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Challenging Legal Standing in Climate Change Litigation

A Comparative Approach to the Italian Case 'Giudizio Universale'

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Abstract

Associations and private individuals, groups of young people and groups of senior women, farmers and workers, present and future generations, mayors and whole towns, trees and woods, water and rivers: the list of claimants in climate change litigation is wide and varied. Indeed, since everyone and no one in particular has the right to a healthy climate, determining claimants' legal standing in climate disputes is of paramount importance. Rules of proceedings are sometimes of help, providing ad hoc standing for public interest litigations. In other cases, however, judges have to manage the claim according to the traditional rules of proceedings, which generally require claimants to demonstrate their direct and personal concern. Thus, since legal standing is one of the first hurdles that activists must overcome to succeed in climate disputes, procedural law may provide judges with the grounds for meaningful decisions as well as a way to avoid 'political' decisions.

In this paper, after analysing why civil litigation is proving to be the only suitable path for climate activists in the Italian legal order, I therefore intend to address four key 'standing-orientated' climate cases and namely the Dutch case of Urgenda, the Canadian case of ENvironnement JEUnesse, the Belgian case of Klimaatzaak, and the Swiss case of KlimaSeniorinnen. Having completed this analysis, and returning to the

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Italian case, the possible outcomes related to the claimants' legal standing are then explored, both with respect to the associations and the individuals involved in the case.

Keywords

climate change litigation – Last Judgement case – legal standing – strategic litigation

1 Introduction

The so-called 'Last Judgment' (in Italian *Giudizio Universale*) – ie, the claim against the Italian Government supported by more than 200 activists – marked the beginning of climate change litigation in Italy.[1] This development evidently poses a fresh challenge for Italian proceduralists, who must navigate this type of strategic litigation within the framework of traditional procedural rules, typically designed to resolve disputes between private individuals.

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

Therefore, bearing in mind that in this study we are only considering strategic human rights-based domestic litigations in which the defendant is a

1 For some comments, in English, see R. Luporini, 'The "Last Judgment": Early Reflections on Upcoming Climate Litigation in Italy', Zoom in 77 *Questions of International Law*, pp. 27–49 (2021); M. Fermeglia and R. Luporini, '"Urgenda-Style" Strategic Climate Change Litigation in Italy: A Tale of Human Rights and Torts?', *Chinese Journal of Environmental Law*, 7, pp. 245–260 (2023); L. Saltalamacchia, 'Giudizio Universale: Insights From a Pending Leading Case', in E. D'Alessandro and D. Castagno (eds.), *Reports & Essays on Climate Change Litigation*, pp. 15–22 (Torino, Università degli Studi di Torino, 2024).

State,[2] we are first going to analyse why civil litigation is currently proving to be the only suitable path for Italian climate activists (para. 2). As we will see, the constitutional review mechanism is not directly open to individuals (para. 2.1), while proceedings before administrative courts do not offer adequate solutions to settle climate change litigation (para. 2.2). Therefore, while civil proceedings may lack dedicated regulations for effectively handling such claims, they nonetheless present themselves as an adaptable framework that could potentially accommodate climate change disputes through the general gateway of tort law (para. 2.3).

We will then examine four key 'standing-orientated' climate cases, that is to say cases in which the court's decision largely hinged on whether or not the claimants possessed the requisite legal authority to sue the State (para. 3). In particular, we will refer to the Dutch case of *Urgenda* (para. 3.1.1) and to the Canadian case of *ENvironnement JEUnesse* (para. 3.1.2), on the one hand, and to the Belgian case of *Klimaatzaak* (para. 3.2.1) and to the Swiss case of *KlimaSeniorinnen* (para. 3.2.2), on the other. The reason for this choice is that in the first group of cases, collective actions for the protection of general interests are provided for. However, in the second group, such actions do not exist, or at least did not exist at the time the cases were brought. Furthermore, it is worth noting that all of these cases were adjudicated by civil law courts, similar to the Italian judicial system.[3]

Having completed this analysis, we will return to the Italian case, exploring the possible solutions concerning the claimants' legal standing, also referring to the international examples analysed in the previous paragraphs (para. 4). Specifically, we will scrutinise the potential outcomes related to the standing of the associations (para. 4.1) and the individuals (para. 4.2) involved in the case.

1.1 *Postscript to the Introduction*

This paper was originally drafted to be presented at the 2023 Post-Doctoral Summer School of the International Association of Procedural Law on 'Challenges For Procedural Law', which took place in Madrid from 19 to 21.06.2023.

Since that time, two events have occurred that must be taken into account.

2 Consequently, we do not refer to litigations against multinational companies, which represent another branch of climate change litigation, in which different mechanisms apply.

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

First of all, the Italian case *Giudizio Universale* has finally been decided by the Court of first instance of Rome. In its judgment of 06.03.2024, the Court declared the claim as 'inadmissible', due to an absolute lack of jurisdiction of the court. Indeed, according to the Court ruling, the questions posed by the claimants – seeking to ascertain the responsibility of the State and to compel it to adopt all necessary initiatives to reduce national artificial CO2-eq emissions by 92% by 2030 compared to 1990 levels, or to adopt another, higher or lower, measure to be determined during the proceedings – were clearly expressive of the function of 'political direction', consisting in determining the fundamental lines of development of the State's policy on the delicate and complex issue of climate change. Therefore, the Court ruled that the claimants' assertions were not justiciable by any Italian civil courts, at all. As for the subordinate request of the claimants – aimed at obtaining a modification of the Italian National Integrated Energy and Climate Plan (PNIEC) due to the failure to comply with the objectives set by the European legislator in the Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action – according to the Court opinion, this was a matter that could be challenged before the administrative courts, dealing with issues attributable to the exercise of public powers (see *infra* para. 2.2).[4]

Notwithstanding this, we can say that the content of this article still remains unaffected. Indeed, as affirmed by the promoters of the lawsuit, the judgment will be certainly appealed before the Court of appeal of Rome, so that the litigation cannot be considered as concluded at all.[5] Moreover, since the decision of the Court of first instance is based solely on jurisdictional grounds, and thus out of the merits, all other procedural requirements, like the claimants' standing, remain unexplored and will arguably have to be addressed by the court of appeal.

4 Rome Court of First Instance, 06.05.2024, ASUD Onlus and Others v. The Italian State, https://drive.google.com/file/d/1mznvokgvKAMJOrqcYs_ORaghAYROfXKn/view?usp=sharing, last accessed on 20.05.2024. For a first comment to the judgment see C.V. Giabardo, 'Qualche annotazione comparata sulla pronuncia di inammissibilità per difetto assoluto di giurisdizione nel primo caso di Climate Change Litigation in Italia', 29 April 2024, https://www.giustiziainsieme.it/it/diritto-civile/3125-climate-change-litigation-carlo-vittorio-giabardo?hitcount=0, last accessed on 20.05.2024. On the problem of justiciability in the Italian climate change litigation see also G. Ghinelli, 'Justiciability and Climate Litigation in Italy', in E. D'Alessandro and D. Castagno, *Reports & Essays on Climate Change Litigation*, *supra* note 1, pp. 23–42.

