room for a new claim.

Article 100 c.p.c. replicates the provision of article 36 of the 1865 c.p.c., which refers to the condition of interest also to the defendant. The same applies to article 81 c.p.c. which, as seen above, requires that both the plaintiff and the defendant have *legittimazione*. In the latter case,

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*esiste il diritto e la sua violazione. L'interesse ad agire sta, dunque, nell'affermazione (allegazione) , contenuta nella domanda, dei fatti costitutivi e dei fatti lesivi di un diritto*".

[371] *Corte di cassazione*, judgement No. 19268 2016: "L'assenza di interesse ad agire, richiesto per qualsiasi domanda dall'art. 100 c.p.c., è rilevabile anche d'ufficio in ogni stato e grado del procedimento, poichè costituisce un requisito per la trattazione del merito della domanda; pertanto, la sua sussistenza va accertata dal giudice anche quando non vi è contrasto tra le parti sul merito della stessa". The judgement in available in the on-line database Leggi D'Italia.

[372] Most notably, this relationship was defined by Carnelutti: «l'interesse ad agire suppone la legittimazione mentre questa non implica l'interesse»; «*logicamente il problema della legittimazione precede il problema dell'interesse ad agire*». For this citation, see PROTO-PISANI, *Lezioni di diritto prcessuale civile*, Napoli, 2014, p. 312.

however, this duality makes sense, as the substantive right has at least one active and one passive subject: One creditor and one debtor, for example. And this dichotomy must be replicated and asserted in the claim. The same cannot be said for the notion of interest because the defendant has the interest to defend themselves as soon as they are sued. It is unimaginable that a defendant lacks the interest to exercise their right of defense. It is, conversely, possible that a claim is inadmissible because the defendant is not presented as the passive subject of the substantive law relationship.

## 2. Rationale and Practical Consequences

*Interesse ad agire* can be translated as interest in action or interest in suing. It means having actual and concrete interest in the judicial decision or the use of the civil proceeding. What 'writes' interest can be 'read' as utility, usefulness, or advantage. Using a German expression, it is the need for judicial protection: '*Rechtschutzbedurfnis*'. Lacking the court's intervention, the plaintiff would not be able to restore the claimed right's infringement.[373]

In other words, the court's decision must be able to potentially place the plaintiff in a better position.

Famously, Chiovenda used this expression:

'*Interest in action consists in that, without the intervention of the court, the plaintiff would suffer unjust damage*'.[374]

Hence, there is no interest in a decision that does not improve the position of the plaintiff, even if their claim is grounded. The *Corte di cassazione* stressed that article 100 c.p.c. has to be construed, keeping in mind the practical effects of the decision for the plaintiff. In 1979, the plenary session of the *Corte di cassazione* fund that a claimant lacked interest in suing, under Article 100 c.p.c., in a contractual breach case where the seller undertook the obligation to obtain, from the municipal authority, the permit for the habitability of a building. The defendant could not fulfill this obligation, as a private party cannot force the public administration to issue any act if the requirements are missing. Consequently, the court order would remain unattended. Hence, the court deemed it would have been "useless."[375]

A recent decision of the *Corte di cassazione* reinforced that *(i)* the claim must pursue a tangible result and *(ii)* that the judiciary must represent the only resort. Accordingly, the plaintiff lacks

[373] LIEBMAN, Manuale di diritto processuale civile, Milano, 2007, p. 146: "L'interesse ad agire è, riassumendo, il rapporto di utilità corrente tra la lesione di un diritto, che è stata affermata, e il provvedimento di tutela giurisdizionale che viene dmandato."

[374] In Italian language, Chiovenda's words are: «l'interesse consiste in questo virgola che, dell'intervento degli eccezionali, l'attore subirebbe un ingiusto danno». This sentece is cited by PROTO PISANI, Lezioni di diritto processuale civile, 2014, Napoli, p. 309.

[375] *Corte di cassazione*, sezioni unite, judgment No. 1756 of 1979.

*interesse ad agire* under article 100 c.p.c. it they present to the court perfectly correct arguments that are, however, even if accepted, practically irrelevant for the outcome of the decision. [376]

Prominent authors have offered effective examples. A plaintiff contesting a will for lack of formal requirements has no interest in the claim if the choice does not derogate from the ordinary succession law. Despite the claim being grounded, the judicial decision declaring the will null would not improve the plaintiff's position as the content of the will reflects the rules that apply in the absence of a will. This case shows that even if the plaintiff lodges a grounded claim, they could still lack standing – in the form of *interesse ad agire* – if the decision is substantially useless.

Further, *interesse ad agire* can be found missing also when the substantive law grants a remedy alternative to the judicial decision. It is the case of potestative rights, meaning the right to modify the legal reality. An example should help get a clearer picture. In the labor law context, the breach of contract can lead to the termination of the contract in form of the dismissal of the employee. This effect can be reached by ways of substantial law, with written communication. There is no need for a judicial decision that ascertains the conditions for the termination of the contract. In similar circumstances, a claim made by the employer, even founded in principle, could be dismissed for lack of article 100 c.p.c. interest – *interesse ad agire.* In general terms, for lack of standing.[377]

Both examples show that article 100 c.p.c. refers to the need for judicial protection. Hence, it must be conceived separately from the interest protected by the substantive law provision that grants a right and, in so doing, offers legal recognition to a factual interest.

The Supreme court case law has confirmed this view and the consequential separation between the interest of the claimant vis-à-vis the merits of claims, on the one hand, and the abstract nature of *interesse ad agire*, on the other. *Corte di cassazione* further stressed that article 100 c.p.c. interest must be construed, keeping in mind all the benefits of a judicial proceeding for the plaintiff, including the effects of the claim's transcription in the land register, when its object is a piece of real estate. More specifically, the court stated the autonomy of *interesse ad agire* in a case where the plaintiff had lodged a claw-back action under article 2901 c.c. after the debtor had transferred a piece of property to his wife, intending to save it from a possible creditor's foreclosure. The first instance court accepted the claim and declared the inefficacy of that transfer for the plaintiff. After the appeal, however, the piece of property re-entered the debtor's asset. In other words, the wife returned it to the husband by terminating the sales agreement. The issue was, at this point, that the action seemed devoid of purpose. The court of appeals accepted this argument, finding that the plaintiff had no interest anymore, given that claw-back action aims at declaring the inefficacy of a

[376] *Corte di cassazione*, judgement No. 18823 of 2020: "L'interesse ad agire richiede non solo l'accertamento di una situazione giuridica ma anche che la parte prospetti l'esigenza di ottenere un risultato utile giuridicamente apprezzabile e non conseguibile senza l'intervento del giudice poichè il processo non può essere utilizzato solo in previsione di possibili effetti futuri pregiudizievoli per l'attore senza che siano ammissibili questioni di interpretazioni di norme, se non in via incidentale e strumentale alla pronuncia sulla domanda principale di tutela del diritto ed alla prospettazione del risultato utile e concreto che la parte in tal modo intende perseguire" (…) Infatti "... il processo non può essere utilizzato solo in previsione della soluzione in via di massima o accademica di una questione di diritto in vista di situazioni future o meramente ipotetiche"". The judgement in available in the on-line database Leggi D'Italia

[377] Both examples are provided by LUISO, *Diritto processuale civile, I Principi generali*, Milano, 2019, pp.225-226.

contractual arrangement that diminishes the collateral. The *Corte di cassazione* quashed such decision, finding that *interesse ad agire* under 100 c.p.c. is comprehensive of all effects of the claim, including the reservation effect produced by transcribing the claim in the land registers. Following the transcription of the claim in the land register, the effects of the decision retroact to the date of the transcription and protect the plaintiff from third parties claims. This protection can only be achieved if the proceeding continues until the decision without being dismissed based on the new events.[378]

Not everyone agrees, though. Article 100 c.p.c. has raised more than one highbrow among scholars. Some authors, such as Redendi, have argued that article 100 c.p.c. contains a void provision, and that *interesse ad agire* is the 'fifth wheel of the cart'. In their view, the notion of interest cannot be separated from the merits, and conceiving it separately is, therefore, useless.

For this reason, other authors have tried to make sense of the provision of article 100 c.p.c. and tried to differentiate between the various fields of jurisdiction to highlight when *interesse ad agire* is relevant and when it is not.

## 2.1 Enforcement Proceedings

Article 100 c.p.c. is not relevant in the field of executive action based on the rationale behind executive jurisdiction, which is aimed at enforcing a judicial order.

The judicial executive proceeding can only be leveraged on the basis of a title empowering to levy execution and only when the debtor does not fulfill the judicial order. In case the creditor has already received the performance by the debtor and yet still starts the execution proceeding, this is not a matter of interest but rather an issue of lack of title. As soon as the debtor provides the judicially ordered performance, the title is extinguished; conversely, if the judicial order is still unfulfilled, the execution proceeding can be started. In the latter case, there is no room for article 100 c.p.c. and the objection of lack of interest cannot be raised – for logical reasons.

Article 100 c.p.c. is the fifth wheel of the cart in execution or enforcement proceedings.

## 2.2 Interim Jurisdiction

*Interim* remedies require the existence of a *periculum in mora*, meaning an urgency. Some scholars, such as Attardi, Liebman, and Proto Pisani, maintain that article 100 c.p.c. may be relevant in this field of civil jurisdiction as a general norm requiring a sufficient degree of urgency for each interim remedy provided by the legislator.[379]

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[378] *Corte di cassazione*, judgement No. 25862 of 2020, which stated the following principle: "L'interesse del creditore ad agire in revocatoria non viene meno per il fatto che il bene oggetto dell'atto dispositivo sia rientrato nel patrimonio del debitore, perchè altrimenti potrebbe essere pregiudicata l'efficacia di prenotazione costituita dalla trascrizione della domanda giudiziale di revoca, ai sensi dell'art. 2652 c.c., n. 5)". The judgement in available in the on-line database Leggi D'Italia.

[379] See, ATTARDI, *L'interesse ad agire*, Padova, 1955 re-printed in 1959, p. 164; LIEBMAN, *Manuale di diiritto di diritto processuale civile*, I, Milano, 2012, p. 148; PROTO PISANI, *Lezioni di diritto processuale civile*, 2014, Napoli, p. 311.

According to other scholars, for example, Recchioni, Article 100 c.p.c. is irrelevant in this realm, given that the precondition of *periculum in mora* is a matter that concerns the merits of the *interim* claim. If found missing, the claim is unfounded and must be rejected regardless of Article 100 c.p.c.[380]

The case law seems to follow the first theory, finding that Article 100 c.p.c. is relevant in the context of *interim* and provisional proceedings. In a case in which, during the *interim* proceedings aimed to prevent a harmful event from happening, the harm occurred, the *Tribunale di Torino* dismissed the claim, given that the harm could not be prevented anymore.[381] This ruling is a direct application of Article 100 c.p.c. in the context of *interim* and *provisional* jurisdiction. Further, both the *Corte d'appello di Milano* and *Tribunale di Milano* have found that Article 100 c.p.c. is relevant and can determine the dismissal of the claim on procedural grounds when the plaintiff seeking *interim* measures already has a title that they could use to start the enforcement proceedings.[382]

## 2.3 Declaratory Actions

Declaratory actions aim at a judicial finding that merely declares the existence and scope of a right without further consequences. The plaintiff does not seek an order or a modification of a status – i.e., legal separation or divorce – or a legal situation – i.e., the judicial termination of a contract. Declaratory actions are, in a way, the common denominator of any judicial action in the realm of cognizance proceedings, given that both actions seeking an order and those aiming at modifying a status or another legal situation– are based on a previous cognizance finding. According to most contemporary authors, this is the main field where the provision of Article 100 c.p.c. has practical relevance. [383]

The Italian legal system, different from the German one, does not explicitly regulate the criteria for the admissibility of a merely declaratory claim.[384] The lack of a specific regulation on declaratory claims poses two risks: *(i)* vexatious litigation and *(ii)* an over-reach of the civil justice system

[380] RECCHIONI, *Il processo cautelare uniforme*, Torino, 2005, p. 133.
[381] *Tribunale di Torino*¸judgment rendered on April 5t[h] 2002, commented by RONCO, in *Giurisprudenza Italiana*, 2002, I, p. 2302.
[382] *Tribunale di Milano*, judgment rendered on June 14t[h] 2001, published in the journal *Giustizia civile*, 1983, I, p. 2476; and *Corte d'appello di Milano*, judgment rendered on March 22[nd] 1983, published in the journal *Gius*, 2022, p. 2362. These judgments, as well as the scholarly opinions reported in the previous footnote, are mentioned by BARLETTA, comment to Article 100 c.p.c., §19, in the commentary CONSOLO, *Codice di procedura civile*, Milano, 2013.
[383] See, MANDRIOLI-CARRATTA, Diritto processuale civile, I – *Nozioni introduttive e disposizioni generali*, Torino, 2022, p. 51.
[384] The German code of civil procedural law – *Zivilprozessordnung* or, for short, *ZPO* – chose to restrict declaratory actions – *Feststellungsklage* – to a given set of cases. § 276 (1) ZPO provides the cases when a merely declaratory action is admissible: «*Auf Feststellung des Bestehens oder Nichtbestehens eines Rechtsverhältnisses, auf Anerkennung einer Urkunde oder auf Feststellung ihrer Unechtheit kann Klage erhoben werden, wenn der Kläger ein rechtliches Interesse daran hat, dass das Rechtsverhältnis oder die Echtheit oder Unechtheit der Urkunde durch richterliche Entscheidung alsbald festgestellt werde*». In Italy there is no similar provision, which gave rise to a debate whether merely declaratory claims are admissible Their admissibility is arguable based on three provisions: Articles 2655 No.

and misuse of public resources. Article 100 c.p.c. helps filter those declaratory claims that are admissible.

Ever since Chiovenda's teachings, scholars and case law have agreed that, in the field of declaratory actions, *interesse ad agire* requires that the defendant contends the existence, or the scope, of the right, claimed by the plaintiff. Consequently, merely declaratory actions are admissible under Article 100 c.p.c only if there is a situation of legal uncertainty deriving from the defendant's conduct. [385]

The case law of the *Corte di cassazione* makes clear that such uncertainty must concern the right claimed by the plaintiff, not the facts. The court must dismiss the claim if the defendant does not contend the right claimed by the plaintiff but only factual elements from which the defendant might derive a future claim.[386] Further, to have interest, the plaintiff must claim an allegedly existing right at the time of the court application – not a future right.[387]

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1 and 2691 c.c. regulate the transcription of the claim in public registries concerning of real estate and movable property. Such provisions mention the notion of declaratory claims. The thirds provision is the one of Article 34 c.p.c., which impliedly foresees the possibility to bring a declaratory action regarding a prejudicial right in the course of a proceeding principally concerned with the dependent right. Based on such indirect regulation, authors and case law concordantly argue on the admissibility of declaratory actions.

[385] See, PROTO PISANI, Lezioni di diritto processuale civile, 2014, Napoli, p. 311. The author mentions Chiovenda's words: «la vera difficoltà che presentano le azioni di mero accertamento e nella determinazione dell'interesse sufficiente per giustificarne la proposizione (…) questo interesse consiste in una situazione di fatto tale che l'attore senza l'accertamento giudiziale soffrirebbe un danno, di modo che la dichiarazione giudiziale si presenta come il mezzo necessario per evitare il danno (…) ma è soltanto l'oculatezza del magistrato nella valutazione di questa necessità, caso per caso, che può garantire contro eventuali abusi, quali possono essere i giudizi collusivi o fittizi, le azioni inconsiderate o vessatorie».

[386] *Corte di cassazione*, judgement No. 18511 of 2017 which in a labour law dispute found that: «L'interesse ad agire nell'azione di accertamento è dato dalla contestazione di un diritto, non già di fatti, pur giuridicamente rilevanti, ma che costituiscano elementi frazionati della fattispecie costitutiva del diritto di cui l'attore sia o possa in futuro divenire titolare o per i quali possa avere necessità di contraddire; ne consegue che non sussiste l'interesse ad agire del datore per l'accertamento dell'esatto adempimento dell'obbligo contributivo, al fine di prevenire future azioni del dipendente finalizzate ad ottenere la regolarizzazione contributiva o, comunque, da altra azione correlata alla sfera previdenziale del medesimo lavoratore». Available in Lavoro nella Giurisprudenza, 2017, 12, p. 1124 or in the on-line database Leggi D'Italia.

[387] *Corte di cassazione*, judgement No. 27151 of 2009 which stressed that future or theoretical issues cannot be submitted to the court. In such cases, the claim must be dismissed for lack of Article 100 c.p.c. interest. In the case at stake the parties sought general declaration that were not linked to specific rights. The court found that: *«"l'interesse ad agire, previsto quale condizione dell'azione dell'art. 100 c.p.c., con disposizione che consente di distinguere fra le azioni di mera iattanza e quelle oggettivamente dirette a conseguire il bene della vita consistente nella rimozione dello stato di giuridica incertezza in ordine alla sussistenza di un determinato diritto, va identificato in una situazione di carattere oggettivo derivante da un fatto lesivo, in senso ampio, del diritto e consistente in ciò che senza il processo e l'esercizio della giurisdizione l'attore soffrirebbe un danno, sicchè esso deve avere necessariamente carattere attuale, poichè solo in tal caso trascende il piano di una mera prospettazione soggettiva assurgendo a giuridica ed oggettiva consistenza, e resta invece conseguentemente escluso quando il giudizio sia strumentale alla soluzione soltanto in via di massima o accademica di una questione di diritto in vista di situazioni future o meramente ipotetiche" (..) In sintesi, come pure è stato da ultimo precisato, "poiché la tutela giurisdizionale e tutela di diritti, il processo, salvi casi eccezionali predeterminati per legge, può essere utilizzato solo come fondamento del diritto fatto valere in giudizio e non di per sé, per gli effetti possibili e futuri" (v. Cass. S.U. 20/12/2006 n. 27187)».*

## 2.4 Actions Seeking an Order

These actions seek an order against the defendant to pay, deliver, release, do, undo, or restrain from doing something. Scholars argue that, in general, in the realm of these actions, there is no room for Article 100 c.p.c. besides a couple of exceptions. Let us start with ordinary cases.

If the claim is based on contractual obligations, the breach of contract constitutes the factual cause of action – the factual precondition for the insurgence of the substantive right claimed by the plaintiff – it does not concern *interesse ad agire.* Therefore, if the court finds no breach, the claim must be rejected on the merits, not based on Article 100 c.p.c. The difference has practical consequences: only decisions on the merits produce the preclusive effects of *res iudicata.*

If the plaintiff seeks protection for a "real right" – or right *in rem* – the claim following its violation aims either at a monetary compensation, restitution, damage restoration, or termination of the damaging conduct. In such cases, the infringement is a component of the factual cause of action and the precondition for the insurgence of the rights claims. It is not a procedural issue of interest under Article 100 c.p.c. In this case, as well as in the previous one, there is no room for assessing *interesse ad agire* and any dismissal of the claim concerns the merits

According to a view broadly shared among scholars, in actions seeking an order, Article 100 c.p.c. is the "fifth" – therefore useless – "wheel of the cart". Sometimes, however, even in this realm, Article 100 c.p.c. might come in handy to filter those cases where the notion of *interesse ad agire* has its own space.

First, Article 100 c.p.c. becomes relevant when the plaintiff already has a title empowering the execution proceeding that, because of its extrajudicial formation, cannot be transcribed in public registries or, based on it, the plaintiff cannot register a mortgage. In this case, Article 100 c.p.c. is relevant, as the plaintiff may or may not be interested in the effects of the registered claim or decision. In other words, even though the claim seeks an order, the plaintiff might lack *interesse ad agire* if already in possession of a title to levy the enforcement proceeding, and neither the claim nor the decision can be transcribed in public registries. [388]

Second, Article 100 c.p.c. is also relevant to the hypothesis of claims seeking an order with future effects. Italian scholars refer to it as "*condannna in future*." Their feature is based on the potential future violation – which has not happened yet – and they aim to grant a judicial decision to levy the execution proceeding as soon as the future breach might occur. Scholars have discussed whether this claims category is admissible in the Italian legal framework.

[388] *Corte di cassazione*, judgement No. 18248 of 2004 found that the plaintiff lacked *interesse ad agire* under Article 100 c.p.c. because they applied for an order to pay maintenance allowances established in the consensual separation was inadmissible due to lack of interest in the action, given that the relevant judicial decree whoch (...) constitutes an enforceable title thats also allows to register a judicial mortgage: «*il creditore che abbia ottenuto una pronuncia di condanna nei confronti del debitore ha esaurito il suo diritto di azione e non può, per difetto di interesse, richiedere "ex novo" un decreto ingiuntivo contro il medesimo debitore per lo stesso titolo e lo stesso oggetto trova deroga nei casi in cui la domanda di condanna rivolta al giudice, nella preesistenza di altro ed analogo titolo giudiziale, non mira alla duplicazione del titolo già conseguito, ma è diretta a far valere una situazione giuridica che non ha trovato esaustiva tutela, suscettibile di conseguimento di un risultato ulteriore rispetto alla lesione denunziata*». The decision in available in the on-line database *Leggi d'Italia.*

The risks posed by orders with future effects are the proliferation of vexatious claims and that the civil justice system spends time and financial resources on adjudicating cases and issuing orders that have no practical relevance for the parties involved. On the other hand, allowing these orders reduces the chance of repeated identical claims based on a right subjected to multiple deadlines. For example, if the debtor must pay the creditor X amount of money every month for a certain period, it is more convenient for the system to allow orders that concern both past and future violations. If that were not the case, the creditor should make separate monthly claims with evident adverse side effects for the creditor and the functionality of the judicial system. Moreover, orders with future effects grant the plaintiff a title to levy execution jurisdiction in case of further non-fulfillment by the debtor. Such a mechanism deletes any time between violation and judicial decision as it pre-establishes a title empowering to levy the enforcement proceeding. In this light, the legal arrangement of '*condannna in futuro*' is an important tool to grant adequate judicial protection, as required by Articles 24 and 3(2) cost.

This debate resulted in the generally accepted opinion that plaintiffs may seek an order destined to be effective in the future and only if the violation happens. Therefore, the Italian legal system has a place for condanne in futuro. In the absence of a regulation, Article 100 c.p.c. plays a relevant role, as it is considered to be the filter to select admissible claims. Hereafter, it will be discussed the scholarly opinions on this topic and the findings of the case law.

Those scholars who argue favorably pin-pointed that provisions scattered around both the Codice civile and the Codice di procedura civile foresee this kind of order with a future effect.

It is the case of eviction law: under Article 657 c.p.c., the landlord may seek an eviction order against the tenant effective from the expiry date. In this case, a future point in time and the possible violation of the agreement by the tenant are the conditions for the effects of the order.

Eviction law offers another example, this time in the case of eviction for rent arrears. Article 664(1) c.p.c. allows seeking an order to pay past and future rent fees, up to the moment the eviction is completed. But, again, this order has future effects under the condition that the tenant keeps the rented house and does not pay rent.

Article 316-bis c.c provides another example of an order with future effects., in the field of family law to recover childcare expenses. If one of the child's parents does not contribute to the education expenses despite having a regular source of income – i.e., a monthly paying job – the court may order the *debitor debitoris* – i.d., the employer – to pay directly to the other parent a sum due for childcare. Here, again, the order is destined to have effects in the future, and only if the defaulting parent keeps beaching their childcare duties.

A further argument for their admissibility is linked to the structure of the enforcement proceeding. The latter starts in the presence of a judicial or extrajudicial title that, under Article 474 c.p.c., grants the power to start the enforcement. There is no prior assessment of whether the debtor has performed their duty. If that were to be the case, the title – a judicial order, for example – would be void of effects. And yet, under Article 479 c.p.c., the holder of a title empowering to levy the enforcement proceeding may still get it started by serving both the title and the order of payment. In such a case, the debtor may avoid the enforcement by challenging the order of payment, which

gives rise to an ordinary cognizance proceeding concerning the right of the movant to proceed and enforce their right. In light of this open structure of the enforcement proceeding and of the provisions that foresee orders with future effects, the latter category has been generally accepted by authors.

The case law maintains that orders with future effects are admissible, given the considerations expressed above on the structure and remedies offered by the enforcement proceeding – in particular, the challenge under Article 615 c.p.c.[389]

In this realm, Article 100 c.p.c. interest is relevant as a criterion to filter and select the admissible actions seeking an order with future effects.