5 See the comments of the promoters at https://giudiziouniversale.eu/2024/03/06/arrivata-la-sentenza-il-tribunale-di-roma-decide-di-non-decidere-non-ce-giustizia-per-il-clima/, last accessed on 20.05.2024.

In this perspective, however, a second event must be considered. We refer to the decision of the European Court of Human Rights of 09.04.2024 in the *KlimaSeniorinnen* case, which marked a fundamental step forward in shaping the claimants' legal standing in climate change litigation. Indeed, with particular regard to the individual applicants, the Court stressed more than once the need to avoid the risk that the criteria for 'victim status' under Article 34 of the European Convention on Human Rights (ECHR) slip into *de facto* admission of *actio popularis* when it comes to climate change litigation. And this because everyone is ultimately concerned by the actual and future risks linked to climate change, in varying ways and to varying degrees, and may claim to have a legitimate personal interest in seeing those risks disappear.[6] On the other hand, however, the Court held that the applicant association *Klimaseniorinnen Schweiz* had the necessary *locus standi* as to the complaints pursued on behalf of its members within the scope of Article 8 ECHR (Right to respect for private and family life). And this because such association was lawfully established; it had demonstrated to pursuing a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members and other affected individuals against the threats arising from climate change in the respondent State; and it was genuinely qualified and representative to act on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention.[7]

Of course, these rulings apply within the particular context of the recourse to the European Court of Human Rights and aim at narrowing the meaning of victim status under Article 34 ECHR. Nevertheless, they will certainly have a significant impact on future decisions of national courts called upon to determine the claimants' standing in climate change disputes, like the Italian ones (see *infra* para. 4).

Eventually, besides these two crucial events, a third one should be mentioned. Namely, on 30.11.2023, the Court of appeal of Brussels ruled in favour of the climate activists in the *Klimaatzaak* case, ordering the Belgian State and the Flemish and Brussels regions to reduce their greenhouse gases emissions by at least 55% by 2030. As to the legal standing, the Court of appeal confirmed the decision of the Court of first instance, which had granted such

6 ECtHR, 09.04.2024, Verein Klimaseniorinnen Schweiz and Others al. v. Switzerland, No. 53600/20, *HUDOC*, paras 478–505.

7 *Supra* note 6, paras 521–526.

a standing to both the association and the individual claimants (see *infra* para. 3.2.2).[8]

2 Civil Proceedings as the Only Suitable Path for Climate Change Litigation in Italy

2.1 *The Screening of Judges in the Constitutional Review Mechanism*

Constitutional review proceedings are sometimes of help for climate change litigation. The German case of Luisa Neubauer and others is an excellent example of this. By challenging the Federal Climate Change Act of 2019 (*Bundes-Klimaschutzgesetz*) through the Federal Constitutional Court (*Bundesverfassungsgericht*), the claimants obtained a revision of this Act, successfully securing a reduction of greenhouse gases emissions. As per the constitutional ruling, Section 3(2) and Section 4(1) of the 2019 Climate Change Act – when coupled with Annex 2 – were deemed partially unconstitutional because they did not contain provisions that adhered to the fundamental rights stipulated in Article 20a of the German Basic Law (*Grundgesetz*).[9]

Nevertheless, to obtain such a result, at least three conditions must be met. First, the national basic law must include the protection of nature as a fundamental right, as provided by the above-mentioned Article 20a of the German Basic Law.[10] Second, the mechanism of constitutional review has to be directly open to individuals, as the German constitutional review mechanism is. Finally, since a regulation concerning climate change must be challenged, such regulation needs to have been previously promulgated by a legislator, as occurred in Germany with the Federal Climate Change Act.

With regard to the Italian situation, however, only the first requirement has been met. In March 2022, a constitutional reform introduced through Article 9 of the Italian Constitution a new sentence, specifically including the protection of the environment, biodiversity and ecosystems as fundamental rights, and

8 Brussels Court of Appeal, 30.11.2023, ASBL Klimaatzaak and Others v. The Belgian State and Others, No. 8411/2023, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231130_2660_judgment-2.pdf (English unofficial translation), last accessed on 20.05.2024, paras 117–136.

9 German Federal Constitutional Court, 24.03.2021, 1 BvR 2656/18, https://www.bverfg.de/e/rs20210324_1bvr265618en.html (English official translation), last accessed on 26.05.2023, para. 266.

10 According to Article 20a of the Basic Law for the Federal Republic of Germany also mindful of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

also considering the interest of future generations.[11] The fact remains, however, that individuals are not allowed to directly act before the Constitutional Court, since only judges may refer to the Court with a question raised by the parties through an ordinary claim.

Finally, and equally important, even if such a situation were to arise, there is currently no specific regulation enacted by the Italian Parliament that explicitly addresses a national strategy for climate change mitigation.[12]

Thus, considering all these aspects, constitutional review proceedings can be considered a very difficult path to support climate change litigation in Italy.

2.2 *Claims for Annulment before the Administrative Courts*

Things differ slightly before Italian administrative courts, even if – in this case – environmental associations benefit from a special standing regarding environmental issues. Pursuant to Article 18 of Law No. 349/1986 of 08.07.1986, which establishes the Ministry of the Environment, environmental associations are indeed granted the authority to represent the public interest and contest administrative misconduct related to environmental matters before administrative courts.

Nonetheless, it should be noted that within the Italian legal system, the mere challenge of the State's actions does not automatically trigger proceedings before administrative courts. Indeed, administrative jurisdiction is only invoked when the State operates within the scope of its public authority, whereas cases

11 Italian Constitutional Law No. 1/2022 of 11.02.2022. In any case, it should be pointed out that the Italian Constitutional Court had already recognised the existence of a fundamental right to live in a healthy environment on the basis of Articles 2 (concerning the protection of the fundamental rights of individuals), 9 (concerning the protection of culture, science and research) and 32 (concerning the protection of the right to health) of the Italian Constitution (Italian Constitutional Court, 28.05.1987, No. 210 and 30.12.1987, No. 641, https://www.cortecostituzionale.it/actionPronuncia.do, last accessed on 26.05.2023).