## 2.5 Actions Seeking the Modification of a Relationship or Status

These actions seek either the modification of status or a legal situation. The first category is called *"azioni costitutive necessarie"* while the second is *"azioni costitutive non necessarie."* In both cases, the decision modifies a legal situation. In this regard, both action types are different from the actions seeking an order, as the order imposes a duty, but if it remains unfulfilled, the plaintiff-creditor will need to levy the execution proceeding in order to modify the legal and material circumstance and enforce their rights.

Conversely, "*azioni constitutive"* directly institutes, modifies or extinguishes a legal circumstance. Therefore, the plaintiff does not need any further remedy.

This category encompasses *'azioni costitutive necessarie'* and *'non necessarie'*. The difference lies in the adjective "necessary," which only applies to those cases where judicial intervention is necessary to produce the modification sought by the plaintiff. It is the case of judicial separation or divorce proceedings, the declaration of diminished capacity, or the appointment of a guardian, etc. There is no other way to achieve such results without a judicial decision which is, therefore, necessary. Parties cannot express their will and agree to, for example, recognize a diminished capacity to someone and change their legal status. These actions are brought in the field of personal and status rights that are not subject to economic assessment and cannot be disposed of by means of a contract. Such inherent necessity puts Article 100 c.p.c. off the table. In other words, *interesse ad agire* is implied in these actions: it is, *in re ipsa.*

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[389] *Corte di cassazione*, judgement No. 2202 of 1955, available in *Giurisprudenza italiana*, 1956 I, 1, p. 810 commented by Mandrioli. See also *Corte di cassazione*, judgement No. 11061 of 2003 available on-line on the database *Leggi d'Italia*. In the case at stake, the plaintiff sought an order of payment before the contractual deadline. The court found that such orders are admissibile, if grounded and if no further judicial cognizance activity is necessary. This is the principle stated by the *Corte di cassazione*: «*Nel vigente ordinamento processuale - come assolutamente pacifico in dottrina come in sede di legittimità - infatti, è ammissibile la condanna condizionata, quanto alla sua efficacia, ad un evento futuro ed incerto o ad una controprestazione (Cass. 26 ottobre 1991 n. 11424; Cass. 13 settembre 1991 n. 9578, nonché Cass. 12 luglio 1996 n. 6329). Nel nostro ordinamento - in altri termini - sono ammesse, in omaggio al principio dell'economia dei giudizi, sentenze condizionali, nelle quali l'efficacia della condanna è subordinata al verificarsi di un determinato evento futuro ed incerto, o di un termine prestabilito, o di una controprestazione specifica, sempre che il verificarsi della circostanza tenuta presente non richieda ulteriori accertamenti di merito da compiersi in un nuovo giudizio di cognizione (Cass. 12 luglio 1996 n. 6329, nonché Cass. 1 aprile 1996 n. 2961 e, recentemente, Cass. 15 febbraio 1999 n. 1642, specie in motivazione)*».

'*Azioni constitutive non necessarie*' are exemplified by the action of nullification of the contract under Articles 1441-1446 c.c., contractual rescission under Article 1447 c.c. or its termination under Article 1453 c.c., and the action under 2932 c.c. to enforce a preliminary contract through a judicial decision that creates the effects of the final contract. In all such cases, the judicial decision creates a new legal reality, but the parties themselves could have agreed to that result. Resorting to the judiciary is not necessary, yet *interesse ad agire* seems relevant in this realm too. In the case of contract nullification for 'genuine mistake,' the latter is an element of the factual cause of action. It is not a procedural law issue of Article 100 c.p.c. interests. It is believed, here as well, that *interesse ad agire* has no practical relevance. It is possible, however, to imagine a role for Article 100 c.p.c. regarding the possible intersection with other actions. For example, it is open for discussion whether the plaintiff has *interesse ad agire* based on Article 2932 c.c. if, before the claw-back action, the plaintiff had foreclosed on the right that was transferred. In conclusion, with regard to "*azioni constitutive,*" it seems accurate to state that Article 100 c.p.c. has no practical relevance in the realm of '*azioni constitutive necessarie*'; and that the same goes for "*azioni constitutive non necessarie*", unless the latter overlap with other forms of judicial protection may change the general rule in specific cases.

## 3. Non-Enforceable Orders

The section introducing the right of action explored how cognizance jurisdiction can be broken down into three main areas: declaratory claims, claims-seeking orders, and constitutive claims. To each claim corresponds a judgments kind: declaratory judgments "declare" rights and wrongs in a binding way for the parties, their heirs, and those entitled to a right that depends on the one subjected to the adjudication. Constitutive judgments modify or create legal circumstances involving people's statuses or contractual relationships.

Judgments issuing an order contain a binding declaration of rights and wrongs, but they also impose on the defeated party to do or not do something. If the latter does not comply, these decisions can be enforced through the mechanisms of enforcement procedures. The judicial order is, in fact, a title that empowers the creditor to levy the execution proceedings.[390]

If the court orders concern the payment of a sum of money, the creditor can activate the foreclosure and forced expropriation proceedings, which aim to convert the debtor's assets into money to pay the debt (*espropriazione forzata*, Articles 2910 c.c. and 491 c.p.c.

If the court orders the restitution of movable goods or the release of real estate, the creditor can activate a procedure to obtain – with the use of public force if necessary – the restitution or the release (*esecuzione per consegna o rilascio*, Articles 2930 c.c., 608-611 c.p.c.).

When the court orders the doing of a "fungible" activity – doing something that anyone could do replacing the defeated party, such as demolishing a wall or removing a fence – the creditor of the performance can pursue an enforcement procedure that seeks the execution of that specific activity (*esecuzione di obblighi di fare*, Articles 2931-2933 c.c. and 612-614 c.p.c.).

[390] Judgments containing an order are also a title for the registration of a mortgage under Article 2818 c.c.

The enforcement issue arises when the court orders the defeated party to perform conduct or abstain from it that is "irreplaceable," meaning that only the defendant can perform. The classic text-book example concerns the opera singer's performance: if the singer is found breaching a contract, refusing unjustifiably to sing the day of the concert. The court order cannot be enforced if the singer refuses their performance. The only way to obtain enforcement is through "indirect" means.

This applies when courts issue an injunction to prevent harm from happening or from being reiterated. While in the case mentioned above, the order has a repressive function, in the case of injunctions, the order has a preventive one. In both instances, the order cannot be enforced regardless of its "repressive" or "preventive" aim.

This section starts from the consideration: in climate litigation, governments and the board of directors of "big carbons" are like the opera singer who is unwilling (or unable?) to perform the order issued by the court. So, the question is whether an ordinary court-issued order to reduce emissions can be issued, under Article 100 c.p.c. or the claim should be dismissed on procedural grounds.

Whether non-enforceable orders are admissible under Article 100 c.p.c. has been debated by civil procedural law scholars for a long time. Climate litigation, however, has turned on the spotlight on the issue. The solution might lie in the application of Article 614-bis c.p.c., which allows the court to order the payment of a daily sum for each day of delay or subsequent violation.[391]

This only applies to cases before ordinary courts. If the plaintiffs seek judicial review of planning administrative decisions – such as in *Gloucester* – this issue does not even arise, given that stopping a new carbon-intensive project – e.g., a new coal mine – does not need any execution.

This section will consider a series of cases where the execution of judicial orders is impossible. Yet, plaintiffs have an interest in suing under Article 100 c.p.c. Moreover, the *Corte di cassazione* has repeatedly found that orders that cannot be enforced are still admissible.[392] It then looks into the mechanisms created by the legislator to "indirectly" enforce the claim.

[391] BALENA, Elementi di diritto processuale civile, Princìpi, Bari, 2006, p. 57: "(…) sebbene non possa escludersi che il requiesito in esame venga concretamente in rilievo, eccezionalmente, pure in relazione a domande costitutive o di condanna. Per queste ultime, in particolare, proprio l'*interesse ad agire* potrebbe limitare (…) la proponibilità di azioni di condanna aventi ad oggetto obblighi di fare infungibili o comunque non sucettibili d'esecuzione forzata, per i quali non siano previsti strumenti di esecuzione indiretta (misure coercitive)."

[392] *Corte di cassazione*, judgment No. 28274 of 2008 foun that. "in via generale, è ammissibile la pronuncia di condanna resa dal Giudice nella ipotesi di infungibilità (e, dunque, di incoercibilità) del facere dell'obbligato, in quanto la relativa decisione non solo è potenzialmente idonea a produrre i suoi effetti tipici in conseguenza della (eventuale) esecuzione volontaria da parte del debitore, ma è altresì funzionale alla produzione di ulteriori conseguenze giuridiche (derivanti dall'inosservanza dell'ordine in essa contenuto) che il titolare del rapporto è autorizzato ad invocare in suo favore, prima fra tutte la possibile, successiva domanda di risarcimento del danno, rispetto alla quale la condanna ad un facere infungibile assume valenza sostanziale di sentenza di accertamento (…) In particolare, nelle controversie relative ai rapporti di lavoro alle dipendenze delle pubbliche amministrazioni, poichè D.Lgs. n. 165 del 2001, art. 63, comma 2, prevede espressamente che il Giudice adotta, nei confronti delle pubbliche amministrazioni, tutti i provvedimenti di accertamento, costitutivi o di condanna, richiesti dalla natura dei diritti tutelati, il Giudice del lavoro ha il potere di emanare qualsiasi tipo di provvedimento, ivi compresa la sentenza di condanna ad un facere, essendo irrilevante l'insuscettibilità di esecuzione forzata, che ne condiziona, eventualmente, soltanto l'esecuzione (Cass. 14 ottobre 2005, n. 19900)". Similarly, see *Corte di cassazione* No. 113664 of 2004.

The first category of non-enforceable orders concerns obligations that only the defeated party can perform, like in the case of the opera singer. The second category comprehends a vast list of injunctions that have preventive functions. They inherently prevent one party from doing something and are non-enforceable. It is practically impossible to enforce an order that imposes an omissive conduct on the defeated party. Sometimes these two functions get mixed up. What matters for this thesis is to point out how the Italian legal framework accepts the existence of judicial orders that cannot be enforced. Not only that. Taking into account these circumstances, the legislator introduced multiple systems to obtain the spontaneous implementation of the law. Further, since 2011 there has been a general provision, set out by Article 614-*bis* c.p.c., that allows the court to order the payment of a sum of money for each day of delay in the implementation of judicial orders or injunctions.

### i. Labor Law

Article 18 of law No. 300 of 1970, the so-called *Statuto dei lavoratori*. Article 18 regulates the case of unlawful dismissal, providing for the employee's reintegration into the workplace. This obligation can be performed only by the employer – no bailiff can achieve such reintegration if the employer does not comply. And yet there is no discussion regarding the interest to sue under Art. 100 c.p.c.: the employee does have *interesse ad agire*. The law, however, foresees mechanisms to obtain the spontaneous implementation of judicial orders. When the court orders the reintegration in the workplace of a worker unlawfully laid off, the court also orders the payment of a daily sum from the day of the layoff to the one of reintegration in the workplace. On top of that, the employer must also pay social security contributions. Article 18(4) Article 18(11) foresees a special coercive mechanism in case the employer does not implement the order to reintegrate a worker that serves as a union official. For each day of delay, the employer must pay the equivalent of the daily salary to a public fund – *Fondo adeguamento pensioni.*

Article 28 of law No. 300 of 1970 deals with anti-union conduct. The employer found infringing union rights can be ordered to remove all factual conditions that constitute the violation (repressive function of the order). At the same time, the court can issue an injunction for the future (preventive function of the order). The "repressive" side of the order concerns obligations to do or undo certain material acts. Either way, the defeated party must take material action. The enforcement of these duties can prove to be challenging to achieve, but it is theoretically possible under the rules of so-called *esecuzione di obblighi di fare*, Articles 2931-2933 c.c. and 612-614 c.p.c. Conversely, the injunction to avoid in the future anti-union conducts cannot be enforced. According to case law, the lack of compliance can trigger the criminal sanction foreseen by Article 650 c.p.c. – similarly to the common law notion of contempt of court.[393]

[393] The cultural and legal roots of the common law notion of contempt of court are explored by GIABARDO, *Aspetti distintivi del civil contempt of court nel processo civile angloamericano* ¸in *Rivista di diritto e procedura civile*, 2021, p. 795. See also, PEKELIS, *Legal Teqnuiques and Political Ideologies: A Comparative Study*, in 41 *Michigan Law Review*, 1943, p. 665.

### ii. Civil Code

Article 7 c.c. protects from unauthorized use of the name. Similarly, Article 9 covers the pseudonym. Article 10 c.c. concerns the abusive use of someone else's image. In case of name-, pseudonym-, or personal image violations, the plaintiff can seek an order for the compensation of damages and an injunction to cease any further violation. The order cannot be directly enforced. The only way to prevent future violations is through indirect coercion.

Articles 949(2) and 1079 c.c. protect, respectively, the right to property and the right of way. Besides ordering compensation for damages, the court can also issue an injunction to prevent future violations.

Article 2599 c.c. applies in the field of commercial and competition law. In case of unfair competition, the court can issue an injunction to cease any act of unfair competition.

### iii. Trademark and Patent Law

In the field of trademark and patent law, Articles 124 and 131 of the Codice della proprietà industriale allow courts to order the destruction of the removal of all material goods that constitute the violation, issue an injunction to forbid future violations, and order the payment of a sum of money for each day of delay or each future violation.

### iv. Anti-Discrimination Law

A fascinating mechanism has been introduced in the field of workplace gender discrimination under Article 37(3) of legislative decree No. 198 of 2006. Besides ordering the compensation of damages, the court can also order the defendant who perpetrated discrimination to set out a plan to remove systemic discrimination. It is worth mentioning that this provision broadens the scope of judgments in non-enforceable orders.

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| "Articolo 37<br>Decreto legislativo n. 198/2006<br><br>3. Il giudice, nella sentenza che accerta le discriminazioni sulla base del ricorso presentato ai sensi del comma 2, oltre a provvedere, se richiesto, al risarcimento del danno anche non patrimoniale, ordina all'autore della discriminazione di definire un piano di rimozione delle discriminazioni accertate, sentite, nel caso si tratti di datore di lavoro, le rappresentanze sindacali aziendali ovvero, in loro mancanza, gli organismi locali aderenti alle organizzazioni sindacali di categoria maggiormente rappresentative sul | "Article 37<br>Legislative decree No. 198 of 2006<br><br>3. The court, in the judgment ascertaining discrimination on the basis of the claim filed under paragraph 2, in addition to ordering, if requested, compensation for damages, including non-pecuniary damages, shall order the perpetrator of discrimination to establish a plan for the removal of the discrimination ascertained, after hearing, in the case of an employer, the company's trade union representatives or, in their absence, the local bodies belonging to the most representative trade union organizations at the national level, as well as the regional equality council or counselor with |

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| piano nazionale, nonché la consigliera o il consigliere di parità regionale competente per territorio o la consigliera o il consigliere nazionale. Nella sentenza il giudice fissa i criteri, anche temporali, da osservarsi ai fini della definizione ed attuazione del piano." | territorial competence or the national counselor or counselor. In the ruling, the judge sets the criteria, including timeframe, to be observed to establish and implement the plan." |

Article 37(5) provides for criminal punishment if the order and the injunction are not implemented. The non-compliant party must pay a fine of up to fifty-thousands euros and six months of detention – as well as by an order to pay fifty-one euros for each day of delay. The payment is made to a public fund instituted by the same law to prevent and repress gender discrimination. The scope of such orders and injunctions, and most of all, the order to create a plan to prevent discriminatory events from happening again, are a very innovative means of protection. There might be a resemblance with what happened in the Pakistani *Leghari case* with the big difference that, in the case of the legislative decree No. 198/2006, the court does not retain jurisdiction after the judgment is issued.

Legislative decree No. 286 of 1998 aims to prevent ethnic, linguistic, religious, and other forms of discrimination. This piece of legislation allows whoever maintains to have been discriminated against to access courts, seek an order for compensation of damages, and remove all discriminatory conditions and an injunction to prevent discrimination from happening again. The court can also order the defendant, private parties, and public bodies to implement a plan to avoid discrimination. If such orders and injunctions are not implemented, the defendant undergoes criminal liability under Article 388 c.p.

### v. Family Law

Article 709-ter c.p.c. regulates controversies between parents concerning the exercise of their parental responsibility. The performance of parental duties is non-fungible, and legal scholars have wondered whether and how judicial orders can be enforced when unattended.[394] Violations of the judicial rulings on child placements pose significant issues – especially when one parent does not comply with the mandate to grant the other parent the right to see the child. Criminal law punishes non-compliance with judicial rulings under Article 288(2) c.p. More problematic are civil law remedies.

Under Article 709-ter c.p.c., the court that rules on the merits of the separation or divorce procedure is also invested in ruling on the infringement of such duties and imposing sanctions,

[394] Before the introduction of Article 709-ter c.p.c., some scholars have argued in favour of the use of *esecution per consegna o rilascio* under Article 605-611 c.p.c., while others sustained that the delivery of a child is a duty to perform an action, hence it falls under the procedure of *esecuzione di obblighi di fare e di non fare* under Articles 612-614 c.p.c. Arguing against the applicability of Articles 605-611 c.p.c. in the realm of enforcing parental duties, is PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, p. 749. For a comprehensive view of the various opinions expressed by scholars, see FARINA, *L'esecuzione forzata dell'obbligo di consegna dei minori*, in *Rivista diritto processuale*, 1997, p. 259; CONSALES, *L'attuazione dell'obbligo di consegna dei minori: orientamenti dottrinali e giurisprudenziali*, in *Rivista esecuzione forzata*, 2002, p. 481. Farina and Consales are cited by MANDRIOLI-CARRATTA, *Diritto processuale civile*, Torino, 2019, pp. 202-203, footnote 25.

including the warning of the non-compliant parent, the order to pay damages suffered by the minor or the order to deliver a daily sum for each day of delay, under Article 614-bis c.p.c.; finally, the order to pay a fine between seventy-five and five-hundred euros to *Cassa delle ammende* (the box of the fines). This provision shows that family law is another terrain for non-enforceable judicial orders. Damages, orders under Article 614-bis c.p.c., and fines are the only means to compel compliance.[395]

Article 709-ter c.p.c. is living its final days. Legislative decree No. 149 of 2022 introduced the reform of the *codice di procedura civile*, effective after June the 30th, 2023.[396] The reform foresees a new set of provisions regulating the proceedings in family law matters. Article 473-bis.39 c.p.c. has the same content as Article 709-bis c.p.c. Article 473-bis.38, however, introduces a specific regulation regarding the child's placement. It allows courts to intervene using public force in case the child is retained by one of the parents in violation of a judicial ruling.

In conclusion, it seems that the reform seeks to extend the court's judicial power of the merits to assure the actual enforcement of its orders. Nevertheless, for this thesis, it is relevant to note that until June 30th, 2023, judicial decisions in parental responsibility and child placement will remain without direct enforcement mechanisms, leaving parties only the option to seek to compel the other parent to comply. Yet, nobody doubts that plaintiffs are interested in suing under Article 100 c.p.c.

## 4. Article 614-bis c.p.c. and its Systematic Implications

Law No. 69 of 2009 introduced Article 614-bis c.p.c. This provision offers a new "remedy" to compel the defeated party to perform duties that cannot be directly enforced, such as in the abovementioned cases. In short, it foresees that the court of the merits can order the payment of money for each day of delay or subsequent violation of a judgment. The amount is made directly to the other party.

From a comparative perspective, the model chosen by the Italian legislator reflects the French system of *astreintes*, first elaborated by French case law and later received by the legislator. In 1926, the Italian scholar and lawyer Francesco Carnelutti proposed a similar remedy in his project to reform the 1865 *Codice di procedura civile*. Yet the 1942 reform did not incorporate this remedy; hence Italian case law has never allowed it. As mentioned above, though, specific Italian laws have introduced similar systems in the areas of intellectual property under Article 124, 131(2) *Codice proprietà industriale* and Article 163(3) of law No. 633 of 1941 (Italian copyright law).

Opposite to the French model of *astraintes* is the German §§ 888 and 889 *ZPO* and the Austrian §§ 354 and 355 *ZPO*. The latter imposes a payment in favor of the state. Conversely, French *astraintes* directly benefit the other party. The German model inspired Italian law when it punishes the non-compliant party to pay a fine. It is the case of Articles 18 and 28 of law No. 300 of 1979,

[395] For a comment of Article 709-ter c.p.c. in conjunction with Article 614-bis c.p.c., see CARAPEZZA FIGLIA, *Effettività della tutela del minore e misure di coercizione indiretta. gli artt. 614-bis e 709-ter c.p.c. nella riforma del processo della famiglia*, in *Diritto di famiglia e delle persone*, 2, 2022, p. 632.

[396] Under Article 35 of the legislative decree No. 149 of 2022, Article 709-ter c.p.c. will keep its efficacy for family law proceedings commenced before June the 30th, 2023.

in labor law, and Article 37 of the legislative decree No. 198 of 2006, in the context of anti-discrimination law.

The German approach is somewhat similar to the common law contempt of court, which foresees a criminal sanction and the payment of a fee that benefits the other party.[397]

Article 614-bis c.p.c. generalized the remedy of *astraintes*, setting the following provision: follows:

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| *"Articolo 614-bis c.p.c.*<br>*Con il provvedimento di condanna all'adempimento di obblighi diversi dal pagamento di somme di denaro il giudice, salvo che ciò sia manifestamente iniquo, fissa, su richiesta di parte, la somma di denaro dovuta dall'obbligato per ogni violazione o inosservanza successiva ovvero per ogni ritardo nell'esecuzione del provvedimento. Il provvedimento di condanna costituisce titolo esecutivo per il pagamento delle somme dovute per ogni violazione o inosservanza. Le disposizioni di cui al presente comma non si applicano alle controversie di lavoro subordinato pubblico o privato e ai rapporti di collaborazione coordinata e continuativa di cui all'articolo 409.*<br>*Il giudice determina l'ammontare della somma di cui al primo comma tenuto conto del valore della controversia, della natura della prestazione, del danno quantificato o prevedibile e di ogni altra circostanza utile."* | *"Article 614-bis c.p.c.*<br>*In the order sentencing the fulfillment of obligations different from the payment of sums of money, the court shall, unless manifestly inequitable, establish, at the request of a party, the sum of money owed by the debtor for each subsequent violation or non-compliance or each delay in the execution of the order. The order shall constitute an enforceable title for the payment of the sums due for each violation. The provisions of this paragraph shall not apply to public or private subordinate labor disputes and coordinated and continuous cooperation relationships referred to in Article 409.*<br>*The court shall determine the amount of the sum referred to in the first paragraph taking into account the value of the dispute, the nature of the service, the quantified or foreseeable damage, and any other relevant circumstances."* |

When requested by the plaintiff, courts of merits can impose the payment of a sum of money for each day of delay or subsequent violation after the judgment is issued. Such orders have a procedural nature and are ancillary to the ones concerning the merits. They aim to compel the debtor to comply with the judgment.

Orders under Article 614-bis c.p.c. are issued only if the court deems it equitable and in a measure discretionally determinable by the court. This discretional power is because such daily sums do not qualify as damages. They do not have a compensatory nature.

The present formulation of the provision foresees that the court of the merits issues orders under Article 614-bis c.p.c. However, the *Cartabia* reform mentioned above of the *Codice di procedura civile* extended its scope of application. Therefore, starting from June 30th, 2023, parties

[397] This comparative analyses is made by PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, p. 151-153.

can resort to Article 614-bis(2) c.p.c. even during the execution proceeding requiring this remedy before the enforcement judge (*giudice dell'esecuzione).*

Initially, the provision allowed the plaintiff to seek an order under Article 614-bis c.p.c. only for the enforcement of non-fungible duties. In 2015, the legislator extended the reach of this provision to all duties and obligations, including fungible performances. Article 615-bis c.p.c. excludes only the obligation to pay a sum of money. In the latter case, the forced liquidation of assets is sufficient to protect the creditor's rights. Further, the provision does not apply to labor law. This choice seems to discriminate against employees, as there is no logical justification for such exclusion.[398]

At a broader systematic level, Article 614-bis c.p.c. leaves no doubt that the plaintiffs are interested in suing under Article 100 c.p.c. when orders concern non-fungible performances, and direct enforcement is not feasible.

In 2011, *Corte di cassazione* confirmed this conclusion.[399] The court found that an order to perform a non-fungible obligation benefits the plaintiff even if it cannot be enforced. In effect, it can help the plaintiff obtain spontaneous fulfillment. Further, if the order remains unattended, the plaintiff can later seek compensatory damages.

As climate litigation is concerned, Article 614-bis c.p.c. has a twofold value: first, it could be used to compel the government to implement a court's order. Second, as recognized by the *Corte di cassazione,* it confirms that non-enforceable orders are perfectly compatible with Article 100 c.p.c. notion of interest in suing.

[398] Criticisms is expressed by MANDRIOLI-CARRATTA, *Diritto processuale civile*, Torino, 2019, p. 212 and by LUISO, *Diritto processuale civile – III Processo esecutivo*, Milano, 2017, p. 251.

[399] *Corte di cassazione*, judgment No. 19454 of 2011 which stated the principle summed up by the CED as follows: "E' ammissibile la pronuncia di condanna resa dal giudice nella ipotesi di infungibilità (e, dunque, di incoercibilità) del "facere" dell'obbligato, in quanto la relativa decisione non solo è potenzialmente idonea a produrre i suoi effetti tipici in conseguenza della (eventuale) esecuzione volontaria da parte del debitore, ma è altresì funzionale alla produzione di ulteriori conseguenze giuridiche (derivanti dall'inosservanza dell'ordine in essa contenuto) che il titolare del rapporto è autorizzato ad invocare in suo favore, prima fra tutte la possibile, successiva domanda di risarcimento del danno, rispetto alla quale la condanna ad un "facere" infungibile assume valenza sostanziale di sentenza di accertamento (nella specie, la S.C., enunciando il suindicato principio di diritto e confermando la pronuncia del giudice di merito, ha ritenuto legittima la domanda - e la relativa sentenza di accoglimento - proposta da un fideiussore per ottenere la condanna del cofideiussore alla sua liberazione dall'obbligazione di garanzia in "parte qua", in adempimento ad una convenzione tra di essi intercorsa, escludendo la validità dell'obiezione secondo la quale anche lo spontaneo adempimento non sarebbe stato, in tale specifico caso, possibile, attesa la necessità del consenso anche del creditore garantito, ed osservando che l'interesse dell'istante, avente diritto alla liberazione, sarebbe risultato realizzabile sia attraverso l'adempimento della obbligazione garantita da parte del cofideiussore, sia attraverso la prestazione, ancora da parte del cofideiussore obbligato alla liberazione, di garanzie sufficienti nei suoi confronti per la ipotesi di richiesta di adempimento rivoltagli dal creditore garantito)."

# CHAPTER 11
# SOLUTIONS TO STANDING AND JUSTICIABILITY IN ITALY

## 1. Four-Steps Toward Access to Climate Justice in Italy

The previous chapters mapped the existing legal scenario that plaintiffs must consider when they bring a climate litigation case. They show that it is possible to overcome objections on standing and justiciability  This conclusive section summarizes the main arguments based on the existing legal framework that plaintiffs and courts court use to overcome the obstacle posed by the *condizioni dell'azione* – standing and justiciability – and decide the claim's merits.

*Possibilità giuridica* (justiciability), on the one hand, and *legittimazione* and *interesse ad agire* (standing), on the other, are the preconditions for the existence of the *diritto d'azione* (right of action). The sections dedicated to the history of the right of action showed that its content had been debated among German and, later, Italian scholars. In nineteenth-century Germany, Windscheid believed that the right of action exists if the claim's merits are founded, while Murther argued the opposite based on the two phases – *in iure* and *apud iudicem* – that characterized the classic Roman civil proceedings.[400] Italian scholars, such as Chiovenda[401] and Calamandrei,[402] held that the right of action implies the right to a favorable decision on the merits. Liebman took the opposite view, stating that *"the right of action is the right to the means, not to the end"* (translation). In other words, it is the right to access justice – not also to obtain a favorable decision.[403]

However, as noted in the previous section, not all scholars agreed on the autonomous nature of the right of action, separated from the substantive rights claimed by the plaintiffs. In particular, Satta held that *legittimazione* and *interesse ad agire* could not be established separately from the underlying substantive right: both requirements shrink down to an issue of merits.[404] In his view, the only condition of the right of action is the substantive provision that founds the claim, which, ultimately, also is a matter of merits.[405]

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[400] WINDSCHEID-MURTHER, *Polemica intorno all'«actio»*, translated in Italian by Heinitz and Pugliese Firenze, 1954.

[401] CHIOVENDA, Istitutioni di diritto processuala civile, Padova, p. 20. For a comprehensive study of Chiovenda's work, see TARUFFO, *Considerazioni sulla teoria chiovendiana dell'azione, in Rivista trimestrale di diritto e procedura civile*, 2003, p. 1139.

[402] CALAMANDREI, Istitutzioni di diritto processuale civile secondo il nuovo codice, I Premesse storiche e sistematiche, pp. 111-114.

[403] LIEBMAN, L'azione nella teoria del processo civile, in Rivista trimestrale di diritto e procedura civile, 1950, p. 54: "L'azione è dunque il diritto al mezzo, non al fine (…)". Also, see LIEBMAN, Manuale di diritto processuale civile, Milano, 2007, p. 141.

[404] SATTA, *Diritto processuale civile*, Padova, 1967, pp. 103-109. The duality subjective right-right of action wa salso denied by PEKELIS, *Azione*, in *Nuovo digesto italiano*, Torino, 1937.

[405] SATTA, Diritto processuale civile, Padova, 1967, p. 113: "A ben considerare le cose, l'azione non può avere altra condizione che la norma che la istituisce: ma questo è il giudizio di merito e niente altro."

According to most contemporary authors and the case law of the *Corte di cassazione*, the right of action is a partially abstract right that depends on an allegedly existing subjective right.[406] Whether the claim is grounded or not is a matter of merits.

The partially abstract nature of the right of action is the point of reference for all *condizioni dell'azione*; it is the starting point for a four-step argumentative process that plaintiffs and courts could follow to decide climate litigation in the merits.

## 2. First Step: Identifying the Substantial Situation to Protect

First, plaintiffs should start by identifying the substantial situation they want to seek protection for and determine whether it is a right or an interest. This proves to be challenging for climate litigants, given the widespread effects of climate change, on the one hand, and the lack of specific national substantive law provisions that mention climate change rights, on the other one. The 2015 Paris Agreement creates a procedural obligation for states to reduce anthropogenic GHG emissions. However, the Paris Agreement does not explicitly and directly create a substantive right to a safe climate.

If plaintiffs claim individual subjective rights, such as the right to health, life, property, freedom of movement, etc., there is no doubt that such subjective positions are protected by the law both at the constitutional level and by the non-contractual liability provisions of the *Codice civile.* Choosing to claim subjective rights facilitates the establishment of both standing and justiciability.

Plaintiff, however, could also seek judicial protection of the climate as a whole, arguing that Article 9(3) of the Italian constitution recognizes the right to a safe climate. Article 9(3) protects "*the environment, biodiversity, also with regard to future generations*." The duty to protect future generations could be beneficial for strategic climate litigation against governments.

While the constitutional provision does not mention the climate, an extensive interpretation of the notion of environment could lead to including the climate under Article 9(3) of the constitution. If that were to be the case, it would be necessary to assess whether such a provision grants a subjective right or a merely programmatic provision, as the *Bundesverfassungsgericht* ruled about Article 20a *Grundgesetz* in the *Neubauer* case.[407]

If the case law would interpret this provision as a source of subjective rights, Article 9(3), combined with Article 2 of the constitution, would have a high potential for climate litigation. Plaintiffs could leverage it to argue in favor of the existence of a right – individual or collective – to a safe and stable climate. Thus, the plaintiffs could have a solid base to bring a tort law claim to protect a fundamental right.

Conversely, understanding Article 9(3) as a provision that recognizes the existence of a 'diffuse interest' in a safe climate would preclude any chance of success before the courts. In the current

[406] *Corte di cassazione*, judgement No. 2951 of 2016 that availabe in the on-line database Leggi D'Italia: "La legittimazione ad agire attiene al diritto di azione, che spetta a chiunque faccia valere in giudizio un diritto assumendo di esserne titolare."

[407] This question is also raised by ALPA, Note sulla riforma della Costituzione per la tutela dell'ambiente e degli animali, in Contratto e Impresa, 2022, 2, p. 361.

setting, as suggested by Alpa, 'diffuse interests' can be protected only when the law transforms them into 'collective' interests by attributing standing to an entity.[408] Individuals cannot pursue judicial protection of 'diffuse interests' because nobody is entitled to such interests exclusively. This seems to be the outcome of the 2016 judgment of the *Corte costituzionale* on the protection of the environment.[409] Such findings have consequences for climate litigants as well. The climate, more than the environment, is incompatible with exclusive ownership. In 2016, the Corte costituzionale validated a system where the more interest is fragmented; the more centralized it is for its protection. Thus, arguing in court that Articles 2 and 9 of the constitution give rise to a new fundamental right to a safe climate is quite a challenge.

Alternatively, the interest in a safe climate, hence the interest to reduce dangerous GHG emissions, could be framed as an *interesse legittimo* in light of the judgment *Corte di cassazione,* No. 500 of 1999, which recognized the substantial nature of *interesse legittimo.* Italian plaintiffs could replicate cases like the Australian *Gloucester* by participating in the administrative proceedings under Articles 7 and 9 of law No. 241 of 1990 or by seeking the judicial review of administrative acts that allow infrastructural projects inconsistent with the Paris Agreement. In the first case, they could prevent administrative acts that allow highly emitting projects, while in the second one, plaintiffs could try to annul such acts.

## 3. Second Step: Justiciability and Jurisdiction

Identifying the foundations of the claim also allows arguing in favor of justiciability. The first nuance of justiciability refers to the possibility of adjudicating a claim based on the existence of substantive law provisions (*possibilità giuridica*). However, as found by *Corte di cassazione, sezioni unite,* judgments No. 26038 of 2022 and No. 18052 of 2022, both mentioned in the previous sections, the lack of a provision or legal principle leads to a dismissal on the merits, rather than for lack of justiciability. Therefore, for example, a court finding that a right to a safe climate, under Articles 9(3) and 2 of the constitution, does not exists would dismiss the case on the merits – not on procedural grounds. Hence, due to the *res judicata* effect under Article 2909 c.c. the same plaintiffs could not make the same claim in a different proceeding. Nevertheless, on the other hand, other plaintiffs could try again because the *res judicata* does not bind other parties and courts, unlike the common law principle of *stare decisis.*

In view of this recent case law, justiciability must be understood as a synonym of jurisdiction and its limits. Hence, plaintiffs must identify which body of courts has ordinary or administrative jurisdiction. As explained in the previous sections, under the *Codice del processo amministrativo,* administrative courts' jurisdiction is mostly limited to *interessi legittimi,* while *giurisdizione esclusiva* on subjective rights is limited to a predetermined set of cases. Therefore, claims seeking judicial review of administrative acts that impact GHG emission is a path that could be pursued before administrative courts. However, all claims based on non-contractual liability fall under the ordinary

[408] ALPA, Interessi diffuse, in Digesto delle discipline privatistiche, IX, Torino, 1993, p. 610.
[409] *Corte costituzionale*, judgement n. 126, June 1st, 2016, available in *DeJure*

jurisdiction exercised by civil courts (*giurisdizione ordinaria*). This thesis focuses on claims before ordinary courts, and the next pages will draw conclusions that apply to ordinary jurisdiction.

Climate litigation is likely to present cross-border elements. For example, some plaintiffs might reside outside Italy. Alternatively, in litigation against the private sector, some conduct could happen abroad. Within the European Union, questions of international jurisdiction relating to civil and commercial matters must be solved under EU Regulation No. 1215 of 2012. Tort law claims are certainly civil matters; hence, the regulation applies, and under Article 7(2), jurisdiction is attributed to the "*courts for the place where the harmful event occurred or may occur*."

The other branches of government pose the other limit of jurisdiction. As proven in Chapter II, arguments relying on the separation of powers are challenging to overcome. In climate litigation, the difficulty consists in seeking an effective order, on one side, without asking the court to enter the province of the other branches of government.

Objections regarding the separation of powers could be successfully overcome leveraging two arguments. First, it is the courts' role, in a constitutional democracy, to protect subjective rights against any alleged violation. Governments are no exception to this principle. This argument replicates the Dutch *Hoge Raad*'s findings in *Urgenda III*, where the Court stated that the judiciary could not dictate the merits of climate policy but it has the power to adjudicate whether the state lawfully *exercised* its discretionary political power.[410] Second, further arguments on the limits of political discretion can rely on the case law findings on Article 7 c.p.a., considered in the previous sections. *Corte di cassazione*, judgment No. 18829 of 2019, *Consiglio di stato*, judgment No. 7054 of 2021, and *Corte costituzionale* No. 282 of 2002 agree that the national or regional government's policy is subject to judicial review and margins of non-justiciable political discretionally are very thin. Most political decisions remain subject to judicial scrutiny. All it takes is a written provision – or even just a legal principle embedded in the legal system – that limits the power of the executive.

This consideration is critical in climate litigation. Climate litigants can easily find, in their legal systems, principles that should guide governments in how they deal with climate change: first, the precautionary principle; second, the duty to follow the best-available science (*riserva di scienza*).

*Consiglio di stato*, judgment No. 7045 of 2021, found that both were recognized as being at the core of public health policies against the covid-19 pandemic. Such principles guide the action of the government and the public administration. The case dealt with the issue of political discretion in the way the government handled the covid-19 pandemic. The court found that the public policymakers at the administrative and legislative levels must act following the best available science. The pandemic opposed personal freedoms with public health and the right to health of those exposed. In handling national public health, economic and social emergency, such as the pandemic, there is an inevitable margin of political discretion. Science needs time to reach conclusive scientific answers to the many unsolved issues. Yet, the executive and the legislative powers of government have to act and find a balance between the opposing interests that come into play. The court maintained that the best available science and the precautionary principle must guide political

[410] *Urgenda III*, paragraph No. 8.2.4.

choices. Interestingly, the court combined the "precautionary principle" with the notion of "best available science."[411]

The same principle of law had previously been stated by *Corte costituzionale*, judgment No. 282 of 2002, in which the court declared that the regions might legislate on health-related matters; however, the legislator does not have unlimited discretion: policymakers must exercise their power within the setting of the best available science.[412]

In conclusion, climate litigants could leverage the findings made by the apex courts of the Italian judiciary system on Article 7 c.p.a. The government's policy is subject to judicial scrutiny any time there are explicit or implied rules of law that set relevant legal boundaries – including the constitutional duty to follow the 'best available science' and the precautionary principle.

Another piece of this puzzles, is provided by judgment No. 334 of 2008 issued by the *Corte costituzionale* in the *Englaro* case, considered above. The Court found that there was no violation of the separation of power principles in the case at hand. In fact, the judiciary exercised its duty to adjudicate a claim applying statutory and constitutional law. The Court made clear that the judiciary cannot refuse access to justice if the claim involves areas not yet explicitly regulated by the legislator and of political interest.

A further argument could be advanced based on investment arbitration. In that realm of law, states accept that an arbitral tribunal dictates policy changes based on investment-protection treaties. Moreover, a wave of international arbitration launched by the private sector against states' policies put in place pursuing the 2015 Paris Agreement.

Recently, Italy was involved in an arbitration before the International Centre for Settlement in Investment Disputes in *Rockhopper v Italy*. The tribunal found that Italy had violated the 1998 Energy Charter Treaty. Italy's liability was found based on law No. 221 of 2015, which interrupted off-shore oil and gas exploration within a certain distance from the shores and ordered Italy to pay

[411] Consiglio di stato, judgment No. 7045 of 2021, available in the online database Leggi d'Italia, stated the following principle: "La riserva di scienza, alla quale il decisore pubblico sia livello normativo che amministrativo deve fare necessario riferimento nell'adottare le misure sanitarie atte a fronteggiare l'emergenza epidemiologica, lascia a questo, per l'inevitabile margine di incertezza che contraddistingue anche il sapere scientifico nella costruzione di verità acquisibili solo nel tempo, a costo di severi studi e di rigorose sperimentazioni e sottoposte al criterio di verificazione-falsificazione, un innegabile spazio di discrezionalità nel bilanciamento tra i valori in gioco, la libera autodeterminazione del singolo, da un lato, e la necessità di preservare la salute pubblica e con essa la salute dei soggetti più vulnerabili, dall'altro, una discrezionalità che deve essere senza dubbio usata in modo ragionevole e proporzionato e, in quanto tale, soggetta nel nostro ordinamento a livello normativo al sindacato di legittimità del giudice delle leggi e a livello amministrativo a quello del giudice amministrativo."

[412] *Corte costituzionale*, judgment No. 282 of 2002, available in the online database Leggi d'Italia, found that: "Tutto ciò non significa che al legislatore sia senz'altro preclusa ogni possibilità di intervenire. Così, ad esempio, sarebbe certamente possibile dettare regole legislative dirette a prescrivere procedure particolari per l'impiego di mezzi terapeutici "a rischio", onde meglio garantire - anche eventualmente con il concorso di una pluralità di professionisti - l'adeguatezza delle scelte terapeutiche e l'osservanza delle cautele necessarie. Ma un intervento sul merito delle scelte terapeutiche in relazione alla loro appropriatezza non potrebbe nascere da valutazioni di pura discrezionalità politica dello stesso legislatore, bensì dovrebbe prevedere l'elaborazione di indirizzi fondati sulla verifica dello stato delle conoscenze scientifiche e delle evidenze sperimentali acquisite, tramite istituzioni e organismi - di norma nazionali o sovranazionali - a ciò deputati, dato l'"essenziale rilievo" che, a questi fini, rivestono "gli organi tecnico-scientifici" (cfr. sentenza n. 185 del 1998); o comunque dovrebbe costituire il risultato di una siffatta verifica."

damages.[413] That law expressed an environmental policy and was also taken in view of the Paris Agreement. Articles 13, 16, and 18 referred to incentives for renewable energy sources and "green public procurement." Nonetheless, a climate-oriented policy put forward in light of the Paris Agreement was considered inconsistent with the investors' rights. Accepting to be bound by these claims has a consequence on climate litigation. Following the same logic, in climate litigation before national courts, governments should accept the judicial scrutiny of their own courts, based on national law – the 2015 Paris Agreement and the European Convention of Human Rights – to protect their citizens. This argument could help courts establish that, while establishing governments' non-contractual liability under the Paris Agreement is a matter concerning the merits, courts do have jurisdiction. Hence, climate litigation is justiciable.

## 3 Third Step: Establishing Standing

Before ordinary courts, the further step is to establish standing based on the relationship between the plaintiff and the claim: if it concerns a subjective right, they must determine whether it is an individual- or a 'homogeneous right.' If the claim involves an 'interest,' the plaintiff must distinguish between legitimate-, collective- or diffuse interest. Each of the two categories requires arguing the existence of standing differently. In climate litigation, plaintiffs face the challenge of framing an appropriate relationship between their individual rights or interests and the fragmented effects of climate change, which inevitably involve potentially anyone.

Keeping in mind the theory of action, as received by Article 81 c.p.c. and the case law of the *Corte di cassazione*, plaintiffs must, first, identify what subjective rights they seek protection for; second, present themselves in their claim as right holders; third, assert that the defendant is the party who infringed the right claimed. Any objection on the matter of actual entitlement is a matter of merits, as confirmed by the plenary session of the *Corte di cassazione* in 2016.

In the setting of Article 81 c.p.c., there seems to be no way to argue in favor of standing on behalf of future generations, as there is no provision that recognizes the rights of future generations. Furthermore, Article 1 *Codice civile* attributes the capacity to be a right-holder only to born people, while an unborn *fetus* has, under strict circumstances, limited judicial protection. As discussed later, the *azione di classe inibitoria* seems to offer a viable solution for the *rebus* of future generations' protection.

Given the serial nature of climate change consequences, the latter could be labeled as 'mass harm' and, within a given set of rights, the plaintiff draws the borders of the 'class.' The plaintiff could therefore benefit from the class action device, as regulated by Articles 840-bis-840-sexiesdecies c.p.c. and the *legittimazione strardinaria* mechanism that allows a class-plaintiff to launch a class action on behalf of the entire 'class'. In addition to that, plaintiffs could benefit from the evidentiary and cost-derogatory rules that favor the class over the defendant.

[413] *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14. Documents related to the case are available online, at: https://jusmundi.com/en/document/decision/en-rockhopper-exploration-plc-rockhopper-italia-s-p-a-and-rockhopper-mediterranean-ltd-v-italian-republic-final-award-wednesday-24th-august-2022

The case law on the notion of 'homogeneous rights' developed under Article 140-bis of the *Codice del consumo* is not vast. Yet it seems appropriate to argue that any individual subjective right can potentially fall under the category of 'homogeneous rights ' as long as it is traceable to a 'mass tort.' However, the analysis of class action showed that there is another – ambiguous – condition that restricts the scope of 'homogeneous rights.' The Italian legislator chooses to keep the 'opt-in' mechanism in place, and joining class members may only prove their claim by filing documents. Further taking of evidence to prove individual claims is not admissible. Therefore, it seems that the adjective 'homogeneous' refers to the possibility of standardizing the evidence on individual harm.

Regarding climate litigation, it seems that the issue is not 'what' rights can be bundled up into a class action. Potentially, any right might be suitable for a class action. Instead, the issue is 'how' the class plaintiff describes the class. As a matter of fact, sub-classes are not explicitly allowed. [414] Hence, claiming, for example, the right to health is probably too vague; the class plaintiff should link the claim to specific diseases so that each class member can produce documents to prove their right to compensation if the mass tort is ascertained. If sub-classes were allowed, the class action could broaden its scope to many different rights categories that happen to be harmed by climate change.

In the context of climate litigation, plaintiffs must consider that class actions cannot be brought against the state, regional, or local authorities. Strategic litigation against governments is excluded from using the class action device, which can apply in strategic cases against the private sector. Furthermore, it is important to note that the 'new' class action device only applies to conducts following its introduction. A class action could nevertheless be brought against companies with a high carbon footprint and insufficient industrial plans for its reduction. The azione di *classe risarcitoria* seems to be restricted to climate litigation against the private sector for damages. It could be used in cases launched by communities living in Italy or abroad against big industrial groups, replicating the (ongoing) German *LLyla v RWE* case.

A very helpful tool for climate litigation is offered by the *azione di classe inibitoria* Article 840-sexiesdecies c.p.c., which foresees a class action aimed at an injunctive relief to prevent mass harm from continuing.

In the context of strategic climate litigation, the *azione di classe inibitoria* has four advantages compared to the one aimed at recovering damages.

First, *azione di classe inibitoria* applies to both interests and homogeneous rights. Thus, plaintiffs could try suing based on the public interest – or right – to a safe climate and on traditional fundamental rights.

Second, it achieves the same result of a strategic claim brought with an *azione di classe risarcitoria* under Article 840-bis c.p.c. The claim and the consequent injunction focus only on the termination of the mass tort. Once the order is issued, compliance with it satisfies the class in the

[414] This possibility is mentioned by GABELLINI, Accesso alla giustizia in materia ambientale e climatica, in Rivista di diritto e procedura civile, 2022, p. 1128.

sense that individual rights are not compensated, but the source of damages is stopped. In addition, the court can order the payment of a daily penalty for the delay in the implementation of the order.

Third, *azione di classe inibitoria* under Article 840-*sexiesdecies* c.p.c. also applies only to conducts that happened after the law entered into force. However, while this time limitation might constitute a problem for the *azione di classe risarcitoria*, the *azione di classe inibitoria* is not impacted because plaintiffs as they seek the prevention of future harm or the continuation of harmful conduct.

Fourth, leveraging Article 840-*sexiesdecies* c.p.c. there is no need to come to terms with the puzzle of standing for future generations, which would require modifying the law or coming up with creative theories to argue that unborn people have rights. Instead, tackling the mass tort based on a class action that seeks protection for *interessi diffuse* seems to solve this cumbersome issue.

## 4. Fourth Step: Showing Sufficient Interest in the Outcome of the Judgment

Third, plaintiffs must be prepared to argue that they have a sufficient interest under Article 100 c.p.c. Strategic climate litigation against governments or the private sector must deal with the fact that one single court ruling, even if scrupulously implemented, cannot conclusively solve climate change. The same problem does not exist, at least at this magnitude, in environmental cases were implementing an order to restore or pay for the restoration of the environment can achieve the objective of remedying environmental harm.

When climate litigation is directed to recover damages, the issue is not relevant, as the interest in an order for damages is *in re ipsa.* Furthermore, if the defendant does not comply, the plaintiff may always enforce the judgment by seizing the defendant's assets (*espropriazione forzata*).