12 Speaking about regulations concerning national strategy on climate change mitigation we refer to specific regulations, such as the above mentioned German *Bundes-Klimaschutzgesetz* of 2019, the British Climate Change Act of 2018, the French *Loi climat et résilience* (Law No. 2021-1104 of 22.08.2021), the Spanish *Ley de cambio climático y transición energética* (Law No. 7/2021 of 20.05.2021) and the Portuguese *Lei de Bases do Clima* (Law No. 98/2021 of 31.12.2021). Actually, the Italian Government has adopted some urgent measures expressly directed to prevent climate change (Italian Decree-law No. 111/2019 of 14.10.2019). Nevertheless, this act is not comparable with any of the other national acts just mentioned. For an overview of the national framework climate change legislation in the European context, see F. Gallarati, 'Le leggi-quadro sul clima negli Stati membri dell'Unione europea: una comparazione', 49(4) *DPCEonline*, pp. 3459–3484 (2021). For a more general overview, see also A. Averchenkova, S. Fankhauser and M. Nachmany (eds.), *Trends in Climate Change Legislation* (Elgar, Cheltenham, 2017).

related to actions governed by private law fall under the purview of civil judges. Thus, Italian administrative judges usually cannot refer to general liability rules, as was the case for instance of the French *Affaire du Siècle*.[13]

Therefore, an administrative action is invariably a prerequisite for initiating a lawsuit for annulment in Italian administrative courts. Moreover, such an act must be unlawful. It means that the public administration must have failed to respect some regulation in acting with its public authority. Finally, the effects of such an act must cover a particular area in which the environmental association carries out its social engagement. As per the case law of administrative judges, the eligibility of environmental associations, as stipulated in Article 18 of Law No. 349/1986, is typically associated with highly localised environmental issues that typically pertain to specific regions within the country's borders. These issues may include matters like industrial pollution, soil extraction, and similar concerns. Consequently, once again, this kind of solution does not seem to be an appropriate procedural vehicle for climate change issues, which are not easily confined to a certain area.

2.3 *Tort Law as a Blank Canvas*

Given the limitations outlined in the preceding sections, the tort law framework emerges as the preferred avenue for climate activists in the Last Judgment group – consisting of 24 NGOs, 162 adults, and 17 children – to initiate climate change litigation in Italy. According to Article 2043 of the Italian Civil Code (hereinafter ICC), any person who commits an unlawful act against another person that can be attributed to him, negligently or intentionally, must repair the damage that this other person has suffered as a result. So, basically, the claimants' main argument is that by failing to implement measures containing climate change, the State has acted unlawfully within the meaning of Article 2043 ICC. With its negligent conduct, the State is in fact alleged to have violated some of the fundamental rights laid down in the Italian Constitution and in the European Convention on Human Rights (ECHR), the right to health and to a healthy environment above all. Thus, the State should promptly take any appropriate measure permitting the reduction of greenhouse gases emission within 2030

13 Paris Administrative Court, Notre Affaire à Tous and Others v. France, 14.10.2021, Nos. 1904967, 1904968, 1904972, and 1904976/4, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211021_NA_decision-2.pdf (English unofficial translation), last accessed on 26.05.2023. In this case, the Paris Administrative Court based its judgment on Article 1246 of the French Civil Code, which is a rule concerning liability for ecological damage. For a comment on the case see also C. Cournil, A. Le Dylio and P. Mougeolle, 'L'affaire du Siècle: French Climate Litigation between Continuity and Legal Innovations', 14(1) *Carbon & Climate Law Review*, pp. 223–233 (2020).

on the basis of Article 2058 ICC, which provides for restoration in kind, as far as it is possible. The provision of Article 2043 ICC is in fact to be intended in a very general sense, allowing to act not only to obtain compensation, but also to prevent any potential damage to fundamental rights that may occur.[14]

In this regard, the summons points out that each citizen has the right to bring a claim alleging the State's breach of its climate duties, which derives notably from the United Nations Framework Convention on Climate Change (UNFCC) and its juridical instruments, like the 2015 Paris agreement, as well as from Articles 2 and 8 ECHR. No more words are used to illustrate the claimants' *locus standi*, for which general rules of the Italian Code of Civil Procedure apply. Before analysing these rules and how they might affect the Italian case, however, it may be appropriate to further examine the four cases we referred to, seeing how legal standing can shift the balance from a decision on the merits to a decision of inadmissibility.

3 The Matter of *Locus Standi* and its Outcome in Different Foreign Experiences

3.1 *Climate Change Litigation under Specific Regulations that Permit Collective Actions*

3.1.1 The Urgenda case in The Netherlands

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

In this case, the claimant was an association, namely Urgenda Foundation, that expressly acted on behalf of itself as well as legal representative of 886 individuals who had authorised Urgenda to also conduct the proceedings on their behalf.[15] The proceedings had been instituted in accordance with Article 305a of the Dutch Civil Code (hereafter DCC), which allows collective

14 Cf. *inter alia* Italian Constitutional Court, 30.12.1987, No. 641, *supra* note 11, and Italian Supreme Court of Cassation, 21.12.1990, No. 12133, *DeJure*.

15 Urgenda – a contraction of the words 'Urgent' and 'Agenda' – was founded in 2007 as an initiative of the Dutch Research Institute for Transitions (DRIFT), an institute for the transition to a sustainable society, at the Erasmus University in Rotterdam. Urgenda is a non-governmental organisation that has gained Dutch NGO status (*algemeen nut beogende instelling*). The official purpose of Urgenda, as stated in its articles of incorporation, is 'to stimulate and accelerate the transition to sustainable society, starting in the Netherlands'. For more information visit www.urgenda.nl.

actions (otherwise called class actions) to obtain a declaratory judgment.[16] A distinctive feature of this process is that there is no specific conflict between the defendant and the organisation that typically files the claim. This is because the organisation does not pursue litigation based on its own interests but rather advocates for the interests of an unspecified group of 'others'.[17]

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

On its own, the State did not dispute Urgenda's capacity to represent the present generations of Dutch citizens, but it argued that Urgenda had no basis when it sought to protect the interests of current and future generations in other countries.[18] As for the interests of future Dutch generations, the State deferred to the court's opinion.

Considering that Urgenda had made sufficient efforts to attain its claim by entering into consultations with the State, according with Article 3:305a(2) DCC, the Hague District Court concluded that Urgenda's claim, in so far as it acted on its own behalf, was admissible to the fullest extent.[19] Nevertheless, the

16 Under this provision, a legal entity, such as a foundation or association, can submit a complaint if it seeks to protect a common interest or the collective interests of others, provided that such an interest aligns with one of the constitutional objectives of that legal entity. Since the Urgenda claim was initiated in 2013, we refer to the regulation as existing before the amendments which from January 2020 were made to the procedure as a result of the enactment of the Act on collective damages in class actions (Act of 20.03.2019, Stb. 2019, 130).