Things are different in strategic claims because any judicial order concerns the fulfillment of non-fungible obligations; only the government, or the board of directors, can change the national or corporate climate policy. In this field, there are no effective enforcement mechanisms if the order is left unattended.

The previous section discussed how common law countries might be advantageous for climate litigants. The more flexible notion of ‘remedy’ has sometimes been interpreted to allow courts to supervise defendants' actions. Conversely, based on the primacy of the subjective right, civil law jurisdictions would need a substantive law provision that allows courts to retain jurisdiction and supervise defendants’ actions. Currently, civil law cannot replicate judgments such as Leghari and Doucet-Boudreau, where courts imposed information duties on the parties involved and created a managerial role to implement the order to reduce GHG emissions. In other words, plaintiffs seeking a strategic ruling before an Italian court must be prepared to cope with the lack of enforcement mechanisms. However, scattered around multiple sources of law, many instances of rights cannot be enforced. The previous sections mentioned: Articles 18 and 28 of the law No. 300 of 1970 (labor law), Articles 124 and 131 of the legislative decree No. 30 of 2005 (Patent and trademark law), Article 37(3) of law legislative decree No. 198 of 2006 (anti-discrimination law) and Article 709-ter c.p.c., replaced by the reform of civil procedural law by Article 473-bis.39 c.p.c. (family law).

The case law of the *Corte di cassazione* also supports the conclusion that non-enforceable orders can be issued and that plaintiffs do not lack interest under Article 100 c.p.c. The Court found that an order to perform a non-fungible obligation benefits the plaintiff even if it cannot be enforced; it can help the plaintiff obtain spontaneous fulfillment. Further, if the order remains unattended, the plaintiff can later seek compensatory damages. *Corte di cassazione* also found that Article 614-bis c.p.c. is the expression of the general principle that allows plaintiffs, under Article 100 c.p.c., to seek an order even when the judicial command concerns the execution of non-fungible performances.[415]

Hence, objections relating to Article 100 c.p.c. should be rejected based on the systematic impact of Article 614-bis c.p.c., which applies to any claim seeking the order to fulfill non-fungible performances. Plaintiffs in climate litigation may leverage Article 614-bis c.p.c. to compel the defendant to implement a court's ruling.

Given the primacy of the subjective right, civil law jurisdictions do not allow courts to create new remedies and retain jurisdiction beyond the judgment on the merits. As noted above, it is virtually impossible to see judgments such as the Pakistani Leghari, where the court created a "Climate change commission" to supervise the government's actions. Further, the principle *nemo ad facto cogi potest* applies to people, entities, and governments. Missing a specific law provision, such as Article 18 of the IBA Model Statute commented in Chapter IV, that allows courts to retain jurisdiction, Article 614-*bis* seems to be the most effective remedy for strategic climate litigation. The enforcement function of Article 614-*bis* is confirmed by the *Cartabia* reform of the *Codice di procedura* civile, which amended the second paragraph of Article 614-bis c.p.c., under which parties can resort to Article 614-*bis*(2) c.p.c. even during the execution proceeding requiring this remedy before the enforcement judge (*giudice dell'esecuzione).* Article 614-*bis* also applies under Article 840-*sexiesdecies*(6) c.p.c. to compel the defendant to end the mass tortious conducts or events. Further, Article 614-*bis* c.p.c. is substantially replicated by the draft versions of Article 140-*terdecies Cod. cons.* which might enter into force following the government's proposal to introduce the *azione di classe rappresentativa* for the protection of consumer interests and substantially allows

In conclusion, *interesse ad agire* and the other two condizioni dell'azione are hurdles that plaintiffs can overcome within the existing legal framework.

[415] *Corte di cassazione*, judgment No. 19454 of 2011, available on-line in Leggi d'Italia: "Profilo diverso, non pertinente nella specie, resta quello dell'impossibilità dell'esecuzione in forma specifica, in ipotesi di vera infungibilità nemo ad factum cogi potest). Ma questo nulla toglie all'interesse del creditore ad ottenere la condanna, in vista di un congruo risarcimento per equivalente, eventualmente assistito da garanzia ipotecaria (art. 2818 cod. civ.). Del resto, ogni dubbio sull'ammissibilità, in subiecta materia, di una pronuncia di condanna è stato eliminato ex post dal legislatore con l'introduzione, ne terzo libro del codice di rito dedicato al processo di esecuzione, dell'art. 614 bis cod. proc. civ., (Attuazione degli obblighi di fare infungibile o di non fare) con L. 18 giugno 2009, n. 69; che, seppur inapplicabile, ratione temporis, alla fattispecie in esame, appare ricognitivo di un principio di diritto già affermato, come visto, in giurisprudenza."

# FOURTH PART
# THE IBA'S PROPOSALS TO REFORM PROCEDURAL LAW

# CHAPTER 12
# THE IBA 'MODEL STATUTE' RULES ON STANDING AND JUSTICIABILITY

## 1. Introduction to the IBA Model Statute

Established in 1947, the *International Bar Association* (IBA) is the organization that represents the legal profession, bar associations, and law societies worldwide. In the post-world war two era and concomitance with the United Nations institution, IBA's founders were convinced that this institution could contribute to global peace and promote access to justice. Initially, the IBA was composed exclusively of national bar associations and law societies. It then evolved into an entity that nowadays incorporates both individual lawyers and law firms.[416]

The IBA aims to reform and develop international law and the legal profession. Internally, it is divided into two 'divisions': *(ii) the* Legal Practice Division and (ii) the Public and Professional Interest Division.

The IBA *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (IBA Model Statute) addresses the global climate crises from a legal point of view. The IBA accepted the premise that *(i)* climate litigation is a reality with increasing cases being brought to court in multiple jurisdictions, *(ii)* citizen suits can significantly contribute to getting more action on climate change, and *(iii)* climate litigation is a tool to enforce the 2015 Paris Agreement. However, the IBA also recognized that many climate claims are clashing against unfavorable procedural rules, which obstacle access to justice. Such 'procedural hurdles' constituted the focus of the IBA's *Task Force on Climate Change Justice and Human Rights*. In 2014, the *task force* issued a landmark report titled *Achieving Justice and Human Rights in an Era of Climate Disruption*. Following this report, the IBA formed an *Expert Working Group*, which, in 2020, published the Model Statute based on the *Task Force* recommendation to:

> *"(…) outline legal rights and remedies in respect of climate change, including injunctive relief to mitigate or prevent current or future threats, declaratory relief, and judicial review."*

The Model Statute is constituted of 23 Articles and an extensive explanation of their rationale. The document also refers to judicial precedents across many jurisdictions – most of which belong to the common law tradition.

It is also noteworthy that Article 2(1) of the Model Statute makes clear that the Model Statute only applies to claims against governments:

[416] The IBA's website states that its membership "is comprised of more than 80,000 individual international lawyers from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries".

> *"This Act and its principles are intended to facilitate access to justice in Government related climate change proceedings, and are not intended to apply to climate change proceedings against private parties."*

This restrictive scope of application probably results from a 'political' stance, given that the IBA also represents big law firms and might be somewhat influenced by their interests. Of course, this is just an assumption. However, theoretically speaking, nothing would prevent a national legislator from implementing the Model Statute for all proceedings – be it against governments or the private sector.

The IBA's effort contributes significantly to climate litigation and the hope that legal action might help address the climate crisis. The Model Statute shows that *(i)* it is possible to conceive rules that allow access to climate justice and *(ii)* that most solutions have solid roots in multiple national jurisdictions.

The Model Statute's continuous reference to the common law precedents helps explore territories that might be unchartered to some continental civil lawyers.

As it will be apparent from the short commentary on the standing and justiciability provision, a great source of inspiration is provided by the Canadian legal order. That is also thanks to the critical contribution brought by David Estrin – who served as co-chair of the *Expert Working Group* and leading Canadian environmental lawyer.

The common law roots prompt doubt about whether the proposals advanced by the IBA are compatible with the Italian legal framework and its civil law tradition.

Chapter I introduced climate litigation; Chapter II showed how traditional standing and justiciability rules give courts and parties a hard time; Chapter III mapped the Italian legal ground; Therefore, the following sections consider the Model Statute's rules on standing and justiciability. The aim is to verify whether these provisions could be implemented nationally or via an EU Directive within the Italian legal framework.

## 2. The IBA Model Statute's Standing Rules

On the matter of standing, the Model Statute impliedly acknowledges the facts that in most jurisdictions standing rules require plaintiffs to be entitled to the rights claimed. *KlimaSeniorinnen* and the *People's case* showed that standing rules often require a relationship of exclusivity with the rights that plaintiffs seek to protect – which is paradoxical in the context of widespread and diffuse mass injuries. This stringent notion of standing also makes it harder to sue on behalf of future generations, meaning those who will suffer the most from climate change. The Neubauer case's intergenerational dimension of climate change was well displayed, where the German Constitutional Court stressed that climate change impacts future fundamental rights.[417] In other cases, such as in *Urgenda*, plaintiffs must sustain that they have an interest in suing. In strategic litigations against both governments and the private sector, the decision must be able to curb emissions effec-

[417] *Neubauer*, Par. 194.

tively and provide meaningful relief for the plaintiff's rights. Both potential connotations of standing – being entitled of an individual right and having an interest in an effective decision – clash against the fact that climate change affects everyone and is caused by innumerable sources that mix in the atmosphere.

Articles 4 and 5 of the IBA Model Statute also take into account that the judicial protection of fragmented interests, such as those involved in climate change and the environment, hardly fits into traditional standing schemes as nobody is entitled to the right to a safe climate exclusively.

The IBA Model Statute regulates standing under Articles 4 and 5. Article 4 establishes standing as to who can sue, using multiple tools: *(i)* Article 4.1 provides for private enforcement of statutory duties; it seems to be inspired by Canadian federal and provincial environmental law; *(ii)* Article 4.2 sets out rules for party representation that do not differ from the ones already existing under present Italian law; *(iii)* Article 4.3 concerns third-party funding; *(iv)* Articles 4.4 propose 'open standing' rules that would allow anyone to launch climate litigation regardless of personal entitlement to the rights or interests claimed. These provisions have their roots in multiple jurisdictions, such as Canada, The Philippines, the United States, Australia, Uganda, and Ecuador. Article 4.5 concerns standing for future generations. This provision would allow anyone to claim on behalf of future generations. This provision is probably the most revolutionary, as it would amount to the legal recognition of substantive rights to future generations; *(v)* Articles 4.6 and 4.7 provide for *parens patriae* standing. They would allow certain public bodies or the Attorney general to start a claim on behalf of their community.

Article 5 concerns third-party intervention as *amicus curiae.* This provision might be helpful to bring scientific knowledge to the court. However, it must be kept in mind that Article 5 does not foresee a standing provisions applicable to climate litigants, as the *amicus curiae* is not a party to the proceedings.

Despite the text mentioning the wording "Government-related climate change," nothing – besides the political will – prevents applying Article 4 and 5 provisions to suits against the private sector.

## 3. Commentary on Article 4.1: Private Enforcement of Statutory Duties

> *"[4.1] Any person may bring proceedings to enforce rights, duties or obligations under, restrain a breach or threatened or apprehended breach of, or remedy a breach of a legal instrument in Government-related climate change proceedings, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."*

Article 4.1 leverages standing to facilitate the enforcement and breach of "legal instruments." Under this provision, anyone could seek a judicial order to enforce a law regulating climate-related matters. Hence, this provision introduces a form of 'open standing': any time someone does not live up to a climate obligation, anyone could sue to enforce a climate change—related duty.

Article 4.1 does mention the word 'rights,' yet it seems to be designed more for enforcing statutory climate law and protecting 'diffuse interests' rather than individuals and their subjective

rights. Article 4.1 lays a legal basis for the private enforcement statutes through the mechanism of 'private prosecution.'

## 3.1 The Background

### 3.1.1 Canadian Federal Law

Article 4.1 picks up on the Canadian reception of the British common law tradition under which any citizen had a common law right to prosecute statutory offenses.418 The Canadian legal order incorporated this common legal arrangement into its criminal and environmental law. Canadian scholars note that, in environmental matters, offenders tend to spend more resources to invest in correction measures.

In addition, private prosecution helps set influencing precedents and influence the government's actions. At the federal level, Canada adopted British criminal law, except for what was altered by its 1985 Criminal Code. Based on the Canadian criminal code, anyone showing a 'reasonable and probable cause' that a federal or provincial statute or regulation has been breached can search an 'information' before the justice of the peach and become a 'private prosecutor' if the justice issues a summons to the person or entity accused of the statutory breach. The Attorney-General can decide whether to stay the prosecution or allow it to proceed. Private prosecution is also provided under federal statutes, such as the Fisheries Act or the Species at Risk Act. However, such statutory acts require passing a prior screening measure called pre-enquete to avoid frivolous or improper private prosecutions.[419]

### 3.1.2 Canadian Provincial Law

Private enforcement of environmental law is also regulated at the provincial level. Ontario provincial environmental legislation private prosecution under §§ 103(1) and 84(1) of *Ontario's Environmental Bill of Rights,* passed into law in 1993.

§ 103(1) of *Ontario's Environmental Bill of Rights* allows anyone to bring a public nuisance for environmental harm in case of economic loss or personal injury from environmental harm. Individuals or environmental groups do not need consent from the Attorney-General. Also, their injury does not need to be unique. Plaintiffs can sue even though their loss or damage is:

"(…) of the same kind or to the same degree as other persons".

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[418] JACKSON, The Machinery of Justice in England, 5th ed , Cambridge, 1967, pp. 129-301.

[419] SWAIGEN, KOEHL, HATT, *Private Proscutions Revisited: The Continuing Importance Of Private Prosecutions In Protecting The Environment*, A Symposium on Environment in the Courtroom (II): Environmental Prosecutions March 18-19, 2013 University of Ottawa, p. 9. This Article is available on the website of the Canadian Institute of Resources Law (CIRL) at th following link: https://cirl.ca/sites/default/files/2013%20Symposium/ENG_Private%20Prosecutions%20Revisited_Swaigen.pdf. Also, see ESTRIN, *The Suncor Saga: Transforming Alberta Environmental Law Enforcement,* in *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved,* Edited by William A Tilleman and Alastair Lucas, Thomson Reuters Canada Ltd, 2017.

Hence, this provision allows pursuing environmental harm regardless of a personalized injury.

§ 84(1) of *Ontario's Environmental Bill of Rights* contains a provision for preventing harm to public resources caused by the contravention or imminent contravention of environmental regulatory or statutory provisions. Any Ontario resident can bring an action under § 84(1). This action can be brought in case of contravention or imminent contravention of environmental protection regulations or statutes.

On the remedies front, §§ 93 and 94 make clear that actions under § 84(1) are brought for the protection of the public interest – not personal rights as under § 103(1). In effect, the court may:

> *"(a) grant an injunction against the contravention; (b) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time; (c) grant declaratory relief; and (d) make any other order, including an order as to costs, that the court considers appropriate."*

These are the only available remedies: § 94 explicitly states that the court cannot award damages.

## 3.2. Is Article 4.1 Compatible with Italian Law?

Article 4.1 seems compatible with the Italian legal context. Both civil procedural law and administrative law foresee tools to protect supra-individual interests.

First, the project approved by the Council of Ministers regarding the *azione di classe rappresentativa*, analyzed in chapter three, also deals with protecting collective interests infringed by statutory violations. Second, the class action under Article 840-*sexiesdecies* c.p.c. also offers protection for diffuse interests harmed by mass torts.

Under Article 18(5) of law No. 349/1986, environmental associations can join civil proceedings commenced by the state to vindicate environmental harm. In addition, entities can also seek the judicial review of illegitimate administrative acts in administrative jurisdiction.

Further reference for 'open standing' for public interest litigation is offered by Article 9 of law No. 267 of 2000, under which anyone residing in a municipality or province may replace the local authority and bring an administrative or ordinary claim to protect the 'diffuse interest' to a healthy environment.

## 4. Commentary on Article 4.2: Party Representation

> *"[4.2] Government-related climate change proceedings may be brought under Article 4.1 by a person on their own behalf or on behalf of another person (with their consent)."*

This provision is not technically a standing one –in Italian terms. Article 4.2 concerns the power to represent someone before the court. This proposal does not change much in with regard to the

Italian legal system. Article 77 (1) c.p.c. requires a written power of attorney concerning substantive rights and the right to sue or defend in court. Likewise, Article 4.1 Model Statute also refers to the principal's consent.

## 4.1 Is Article 4.2 Compatible with Italian Law?

Article 4.2 sets out rules for party representation that do not differ from the ones already existing under Article 75 c.p.c. Hence, Article 4.2 of the IBA Model is compatible with Italian law but also not necessary.

## 5. Commentary on Articles 4.4 and 4.5: Open Standing

> *[4.4] Any person may bring Government-related climate change proceedings if the person can establish: (a) a serious issue is raised in the proceedings; and (b) a genuine interest in the issue and, in the case of an organisation, an objective or mandate to protect the public interest.*
>
> *[4.5] Any person meeting the qualifications in Article 4.4 may bring Government-related climate change proceedings on behalf of minors or future generations.*

The provisions set by Articles 4.4 and 4.5 address standing in the context of individual or collective suits to vindicate the violation of subjective rights or collective interests. Conversely, Article 4.1 concerns the private enforcement of statutes – hence, the protection of 'diffuse interests.'

The conditions under letters (a) and (b) seem to work differently. Letter (a) concerns the claim's merits. Indeed, the claim must be "serious" – not frivolous or abusive. On the other hand, the condition under letter (b) resembles Article 100 c.p.c., given that it requires a personal interest in the claim. If this were the case, letter (b) might cause the same issues existing standing provisions to create in climate litigation, as it might be difficult to establish that the plaintiff has a personal stake in the claim. Due to the letter (b), Article 4.4 does not set an 'open standing provision in a technical sense.

### 5.1 The Background

Multiple national jurisdictions inspired the provisions proposed by the IBA under Articles 4.4 and 4.5: Canada, The Philippines, the United States, Australia (New South Wales), and Ecuador.

#### 5.1.1 Canada

In Canada, in the *Finlay* case, the Supreme Court recognized a citizen's public interest standing to challenge before courts government actions if they raise a 'serious issue' and the plaintiff shows a 'genuine interest.'[420] The IBA Model Statute replicates the same requirements.

#### 5.1.2 The Philippines

Open standing provisions to enforce environmental law and protect public interests are foreseen in the Philippines.

Rule 2, section 4 of the 2010 *Rules of Procedure for Environmental Cases* 2010 foresees that:

> *"Section 4. Who may file. — Any real party in interest, including the government and juridical entities authorized by law, may file a civil action involving the enforcement or violation of any environmental law."*

[420] *Finlay v. Canada* (Minister of Finance), 1986 CanLII 6 (SCC), [1986] 2 SCR 607

Rule 2, section 4, goes as far as granting standing to protect future generations:

> *"Section 5. Citizen suit. — Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws."*

'Open' and 'intergenerational standing' was leveraged in the 1993 *Oposa v. Factoran* case decided by the Supreme Court of The Philippines concerning the harm caused by logging to the 'virgin forest.'[421] Represented by the iconic environmental lawyer Tony Oposa, a group of families and an environmental organization sued, also on behalf of future generations, seeking protection of the tropical 'virgin' rainforests. The plaintiffs filed a class suit seeking an order against the Philipino *Secretary of Environment and Natural Reso urces* to refrain from issuing new timber licensing agreements which would have destroyed the remaining rainforest. On the issue of standing, the Supreme Court found that:

> *"Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature.' (...) Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."*

It is interesting to note that the Supreme Court found that (i) the lawsuit corresponded to present and future generations' substantive right to a healthy environment, and (ii) at the same time, the claim is the performance of the obligation towards future generations.

### 5.1.3 United States Federal Law

The IBA standing provisions are influenced by the U.S. citizen suits experience. At the federal level, many environmental statutes allow anyone to bring 'citizen suits.' For example, the *Clean Air Act*, the *Clean Water Act*, the *Resource Conservation and Recovery Act*, and the *Endangered Species Act*. [422] The use of 'citizen suist' and its reception by the U.S. Supreme Court deeply influence environmental law litigation in the United States. The history of citizen suits also shows how closely connected standing, justicibility are. In fact, broader standing implies a deeper review of political choices. Hence, allowing more people to go to court and enforce environmental law creates greater friction between the judiciary and the other branches of government.

[421] *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (1993)
[422] Resource Conservation and Recovery Act, 42 USC 2012 § 6962; Endangered Species Act, 16 USC 2002 § 1540.

The way the legislative power shapes standing rules also mirrors a private or public law conception of what civil lawyers call the right of action. Besides citizen suits' influence on the IBA Model statute, it is fair to say that climate change litigation might need citizen suits to contribute to enforcing climate law.

In the 1970', the U.S. Congress deployed citizen suits to enforce environmental legislation. As a result, 1970 the *National Environmental Policy Act (NEPA)* came into force. In case a public agency violated an environmental protection procedure set forth by the *NEPA* Administrative Procedure Act, anyone could sue besides suffering a personal injury.[423]

After *NEPA*, the U.S. Congress passed the Clean Air Act in 1979 and the Clean Water Act in 1972. Both pieces of legislation leveraged open standing and citizen suits as based on two assumptions: *(i)* the environment is a collective good, and its protection is a diffuse interest to which anyone is entitled; *(ii)* federal agencies may be pressured by those political powers that put the environment at risk.[424]

In the 1980' citizen, suits became a tool against the private sector in case of violation of the *National Pollution Discharge Elimination System.*

The Supreme Court slowly geared toward a restrictive view of standing requirements. In *Association of Data Processing, Inc. v* Camp, the Court went from requiring the existence of a 'cognizable interest' to an 'injury in fact,' which is much more restrictive as the plaintiff must show a personal injury. At this stage, standing rules were still 'loose' enough to allow environmental groups to bring citizen suits, for example, in *Sierra Club v Morton*.[425]

The 'destiny' of citizen suits came at a crossroads in 1983 when circuit judge Antonin Scalia published an Article titled "*The Doctrine of Standing as an Essential Element of the Separation of Power*."[426] Judge Scalia argued that standing could be granted only to plaintiffs seeking redress for a personal injury, not when the claim concerns diffuse interests. According to him, any broader definition of standing would violate the separation of powers.

Scalia's views impacted citizen suits a decade later, in 1992, when he served as a judge at the Supreme Court and wrote a milestone opinion in *Lujan v Defenders of Wildlife*. *Lujan* invalided all major environmental statutes where Congress leveraged open standing and citizen suits to enforce environmental law regardless of individual injury.[427]

In the case at stake, despite the environmental organization having brought a citizen suit, the Supreme Court held it lacked standing because it only presented a generalized grievance rather than an 'injury in fact.' As a result, the Supreme Court declared the unconstitutionality of citizen

[423] 5 U.S. Code § 702 ( Right of review)
[424] DE SANTIS, La tutela giurisdicionale collettiva, Contributo allo studio della legittimazione ad agire e delle tecniche di tutela inibitoria, Napoli, 2013, p. 314.
[425] *Sierra Club v. Morton*, 405 U.S. 727 (1972).
[426] SCALIA, The Doctrine of Standing as an Essential Element of the Separation of Powers, in Suffolk University Law Review, 17, 1983, p. 881.
[427] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The case is commented by SUNSTEIN, What's Standing after Lujan? Of Citizen Suits, "Injuries,"and Article III, in Michigan Law Review, November 1992, Vol. 91, No. 2, pp. 163-236.

suits under Articles III and II of the Constitution. According to the Court, Congress could grant standing only in the presence of an 'injury in fact.'

The U.S. Constitutional Court reversed course in 2000 with the decisions *Friends of the Earth, Inc. v Laidlaw, Inc.*[428] In this case, the environmental group F*riends of the Earth* sued the corporation *Laidlaw* under the *Clean Water Act*, claiming that Laidlaw had polluted river waters with toxic waste. Before the Supreme Court, the defendant argued that *Friends of the Earth* lacked standing under the injury in fact requirement. The Court found that, in environmental litigation, Article III standing cannot be construed too strictly and that plaintiffs have standing regardless of an 'injury in fact.' The Court impliedly recognized that the judicial protection of the environment does not fit into the scheme of 'private law litigation.' With specific regard to the claim brought by the plaintiffs, the Court held that water pollution violated the interest in recreative, economic, and aesthetic enjoyment of waters. Despite its inherently collective nature, this injury was deemed sufficient to fulfil the first standing requirement. The Court also broadened the second standing requirement – redressability. Under the *Clean Waters Act,* the civil penalties sought by the plaintiffs must be paid to the U.S. Department of the Treasury. Yet the Court found that the claim was redressable as the civil penalties had a deterrent effect.[429]

Overall, *Laidlaw* reversed *Lujan* and restored the constitutionality of citizen suits. Besides the U.S. legal system, these Supreme Court judgments show that: *(i)* standing and justiciability are linked, as loosening plaintiffs to sue beyond a personal injury expands jurisdiction; *(ii)* broader standing requirements imply a public law conception of procedural law, as opposed to a private law conception.