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

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

19 The Hague District Court, 24.06.2015, Urgenda Foundation v. The State of The Netherlands (Ministry of Infrastructure and the Environment), No. C/09/456689/HA ZA 13–1396, https://uitspraken.rechtspraak.nl/details?id=ecli:nl:rbdha:2015:7196 (English official translation), last accessed on 26.05.2023, para. 4.9. For some comments see K. De Graaf and J. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', 27(3) *Journal of Environmental Law*, pp. 517–527 (2015); J. Lin, 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation c. the State of the Netherlands', 5(1) *Climate Law*, pp. 65–81 (2015); J. Van Zeben, 'Establishing a

Court considered that Urgenda itself could not rely on Articles 2 and 8 ECHR, since Urgenda itself could not be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. The fact remains, however, that these treaty obligations have contributed to detailing the standard of care under Article 6:162 DCC invoked by Urgenda towards the State.[20]

Urgenda's standing has been reviewed by the Hague Court of Appeal, whose decision expressly relied on 'regulations of a predominately procedural nature', namely Article 34 ECHR and Article 3:305a DDC, respectively.[21] The Court of Appeal observed that the District Court had failed to acknowledge that Article 34 ECHR could not serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in those proceedings. While individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf under Article 3:305a DCC.[22] On the other hand, with respect to Urgenda's inability to represent the future generations of Dutch citizens or the current and future generations of individuals from other countries, the Court noted that the claim remained permissible as long as Urgenda acted on behalf of the current generation of Dutch citizens and individuals. After all, it was without a doubt plausible that the current generation of Dutch nationals – in particular but not limited to the

Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?', 4(2) *Transnational Environmental Law*, pp. 339–357 (2015); R. Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation c. the State of the Netherlands', 34(2) *Journal of Energy & Natural Resources Law*, pp. 143–163 (2016).

20 Cf The Hague District Court, *supra* note 19, para. 4.45. As for the action instituted on behalf of the individuals, the Court observed that Urgenda was defending the right of not just the current, but also the future generations' right to access natural resources and to live in a safe and healthy environment. In any case, in this situation, the Court found out that the individual claimants did not have sufficient personal interest besides the Urgenda's interest (para. 4.109).

21 The Hague Court of Appeal, 9.10.2018, The State of The Netherlands (Ministry of Infrastructure and the Environment) v. Urgenda Foundation, No. 200.178.245/01, https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2018:2610 (English official translation), last accessed on 26.05.2023, para. 34. For some comments see B. Mayer, 'The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)', 8(1) *Transnational Environmental Law*, pp. 167–192 (2019); P. Minnerop, 'Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case', 27(2) *Journal of Energy & Natural Resources Law*, pp. 149–179 (2019); I. Leijten, 'Human rights v. Insufficient climate action: The Urgenda case', 37(2) *Netherlands Quarterly of Human Rights*, pp. 112–118 (2019).

22 The Hague Court of Appeal, *supra* note 21, para. 36.

younger individuals in that group – would have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases were not adequately reduced.[23]

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

> the interests that are suitable for a grouping in a class action may be financial interests, but also more idealistic interests, and in this case, it is irrelevant whether each member of society attaches the same value to these interests. It is even possible that the interests that are sought to be protected in the proceedings conflict with the ideas and opinions of other groups in society. This alone shall not stand in the way of a class action. […] It does not have to concern the interests of a clearly defined group of others. It may also concern the interests of an indeterminable, very large group of individuals.[24]

The decision was finally confirmed by the Dutch Supreme Court, which argued that Urgenda, on the basis of Article 3:305a DCC, was representing the interests of the residents of the Netherlands, with respect to whom the obligation under Articles 2 and 8 ECHR applied. After all, the interests of those residents were sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. The mere fact that Urgenda did not have a right to complain to the European Court of Human Rights on the basis of Article 34 ECHR, because it was not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, did not detract from Urgenda the right to institute a claim before Dutch civil courts, in accordance with Article 3:305a DCC on behalf of residents who were in fact victims.[25]

23 The Hague Court of Appeal, *supra* note 21, para. 37.

24 Parliamentary Papers II, 1991/92, 22 486, No.3, p. 22. Moreover, it was set out in the Explanatory Memorandum that an environmental organisation's claim in order to protect the environment, without an identifiable group of persons needing protection, would be allowable under that scheme. On this point, see also M.F. Cavalcanti and M.J. Terstegge, 'The Urgenda Case: The Dutch Path Towards a New Climate Constitutionalism', 43(2) *DPCE online*, pp. 1371–1404 (2020).

25 The Netherlands Supreme Court, 20.12.2019, The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda, No. 19/00135, https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2019:2007 (English official translation), last accessed on 26.05.2023, paras 5.9.2 and 5.9.3.

3.1.2 The Canadian case of ENvironnement JEUnesse (Enjeu)

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

Enjeu is an association that was founded in 1979 with the constitutional purpose of educating young people on environmental issues. In this case, *Enjeu* specifically acted on behalf of all Quebec resident aged 35 and under on 26.11.2018 (ie, the date of the filed action), aiming at a declaratory judgment establishing that the Canadian Government's behaviour in the fight against climate change had infringed on the rights of the youth, as well as an order to pay punitive damages.[26] According to Article 571 of the Quebec Code of Civil Procedure (hereinafter QCCP)

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

In any case, according to Article 574 QCCP, in order to institute a class action, a prior authorisation of the court is required. Thus, in its motion for authorisation, *Enjeu* argued that the claim complied with all the requirements mentioned in Article 575 QCCP,[27] relying in particular on the fact that the class

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26 According to the *Enjeu*'s claims, the Canadian Government's behaviour had infringed on a number of rights protected by the Canadian Charter of Rights and Freedoms and Quebec's Charter of Human Rights and Freedoms, namely: the right to life, integrity and security of the person protected by section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec's Charter of Human Rights and Freedoms; the right to live in a healthful environment in which biodiversity is preserved, protected by section 46.1 of the Quebec's Charter of Human Rights and Freedoms; the right to equality protected by section 15 of the Canadian Charter of Rights and Freedoms and section 10 of the Quebec's Charter of Human Rights and Freedoms. For further details see C. Feasby, D. Devlieger and M. Huys, 'Climate Change and the Right to a Healthy Environment in the Canadian Constitution', 58(2) *Alberta Law Review*, pp. 213–248 (2020).

27 In accordance with Article 575 QCPC:
The court authorises the class action and appoints the class member it designates as representative plaintiffs if it is of the opinion that:
(1) the claims of the members of the class raise identical, similar or related issues of law or fact;
(2) the facts alleged appear to justify the conclusions sought;

composition made it difficult or not viable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings.[28] Nevertheless, in its reply, the Government challenged *Enjeu*'s decision to use a collective action under Article 571 QCCP as a procedural vehicle for its claims, arguing that the association had failed to fulfil different requirements established in Article 575 QCCP.