### 5.1.4 Michigan, United States

State environmental law also leverages open standing and citizen suits to extend protection for natural resources and the public trust. For example, under § 324.1701(1) of the 1994 *Michigan's Natural Resources and Environmental Protection Act*, any private citizen, as well as the Attorney General, may seek the protection of the environment if environmental harm:

> *"occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."*

### 5.1.5 New South Wales, Australia

In Australia, under the 1979 *New South Wales Environmental Planning and Assessment Act* anyone may file a claim before the *Land and Environment Court* of New South Wales, seeking the enforcement of the Act.

[428] Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000)
[429] DE SANTIS, La tutela giurisdicionale collettiva, Contributo allo studio della legittimazione ad agire e delle tecniche di tutela inibitoria, Napoli, 2013, pp. 236-327.

Part 9.45 foresees the following provision:

> *"(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."*

A similar 'open standing' provision is set by § 253 of the 1997 New South Wales Protection of the Environment Operations Act. § 253 allows anyone, regardless of a breach of personal rights, to privately enforce environmental law:

> *"Any person may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of any other Act, or any statutory rule under any other Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment."*
>
> *which allows 'any person' to bring proceedings to restrain a breach (or a threatened or apprehended breach) of any other statute if the breach is 'causing or is likely to cause harm to the environment', whether or not any right of that person has been or may be infringed by or as a consequence of the breach (or the threatened or apprehended breach).*
>
> *Any such proceedings may be brought whether or not any right of that person has been or may be infringed by or as a consequence of the breach (or the threatened or apprehended breach)."*

### 5.1.6 Ecuador

Open standing for the protection of nature is granted under Article 71 of the Ecuadorian Constitution:

> *"All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate."*

### 5.1.7 Uganda

In the case, *Advocates Coalition for Development and Environment (ACODE) v. Attorney General*, the High Court of Uganda granted standing to a community group opposing the government's issuance of a permit to deforest the Butamira Forest Reserve.[430] The Court found that the plaintiffs had standing even if they were not living near the area concerned by the government's decision. The Court leveraged 50 of the Ugandan Constitution, which allows anyone to claim the violation of fundamental rights. Hence, the plaintiffs had standing. This is the wording used by the Court:

[430] Advocates Coalition for Development and Environment (ACODE) v Attorney General COU-144375 (High Court of Uganda 13 July 2005)

> *"To put it in the biblical sense the Article makes all of us our 'brother keeper'. In that sense it gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy. In that regard I cannot hide any pride to say that our constitution is among the best the would over because it emphasizes the point that violation of the right of all."*

Moreover, the Court held that the forest was part of the 'public trust' and anyone had a right to use that area. On the merits, the court found that the government had issued a null permit, given that it was issued without adequate 'Environmental Impact Assessment.'

## 5.2 Are Articles 4.4. and 4.5 Compatible with Italian Law?

Italian law's analysis has noted that 'diffuse interests' are inherently non-subjected to private ownership. Consequently, nobody can claim an exclusive legal relationship to such rights. It has also emerged that, in the Italian legal system, nobody can sue before ordinary courts to protect diffuse interests. In the case of environmental protection, in 2016 the *Corte costituzionale* confirmed the setting according to which individuals can only claim damages indirectly caused by environmental harm; individuals have no personal right to the environment; the environment is a diffuse interest that no individual nor entity can claim.[431] On the other hand, in administrative jurisdiction, environmental groups can seek the annulment of administrative acts to protect the environment.

Applying Article 4 of the IBA's Model Law in ordinary proceedings before ordinary civil courts would be innovative as it would effectively create attribute individuals and groups a right or an interest. However, it could be compatible with the existing legal system as there are at least two other cases where plaintiffs can seek judicial protection of 'collective interests' before ordinary courts.

First, under Article 840-sexiesdecies c.p.c., a class member or group can seek injunctive relief to prevent a mass tort from continuing. In such cases, the individual and the association target the tortious conduct – not the individual right. Hence, they pursue a collective interest.

The new consumer class action offers a further case: *azione di classe rappresentativa*, which, once entered into force, will allow consumer associations to seek protection for rights or collective interests.

In other words, the impression is that Italian law is experiencing an expansion of standing rules toward more effective protection of supra-individual rights beyond a link of exclusivity between the individual plaintiff and the subjective rights claimed. Hence, Articles 4.4 and 4.5 of the IBA Model Statute could be compatible with Italian law.

[431] *Corte costituzionale*, judgement n. 126, June 1st, 2016, available in DeJure. See, BETZU-ARU, Il risarcimento del danno ambientale tra esigenze unitarie e interessi territoriali, in Giurisprudenza costituzionale, 3, 2016, p. 987.

## 6. Commentary on Article 4.6 and 4.7: *Parens Patriae* Standing

> *"[4.6] The State (through the Attorney-General or other representative of the State) may bring climate change proceedings on behalf of its people.*
>
> *[4.7] In federal states, the State/Province (through its Attorney-General or other representative of the State) may bring Government-related climate change proceedings against the (federal) State on behalf of the State/Province's people, and vice versa."*

In some national jurisdictions, governments – usually through the office of the Attorney-General – have standing to intervene against wrongful conduct against their citizens under the theory of '*parens patriae'* standing.

### 6.1 The Background

This provision relies on the experience of several jurisdictions: the United States, India, and the European Union.

#### 6.1.1 Parens Patriae in the United States, State Law

In the U.S., *parens patriae* standing allows state governments to act on behalf of their people. This legal arrangement was leveraged in *Massachusetts v. EPA*.[432] In this case, the U.S. Supreme Court found that the State of Massachusetts had standing to seek an order against the Environmental Protection Agency to regulate carbon dioxide produced by motor vehicles as an "air pollutant" under the Clean Air Act.

#### 6.1.2 Parens Patriae in India

In India, the same legal theory was used before the Uttarakhand High Court in the case *Mohd Salim v State of Uttarakhand*.[433] The court held that some state officials are entitled to protect the rivers Ganga and Yamuna and their tributaries through judicial action. More specifically, the *parents patrie* doctrine was used as a procedural too attached to the consideration that such rivers had an autonomous legal personality and rights:

> *"while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve*

[432] Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007).
[433] *Salim v. State of Uttarakhand*, Writ Petition (PIL) No.126 of 2014 (December 5, 2016 and March 20, 2017)

*Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers."*[434]

### 6.1.3 Parens Patriae in the European Union

In the EU, the *parens patriae* doctrine could be developed under the EU directives concerning environmental harm and GHG emissions allowances in the EU.

The Directive 2004/35/CE establishes a framework of environmental liability based on the 'polluter pay' principle. The directive grants procedural powers to state authorities to prevent and remedy environmental harm.[435] The Directive 2003/87/EC instituted a GHG trading scheme to reduce emissions.

Some scholars proposed that, under these legal tools, Member States or the European Commission could establish standing to litigate on behalf of their citizens.[436]

As described in the next section, *parens patriae* standing is not necessarily helpful as it might centralize standing and reduce margins for 'citizen suits.'

## 6.2 Are Articles 4.6 and 4.7 compatible with Italian Law?

The notion of *parens patriae* standing is already accepted by Italian law, even though not explicitly in civil, criminal, and administrative law.

The law determines when public authorities act as an individual private person and when they exercise public power. In matters relating to the first scenario, Italian law allows municipalities, regions, and the state can sue and be sued before a civil court. Local authorities can seek pecuniary and non-pecuniary damages as long as they do not seek the protection of the environment as a whole, to which only the state is entitled under the *Codice dell'ambiente*. Local Authorities can lodge such claims either before ordinary courts or in the context of criminal proceedings for environmental harm through the *costituzione di parte civile*.

Criminal law protects the environment, and public prosecutors have the power to purse alleged environmental crimes. Furthermore, anyone can file a criminal complaint to the office of the public prosecutor (*Procura della Repubblica*) alleging that an environmental crime has been committed.

From the administrative law point of view, Article 311 *Codice dell'ambiente* already foresees a much-debated form of *parens patriae*. In case of environmental harm, the Ministry of the environment may either *(i)* recur to public law measures to prevent environmental harm or obtain the restoration of the environment or *(ii)* sue the polluter for damages before ordinary courts. Either

[434] Salim v. State of Uttarakhand, paragraph No. 19.
[435] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability regarding the prevention and remedying of environmental damage, available on-line at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0035
[436] HARE, *Blue Jeans, Chewing Gum and Climate Change Litigation: American Exports to Europe*, in *Merkourios*, Vol. 29, No. 76, 2013, pp. 65-87, available at SSRN: https://ssrn.com/abstract=2219187.

way, Article 311 only grants standing to the Ministry based on the notion that the environment is a 'common good' to which individuals or groups cannot claim exclusive ownership.

The existing legal framework applicable to the vindication of environmental harm basically corresponded to *parens patriae* and was considered constitutionally lawful by the *Corte costituzionale*, judgment No. 126 of 2016.

The question is not whether *parens patriae* standing is admissible in Italy but instead if it is helpful for climate litigants. The practical problem for plaintiffs seeking judicial protection of 'common goods' – or the *public trust* – is that individuals have difficulty accessing courts. That local or national public institution can sue on behalf of their citizens is not new. Furthermore, if climate obligations bind national and local levels of government first and foremost, centralizing standing does not help much. For this reason, *parens patriae* provisions might be counterproductive. The same could be argued under Article 13 ECHR, which requires the national law to grant a remedy for the violation of fundamental rights protected by the Convention, or under Article 9 of the Aarhus Convention, which requires states to facilitate access to courts for individuals.[437]

[437] ECHR, *Rotaru V. Romania*, Application no. 28341/9.

## 7. Commentary on Article 5: Third-Party Intervention and Amicus Curiae

> *[5.1] On appropriate notice to the parties, the Court may grant standing to intervene to any person who demonstrates a genuine interest in an issue raised in a Government-related climate change proceeding and, in the case of an organisation, the objective or mandate to protect the public interest (the 'Intervening Party'). The Court may permit the Intervening Party, consistent with applicable procedural rules and guidelines, to: (a) make submissions on interlocutory and case management issues; (b) file submissions and evidence in the substantive proceedings; and/or (c) call and cross-examine witnesses.*
>
> *[5.2] On appropriate notice to the parties, the Court may grant standing to any person to participate as amicus curiae in Government-related climate change proceedings and, if granted, that person may participate to the extent and on the terms and conditions granted by the Court.*

Under the IBA's proposal, organizations or individuals may join the proceedings as interveners or *amicus curiae* with the court's permission. The joinder conditions differ depending on whether the third party is an individual or an entity. Standing requirements for these two categories are different. Individuals must show a "direct interest" in the proceedings subject matter and outcome, while entities can only join if their Articles of association overlap with the public interest pursued by the plaintiffs.

An *amicus curia* can contribute to the plaintiff's claims by providing their expertise on particular case issues without becoming a party to the proceedings. Hence, the *amicus curia* is not bound by the judgment. Conversely, interveners assume the quality of the party to the proceeding and are bound by the judicial decision.

Allowing third parties to participate in climate change litigation seems appropriate, as it broadens the participation of those who might not fit in the tight standing requirements. This is particularly true in consideration of the fact that climate litigation does necessarily involve multiple parties which could be interested in the outcome of the proceedings from a practical or ideal point of view.

Moreover, in litigation for economic damages, plaintiffs might benefit from *amicus curiae* that bring scientific knowledge to the court to sustain the burden of proof on the causal link between the defendant's conduct and the alleged individual harm.

## 7.1 The Background

### 7.1.1 Amicus Curiae in the United States

The United States have a longstanding practice with regard to *amicus curiae*, 1790.[438] According to some scholars, the U.S. *amicus curia* tradition was justified by the need to grant adequate representation to the numerous groups affected by federal law that were unrepresented in court due to standing rules.[439]

The U.S. *amicus curia* is not a part to the proceedings but it is a partisan advocate for the claim of one of the parties. It differs from the British *amici curiae*, which is non-partisan and merely aids the court. Over the last century, *amici curiae* involvement in litigation has grown significantly. Scholars have noted that in proceedings before the U.S. Supreme Court there has been a radical increase of amicus curia briefs during the twentieth century: until the 1920', *amicus curiae* briefs were filed in 10% percent of the cases; by the end of the century, *amicus curiae* briefs were filed in 85% percent of cases. In 1938 the Supreme Court drafted a set of rules, amended several times, to regulate standing for *amicus curiae* intervention.[440] As of today, anyone wanting to intervene as an *amicus curiae* needs both parties consent of the leave to intervene from the Court. The *amicus curia* must also clarify their interest in the proceedings.

*Amicus curiae* rules favour those briefs that contribute to a new and better understanding of the subject matter of the claim, bringing to the attention of the court issues that the parties did not tackle. The same rules disfavour those that burden the court with unnecessary information.

Further, the U.S. system foresees a special case of *amicus curiae* called 'brandeis brief*'*. It is applicable to claims that involve the evaluation of social or other empirical data

*Amicus curiae* application was used in the U.S. in the climate litigation case *Coalition for Responsible Regulation v EPA*. The case was brough by an American organization after the U.S. Supreme Court decision *Massachusetts v EPA*. For the first time a European NGO, *Client Earth*, participated to a U.S. proceeding as an *amicus curiae*. submitted an amicus brief to a US court. *Client Earth* was accepted as *amicus curia* by the Court of Appeals for the District of Columbia Circuit. The brief contained a detailed account of the European regulations of GHG emissions.

### 7.1.2 Amicus Curiae in England

English courts, or the Attorney General, could appoint an *amicus curiae*, which was traditionally non-partisan. The function of the *amicus curiae* was to provide courts with additional information or legal arguments besides the matters alleged by the parties of the proceedings. In addition to the

[438] BANNER, The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890, 20 Const. Commentary 111, 119 (2003).
[439] JOHNSON-AMERASINGHE, *Protecting The Public Interest In International Dispute Settlement: The Amicus Curiae Phenomenon*, in CIEL Publications, 2009, p. 8. The article is available at: https://www.ciel.org/Publications/Protecting_ACP_Dec09.pdf
[440] JOHNSON-AMERASINGHE, *Protecting The Public Interest In International Dispute Settlement: The Amicus Curiae Phenomenon*, in CIEL Publications, 2009, p. 8. The article is available at: https://www.ciel.org/Publications/Protecting_ACP_Dec09.pdf

'traditional' non-partisan *amicus curiae*, English law allows the *amicus curiae* to advance arguments on behalf of non-represented parties or the public interest. Hence, organizations may intervene to support one party in human rights cases.[441]

## 7.2 Is Article 5 Compatible with Italian Law?

In Italy, third-party intervention in climate litigation against governments might be helpful, considering that the class action under Article 840-bis c.p.c. does not apply to claims against the government and other public authorities. Hence, multiparty litigation must happen through the 'traditional' method of multiple plaintiffs lodging the same claim or, possibly, recurring to intervention.

Italy regulates third-party intervention under Article 105 c.p.c., allowing joinders to seek protection for their rights – both in contrast with the original parties or aligned with one of the parties. Article 105(2) c.p.c. foresees a provision partially similar to Article 5 of the IBA Model Statue, as it allows a third party carrying a mere interest – not a subjective right – to intervene. The notion of interest under Article 105 c.p.c. is to be understood ad someone having a right that depends on the rights claimed by the plaintiff. The intervener must show that the outcome of the decision impacts on them. Article 105(2) seems to be, in this regard, quite similar to Article 5 of the IBA Model Statute.

Italy does not have a general regulation of *amicus curiae*. However, two instances resemble the notion of *amicus curiae*.

First, in individual labour law disputes, under Article 425 c.p.c., upon parties' request, workers' unions can submit written or oral information to the court. In this case, the union acts in the proceedings without being party to it. There is still a difference with Article 5 of the IBA Model Statute, though, as the union can only intervene when asked to do so by one party.

Second, under Articles 191-201 c.p.c. courts can recur to expert opinions rendered under oath by a technical consultant (*consulenza tecnica d'ufficio*). The parties may also appoint their own expert (*consulente tecnico di parte*). Their function is to guarantee the adversarial process with regard to the investigations of the court-appointed expert. Both court- and party-appointed experts do not present evidence: the court expert works as a court's auxiliary, assisting in obtaining and evaluating the evidence; similarly, experts appointed by the party provide technical assistance to the party's defence.[442]

[441] JOHNSON-AMERASINGHE, *Protecting The Public Interest In International Dispute Settlement: The Amicus Curiae Phenomenon*, in CIEL Publications, 2009, p. 7. The article is available at: https://www.ciel.org/Publications/Protecting_ACP_Dec09.pdf

[442] See, CAPPELLETTI - PERILLO, *Civil Procedure in Italy*, 1965, The Hague, pp. 230-233. Also see, LUPOI, *Civil procedure in Italy*, Alphen aan den Rijn, 2018, p. 191.

## 8. Model Statute Proposals on Justiciability

The IBA Model Statute acknowledges that justiciability has proved to be a real hurdle for plaintiffs. Hence, its provisions intervene on two fronts. First, it is uncertain whether courts can adjudicate strategic claims against governments or the private sector without interference with discretionary political power; second, an effective remedy would require courts to retain jurisdiction and hear reports on the implementation of the order issued by the court.

The dual face of the justiciability issue is shown by the comparison o of the Dutch case *Urgenda* and the American case *Juliana* – both analyzed in the second chapter. In the *Urgenda* case, the Dutch government argued that courts do not have jurisdiction to order a reduction of GHG emissions, as such a decision would have involved delicate political matters that are not for the judiciary to decide. On the other hand, in *Juliana,* the Court of appeals focused on the lack of redressability based on the court's concern that the relief sought by the plaintiffs would require the court to supervise the government's action and, therefore, potentially violate the separation of powers principle.

The Model Statute proposes solving the justiciability issue by tracking its nuances: Article 17.1 regulates the ability to sue the state, while Article 18 defines the remedies that courts can grant.

Article 18 can be broken down into three main domains: *(i)* Articles 18.1, 18.3, 18.4 concern the declaratory relief or the order that the court may grant; *(ii)* Article 18.2 concerns the remedies that courts may craft to ensure effective implementation of the order; (iii) Articles 18.5 and 18.6 set forth provisions to assure interim jurisdiction.

## 9. Commentary on Article 17(1): Ability to Sue the State

> *"Article 17 Ability to Sue the State*
>
> *[17.1] Any person, having or asserting a claim or demand against the State (not being a claim or demand against a statutory corporation representing the State) may bring climate change proceedings against the State, any Government agency or State-owned enterprise in any competent Court, subject to the standing provisions of Article 4."*

This provision allows plaintiffs under Article 4 IBA Model Statue to sue the government. What looks like a procedural law provision is, in truth, a substantive law provision as it creates a right. In effect, by saying that anyone "may bring climate change proceedings against the State, etc." the provision attributes "anyone" a claim – hence a substantive right.

## 9.1 Is Article 17(1) Compatible with Italian Law?

Italian law allows the national government or lower public authorities to sue before ordinary or administrative courts. There is no immunity of the state. From this point of view, the provision does not seem necessary in Italy.

However, the real potential for these provisions lies in their impliedly substantive law content, as it implies the existence of a 'right' – individual or collective – to obtain reductions in GHG emissions.

Article 9(3) of the Italian Constitution, amended with constitutional law No. 1 of 2022, could help craft such a provision:

| Articolo 9 | Article 9 |
|---|---|
| 1. La Repubblica (…) | 1. The Republic (…) |
| 3. Tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali | 3. Must protect the environment, biodiversity, also with regard to future generations. The state law regulates animal protection. |

Article 9(3) is the constitutional background against which a right to a safe environment. However, it has great potential for climate litigants, as it could be leveraged to argue in favour of the existence of a right – individual or collective – to a safe and stable climate. Thus, the plaintiffs could have a solid base to bring a tort law claim to protect a fundamental right.

Moreover, Article 9(3) of the constitution acknowledges the intergeneration liabilities of the government for the protection of the environment. The same principle could apply to climate litigation. However, all such arguments would remain irrelevant if Article 9(3) is interpreted as a programmatic provision as the *Bundesverfassungsgericht* did about Article 20a *Grundgesetz* in the *Neubauer* case.[443]

In conclusion. Article 17 of the IBA Model Statute would be helpful for its substantive law implication. Further, it would be compatible with the Italian legal system if Article 9(3) of the Constitution were interpreted as a provision granting a subjective right – either individual or 'homogeneous' under Article 840-bis c.p.c.

## 10. Commentary on Articles 18.1 and 18.4: Remedies

> *"[18.1] In addition to its pre-existing powers to grant remedies and relief, and consistent with applicable laws, when determining Government-related climate change proceedings, the Court may, in respect of a Government defendant:*
>
> *(a) set aside, quash or overturn any decision of a public body or overturn any decision of a public body;*
>
> *(b) order any Government defendant to take such steps as are specified in the order within such time as is so specified:*
>
> *(i) to cease, modify or establish GHG emissions-related processes, programmes, operations, policies or procedures;*

[443] This question is also raised by ALPA, Note sulla riforma della Costituzione per la tutela dell'ambiente e degli animali, in Contratto e Impresa, 2022, 2, p. 361.

*(ii) to prevent, control, abate or mitigate any likely adverse effects of climate change caused or contributed to by the conduct, regulation or omissions of the Government defendant;*

*(iii) to remedy any likely adverse effects of climate change caused, regulated or contributed to by the conduct or omission of the Government defendant;*

*(iv) to prevent the continuance or reoccurrence of the conduct or omission of the Government defendant;*

*(v) enforce any right, obligation or duty conferred or imposed by a legal instrument relating to climate change, the environment or related human rights;*

*(vi) review the exercise of any function or privilege conferred;*

*(vii) grant any declaratory relief, including making declarations in relation to any right, obligation or duty or the exercise of any function conferred; or*

*(viii) make any other order as the Court thinks fit to restrain or remedy the conduct of the Government defendant.*

*(...)*

*[18.4] Without limiting the powers of the court under Article 18.3 above, an order made under that Article may require a Government defendant to take such steps, within such time as is so specified, including to:*

*(a) prevent the continuance or recurrence of the breach;*

*(b) prevent, control, abate or mitigate any harm to the environment caused by the commission of the breach; or*

*(c) remedy to the extent reasonably practical any harm to the environment caused by the commission of the breach."*

Article 18.1 of the Model Statute proposes a suite of remedial measures allowing courts to issue declaratory relief and order government emission reductions. While issuing an order against governments is a normal feature in most jurisdictions, an explicit provision that allows a judicial order to curb emissions would simplify the plaintiff's legal arguments on justiciability. In addition, legal certainty on the feasibility of such relief would mitigate costs for plaintiffs and reduce the time spent litigating on justiciability.

More specifically, Article 18.1 is divided into two sets of orders that the court can issue: Article 18.1 letter a) concerns the judicial review of administrative acts, while Article 18.1 letter b) would apply before civil or ordinary courts.

Under letter a), the Model Statute refers to setting aside, quashing, or overturning any public body decision. As noted in the paragraphs dedicated to Italian law, judicial review over adminis-

trative acts is a power that the law already attributes to administrative courts. Seeking the annulment of an administrative action is undoubtedly helpful when plaintiffs want to prevent a specific project from happening, as in the Australian case Gloucester where a citizens group opposed the construction of a new coal mine based on the adverse effects on climate change. Environmental groups made similar arguments in the South African *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others* case and the Austrian *Third Runway at Vienna International Airport* case.[444]

About Article 18.1 letter a), the impression is that this provision would not be new in many jurisdictions. However, what could help create a legal base to argue before administrative courts, is that public decisions concerning development projects should consider, beyond the environmental impact, the effects of climate change. Hence, this provision could be helpful in its substantive law side.

Article 18.1 letter b) proposes a provision that could apply before ordinary courts. Besides a declaratory relief, plaintiffs can also seek an order which can have, under Article 18.1. letter b) any content ranging from GHG mitigation measures to adaptation. This provision would clear the way for plaintiffs and help avoid any defense on the separation of powers principle.

## 10.1 Are Articles 18.1 and 18.4 Compatible with Italian Law?

While Articles 18.1 letter b) and 18.4 create a set of 'remedies,' from the Italian – continental – point of view, these provisions impact substantive law, more than procedural law. They imply the existence of a subjective right to a safe climate and a corresponding duty of the state to safeguard it through exercising its powers. Therefore, from an Italian legal perspective it would be more logical to boost substantive law provisions that define the extent of 'climate obligations and the subjective rights to which individuals are entitled.

However, Italian law is not completely new to protecting rights through a 'remedial approach' rather than by expanding the underlying substantive law.

As considered in the third chapter, anti-discrimination labor law under the legislative decree No. 198 of 2006 pursued this path.

Article 24 of such law allows the *consiglieri di parità* to sue on workers' behalf and seek a judicial order against the employer to draft a plan to reduce endemic discrimination. Such plans for preventing future gender discrimination are, in effect, a 'remedy,' a tool to protect an underlying subjective right. Similarly, the law could allow courts to order defendants to draft a plan to reduce emissions.

While introducing Articles 18.1 and 18.4 in the Italian legal system seems feasible, the question is whether it is useful. In effect, an order to reduce GHG emissions or an order to draft a plan are both equally useless for plaintiffs if the defendants do not comply and implement them. Again, the

[444] See *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and others*, Case no. 65662/16 (2017) and *Third Runway at Vienna International Airport* case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017.

deepest issue concerns enforcing orders concerning non-fungible obligations when coercive measures, such as the one under Article 614-bis c.p.c., seem inadequate to obtain full implementation.

## 11. Commentary on Article 18.2: Enforcement of Remedies and Court's Supervision

> *[18.2] If the Court makes a mandatory order under Article 18(1) in respect of a Government defendant, the Court may monitor the execution of its order. In such circumstances, the Court may: (a) order a public authority to monitor the execution of the order on its behalf; (b) order the production of written reports to the court at appropriate intervals; and (c) order that any report be supported by affidavit as to the accuracy and completeness of the report.*

Article 18.2 acknowledges that judicial orders in strategic climate litigation cannot be enforced through ordinary enforcement procedures, as their implementation requires long term actions.

The rebus of enforcement involves both strategic litigation against the governments and the private sector.

The U.S. government raised this issue in *Juliana*, which framed it in terms of redressability under Article III standing. However, the Ninth District Court of Appeals found that the claim was not redressable as any implementation would have interfered with the other branches of government. The lack of effective enforcement mechanisms was also raised in the context of litigation against the private sector in the *Shell* case. Despite the order to reduce emissions, Shell did not take sufficient action to comply. More specifically, according to the plaintiffs, the company did not delineate a reduction target for 'Scope 3' emissions which represent 95% of total emissions. If the defendant company does not comply, one possible solution might be to resort to criminal law. However, there is no automatism, as it is probably hard for a public prosecutor to prove the existence of malice. Moreover, criminal liability does not reduce GHG emissions. Regardless of the nuances of Dutch law, which would need further inquiry, this case shows how obtaining an order is insufficient to see the defendant reduce its emissions.

Mindful of these precedents, Article 18.2 allows courts to retain jurisdiction and monitor the government's actions after the order issuance. The function of hearing reports could be exercised by courts (letters b and c) or by a public authority. In the latter case, the court would delegate the supervision over the defendant to a public body, leading to two considerations. First, in the case of strategic litigation against the private sector, this provision could be beneficial, especially if such a hypothetical public body had the expertise and the funding to help companies reduce emissions.

This rule extends the court's jurisdiction beyond the decision providing it with supervising powers over the government. Supervision might imply an order to a public authority to monitor the order execution or through reports submitted to the court.

## 11.1 The Background

This provision is inspired by Canadian and Pakistani legal orders. Their respective stator- and case law provide clear examples of how, in certain parts of the world, the notion of judicial remedy can be very different from the European civil law perspective.

### 11.1.1 Court Supervision under Canadian Provincial Law

The experience of the Canadian legal order backs the provision proposed under Article 18.2.

At the provincial level, in Environmental matters, the 1993 Ontario Environmental Bill of Rights grants a similar power to Canadian courts. §93(1) sets a rule linked to the open standing provision under §84: when the latter applies, under §93 courts may:

> *"(a) grant an injunction against the contravention;*
>
> *(b) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time;*
>
> *(c) grant declaratory relief; and*
>
> *(d) make any other order, including an order as to costs, that the court considers appropriate."*

Interestingly, §93(1) letters (b) and (d) allow courts great flexibility – the provision does not predetermine the content of the remedy. This is apparent from the letter (d), which contains the wording "any other order (…) that the court considers appropriate." Further, letter (b) explicitly mentions the power to retain jurisdiction. The court can order the negotiation of a restoration plan and hear reports on the progress made by the parties. Hence, §§ 84 and 93 of Ontario's Bill of Rights offer two very interesting provisions that were replicated in the IBA Model Statute: open standing under §84 and the extension of the jurisdictional power beyond the order under §93(1).

### 11.1.2 Court Supervision in Canada after Doucet-Boudreau v. Nova Scotia

At the federal level, the Supreme Court of Canada affirmed the legitimacy of orders to implement specific measures and report back to the court in the landmark case *Doucet-Boudreau v. Nova Scotia*. Considering that section 24 of the *Canadian Charter of Fundamental Rights* requires courts to grant an 'appropriate remedy,' the Court held that such provision allowed courts to retain jurisdiction if needed to implement its orders effectively.

### 11.1.3 Court Supervision in Pakistan

Court supervision is praxis in the Pakistani legal order. The case that better represents this tradition is *Leghari v Federation* of Pakistan, analysed in chapter three. The remedy granted in this case is probably even more advanced than any other climate litigation precedent. It also went further than Article 18.2 of the Model Statute, as the Lahore High Court case probably established a "Climate Change Commission," creating a new public authority.

## 11.2. Is Article 18.2 Compatible with Italian Law?

In the field of 'cognizance jurisdiction,' there are two fundamental fix points to take into account. First, cognizance jurisdiction aims to adjudicate rights claimed by parties by issuing declaratory-, coercive reliefs or by modifying a legal relationship. In all cases, the judgment 'declares' with binding force the rights claimed by the plaintiff. Thus, the judgment produces the *res judicata* effect. Second, courts cannot go beyond this function; they cannot extend their power beyond judgment. Jurisdiction ceases after the judgment is issued. Courts may not change the content of the judgment; they are merely allowed to correct formal mistakes under Article 287 c.p.c. Therefore, cognizance jurisdiction produces a binding judgment – which is what plaintiffs in climate litigation seek; however, it is based on the assumption that once the judgment is rendered, courts 'lose' their jurisdictional power, and all facts following that moment may constitute a subject matter for another claim or an appeal.

Court supervision over an evolving factual situation in Italy is not a completely extraneous concept. The exercise of jurisdiction implies monitoring a factual situation in its development in specific cases provided by the law, such as *(i)* 'non-contentious' or voluntary 'jurisdiction,' *(ii)* interim or provisional jurisdiction; *(iv)* family law, *(iv)* enforcement procedures.

This section will consider all such fields of civil procedural law to conclude that *(vi)* the basic archetype of insolvency law could be – in theory – a procedural model to implement Article 18.2.

### i. Non-Contentious or Voluntary Jurisdiction

The law does not rigidly define the scope of 'non-contentious' or 'voluntary' jurisdiction (*giurisdizione volontaria*). It applies when courts are required by the law to attend to the public interest and modify a legal status without adjudicating rights. Non-contentious or voluntary jurisdiction applies primarily to the status and capacity of persons and other branches of private law, such as for the winding up of a company requested by all shareholders.

The *Codice civile* and the *Codice di procedura civile* regulate non-contentious jurisdiction. Articles 737-742 c.p.c. foresee a procedural archetype for 'non-contentious' jurisdiction. The main feature is that court's decisions do not produce the *res judicata* effect. Hence, parties can recur to the same court seeking a modification of the previous determination following factual changes. However, courts do not conclusively adjudicate on rights, as the ordinary cognizance jurisdiction does.

### ii. Interim and Provisional Jurisdiction

The procedural steps to seek interim or provisional jurisdiction are regulated by Articles 669-bis - 669-quaterdecies c.p.c. Under Article 669-decies c.p.c., parties may seek the modification or revocation of the provisional decision. Here, again, the court maintains its jurisdiction beyond the initial decision. However, interim or provisional measures never produce res judicate as they do not adjudicate rights.

### iii. Family Law

Separation and divorce proceedings become res judicata on the decision regarding the separation or the divorce. However, these proceedings also imply several inherently provisional decisions regarding the financial and living arrangements and the custody of children. Such matters may change over time – such as the financial situation of one of the parties - requiring courts to retain jurisdiction. Hence, parties may always go back to court and ask for a modification of previous provisional rulings. However, retention of jurisdiction only concerns provisional decisions, not cognizance jurisdiction; furthermore, neither in this setting, do ordinary courts have the power to forge new remedies and retain jurisdiction.

### iv. Enforcement Proceedings

The Codice di procedura civile provides three enforcement proceedings based on the right contained by the title to levy execution (titolo esecutivo). Creditors of a sum of money can recur to the forced expropriation proceedings – espropirazione forzata under Articles 2910 c.c. and 491 c.p.c. The rights to obtain the delivery of movable property of the release of real estate can be enforced through the esecuzione per consegna o rilascio, under Articles 2930 c.c., 608-611 c.p.c. When the court orders doing a "fungible" activity – such as demolishing a wall or removing a fence – the creditor of the performance can recur to the esecuzione di obblighi di fare under Articles 2931-2933 c.c. and 612-614 c.p.c. In all such procedures, the court (giudice dell'esecuzione) exercises a supervisory function over the correctness of the proceedings. However, given that the creditor seeks execution of a title to levy execution (titolo esecutivo) – typically but non-exclusively a judicial order – the *giudice dell'esecuzione* does not adjudicate rights. Nor does the court's decision create a binding *res judicata* effect.

### v. Ideas Based on Insolvency Law

Legislative decree No. 155 of 2017 introduced the *Codice della crisi e dell'insolvenza*, which provides a unitary regulation of insolvency procedures applicable to business crises or insolvency. Both restructuring and winding-up judicial proceedings regulated by the *Codice della crisi e dell'insovenza* imply two phases: first, an initial phase where the court verifies if the legal conditions are satisfied to open insolvency proceedings; second, the exercise of judicial power is mostly exercised in the form of supervision over the parties and the insolvency practitioner appointed by the court.

While the opening of the proceeding might imply a decision on parties' rights, the following section somehow presents similarities with the IBA Model Statute proposals, as insolvency courts exercise a continuous power to either restructure the debtor or liquidate its assets. In any case, courts' powers are predetermined by the law and cannot be 'created' by the court.

In all the cases mentioned above, courts' decisions do not create the *res judicata effect*, as they do not adjudicate rights, as cognizance jurisdiction does. On the other hand, cognizance jurisdiction does produce the binding effect *res judicata* that plaintiffs seek in climate litigation. There seems

to be no alternative or margin for implementing the provision proposed by Article 18.2 of the IBA Model Statute.

However, it must be noted that insolvency proceedings partially derogate from this dichotomy, as they entail both rights adjudication and supervision powers. The basic structure of insolvency procedural law resonates with Article 18.2 of the IBA Model Statute somewhat resonates with the logic underlying insolvency law. The only way to grant ordinary courts the power to retain jurisdiction and supervise the defendants' progress after the order has been issued would be to craft a 'special' procedural scheme that applies to strategic climate litigation divided into two segments. First, the courts would adjudicate the claim and verify if there is a liability for violating climate obligation and fundamental rights; if the claim were to be accepted, the court would issue an order to reduce GHG emissions. Second, the court would require the defendant to draft a plan and would then supervise the implementation of such a plan. This procedural pattern, however, could only apply to the private sector, as supervising government- and parliamentary actions poses a serious issue of separation of powers.

## 12. Commentary on Article 18.3, 18.5, and 18.6: Interim Provisions

> *[18.3] If the Court finds that a breach, or a threatened or apprehended breach, of an Act, a legal instrument, or any other law or any legal right, duty, or obligation has been, will be, or is likely to be committed by a Government defendant, it may make such order as it thinks fit to remedy or restrain the breach.*
>
> *(...)*
>
> *[18.5] The Court may, at any stage of Government-related climate change proceedings, on terms, grant an interim or an interlocutory injunction or stay where it appears to the Court to be just and convenient to do so.*
>
> *[18.6] In any Government-related climate change proceedings on an application for an interim or interlocutory injunction or interlocutory order, and if it is satisfied that the proceedings have been brought in the public interest, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:*
>
> *(a) the injunction or order sought by the applicant; or*
>
> *(b) an undertaking offered by the respondent in response to the application.*

These provisions share the reference to the interim injunction in strategic climate litigation. Articles 18.3 and 18.5 are similar. They both refer to the risk of future harm and allow courts to issue an interim injunction to avoid such harm. Article 18.6 presents a particular feature; it favors plaintiffs from the financial point of view, as the court may not require an undertaking from the plaintiffs. Once again, Article 18 mentions the wording "government-related," but nothing precludes applying it to the private sector.

## 12.1 Are Articles 18.3, 18.5, and 18.8 Compatible with Italian Law?

The use of provisional or interim relief in climate litigation requires a premise on the two-faced nature of interim provisions. In the Italian legal system, the first category includes reliefs with an inherent 'conservative' function only, as they 'freeze' a given factual situation and aim to preserve it for the time needed for the claim on the merits to be adjudicated. Sequestration under Article 671 c.p.c. is a classic example: the provisions allow the creditor to ensure the execution of a future decision regarding a sum of money. In this field, the provisional relief does not fully satisfy the plaintiff, who needs the decision on the merits. Hence, the plaintiffs must start a claim on the merits within sixty days after the remedy is granted. A second category is those provisional reliefs that fully satisfy the plaintiff, as the relief has the same factual effects as the decision on the merits. The only difference is that the decision on the merits produces the *res judicata* effect, while provisional remedies do not. The classic example is offered by the 'urgent relief' under Article 700 c.p.c., which allows seeking any necessary remedy to avoid imminent and irreparable damage. Under Article 700 c.p.c., the court is free to shape the remedy it deems appropriate, and after the injunction, it is the onus of the defendant to start a claim on the merits.[445]

That being said, both categories are based on one fundamental condition – the *periculum in mora*. Therefore, no interim relief can be granted if there is no urgency. However, strategic litigation against governments and the private sector aims at medium or long-term GHG reductions. Hence, while climate action is urgent, the period involved is years, not days, weeks, or months. In such time a claim on the merits, at the list by a first instance court, can be issued. For this reason, with specific regard to strategic litigation in tort law cases, it might be quite problematic to implement Articles 18.3, 18.5, and 18.6 in Italy and probably in other European countries.

Moreover, 'strategic' climate litigation implies, most of the time, allegations of widespread injuries. Therefore, plaintiffs seeking to prevent mass harm can also recur to group litigation. In such context, Article 840-sexiesdecises c.p.c., analyzed in chapter three, aims to prevent the mass tort from happening or continuing. Hence, Article 840-sexiesdecies c.p.c. has a provisional function and might be a better tool than ordinary interim measures that apply to individual litigation.

Conversely, interim or provisional relief is potentially helpful in litigation against the private sector for damages or in planning review cases before administrative courts to avoid a project starting high emitting volumes of GHG.

[445] CAPPELLETTI - PERILLO, *Civil Procedure in Italy*, Oxford, 1965, page 131-143.

# CHAPTER 13
# CONCLUSION
# IMPLEMENTING THE MODEL STATUTE IN THE EU

## 1. Implementing the *Ratio Legis* of the Model Statute

The IBA *Task Force* significantly contributed significantly to climate litigation as the Model Statute offers a reference point for academia and legislators. Reading the Model Statute is not only a fascinating intellectual exercise; this document has real potential for new legislation that considers climate change's features.

Theoretically, legislators could conceive the Model Statute as a draft to 'copy and paste' into domestic statutory law. Alternatively, scholars and legislators could tap into the baseline of the model statute to promote 'climate' citizen suits. The latter seems to be the preferable perspective considering that the provisions contained in the Model Statute trace back to various national jurisdictions.

The commentary on Articles 4, 5, 17, and 18 showed that some provisions seem perfectly compatible with the Italian legal system but not necessary to enhance access to justice, as, for example, those under Article 4.2 on party representation, which replicates existing procedural rules. Other provisions, for example, those under Articles 4.6 and 4.7 on '*parens patriae* standing,' not only replicate existing rules but may be counterproductive in the Italian system where standing for protecting the environment is already centralized in favor of public institutions. Then, the Model Statute proposes provisions like Article 18.2, which extend jurisdiction beyond the judgment allowing courts to supervise the implementation of its orders. Such extensive judicial power is admitted in common law jurisdictions, such as Canada, Pakistan, the sub-Indian continent, and Australia. This rule, however, would encounter resistance as it seems incompatible with the Italian and continental civil law systems. As considered in the previous sections, the only way to implement Article 18.2 would be to create insolvency-like proceedings that allow courts to retain jurisdiction and guide the defendant in implementing the court's orders.

Hence, trying to mechanically 'copy and paste' the Model Statute would probably result in failure. Every jurisdiction has its traditions, which reflect its legal and historical culture.

Nonetheless, there is a way to implement the Model Statute by choosing a different approach. Academics and legislators should consider its *ratio legis*. The spirit of this document, and the ideas on procedural law reform, could be adapted to the nuances of each national jurisdiction to promote effective access to climate justice before domestic courts.

This second approach requires going beyond the first impression that the IBA's proposals are somewhat 'revolutionary' – therefore, impossible to implement. The commentary on Articles 4, 5, 17, and 18 showed that each provision is rooted in different national jurisdictions. The theoretical

and practical background supports the credibility of the Model Statute. Looking at the national legislation cited by the Model Statue and the *Task Force* Report makes clear that what seems 'revolutionary' is actually not.

The Report attached to the Model Statute indicates that many national legislators – mainly in the field of environmental law – have already regulated legal notions such as 'open standing' and jurisdiction on politically sensitive matters.

As mentioned in the commentary on the Model Statute, in the 1970', the U.S. Congress deployed citizen suits to enforce environmental legislation. As a result, the 1970 *National Environmental Policy Act (NEPA)*[446], the 1979 *Clean Air Act*, and the 1972 *Clean Water Act* leverage open standing and citizen suits to protect the environment as a collective good.[447] Similarly, in Australia, New South Wales adopted open standing in numerous environmental statutes to review the enforcement of the substantive law on public participation and information in environmental matters. In other words, the New South Wales legislator considered opening up environmental courts to anyone, regardless of their personal interest in the case, as the natural consequence of the right to public participation and formation in environmental matters.

For these reasons, the IBA Model Statue should be considered a collection of legal sources and practical experiences that help lead to procedural reform. The *ratio legis* of the Model Statute is clear. Climate change affects human rights on a mass scale. Hence, adequate judicial protection can only be granted through citizen suits. The IBA dismissed the arguments made by Judge Antonin Scalia in his famous Article *The Doctrine of Standing as an Essential Element of the Separation of Powers*[448] and then ruled the case *Lujan v Defenders of Wildlife,* which held that even under citizen suits legislation, plaintiffs must show a personal 'injury in fact.'[449]

Conversely, the IBA accepted the idea that civil proceedings are not only the *Sache der Partein*; on the contrary, they have a public law function, as it is a tool to enforce the law. While this might not be relevant in individual claims arising out of traditionally dual conflicts, such a public law conception of civil procedural law seems necessary to offer effective access to justice in light of mass torts and the emergence of diffuse interests.

In this light, the 'spirit' Model Statute is compatible with most legal orders; lawmakers could try implementing the principles of the Model Statute in their jurisdictions.

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[446] 5 U.S. Code § 702 ( Right of review)

[447] DE SANTIS, La tutela giurisdicionale collettiva, Contributo allo studio della legittimazione ad agire e delle tecniche di tutela inibitoria, Napoli, 2013, p. 314.

[448] SCALIA, The Doctrine of Standing as an Essential Element of the Separation of Powers, in Suffolk University Law Review, 17, 1983, p. 881

[449] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). See, SUNSTEIN, What's Standing after Lujan? Of Citizen Suits, "Injuries, "and Article III, in Michigan Law Review, November 1992, Vol. 91, No. 2, pp. 163-236.

## 2. The Model Statute and the Transformation of Italian Procedural Law

This section considers how the IBA Model Statute's *ratio legis* is compatible with the Italian legal system in light of the longstanding scholarly debate on the right of action. The notion of 'citizen suits' promoted by the IBA resonates with the theories on the right of action mentioned in the previous chapters and the future developments under Article 24 of the Italian Constitution.

### 2.1 The Model Statute and the 'Right of Action'

The IBA proposal to allow anyone to sue on behalf of the public, seeking the enforcement of statutory obligations, is compatible with the contemporary conception of the right of action under Article 24 of the Italian constitution.

The right of action and the role of the civil proceedings evolve over time.[450] In the nineteenth-century, conceiving the right of action as an abstract right separated from the underlying substantive one was a means to grant access to justice to any substantive right foreseen by the law.[451] Considering it as a right regulated under 'public law' instead of private law also helped courts regain a central role in handling the civil proceeding.

As mentioned in Chapter 7, the main structure of Italian civil procedural law is based on the work of Giuseppe Chiovenda. Picking up Wach's theories, Chiovenda considered the right of action as a potestative public law right that served two purposes: the individual plaintiff's need to access justice and the State's interest to enforce its substantive law.[452] There seems to be an overlap between this conception of the civil proceedings and the underlying ideas promoted by the Model Statute. This is, however, mostly a coincidence. Chiovenda leveraged the notion of *diritto potestativo* and argued that the right of action fell in the category of public law to pursue two objectives. First, the concept of potestative rights allowed to take into adequate account the individual's need for judicial protection; second, departing from the notion that the right of action is a mere extension of the subjective rights allowed to reinforce the role of the court as the *dominus* of the civil proceedings. In this regard, affirming a stronger role of the court was a necessary theoretical step to build civil proceedings based on the pillars of *oralità, concentrazione,* and *immediatezza* following the 'classic' Roman civil law proceedings – which Chiovenda considered as a model to implement in Italy.

In climate litigation, however, plaintiffs seek private enforcement of climate law – international or national – to protect the public interests to enforce climate legislation and preserve the climate as a shared asset. The public interest in climate litigation is shared among citizens; it is not the

[450] See CALAMANDREI, La relatività del concetto di azione, in Rivista diritto processuale civile, 1929, I, p. 29 as well as CAPPELLETTI, Processo e ideologie, Bologna, 1969, p. 313.
[451] PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, p. 53.
[452] CHIOVENDA, Istituzioni di diritto processuale civile, Napoli, 1933, p. 20: "Quanto a me, che presi ad occuparmi di questi problemi quando la categoria dei diritti potestativi era già largamente studiata nella dottrina, ebbi facile la vita, profittando di questi studi, a ricondurre per primo l'azione in questa categoria; accettando il lato sostanziale della teoria del Wach, definii l'azione come un diritto potestativo" (1903)."

state's interest to enforce its substantive law. In both cases, the civil proceedings serve a public interest, but in climate litigation, the public – not the state – is entitled to such public interest.

Thus, the *ratio legis* of the Model Statute does not actually match Chiovenda's theories. What divides the analysis proposed by Chiovenda from our contemporary perspective is the entry into force of the 1948 Italian constitution. Under Articles 2, 3(2), and 24(1), the right of action entails effectively protecting constitutionally relevant human rights – including social rights and supra-individual interests.

In practical terms, this results in diversified civil proceedings depending on the substantive rights for which plaintiffs seek judicial protection. As mentioned throughout this thesis, the 1970s marked the era of 'differentiated judicial protection' – *tutela guirisdizionale differenziata* – especially in labor disputes. In 1970, the legislature passed a law that reformed civil procedural rules applicable to labor law matters.[453] The spirit of the reform was to derogate from the standard procedural regulations to take into adequate consideration the imbalance between employer and employee and, thus, create substantial equality between the two, even at the procedural level.[454] These principles were implemented through the expanded court's power to actively look for evidence, regardless of parties' evidentiary requests, less stringent rules of evidence admissibility, and the more significant role of hearings. At the same time, with specific regard to standing, the 1970 reform of substantial labor law granted standing to workers' unions to vindicate workers' rights in the event of anti-union behaviors.[455]

Today, the Italian legislature introduced several forms of special proceedings that consider the practical and specific circumstances from which litigations arise. Chapter 9 analyzed several examples of derogatory procedural rules designed to accommodate the plaintiff's need for effective access to justice to protect supra-individual interests and rights.