In July 2019, the Superior Court of Quebec refused the authorisation, focusing on the claimant's standing right. According to the Court's opinion, it was accurate to assert that the class action could guarantee the adherence to regulations pertaining to environmental matters. However, this did not mean that a class action could be authorised automatically every time an environmental issue was a stake.[29] In particular, after having rejected the Government objections based on the separation of powers theory and after having *prima facie* acknowledged the rights alleged by the petitioner, the Court argued that *Enjeu*'s choice to cap the age of the group members at 35 was not reasonable. Indeed, according to Article 591 QCCP, the judgment on a class action describes the class to which it applies and is binding on all class members who have not opted out. But, even if the judge has the power to modify the group definition, this power should not be accomplished by the arbitrary exclusion of persons having the same interest in the common

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

28 ENvironnement JEUnesse, *Motion for authorisation to institute a class action and obtain the status of representative*, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181126_500-06-000955-183_application-1.pdf (English unofficial translation), last accessed on 26.05.2023, para. 3. In particular, *Enjeu* affirmed that:

> the actions of the Canadian Government affect millions of members. 3.2. According to Statistics Canada, in 2017, the population aged 35 and under in Quebec was 3,471,903, including residents and citizens. 3.3. Moreover, it is clear that class members cannot individually bear the costs of such a lawsuit. A class action is undoubtedly the only way for class members to go to court and obtain the cessation of the interference with their rights protected by the Charters.

29 Quebec Superior Court, 11.07.2019, ENvironnement Jeunesse v. Attorney General of Canada, No. 500-06-000955-183, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190711_500-06-000955-183_decision-1.pdf (English unofficial translation), last accessed on 26.05.2023, paras 43–45.

issues.[30] In this instance, this translated to the elimination of the 35-year-age limit, resulting in the formation of a group of over 7 million inhabitants of Quebec aged over 18.

Conversely, when considering minors who were included in the group due to being under 18, the very right to take legal action was subject to scrutiny. In particular, *Enjeu* should not be recognised as having the power to impose on millions of parents the obligation to act to exclude their children from class action nor was it a statutory entity created by the legislator to protect the rights of minors or to act on their behalf.[31] So, in conclusion, the Court observed that the mission and objectives of *Enjeu* – even if admirable in socio-political terms – were too subjective and limiting, by nature, to constitute the ground for an appropriate group bringing a class action on the basis of Article 571 QCCP.

The authorisation refusal was challenged by *Enjeu* before the Quebec Court of Appeal, but the Court dismissed the appeal. Granting the interlocutory appeal, the Court first of all assumed that the claimant's assertions were not justiciable, because of their vagueness and their politically-orientated nature. Besides this aspect, which falls outside the scope of this study, the Court revisited the claimant's standing right, confirming the Superior Court's decision regarding the group definition. According to the Court's opinion, global warming was indeed a common issue for all Canadian residents and the fact that the younger people may be more exposed was merely a matter of time.[32]

30 In this sense see Canadian Supreme Court, 18.10.2001, J. Hollick v. City of Toronto, No. 27699, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1908/index.do, last accessed on 26.05.2023, para. 21. On the topic see also C. Cameron and R. Weyman, 'Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices', 34(1) *Journal of Environmental Law*, pp. 203–207 (2022), and J. Kalajdzic, 'Climate Change Class Actions in Canada', 100(2) *Supreme Court Law Review*, pp. 31–58 (2021).

31 Quebec Superior Court, *supra* note 29, para. 132.

32 Quebec Court of Appeal, 13.12.2021, ENvironnement Jeunesse v. Attorney General of Canada, No. 500-09-028523-199, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211213_500-06-000955-183_judgment.docx (English unofficial translation), last accessed on 26.05.2023. The application for leave to appeal from the judgment of the Court of Appeal of Quebec has been dismissed by the Supreme Court of Canada (Canadian Supreme Court, 28.07.2022, ENvironnement Jeunesse v. Attorney General of Canada, No. 40042, https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19448/index.do, last accessed on 26.05.2023).

3.2 *Climate Change Litigation within Traditional Standing Rules*

3.2.1 The Case of Senior Women in Switzerland (KlimaSeniorinnen Schweiz)

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

The first one is the Swiss case of the Association of Swiss Senior Women for Climate Protection (*KlimaSeniorinnen Schweiz*), an association founded in August 2016 with the specific aim to fight for climate protection before Swiss courts (therefore, an *ad hoc* association).[33] The concept of forming an association aimed to prevent legal proceedings from relying on individuals, whereas the restriction to elderly females stemmed from the vulnerability of older women to severe and frequent heatwaves experienced in Switzerland. In essence, the petitioners sought to align the broader public interest with an individual and particular standpoint, with the goal of addressing the issue of the claimant's legal standing.[34]

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

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

33 We are aware that the case was decided by administrative courts and not civil courts. Nonetheless, we believe that the issue concerning the claimant's standing essentially presents the same characteristics required in civil matters, and therefore we consider the case worthy of analysis in this study.

34 As pointed out on the association's website (www.en.klimaseniorinnen.ch), petitioners were obviously aware that older men, people with diseases, and small children also suffer from heatwaves and other climate effects. Nevertheless, by focusing on the proven susceptibility of older women, they were simply enhancing the lawsuit's chances of success which was ultimately good for everyone. On the topic see C.C. Bähr, U. Brunner, K. Casper and S.H. Lustig, 'KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation', 9(2) *Journal of Human Rights and the Environment*, p. 214 (2018). With particular regard to the strategic action of *KlimaSeniorinnen* see also S. Keller and B. Bornemann, 'New Climate Activism between Politics and Law: Analysing the Strategy of the KlimaSeniorinnen Schweiz', 9(2) *Politics and Governance*, pp. 124–134 (2021).

> public law and which affect rights or obligations that it refrains from, discontinues or revokes unlawful acts.[35]

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

In April 2017, DETEC responded to the request on behalf of the other three respondents and denied the applicants' standing according to Article 5(1)(c) APA, since the applicants' rights had not been affected as required by Article 25a APA. Specifically, the authority contended that Article 25a APA should be interpreted in conjunction with the constitutional guarantee outlined in Article 29 of the Federal Constitution of the Swiss Confederation, which ensures the right to have legal disputes adjudicated by a court when an individual legal position is deemed worthy of protection. However, in this instance, the primary objective of the applicants' petition was not solely the reduction of atmospheric CO2 levels in their immediate vicinity but rather on a global scale. This is because the applicants were urging the administrative authorities to formulate draft legislative measures aimed at further reducing CO2 emissions or to assume responsibility for preparing such legislative proposals. Consequently, the authority of first instance did not enter into the case, stopping the process at a procedural stage on the ground of the petitioner's lack of standing according to Article 25a APA, since no individual legal positions were affected.[36]

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

Considering that the appeal was introduced by the association and by four more individuals, who certainly had an interest worthy of protection in the revocation of the contested ruling, the Federal Court did not expressly decide

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

36 Federal Department of the Environment, Transport, Energy and Communications, Order of 26.04.2017, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20170426_No.-A-29922017_order-1.pdf (English unofficial translation), last accessed on 26.05.2023.

whether, within the scope of an appeal brought by an association in its own name but in the interests of its members (*egoistische Verbandsbeschwerde*), the association was entitled to file a request with the authority of first instance and to file an appeal before the Court itself.[37] Considering this, the Court noted that the pivotal issue in this case revolved around the determination of whether there was a requirement for individual legal protection. This determination was crucial to narrowing the scope of application and excluding the possibility of an *actio popularis* under Article 25a APA.