Article 32-bis TUF grants standing to consumer associations seeking judicial protection of consumer's collective interests.[456] Standing rules were also leveraged to promote better protection against anti-gender and anti-racial discrimination laws Article 36 and 37(2) of legislative decree No. 198 of 2006 grant standing to the *consiglieri di parità* to seel relief for individual workers' right or for the protection of collective interests. Article 44(10) of legislative decree No. 286 of 1998 allows trade unions to sue the employer in case of collective discriminatory acts even when it is impossible to identify the victims of such discrimination. In the field of environmental law, Article 18(5) Codice dell'ambiente allows environmental groups to seek the judicial annulment of administrative acts in planning cases.

The most significant piece of Italian legislation that seems to match the *ratio legis* of the Model Statute is the regulation of class actions for injunctive relief – *azione di classe inibitoria* – under

[453] Law No. 533, August 11, 1973 that reformed Articles 409-473 of the code of civil procedural law.

[454] In Italian the expression used by legal scholars is, «*tutela differenziata*». See, PROTO PISANI, *Lezioni di diritto processuale civile*, Napoli, 2014, pp. 782-831.

[455] See, Article 28, law No. 300, May 27, 1970, also known as «*Statuto dei lavoratori*».

[456] Consiglio di stato, fourth section, judgement No. 3303 of 2016. The judgement is extensively commented by SOLINA, *Legittimazione ad agire per la tutela di interessi collettivi*, in *Giornale di diritto amministrativo*, 2017, 2, p. 249.

Article 840-sexiesdecies c.p.c. This provision allows anyone to initiate a class action aimed at injunctive relief to prevent mass harm from continuing. The *azione di classe inibitoria* does not seek to compensate for individual rights infringements. This procedural 'remedy' has an intrinsic *interim* nature and cannot lead to a *res judicata*, given that individual homogeneous rights are not even considered. However, the court may order the payment of a penalty for every day of delay in implementing the order. Both individual class members and entities represent the class, and with the formal requirements foreseen by Article 840-bis c.p.c., they may institute the class action. Article 840-sexiesdecies c.p.c. allows the judicial protection of collective interests – not necessarily homogeneous rights. As considered above, there is a critical difference between rights and interests: subjective rights, including homogeneous rights, are necessarily subjected to private entitlement, while diffuse interests are necessarily ownerless. Indeed, individual rights are not vindicated directly by 'attacking' the mass tort and requiring an injunction for its termination. Unfortunately, the provision foresees that this device cannot be used against the government. Hence, this device cannot be used in strategic climate litigation against the government. However, the *azione di classe inibitoria* might be very helpful in a suit against the private sector seeking an injunction to reduce dangerous emissions. Finally, the *azione di classe inibitoria* only applies to violations after the law entered into force, but this poses a significant hurdle for climate litigants as, under Article 840-sexiesdecies c.p.c., plaintiffs seek the prevention of future harm or the continuation of harmful conduct. In this light, there is no need to come to terms with the puzzle of standing for future generations, which would require modifying the law or coming up with creative theories to argue that unborn people have rights. Tackling the mass tort based on a class action that seeks protection for *diffuse interests* seems to solve this cumbersome issue.

On December 9, 2022, the Italian Council of Ministers approved a legislative decree implementing the EU Directive 2020/1828, now under parliamentary scrutiny. [457] If it enters into force, this piece of legislation law will modify the *Codice del consume,* adding Articles 140-bis to 140-quaterdecies and introducing the *azione di classe rappresentativa*. This new legislation aims to protect consumers from national or international wrongful conduct and avoid distortion of competition.[458] Standing is granted to entities enrolled in a special registry instituted under Article 137 *Cod. cons*. Consumers' associations can sue even without a mandate from individual consumers whose interests are 'represented.' It is significant that, once again, group litigation is facilitated by liberal standing provisions that derogate from the right of action, and the civil proceedings, are a matter of individual conflicts. These new procedural devices encompass the idea that rights and interests are shared among a vast number of people, and procedural law should recognize this evolution to grant effective access to justice.

[457] Directive (Eu) 2020/1828 Of The European Parliament And Of The Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[458] This decivice offers consumers a tool to seek (i) compensatory measures (Article 140-novies) or (ii) injunctive relief (Article 140-octies Cod. cons.). Further, (iii) it aims to protect 'collective interests,' and only marginally subjective rights, in specific consumer-related fields of law. Finally, (iv) the new provisions grant standing only to consumer associations registered in a special registry under Article 137 Cod. cons.

In conclusion, the IBA Model Statute seems perfectly compatible with the evolution of the right of action as required by the Italian constitution.

## 2.2 The Model Statute and the *Access to Justice Project*

The IBA Model statute taps into Mauro Cappelletti's studies on the transformation of the right of action in the contest of the constitutional principles that inform the 'welfare state.'

Cappelletti's research addressed the standing and justiciability issues in public interest litigation. Cappelletti coordinated in Florence the famous *Access to Justice Project*, which included the contributions of lawyers and sociologists and culminated in the publication of five volumes.[459] *Access to Justice and the Welfare State* addresses, in particular, the issue of standing in public interest litigation with a contribution by Hein Kötz.[460] The study of standing rules considers three metaphorical 'waves' of reforms toward a more compelling right to access justice: legal aid, representation for diffuse, fragmented, or collective interests, and alternative dispute resolution mechanisms. The second wave is the one that is of interest to this thesis.

Cappelletti and Kötz argued that the 'welfare state' constitutional setting requires procedural law to acknowledge that litigation does not always fit into a two-party pattern. In contemporary societies, this archetype is linked to an abstract view of litigation – and legal conflict in general – based on sole individual disputes over individualized rights: seller and buyer, property owner and intruder, landlord, and tenant. In this mindset, parties are considered equal before the substantive and procedural law. However, modern conflict is more complex than that, as it also involves group clashes and supra-individual rights. In addition, the social rights that inform the welfare state, provided by modern constitutions, require considering the substantial differences between litigants. An effective right to access justice cannot tolerate a mere 'formal equality.' Instead, procedural law should grant "substantive" equality given the different features of collective and fragmented interests.

Therefore, in Cappelletti and Kötz's view, "diffuse, fragmented and collective interests" require the adjustment of standing law so that private individuals or citizen groups are granted standing to sue on behalf of the general public and for the redress of public wrongs:

> *"traditional law of standing is based on a built-in bias which unduly favors economic interests held by individuals and organizations but discriminates against "fragmented and diffuse" interests held by the public or large segments of it (...)This is one of the reasons why in the recent*

[459] See CAPPELLETTI, Accesso alla giustizia: conclusione di un progetto internazionale di ricerca giuridico-sociologica, in Foro italiano, 1979, vol. 102, pp. 53-59. The project is also decribed in CAPPELLETTI, Accesso alla Giustizia, in Enciclopedia delle scienze sociali, 1994.

[460] KÖTZ, *Public Interest Litigation: A Comparative Survey*, in *Access to Justice and the Welfare State*, Cappelletti (ed.), Firenze, 1981. pp. 85-116. The author mentioned that legislators designed legal mechanisms that facilitate the vindication and judicial protection of public interests such as class actions. Especially in the U.S., class actions have been used to protect not only consumers but also the public in cases of environmental damage. In the field of company law, the U.S. legal system also offers the example of the 'shareholders' derivative suits', which allow a minority shareholder to represent in court other minority shareholders against the company's management or third parties. In this case, the plaintiff pursues the protection of the corporation's rights, not their own, but a successful action benefits all shareholders.

> *past there has been a movement in many countries towards liberalizing the law of standing by giving private individuals a right to sue for the redress of public wrongs."*[461]

It is no coincidence that during the same timespan that Cappelletti led his access to justice project, important reforms were happening in Italy – especially in labor law. In 1970, the legislature passed a law that reformed civil procedural rules applicable to labor law matters.[462]

Interestingly, Cappelletti clarified that his work did not include the emerging need for global access to justice. According to the author, transnational phenomena need a cross-border approach and adequate access to global justice. Cappelletti recognized that calling for global justice came with many uncertainties. Yet, in 1979, he believed this was the only alternative to secure our species' survival.[463]

Cappelletti did not mention climate change, but the threat posed by climate change fits into his analysis of the need for procedural rules. Considering that climate change endangers the fragmented interests of the general public with a magnitude never seen before, my argument is that the 'second wave' is far from over. The challenges that plaintiffs in climate litigation are experiencing to establish standing and justiciability find solid roots in Cappelletti's work, and, as argued at the end of the thesis, the IBA Model Statute offers some viable solutions to the concerns.

The second part of this thesis showed that the quest for judicial protection of "fragmented, diffuse and collective" interests also raises an issue of justiciability. The Model Statute acknowledges this aspect, advancing bold proposals under Article 18.

Climate litigation raises the question of whether it is appropriate for courts to adjudicate in politically sensitive matters with the effect of binding the public. Many defendants object that lacking specific domestic legislation, courts cannot 'make' the law. This is a legitimate concern. In the constitutional framework of the separation of powers, courts cannot step into the province of the lawmaking function. Yet courts are prepared to reject a too narrow-minded conception of the separation of powers doctrine based on a constitutionally oriented interpretation of the role of courts.

In the context of the ongoing debate on the role of courts, the ideas advanced by the Model Statute on the active role of courts forge ahead the studies of Mauro Cappelletti and Stefano Rodotà.

Cappelletti inquired about the creative law-making role of courts in his book *Giudici legislatori?* While the title begs a question, the author concludes that, in contemporary democracies, the judiciary inevitably contributes to the law-making process – even when they apply statutory law.

This also applies to continental civil jurisdictions based on the assumption that Parliaments make the law – in the form of written statutes – and the judiciary merely applies it – as *la bouche de la loi.*[464] Yet, the boundaries between 'interpretation' and 'creation' of the law are not always

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[461] KÖTZ, *Public Interest Litigation: A Comparative Survey*, in *Access to Justice and the Welfare State*, Cappelletti (ed.), Firenze, 1981. P. 102.

[462] Law No. 533, August 11, 1973 that reformed Articles 409-473 of the code of civil procedural law.

[463] CAPPELLETTI, Accesso alla giustizia: conclusione di un progetto internazionale di ricerca giuridico-sociologica, in Foro italiano, 1979, vol. 102, pp. 53-59.

[464] This expression was famously used by Montesquieu. See, MONTESQUIEU, *L'Esprit des lois*, first published in 1748. See the English, available online, MONTESQUIEU, *The Spirit of Law*, Kitchener, 2001.

clear. Hence, courts always produce 'judiciary law.' According to Cappelletti, the issue is not to pinpoint the difference between 'interpretation' and 'creation'; rather, it is crucial to determine to what extent courts are allowed to produce judiciary law. Cappelletti further argued that the expansion of the judiciary could be traced back to two connected factors: the evolution from liberal democracies to 'welfare states'; second, the 'massification' of our societies due to technological advances.

In the 'welfare state setting, ' the executive and legislative powers' role expanded to attend to their new duties under the social rights foreseen by modern constitutions. The State is not only a "night watchman" with protective and repressive functions. The social rights right that constitutes the backbone of the 'welfare state' require governments to actively promote policies, legislation, and other measures to grant effective social inclusion. This inevitably brings to more extensive legislative and administrative intervention. Cappelletti, in this regard, speaks of "Big Governments." The expansion of the government's powers requires, from the perspective of a system of checks and balances, deeper judicial control. Constitutional and administrative courts have absolved this task in the continental European system. Furthermore, the leap from liberal to welfare democracies explains the more significant role of the judiciary as a third 'law-maker' because 'social rights' are not self-executing, and, in the case of litigation, courts inevitably take on the challenge to implement those rights exercising greater discretion.

Italian legal scholars, such as Stefano Rodotà, pointed out that policymakers should stick to designing the grand scheme of legal principles and give up micro-managing social conflict in all possible configurations. Meanwhile, the court must adapt the law to the fast-changing societal issues, guided by constitutional principles and the legislative's broad rules.[465] From this perspective, allowing courts to play this role would help to prevent parliaments' stagnation over divisive issues. In addition, in Rodotà's view, the separation of powers principle would greatly benefit from this cooperation between the judiciary and the political branches of government.

In conclusion, it seems that this analysis perfectly applies to climate change. Climate harm is a clear example of 'mass injury' caused by governments and corporate action. While we all contribute with our actions to climate change, most people have no control over it - individuals need government and corporate efforts to mitigate or adapt to climate change. Furthermore, the IPCC Reports clearly stated that climate change threatens social justice, as it exacerbates inequality between social classes and counties.

Cappelletti's work and the IBA Model Statute call for a "Big Judiciary" to help protect human rights and the public interest in living in a sustainable climate.

## 3. The Contribution of the 'Model Statute' to the Debate on the 'Commons'

Chapter 6 explored the historical background of the 'right of action.' It highlighted that civil procedural law is a 'means to an end,' as it protects subjective rights provided by the law. However,

[465] RODOTA', Il diritto di avere diritti, Roma, 2017.

civil proceedings are relevant if there is an underlying substantive right to protect. To exercise such an ancillary role, procedural law requires a plaintiff to claim entitlement to a given right.

In this perspective, the procedural hurdles in climate litigation are due to underlying uncertainties concerning the entitlement to the claims' subject matter. It is fundamentally unclear who is entitled to the right, or interests, to live in a safe climate. As a matter of fact, in most jurisdictions, the law does not specify whether the climate is worthy of legal protection and who is entitled to protect the climate.

The unclear legal definition of what the climate is at the substantive law level makes it hard to establish standing and justiciability at the procedural law level.

In this context, the procedural rules proposed by the IBA Model Statute and the growing number of cases that choose a liberal interpretation of standing and justiciability rules advance the idea that the entitlement to some goods is necessarily shared among people – anyone. In other words, climate litigation significantly contributes to the ongoing debate on the 'commons.'

Legal scholars worldwide are discussing the transformation of property rights in light of social changes. Some goods happen to escape the classic division between 'private' and 'public' property. While property is, in its various forms, the right to exclude others from the enjoyment of a good, 'commons' are inherently non-exclusive. Hence, they are not a third alternative to private or public property but a radical alternative to it. Therefore, they must be subtracted from marked-driven logic.

Some examples might help clarify this emerging category. In the internet era, access to knowledge online is crucial to participate actively in our society's functioning. Those excluded from it for political or economic reasons cannot truly be citizens. Having access to clean water is the precondition for a healthy life. Prioritizing marked-based usage of clean water deprives poorer communities of their fundamental rights. Likewise, regulating access to scientific and technological developments based on the sole ability to pay is, in some circumstances, a severe threat to more vulnerable people. In this regard, patent law replicates property-based exclusion patterns with devastating impacts on the public health of poorer countries. Hence, commons are embedded in many branches of law – environmental and industrial property law being just some of those.[466]

Some 'commons' are characterized by scarcity – like clean water in polluted areas – while others are virtually unlimited. Their shared feature is that they are the precondition for effectively enjoying fundamental rights and participation in a democratic society in the condition of substantial equality of opportunity. Furthermore, given their radical departure from the exclusive nature of property rights, commons pertain to anyone and nobody. As such they must be managed in the interest of the public interest and for the benefit of future generations. Hence, even access to justice must pursue these principles.

In this regard, Stefano Rodotà studied this issue extensively and argued that 'commons' truly are the 'patrimony of mankind.' Consequently, standing provisions should be liberalized, rejecting

[466] The notion of 'commons' and industrial property law was analyzed by BOYLE, *The Opposite of Property?*, in *Law and Contemporary Problems*, 2003, Vol. 66, No. 1/2, The Public Domain, pp. 1-32

the argument that courts are inappropriate for adjudicating public interest cases.[467] Rodotà called for a 'new alliance' between courts and political institutions. Effective protection of 'commons' requires cooperation between parliaments and courts. While policymakers should design the core legal principles, courts must take on the challenge of adapting the law to the fast-changing societal issues. In his view, allowing courts to play such a role would help prevent parliaments' stagnation over divisive issues, and the separation of powers principle would greatly benefit from this.[468]

The quest for climate justice fits into this analysis. It further contributes to the construction of a legally relevant concept of the climate system as a common good. Judicial rulings accepting a liberal interpretation of standing provisions impliedly define the climate system as common. In this perspective, courts have the unique opportunity to promote the climate system as a common worthy of legal protection – reversing the usual relationship between substantive and procedural law.

Advancing substantive law through procedural law is definitely an exciting phenomenon to witness from a theoretical point of view. In practical terms, it is better than no advancement at all. However, plaintiffs and courts face great hardships dueling with inadequate procedural rules to pursue this direction. Looking at the *Shell* and *Jeunesse* cases, this thesis argued that even class actions are surprisingly tricky for plaintiffs, as defining the class is complex.

Given these premises, it seems fair to draw the following conclusions.

First, the climate is a 'common': anyone is entitled to it; a safe climate is a precondition for any other human right; as found by the German Constitutional Court in *Neubauer*, it must be preserved in the interest of future generations.

Second, being a common good, the climate escapes the traditional property-based logic. Nobody is entitled to it, and domestic law should come to terms with this reality,

Third, procedural law is *de facto* creating a new right, but effective justice needs legislators to adopt procedural and substantive rules.

## 4. Implementing the Model Statute in the EU

The previous sections argued that reform to facilitate effective access to climate justice is consistent with the transition the role of civil proceedings is undergoing in contemporary democracies: from individual conflicts to means to (also) vindicate the public interest.

This section suggests that the European Union is the most natural context to implement meaningful reforms of standing and justiciability rules. First, the EU is better positioned than individual member states to promote reform in tackling a common problem. Second, 'citizen suits' would provide private enforcement of the climate policies under the 'EU Green Deal.' Third, granting effective access to justice is consistent with EU primary- and secondary law.

[467] RODOTA', Il terribile diritto, Bologna, 2012, p. 483-484: "*tendono a costituire un un vero patrimonio dell'umanità, la cui tutela è anch'essa affidata ad una legittimazione diffusa, al diritto di tutti di agire perché siano effettivamente conservati, protetti, garantiti. Attraverso questa molteplice attribuzione di poteri i beni comuni promuovono una cittadinanza attiva ed uguale.*"

[468] RODOTA', *Il diritto di avere diritti*, Roma, 2017, p. 54-66.

## 4.1 The Potential of an EU-Lead Reform of 'Climate Citizen Suits'

Sure thing, reform following the IBA's proposals could potentially happen nationally. Regarding Italy, Chapter 7 pinpointed cases of existing broad standing provisions to protect collective interests, while Chapter 8 considered rulings that extended jurisdiction to the delicate terrain of politically sensitive issues. Therefore, the Italian legal framework is compatible with broader standing and justiciability reform. However, national Parliaments are unlikely to commit individually to facilitating access to climate justice. Individual states would not be incentivized to increase their government liability.

On the contrary, they would probably fear creating a business 'unfriendly' environment and, therefore, lose – much needed – foreign investment. Other branches of the law clearly show that national legislators try to accommodate the interests of large groups of companies to attract jobs and fiscal revenues and ultimately promote economic growth. In the realm of corporate-, tax, and insolvency law, even European countries engage in a shameful 'race to the bottom' to attract foreign investors. The risk of companies fleeing to other jurisdictions for more favorable legal environments is real. The EU is familiar with this problem and even introduced legislation to avoid *forum and law shopping.* The EU regulation No. 848 of 2015 foresees rules on international jurisdiction, recognition, and enforcement of cross-border insolvency decisions issued in the EU. One of its main goals is to prevent forum shopping. This piece of legislation provides an excellent example of how competitive EU national legal systems are. Nonetheless, it also shows that the EU has the tools to harmonize national jurisdictions, creating equal base conditions for citizens and businesses.

Furthermore, carbon majors would probably lobby against proposed legislation for greater access to justice against the private sector. As a result, it might be easier for political parties interested in advanced public interest litigation across the EU member states to concentrate their efforts at the EU level.

For these reasons, the EU would be better positioned to promote access to effective climate justice in all member states, recurring to 'recommendations or 'directives.' The European Union could pursue the baselines of the Model Statute, leaving a margin of discretion to each government as to the exact provisions to introduce to grant access to climate justice effectively. The tool of 'regulations' – which are immediately applicable in all member states – would be ideal, but, in practical terms, it might also be problematic given that each EU member state has different procedural law legislation.

## 4.2 Private Enforcement of the 'EU Green Deal' through Citizen Suits

Procedural law reform inspired by the IBA Model Statute might contribute to achieving the climate policy objectives developed under the 'European Green Deal.' The EU Commission designed a policy roadmap to guide a 'just' transition towards a sustainable society and economy. The goal is to reduce GHG emissions by 55% before 2023, compared to 1990 levels, and reach net-zero emissions by 2050. The Commission, led by President Ursula von der Leyen, aims to make Europe the first climate-neutral continent and promote social justice and economic development. The 'Green

Deal' was followed by the entry into force of the 'European Climate Law.'[469] This piece of legislation is an 'EU regulation' and has, as such, direct mandatory effects for the EU and its member states. It set reduction targets that states must respect, created a *European Scientific Advisory Board on Climate Change* to advise governments, provided for supervising mechanisms, and called for more robust adaption measures. While the 'European Climate Law' is a positive step forward, it is mostly a 'plan' which needs member states' cooperation. Hence, the EU must control governments' compliance with the 'European Climate Law.'

This pattern – a joint plan and individual responsibility – reproduces the issues posed by the Paris Agreement on a smaller and more detailed scale. Once again, holding governments accountable is a critical issue that makes all the difference between good legislation and actual results.

Moreover, to reach climate neutrality by 2050 and the intermediate objectives, the EU put together an €806.9 billion investment called NextGenerationEU.[470] This plan has the potential to foster public investment and promote, among other goals, climate and environmental protection.

Considering this EU's ambitious policies, promoting citizen climate suits might be a helpful tool to enforce the 'EU Climate Law' and its legislation. In addition, the EU could rely on the examples set by the open-standing provisions for the private enforcement of environmental law existing in multiple jurisdictions (such as Australia and the United States) and proposed by the IBA.

## 4.3 EU Law and Access to Justice

Granting access to climate justice is consistent with the existing EU primary and secondary law.
The right to access justice and an effective remedy are embedded in the EU primary law.
Article 47 of the EU Charter of Fundamental Rights provides that:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."*

Article 47 resonates with Articles 6 and 13 of the ECHR, which have been leveraged in the strategic cases *Klimaseniorinnen v Switzerland* and *Duharte Agostino v Portugal*, now pending before the ECHR.
The right to access justice and to an effective remedy is also a general principle of EU law, common to European constitutional tradition as found in 1986; the ECJ acknowledged this in the *Johnston v Chief Constable Of The Royal Ulster Constabulary* case:

> *"(...) Article 6 of the directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination 'to pursue*

[469] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). See, the web page European Climate Law on the website of the EU Commission https://climate.ec.europa.eu/eu-action/european-green-deal/european-climate-law_en

[470] See https://next-generation-eu.europa.eu/index_en

*their claims by judicial process'. It follows from that provision that the Member States must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned. The requirement of judicial control stipulated by that Article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950"*[471]

The Aarhus Convention provides another solid argument to promote climate citizen suits. The convention was adopted on June 25, 1998, in Århus, at the Fourth Environment for Europe Ministerial Conference. The EU and its member states are all parties to the convention, which recognizes the right to live in a healthy environment and acknowledges the existence of an obligation toward future generations.

Article 9(a) of the Aarhus Convention imposes to grant access to justice in environmental matters also about "interest groups." This provision is relevant to promote 'open standing' provisions in favor of citizen groups seeking judicial relief for the public interest.

Furthermore, Article 9(4) tackles the issue of effective access to justice:

*"effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. "*

On the front of EU secondary law, there are several examples of how the Union considers access to justice as a means to promote active citizenship through public participation in environmental matters. Directive No. 35 of 2003 aims at fostering environmental public participation and information rights, according to the Aarhus Convention. Article 15 of the Directive states the following:

*"Access to justice*

*Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*

*(a) having a sufficient interest, or alternatively,*

*(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*

*have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."*

Once again, the right to public participation and information is coupled with the right to challenge governmental action before an administrative court.

[471] *Johnston v Chief Constable Of The Royal Ulster Constabulary*, Case 222/84 Johnston [1986] ECR 1651

Similar consultation rights are also provided under EU Regulation No. 1999 of 2018 'on the Governance of the Energy Union and Climate Action.'

Article 10 provides that:

> *" (...) each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national energy and climate plan — as regards the plans for the 2021 to 2030 period, in the preparation of the final plan well before its adoption — as well as of the long-term strategies (...)."*

Article 11 requires states to establish:

> *"a multilevel climate and energy dialogue pursuant to national rules, in which local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public are able actively to engage and discuss the different scenarios envisaged for energy and climate policies (...)"*

While these provisions do not mention the role of courts, they foster an active role of citizens in the creation and implementation of the EU climate policy. Consistently with this policy perspective, participation rights should be followed by the right to access courts to ensure that participation and information rights are respected and policies enforced.

In the field of consumer protection law, EU Directive No. 1828 of 2020 'on representative actions for the protection of the collective interests of consumers' requires member states to introduce a collective redress mechanism to grant effective consumer protection. This directive followed Commission Recommendation No. 396 of 2013 on 'common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.'

Whereas No. 24 of such directive states:

> "*Consumer organisations in particular should play an active role in ensuring that relevant provisions of Union law are complied with."*[472]

Under the directive, consumer organizations are granted standing to sue on behalf of consumers and request either an injunction to stop mass consumer right violation or to seek compensation. EU law already allows for private consumer law enforcement, recognizing the generalized interest in having consumer rights protected through individual claims and not only in case of someone's right being infringed. Conversely, the mere fact that a private actor violates consumer law breaches a fragmented interest worthy of judicial protection. If this logic applies to the EU citizens in their guise of consumers, nothing will prevent extending it to citizens as such. Anyone is entitled to the right to live in a safe climate, just as much as all consumers are interested in businesses' compliance with consumer law. In other words, if liberal standing provisions are provided to enforce consumer rights, the EU could extend the 'open standing' provision in favor of public interest litigation.

[472] Directive (Eu) 2020/1828 of the European Parliament And Of The Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

In conclusion, for the reasons explained above, the European Union has the potential and the interest to acknowledge that common goods, such as the environment and the climate, need procedural law that allows citizens to pursue the private enforcement of legal obligations as well as holding governments accountable for their lack of action.

# ANNEX I
# IBA MODEL STATUTE FOR PROCEEDINGS CHALLENGING GOVERNMENT FAILURE TO ACT ON CLIMATE CHANGE[473]

### Article 1
### Definitions

In this Model Statute:

(a) 'Adverse effects of climate change' means changes in the physical environment or biota resulting from climate change that have or may likely have or contribute to significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on socio-economic systems or on human health and welfare.

(b) 'Climate change' means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and is in addition to natural climate variability observed over comparable time periods (as defined in the United Nations Framework Convention on Climate Change (UNFCCC), Article 1(2)). As per the UNFCCC, this human activity may relate to both sources (any process or activity that results in the release of a greenhouse gas (GHG), an aerosol or a precursor of a GHG into the atmosphere) and sinks (any process, activity or mechanism that removes a GHG, an aerosol or a precursor of a GHG from the atmosphere).

(c) 'Government-related climate change proceedings' means any matter brought against a State or State body or before a domestic or international court or tribunal in which a party makes a legal, constitutional or human rights claim, or seeks a declaration, judicial interpretation, order or other form of non-monetary relief in respect of climate change or the likely adverse effects of climate change, including:

(i) the need, function, power, duty or obligation to assess or further consider Government projects or policies, laws and regulations that may contribute to or increase the risk of climate change or the adverse effects of climate change; be affected by climate change; or contribute to the mitigation or prevention of climate change or the adverse effects of climate change;

(ii) legal instruments, and the enforcement of legal instruments, that may contribute to mitigation or prevention of, or adaptation to climate change or to the adverse effects of climate change; or

(iii) non-monetary remedies or measures for Government actors to prevent and redress the adverse effects of climate change or to restore or rehabilitate the composition, resilience or productivity of natural and managed ecosystems or the operation of socio-economic systems or human health and welfare.

(d) 'Costs' means lawyers' fees, court fees, disbursements and other expenses related to litigation.

(e) 'Information' means any information in written, visual, aural, electronic or any other material form.

[473]The text of the IBA Model Statute Articles is copied by the IBA website: https://www.ibanet.org/Climate-Change-Model-Statute At this link, a full report issued by the IBA is available.

(f) ‘Legal instrument’ includes constitutional provisions, legislation, common law, civil codes, Indigenous law and principles of international environmental law, executive orders and subordinate legislation including, but not limited to, regulations, rules, policies or administrative procedures or practices authorised or adopted under a legal instrument or that are used to implement Governmental policies.
(g) ‘Paris Agreement’ means the Paris Agreement adopted by the Parties to the United Nations Framework Convention on Climate Change on 12 December 2015, opened for signature 22 April 2016, UNTS 54113 [FCCC/CP/2015/10/Add.1], and entered into force on 4 November 2016 (30 days after the date on which at least 55 parties to the Convention accounting in total for at least an estimated 55 per cent of the total global GHG emissions have deposited their instruments of ratification, acceptance, approval or accession with the depositary).
(h) ‘Public interest litigation’ refers to any Government-related climate change proceeding (as defined above) that is pursued against the Government or public agencies by or on behalf of individuals, climate change, environmental or community organisations, or any other entity, association or organisation with the objective to protect the public interest through mitigation of, adaptation to or otherwise responding to the likely adverse effects of climate change.
(i) ‘Sustainable development principles’ include the precautionary principle and the principles of sustainable use, integration, intergenerational equity, conservation of biological diversity and ecological integrity, and internalisation of external environmental costs, including the polluter pays principle and the user pays principle, as these are understood under international environmental law.

## Article 2
## Applicability and Interpretation

[2.1] This Act and its principles are intended to facilitate access to justice in Government related climate change proceedings, and are not intended to apply to climate change proceedings against private parties.
[2.2] For greater clarity, this Act and its principles apply to Government-related climate change proceedings although a private actor is found by the court or tribunal to be a necessary party for the effective adjudication of the Government-related claim or a private actor seeks leave to intervene.
[2.3] In cases of doubt as to the interpretation of any Act or legal instrument, the Court or tribunal shall prefer the interpretation most favourable to protecting the environment from any likely adverse effects and adverse effects of climate change.
[2.4] In interpreting any legal instrument in Government-related climate change proceedings, the Court or tribunal shall consider the relevance of fundamental human rights, such as but not limited to the right to life, security of the person and the protection of public health and the natural environment, from the adverse effects of climate change.

## Article 3

**Rules of Procedure**

In Government-related climate change proceedings, the Court may, by order, on such notice as the Court determines in the circumstances is appropriate under laws, regulations and procedures, interpret any requirement of rules of procedure and give such directions as it thinks fit to achieve the interests of justice.

## Article 4
## Standing

[4.1] Any person may bring proceedings to enforce rights, duties or obligations under, restrain a breach or threatened or apprehended breach of, or remedy a breach of a legal instrument in Government-related climate change proceedings, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

[4.2] Government-related climate change proceedings may be brought under Article 4.1 by a person on their own behalf or on behalf of another person (with their consent).

[4.3] Any person is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the Government-related climate change proceedings, provided that the plaintiffs or applicants themselves retain control of the proceedings, and subject to applicable ethical standards for counsel, as well as any local rules and laws related to anti-corruption.

[4.4] Any person may bring Government-related climate change proceedings if the person can establish:

(a) a serious issue is raised in the proceedings; and

(b) a genuine interest in the issue and, in the case of an organisation, an objective or mandate to protect the public interest.

[4.5] Any person meeting the qualifications in Article 4.4 may bring Government-related climate change proceedings on behalf of minors or future generations.

[4.6] The State (through the Attorney-General or other representative of the State) may bring climate change proceedings on behalf of its people.

[4.7] In federal states, the State/Province (through its Attorney-General or other representative of the State) may bring Government-related climate change proceedings against the (federal) State on behalf of the State/Province's people, and vice versa.

## Article 5
## Standing for Interveners and Amicus Curiae

[5.1] On appropriate notice to the parties, the Court may grant standing to intervene to any person who demonstrates a genuine interest in an issue raised in a Government-related climate change proceeding and, in the case of an organisation, the objective or mandate to protect the public interest (the 'Intervening Party'). The Court may permit the Intervening Party, consistent with applicable procedural rules and guidelines, to: (a) make submissions on interlocutory and case management

issues; (b) file submissions and evidence in the substantive proceedings; and/or (c) call and cross-examine witnesses.

[5.2] On appropriate notice to the parties, the Court may grant standing to any person to participate as amicus curiae in Government-related climate change proceedings and, if granted, that person may participate to the extent and on the terms and conditions granted by the Court.

## Article 6
## Judicial Notice, Rebuttable Presumptions and Reports of the Intergovernmental Panel on Climate Change (IPCC)

[6.1] Unless evidence is permitted to be given to the contrary in accordance with Article 6.3 below, a Court shall, in Government-related climate change proceedings, take judicial notice of the findings and conclusions reached by the Intergovernmental Panel on Climate Change (IPCC) in its Assessment Reports or Special Reports.

[6.2] A Court shall in such proceedings accept the findings and conclusions contained in the IPCC Assessment or Special reports as prima facie proof of the findings.

[6.3] Any party wishing to challenge any statement contained in reports of the IPCC shall require leave of the Court. In such event: (a) leave shall not be granted unless the challenging party can demonstrate a reasonable prospect of success; (b) that challenge shall not unduly delay the disposition of the substantive claim or otherwise cause injustice to the plaintiff; (c) the challenging party bears the evidential burden of proof; and (d) before leave is granted the court may require the challenging party to provide in advance sufficient funds for the responding parties to retain experts to respond to such challenges and conclusions.

## Article 7
## Admissible Evidence

[7.1] In Government-related climate change proceedings, the following are admissible as evidence:

(a) records and other material prepared for and by Government bodies that report on:

(i) operations or activities that may result in GHG emissions, whether or not made in response to Government reporting requirements;

(ii) the measurement, modelling or estimation of GHG emissions; or

(iii) any other information involving GHG emissions and the potential risks such emissions may pose to the environment, health or human rights;

(iv) peer-reviewed scientific studies;

(v) statistical information or information derived from sampling;

(vi) information derived from the use of climate models (including global, coupled or regional models); and

(vii) epidemiological, sociological and economic studies.

[7.2] In Government-related climate change proceedings, the evidence referred to in Article 7.1 may, in the discretion of the Court, be regarded as sufficient to satisfy relevant evidentiary standards for the court to adjudicate relief sought, including the quantification of any mitigation or adaptation required.

## Article 8
## Assessment of Risk and Standards of Proof

[8.1] In determining the appropriate relief to be granted in Government-related climate change proceedings, the Court shall undertake a risk assessment with regard to:
(a) the likelihood of a threat being realised;
(b) the severity of the consequences if the threat is realised; and
(c) the time at which the threat may be realised.
[8.2] In particular, the Court shall take into account any potential effect with a low probability but a significant potential impact.
[8.3] In making evaluations concerning the matters in Article 8.1(a)–(c) above, the Court shall not require proof that the matter is more probable than not.

## Article 9
## Burden of Proof and the Precautionary Principle

[9.1] In Government-related climate change proceedings, the Court shall apply the precautionary principle except where the Court finds and articulates why its application is unnecessary or inappropriate in the particular claim.
[9.2] The precautionary principle means that where there are threats of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent, mitigate or adapt to climate change or the likely adverse effects of climate change or to remedy any likely or resulting damage.
[9.3] Where the precautionary principle applies, the party challenging the application of the precautionary principle bears the evidential burden of proving that:
(a) the threat of serious and irreversible damage is not a real risk or is negligible; and
(b) regardless of the finding in Article 9(3)(a), whether any measures the challenging party proposes to prevent, mitigate or adapt to climate change or remedy any resulting damage will be effective.

## Article 10
## Environmental Impact Assessment Review

[10.1] In this Article, ‘initiative’ means a public policy, programme, law, regulation or Government-owned or controlled project, but does not include a private sector project, even if that project requires a Governmental or statutory approval, licence or financial support.

[10.2] Any person may petition the Court to assess the availability and adequacy of mechanisms under current laws whereby members of the public may participate in and seek review of an environmental impact assessment (EIA) or equivalent public process in respect of a Government initiative.
[10.3] In considering the availability and adequacy of such EIA mechanisms, the Court may consider the following principles: (a) whether the EIA is carried out at early planning stages of the initiative before irreversible commitments or decisions by Government, using a process that facilitates public and Indigenous community involvement and incorporates due regard for and response to their views and concerns; and (b) whether the EIA:
(i) identifies and considers the implications of the initiative having regard to applicable law and principles of international environmental law pertaining to climate change mitigation and adaptation such as those contained in the UNFCCC and Paris Agreement; commitments made by the State or subnational State entities with respect to mitigation of carbon and other sources of GHG emissions under such agreements and sustainable development principles;
(ii) identifies, describes and assesses the likely direct, indirect and cumulative effects of the initiative with respect to climate change, the environment and on human rights, including effects on the right to life, health, food, water, housing and culture; as well as Indigenous effects, and of measures necessary to prevent such effects including modifications of or alternatives to the initiative, including not proceeding with the initiative;
(iii) evaluates the significance of impacts likely to be generated as a consequence of predicted changes in the climate based on a combination of:
1. scenarios: an impact's likelihood under a range of climate scenarios;
2. vulnerability of receptors: the vulnerability of people, communities and ecosystems to existing climatic variations; and
3. resilience: a receptor's ability to absorb such disturbance and continue to function; and (iv) evaluates the costs of adapting to a range of climate scenarios, mitigation alternatives and the costs of not adapting to such scenarios.
[10.4] In the context of considering an application under this Article for an Order to Government to establish or revise an EIA process, without prejudice to all available remedies, the Court may, as appropriate and consistent with the Court's authority to issue remedies, issue an order directed at relevant Government entities to consider whether EIA processes in respect of Government initiatives should be established or revised having regard to the factors above and whether a proposed initiative should be deferred in the interim.

## Article 11
## Access to Environmental Information

[11.1] Subject to the Court's discretion, every person should have affordable, effective and timely access to Government-held information related to climate change and the potential adverse impacts of climate change, including access to reproduce and retain such information held by:

(a) a State (including Government departments, agencies and officials) or a public authority that it appears to be likely to have or to have had in its possession, custody; or
(b) a private entity that receives public funds or engages in public functions or the provision of public service (provided that in respect of private entities, the information shall relate to the public funds, benefit, functions or service).
[11.2] The Court may, on its own motion or on application by a Government-related climate proceeding claimant or plaintiff, require production from the State, a public authority or private entity referred to in Article 11.1 of all information that may be relevant to the Government-related climate change proceedings without cost and within a reasonable time, subject to Article 11.3.
[11.3] In determining the issuance of an order under this Article and providing access to such documents to the claimant or plaintiff, the Court shall consider any assertions of privilege that may be raised and may, after considering the validity of such assertions under applicable laws, guidance and case law, require production of such documents and provide access to them to the claimant or plaintiff on such terms and conditions as the Court determines appropriate.

## Article 12
## Pre-litigation Disclosure

[12.1] In advance of the commencement of a formal Government-related climate change proceeding, the Court may order in respect of a Government defendant:
(a) inspection or photographing of any property that may be relevant to climate change litigation;
(b) preservation, custody and/or detention of such evidence; and/or
(c) the taking of samples of any such evidence.
[12.2] The Court may also order a Government defendant in advance of the commencement of a Government-related climate change proceeding (including Government departments, agencies and officials) that appears to be likely to have or to have had in its possession, custody or power any documents that are relevant to an issue arising or likely to arise out of that litigation to:
(a) disclose whether those documents are in their possession, custody or power; and Part B: The Approach and Articles of the Model Statute.
(b) produce such of those documents as are in their possession, custody or power to the applicant; the applicant's legal advisers; and/or the applicant's expert or other professional adviser, on such terms and conditions as the Court may find appropriate having regard to an asserted privilege claim or other protections recognised by law.
[12.3] In deciding whether to make an order under Article 12.1 or 12.2, the Court shall consider:
(a) the benefits of making the order; (b) the cost consequences of making the order; and
(c) whether it is in the interests of justice for the order to be made.
[12.4] The suggested procedural modifications in this Article are not intended to create a new right to discovery or disclosure where one does not currently exist.

## Article 13
## Disclosure of Documents

[13.1] Upon the application of any party in a Government-related climate change proceeding, the Court may order any Government agency or the Government, in respect of any documents which are or are likely to be relevant to an issue arising or likely to arise in Government-related climate change proceedings, to:
(a) disclose whether such documents are in its possession, custody or power; and
(b) produce such of those documents as are in its possession, custody or power to the applicant, the applicant's legal advisers and/or the applicant's expert or other professional adviser, on such terms and conditions as the Court considers appropriate in respect of any asserted privilege or other protections recognised by law.
[13.2] Upon application of any party in a Government-related climate change proceeding in a foreign or international tribunal, and upon showing of good cause, the Court may order any officer of the State to give their testimony or statement or to produce a document or other thing for use in that Government-related climate change proceeding in a foreign or international tribunal.
[13.3] In deciding whether to make an order under Article 13.1 or 13.2, the Court shall consider:
(a) the benefits of making the order;
(b) the cost consequences of the order; and
(c) whether it is in the interests of justice for the orders to be made.
[13.4] The suggested procedural modifications in this Article are not intended to create a new right to discovery or disclosure where one does not currently exist.

## Article 14
## Right to Obtain Reasons for a Decision

[14.1] In any Government-related climate change proceeding in which a public authority's decision (including a policy determination or refusal or omission to act) is challenged, the Court may:
(a) order the public authority to make available to any other party any document that records matters relevant to the decision;
(b) order the public authority to make available to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:
(i) the public authority's findings on any material questions of fact;
(ii) the evidence on which any such findings were based;
(iii) the public authority's consideration of the applicable law; (iv) the reasoning process that led to the decision; and
(v) order particulars, discovery or interrogatories.
[14.2] Nothing in Article 14.1 shall be construed to require the Government to create documentation that does not already exist as part of its normal decision-making process.

## Article 15
## Court-Appointed Experts

[15.1] In Government-related climate change proceedings, the Court may, at any stage of the proceedings: (a) appoint a duly qualified expert to inquire into and report on an issue; (b) authorise the

expert to inquire into and report on any facts relevant to the inquiry; and (c) give such directions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit.

[15.2] The remuneration of a Court-appointed expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by, or in accordance with the directions of, the Court.

[15.3] Subject to Article 15.4, the parties affected are jointly and severally liable to a Court appointed expert for his or her remuneration.

[15.4] The Court may direct when and by whom a Court-appointed expert is to be paid.

[15.5] Article 15.3 and 15.4 do not affect the powers of the Court as to costs.

## Article 16
## Restrictions on Defences Available in Government-Related Climate Change Proceedings

[16.1] In Government-related climate change proceedings, it is not a defence for the Government to show that it is not the sole or substantial contributor to GHG emissions, whether by allowing or increasing a source of or reducing a sink for GHGs.

[16.2] In Government-related climate change proceedings, it is not a defence for the Government to show that it has only allowed or emitted a small quantity or volume of GHGs, has caused or permitted only a minor degree of harm, or is responsible for a small proportionate share of the GHG emissions.

[16.3] In Government-related climate change proceedings, it is not a defence to assert that Government regulation of climate change is non-justiciable as a political, policy, executive or legislative function.

## Article 17
## Ability to Sue the State

[17.1] Any person, having or asserting a claim or demand against the State (not being a claim or demand against a statutory corporation representing the State) may bring climate change proceedings against the State, any Government agency or State-owned enterprise in any competent Court, subject to the standing provisions of Article 4.

[17.2] Climate change proceedings against the State shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, as in an ordinary case between subject and subject, subject to such variation as may be found appropriate by application of the principles and provisions of this Statute by the Court or tribunal hearing the proceeding including, but not limited to, any order or direction as to fees or costs made by the Court as provided in Articles 19–23 below or as to remedies in Article 18.

## Article 18
## Legal Remedies Available in Government-Related Climate Change Proceedings

[18.1] In addition to its pre-existing powers to grant remedies and relief, and consistent with applicable laws, when determining Government-related climate change proceedings, the Court may, in respect of a Government defendant:
(a) set aside, quash or overturn any decision of a public body or overturn any decision of a public body;
(b) order any Government defendant to take such steps as are specified in the order within such time as is so specified:
(i) to cease, modify or establish GHG emissions-related processes, programmes, operations, policies or procedures;
(ii) to prevent, control, abate or mitigate any likely adverse effects of climate change caused or contributed to by the conduct, regulation or omissions of the Government defendant;
(iii) to remedy any likely adverse effects of climate change caused, regulated or contributed to by the conduct or omission of the Government defendant;
(iv) to prevent the continuance or reoccurrence of the conduct or omission of the Government defendant;
(v) enforce any right, obligation or duty conferred or imposed by a legal instrument relating to climate change, the environment or related human rights;
(vi) review the exercise of any function or privilege conferred;
(vii)grant any declaratory relief, including making declarations in relation to any right, obligation or duty or the exercise of any function conferred; or
(viii) make any other order as the Court thinks fit to restrain or remedy the conduct of the Government defendant.
[18.2] If the Court makes a mandatory order under Article 18(1) in respect of a Government defendant, the Court may monitor the execution of its order. In such circumstances, the Court may:
(a) order a public authority to monitor the execution of the order on its behalf;
(b) order the production of written reports to the court at appropriate intervals; and
(c) order that any report be supported by affidavit as to the accuracy and completeness of the report.
[18.3] If the Court finds that a breach, or a threatened or apprehended breach, of an Act, a legal instrument, or any other law or any legal right, duty or obligation has been, will be or is likely to be committed by a Government defendant, it may make such order as it thinks fit to remedy or restrain the breach.
[18.4] Without limiting the powers of the court under Article 18.3 above, an order made under that Article may require a Government defendant to take such steps, within such time as is so specified, including to:
(a) prevent the continuance or recurrence of the breach;
(b) prevent, control, abate or mitigate any harm to the environment caused by the commission of the breach; or
(c) remedy to the extent reasonably practical any harm to the environment caused by the commission of the breach.

[18.5] The Court may, at any stage of Government-related climate change proceedings, on terms, grant an interim or an interlocutory injunction or stay where it appears to the Court to be just and convenient to do so.
[18.6] In any Government-related climate change proceedings on an application for an interim or interlocutory injunction or interlocutory order, and if it is satisfied that the proceedings have been brought in the public interest, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
(a) the injunction or order sought by the applicant; or
(b) an undertaking offered by the respondent in response to the application.

**Article 19**
**Waiver of Court Fees**

[19.1] The payment of Court fees by plaintiffs or applicants in Government-related climate change proceedings may, at the Court's discretion, be waived.
[19.2] The payment of Court fees by plaintiffs in Government-related climate change proceedings shall, unless the court determines otherwise, be deferred until after judgment. Article 20 Maximum and Protective Cost Orders

**Article 20**
**Maximum and Protective Costs Orders**

[20.1] In Government-related climate change proceedings, the Court may grant and review a maximum costs order specifying the maximum amount of costs that any party in public interest litigation may recover from any other party.
[20.2] The Court may grant and review a protective costs order specifying the maximum amount of costs that the plaintiff or applicant in public interest litigation may be liable to pay.

**Article 21**
**Orders for Security for Costs**

[21.1] The Court is not to require a plaintiff or applicant in Government-related climate change proceedings to give security for any other parties' costs unless the Court concludes there are unique and exceptional circumstances in which such an order is clearly required.

**Article 22**
**Advance Cost Orders**

[22.1] At any stage in Government-related climate change proceedings, the Court has discretion to order a party to public interest litigation to pay advance costs where:
(a) the advance costs would be paid to the plaintiff in the public interest litigation;
(b) the claim is prima facie meritorious; (c) the matters raised are of public importance; and
(d) it is just and convenient to make such orders.

[22.2] At any stage in the proceeding, the Court has discretion to review and amend advance cost orders.

## Article 23
## Cost-Shifting in Final Costs Orders

[23.1] In Government-related climate change proceedings, except in exceptional circumstances, the Court is:

(a) to order an unsuccessful Government defendant to pay the costs of the successful plaintiff or applicant;

(b) not to order the unsuccessful plaintiff or applicant to pay the costs of any successful Government defendant; and

(c) to consider whether the unsuccessful plaintiff should be awarded costs against the Government defendant for upholding or advancing an important public interest issue or the law relating to climate change, the environment or human rights.

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