Therefore, concerning the interest in legal protection, it implies that a tangible advantage must be sought, and this interest must also be presently relevant. In terms of interests deserving of protection, which is a matter-specific criterion, it is essential that the appellant is affected in a manner that distinguishes them from the general population according to Article 48(1)(b) of the Administrative Procedure Act (APA).[38]

From this perspective, considering all possible impacts of climate change in Switzerland, the Court concluded that the group of women older than 75 years of age was not particularly affected by climate change. Although different groups were affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said that the proximity of the appellants to the matter in dispute was particular, compared with the general public. Consequently, since the appellants had no sufficient interest worthy of protection, the Court held that the authority of first instance had rightly refused to issue a material ruling on the basis of Article 25a APA.[39]

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37 Swiss Federal Administrative Court, 27.11.2018, Verein KlimaSeniorinnen Schweiz and Others v. Federal Department of the Environment, Transport, Energy and Communications (DETEC), No. A-2992/2017, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181127_No.-A-29922017_decision.pdf (English unofficial translation), last accessed on 26.05.2023, para. 1.2.

38 Swiss Federal Administrative Court, *supra* note 37, para. 6.3.2. In accordance with Article 48(1)b APA, which refers to appellant *locus standi*
A right of appeal shall be accorded to anyone who:
b. has been specifically affected by the contested ruling.

39 Cf. Swiss Federal Administrative Court, *supra* note 37, para. 7.4.3. According to the Court's opinion, further claims to the issuance of a material ruling do not result from the European Convention of Human Rights: since a reduction of the general risk of danger cannot be achieved directly through the actions demanded, the authority of first instance was not obliged on the basis of Art. 6(1) ECHR to enter into the matter of the appellants. After the judgment, the association decided to file a complaint before the European Court of Human Rights, alleging the violation of Articles 2 (Right to life), 6 (Right to a fair trial), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy) ECHR.

3.2.2 The Belgian case of Klimaatzaak

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

In December 2014 *Klimaatzaak* formally declared the four responsible Governments (the three regions and the Federal State) to be in breach of their climate obligations. Having failed to reach a consensus at a round table, in June 2015 the legal proceedings began. The claimants were the association itself, 58.586 individuals and a mountain alder with 81 other trees. Leaving aside the *locus standi* of the trees, which are not entitled to bring a claim in the Belgian legal system, let us concentrate on the standing of the association and the individuals.[40]

On the basis of Article 17(1) of the Belgian Judicial Code (hereinafter BJC), in order to bring a claim, the claimant needs legal standing and interest.[41] Regarding the interest, it must be present and current as per Article 18 BJC. From this perspective, in the summons, individual claimants affirmed that due to climate change they were exposed to material damage (such as damage resulting from storms or floods) and damage to their health and

40 However, the idea that natural objects, such as trees, can also have a legal standing is not new: see C. Stone, 'Should trees have standing? Toward Legal Rights for Natural Objects', 45 *Southern California Law Review*, pp. 450–501 (1972). After all, natural objects such as the Amazonian forest in Colombia or the Ganges and Yamuna rivers in India, as well as all their tributaries, have been recognised by courts as entity subject of rights entitled to legal protection: cf. respectively Colombian Supreme Court, 5.04.2018, A. Lozano Barragán and Others v. the Presidency of the Republic and Others, No. 11001-22-03-000-2018-00319-01, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf (English unofficial translation), last accessed on 26.05.2023 and High Court of Uttarakhand, 20.03.2017, Salim v. State of Uttarakhand, Writ Petition PIL No. 126 of 2014, https://elaw.org/wp-content/uploads/archive/attachments/publicresource/in_Salim__riverpersonhood_2017.pdf, last accessed on 26.05.2023.

41 In this study we do not consider Article 17 BJC as implemented by the 2018 Justice system reform, which did not apply in that case. In any case, starting from 10.01.2019, on the basis of Article 17(2) BJC, the action of a legal person, aimed at protecting human rights or fundamental freedoms recognised in the Belgian Constitution and in the international instruments which bind Belgium, is admissible under the following conditions:

a) the purpose of the legal person is of a particular nature, distinct from the pursuit of the general interest;
b) the legal person pursues this object in a sustainable and effective manner;
c) the legal person takes legal action within the framework of its object, with a view to ensuring the defence of an interest related to this object; and
d) only a collective interest is pursued by the legal person through its action.

well-being (such as spread of new tropical diseases, heatwaves, psychological and emotional stress, and so on). Consequently, the Government's inaction against climate change violated their subjective rights, allowing them to act on the basis of Article 1382 of the Belgian Civil Code (hereinafter BCC), which provides for compensation in case of (future) damages caused by negligence. While for *Klimaatzaak*'s standing, the action was based on a Supreme Court's judgment which had permitted an environmental association to carry out a legal action aimed at contesting negligence of public authorities, which would be contrary to the provisions of environmental law, on the basis of the Aarhus Convention.[42]

So, starting from the individuals' standing, the Brussels Court of First Instance argued that Belgium was of course concerned by climate change effects as demonstrated by national and European scientific reports. By attributing part of the climate change responsibility to the Belgian Government, individual claimants were therefore giving sufficient reasons for their standing, as they were pursuing a personal and real interest according to Article 18 BJC. Although it was a possibility that other Belgian individuals could be impacted by the same alleged harm as the claimants, this was not a compelling reason to categorise the filed action as an inadmissible *actio popularis*, nor was the fact that individuals were acting to prevent damage a hurdle, since Article 18 BJC also admits action to prevent the violation of a seriously threatened right, even on a declaratory basis.[43]

As for *Klimaatzaak*'s legal standing, the Court contended that initially, a legal entity may initiate a lawsuit primarily to safeguard its legal existence, as well as its assets and moral rights, such as honour and reputation. Conversely, the existence of a constitutional purpose for a legal entity does not automatically grant it the authority to act on behalf of that purpose. Nevertheless, in Belgium, environmental associations benefit from a preferential status since Article 9(3) of the Aarhus Convention has to be intended as conferring legal standing to this kind of association with regard to environmental claims.[44] In particular, according to the European Court of Justice's case law, even if Article 9 of the Aarhus Convention contains any unconditional and sufficiently precise

42 Belgian Supreme Court of Cassation, 11 June 2013, No. P.12.1389.N, *Juportal*.

43 Brussels Court of First Instance, 17.06.2021, ASBL Klimaatzaak and Others v. the Belgian State and Others, No. 167, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210617_2660_judgment-2.pdf (English unofficial translation), last accessed on 26.05.2023, para. 1.1. For a comment on the case see C. Renglet and S. Smis, 'The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?', 25(21) *American Society of International Law* (2021).

44 Cf Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to

obligation capable of directly regulating the legal position of individuals, it is up to the national court to give an interpretation of national procedural law which is consistent with the objectives laid down in that Article. From this perspective, therefore, the Court considered that *Klimaatzaak*'s claim was consistent with the association's constitutional purpose of preventing climate change. Thus, the association's claim under Article 1382 BCC met the criteria laid down in Article 18 BJC, since the claimant could be considered as having a personal and direct interest, which was actually different from the general interest.[45]

4 Different Approaches to the Claimants' Standing in the Italian Climate Case

4.1 *Locus Standi of the Associations*

As we have tried to find out in the previous paragraphs, the claimants' legal standing is always at stake in climate change litigation. Collective actions may sometimes be of help, but the Canadian case of *Enjeu* has also shown that this alone could be not sufficient. Conversely, the traditional criterion of a personal and direct interest can be interpreted in a very comprehensive sense, permitting individual claims in this type of litigation.

Bearing that in mind, it is now time to get back to the Italian situation, to further investigate the real chance of success for climate change litigation in Italy.

Actually, the summons of the Last Judgment case does not contain a part specifically dedicated to the claimants' legal standing.[46] This aspect must therefore be addressed by the Court according to the ordinary rules provided by the Italian Civil Procedure Code (hereinafter ICPC), according to which,

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Justice in Environmental Matters, Compliance Committee, 12th meeting, 16.06.2006, Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium), https://unece.org/fileadmin/DAM/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf, last accessed on 26.05.2023, para. 34:

> When assessing the Belgian criteria for access to justice for environmental organisations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.

45 Brussels Court of First Instance, *supra* note 43, para. 1.2.

46 A SUD et al. vs Italy, Summons, Civil Court of Rome 2021, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210605_14016_petition.pdf (English unofficial translation), last accessed on 26.05.2023.

except in cases expressly provided for by a particular regulation, no one may bring a claim on behalf of others (Article 81 ICPC). Moreover, to bring a claim, the claimants must have an interest in it, that is to say that claimants must be directly concerned in the case they brought to the court (Article 100 ICPC).

Thus, when it comes to the standing of the associations, two procedural outcomes seem likely.

The first scenario is that Italian judges ultimately choose to expand traditional rules governing civil procedure concerning common interests, much like their Belgian counterparts did in the case of *Klimaatzaak* (see para. 3.2.2). In particular, since some of the claimant associations had also taken part in the drafting of the Italian National Energy and Climate Plan (PNIEC) with all the ministries concerned, the Government's assertion of pre-contractual liability under Article 1375 of the Italian Civil Code (ICC) might be considered a 'procedural manoeuvre' aimed at allowing such a claim, also under the provisions of Article 9(1) of the Aarhus Convention.[47] Although these organisations are not authorised to represent others, in this instance, their action is explicitly directed towards safeguarding a direct and individual interest of the organisations themselves. Specifically, it pertains to the State's violation of its obligation of good faith in formulating the National Energy and Climate Plan by disregarding the input provided by these organisations.

It would be even more difficult, however, to admit the claim of the associations on behalf of the individual interests they intend to protect, since in that case it would mean admitting a collective action that is currently not provided for by the Italian Code of Civil Procedure. Indeed, the new Title VIII *bis* ICPC allows associations to act on behalf of consistent rights of individuals through collective actions.[48] Nonetheless, such a remedy can only be pursued against companies, as stipulated in Articles 840 *bis*(3) and 840 *sexiesdecies* ICPC. Therefore, if the argument of pre-contractual liability remains unexplored, it will be difficult to demonstrate that the associations have suffered direct and personal damage, pursuant to Articles 2043 ICC and 81 and 100 ICPC, as a result of the State's climate policies. Consequently – and this is

47 A SUD et al. vs Italy, Summons, *supra* note 46, paras VI.19–VI.28.

48 In 2021 the class action reform provided by the Italian Law No. 31/2019 of 12.04.2019 came into force. Before this date, the Italian class action was regulated by the so-called Consumers Code (Legislative decree No. 206/2005 of 23.10.2005) and was referred to consistent rights of consumers only. On the topic see also E. Gabellini, 'Accesso alla giustizia in materia ambientale e climatica: le azioni di classe', 76(4) *Rivista Trimestrale di Diritto e Procedura Civile*, pp. 1105–1132 (2022).

the second scenario – in this case, the only solution seems to be a procedural decision of inadmissibility.

4.2 Locus Standi *of the Individuals*

While the request of the associations is based in part on pre-contractual liability, that of the individuals is based solely on tort law. Consequently, the 179 individual claimants must firstly assert a direct and personal interest, that is to say that they must be able to demonstrate that, due to the State's climate negligent policy, each of them has indeed incurred harm, as defined under Article 2043 ICC. So, here again, two procedural solutions seem to be possible.

First, the judges might emphasise that the right to reside in a clean and healthy environment is unquestionably a universal entitlement, signifying that a broadly shared interest is at stake in the case. However, such an interest cannot be pursuable by an individual claim, nor does Italian legal order allow any public interest litigation whatsoever.[49] The main argument in this respect could probably be derived from the Italian Environmental Code (Legislative decree No. 152/2006 of 03.04.2006), in which the environment is considered as a matter of public interest and its protection is therefore conferred to the Ministry of the Environment, ie, the State, which is the only subject entitled to act in case of ecological damages.[50] From this perspective, the claimants' petition in the Last Judgment could therefore be considered as an inadmissible *actio popularis*, since no individual right is affected in a way that differs from that of the entire population.

On the other hand, following the *Klimaatzaak* case law any individual claimant might conceivably be permitted to substantiate a concrete injury, primarily arising from the purported infringement of the fundamental right to reside in a clean and healthy environment by the State. This is especially relevant, considering the Constitutional 'ecological' reform that became effective subsequent to the commencement of the Last Judgment case (see para. 2.1). In such a case, the individuals' claim would be probably admitted on the basis of Article 81 and 100 ICPC, since each individual concerned could be

49 Actually, a sort of public interest litigation is provided for electoral issues on the basis of Articles 9 and 70 of the Italian Legislative decree No. 267/2000 of 18.08.2000, which allow any citizen to bring action before the administrative or civil courts, as the case may be.

50 Article 311 of the Italian Environmental Code (Legislative decree No. 152/2006 of 03.04.2006). On the need to relate climate damage to environmental damage, according to Legislative decree No. 152/2006, with consequent problems of standing see M. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile*, pp. 53–77 (Napoli, ESI, 2022). On the topic see also M. Carducci, 'La ricerca dei caratteri differenziali della "giustizia climatica"', 43(2) *DPCE online*, p. 1345–1369 (2020).

deemed to be acting on his or her own behalf, even though every other person could potentially benefit from the judgment on the merits of the claim.

5 Conclusion

We started this paper by pointing out that legal standing can sometimes offer judges a strategic answer to a strategic claim. The four cases we analysed have provided sufficient evidence of this. The Canadian case of *ENvironnement JEUnesse* has demonstrated that collective actions intended to safeguard public interests are insufficient without robust intervention by the courts. On the other hand, the Belgian case of *Klimaatzaak* has demonstrated to what extent court activism can overcome traditional limitations of procedural rules. Moreover, the *Urgenda* case in the Netherlands and the case of *KlimaSeniorinnen Schweiz* in Switzerland appear to be two opposite examples of the way in which judges may offer or deny a political answer to the global problem of climate change by using the rules of proceedings.[51] In any case, and this is the key point, rules of procedural law were always at stake.

In this context, Italian courts are now compelled to play a part in addressing this global challenge, which fundamentally pertains to procedural law. In the absence of any *ad hoc* legal standing for climate change activists in the Last Judgment case, judges have both the possibility of denying the justiciability of the claim and the possibility of overcoming the lack of standing to enter into the merits of the claims. Of course, further problems will then come into play for the enforceability of such a judgment, which we do not intend to analyse in this study.

An Italian precedent appears highly pertinent in this regard. I am referring to the claim brought in 2009 to the Court of Milan by a citizen who aimed at challenging the electoral regulation of 2005 (Law No. 270/2005 of 21.12.2005). In that instance, ultimately adjudicated by the Italian Supreme Court of Cassation, which subsequently referred the matter to the Constitutional Court, the issue of the claimants' legal standing was under scrutiny. Indeed, the State's defence, *inter alia*, focused on the fact that the claimant did not have any actual interest in the claim according to Article 100 ICPC. In the State's opinion, that claim had in fact the sole purpose of obtaining from the court an 'entry visa'

51 On this point see also C.V. Giabardo, 'Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate Change?', in B. Pozzo and V. Jacometti, *Environmental Loss and Damage in a Comparative Law Perspective*, pp. 393–406 (Cambridge, Intersentia, 2020).

for access to the constitutional review (*supra* para. 2.1). From this standpoint, it would have been an inadmissible lawsuit, as its subject matter was an ambiguous harm used to resolve purely theoretical legal inquiries, such as the entitlement to voice individual preferences in future elections. Nonetheless, in a landmark ruling, the Court of Cassation allowed the lawsuit, contending that the act of voting constitutes a fundamental right of every citizen under the Italian Constitution, namely Articles 2, 48, 56, and 58. According to the Court's opinion, the state of uncertainty in this regard was therefore a source of concrete prejudice and that was a sufficient reason to justify the applicants' interest in bringing proceedings in the face of State's inaction.[52]

In essence, although, in theory, such a lawsuit appeared to be a procedural debacle and, as a result, seemed initially inadmissible based on conventional civil procedure rules, it transpired that the judges opted for an exceptionally assertive political judgment in that instance. This decision, which allowed not only for the Constitutional Court to declare the unconstitutionality of the electoral regulation in question but also for the potential issuance of a declaratory judgment, recognised both the presence of the fundamental right to vote and its infringement by the State regulation in previous elections.[53] This was ultimately made possible by a strategic use of rules concerning legal standing in civil proceedings, since in that case the interest of the claimant did not differ in any substantial way from the potential interest of every other citizen.

It seems to me that Italian judges are now required to take a similarly strong stance with regard to climate change litigation, pushing the Government to implement its climate policy through a 'political' decision. So, we are now certainly facing a new procedural challenge for Italian judges, but such a

52 Cf. Italian Supreme Court of Cassation, 17.05.2013, No. 12060, *DeJure*.

53 Cf. Italian Constitutional Court, 13.01.2014, No. 1, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf (English official translation), last accessed on 26.05.2023 and Italian Supreme Court of Cassation, 16.04.2014, No. 8878, http://www.ambientediritto.it/wp-content/uploads/2014/05/Corte-di-Cassazione-Civile-16.04.2014-Sentenza-n.8878.pdf, last accessed on 26.05.2023. For some comments on the procedural aspects see also C. Consolo, 'L'antefatto della sentenza della Consulta: l'azione di accertamento della "qualità" ed "effettività" del diritto elettorale', 31(1) *Corriere Giuridico*, pp. 7–15 (2014); G. Basilico, 'Mero accertamento di diritti fondamentali e giudizio di legittimità costituzionale', 76(1) *Rivista di Diritto Processuale*, pp. 34–56 (2021). For this and other examples of strategic litigation in Italy, see also S. Pitto, 'Public interest litigation e contenzioso strategico nell'ordinamento italiano. Profili critici e spunti dal diritto comparato', 50(S.I.) *DPCEonline*, pp. 1061–1098 (2021).

challenge is probably a new challenge for the Italian procedural legislator too, who cannot ignore the request for access to justice on environmental and climate matters.[54] Legal standing in such claims remains a difficult hurdle to overcome without a specific regulation providing for it and most European countries have already provided environmental associations with legal standing to protect general interests.[55] A procedural resolution will undoubtedly need to be established in the near future.

54 The need for a legislative reform is also pointed out by B. Pozzo, 'The Italian Path to Climate Change: Nothing New Under the Sun', in F. Sindico and M.M. Mbengue (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects*, p. 483 (Berlin, Springer, 2021).

55 Article 1248 of the French Civil Code is probably the most relevant example, allowing any person with standing and interest to act for compensation in case of ecological damages, expressly including environmental associations. In this regard, we can also consider the Dutch general provision contained in Article 3:305a of the Dutch Civil Code (see para. 3.1.1), as well as what happened in Belgium, where a reform of Article 17 of the Belgian Judicial Code came into force after the beginning of the *Klimaatzaak* case, which now allows legal persons to bring action before civil courts to protect collective interests related to the fundamental rights guaranteed by the Belgian Constitution (see para. 3.2.2 note 41).