Rechtsvergelijking toegang tot de rechter van belangenorganisaties in algemeenbelangacties

Eindrapport voor het Wetenschappelijk Onderzoek- en Datacentrum (WODC)

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Samenvatting

Aanleiding van het onderzoek

De afgelopen jaren zijn door belangenorganisaties verschillende ideële algemeenbelangacties tegen bedrijven en de overheid ingesteld. Kenmerkend aan dit soort procedures is dat de procederende belangenorganisatie zelf een rechtsvordering instelt om de rechten en belangen van anderen te beschermen. Daarbij vraagt zij om niet-geldelijke remedies, zoals een rechterlijk bevel en/of een verklaring voor recht van onrechtmatig handelen. Sinds 1994 bevat het Burgerlijk Wetboek (BW) een wettelijke regeling voor deze procedure, neergelegd in artikel 3:305a BW. Op 1 januari 2020 is de Wet afwikkeling massaschade in collectieve actie (WAMCA) in werking getreden; daarmee is het instellen van een collectieve schadevergoedingsactie mogelijk gemaakt. Met de inwerkingtreding van de WAMCA is ook artikel 3:305a BW aangepast. Een belangrijke aanpassing is de introductie van het representativiteitsvereiste. Het vernieuwde artikel 3:305a BW bepaalt onder meer dat de rechter bij de ontvankelijkheidsbeoordeling in een ideële algemeenbelangactie en collectieve schadevergoedingsactie beoordeelt of de procederende belangenorganisatie voldoende representatief is, gelet op de achterban en de omvang van de vertegenwoordigde vorderingen.

In 2023 heeft de meerderheid van de Tweede Kamer de regering verzocht om te verkennen in hoeverre voor belangenorganisaties met een ideëel doel op grond van artikel 3:305a BW nadere vereisten met het oog op de representativiteit gesteld moeten worden (*Kamerstukken II* 2022/23, 36169, nr. 37 (motie Stoffer c.s.)). Aan de Kamer is in dat verband toegezegd dat onderzocht wordt hoe ons omringende landen omgaan met ideële algemeenbelangacties en welke (representativiteits)eisen zij stellen aan deze organisaties (*Kamerstukken II* 2023/24, 36169, nr. 42). Dit rapport vormt de verslaglegging van dat onderzoek.

Opzet van het onderzoek

Het onderzoek bestaat uit drie delen. Allereerst is de achtergrond en uitwerking van het representativiteitsvereiste in de Nederlandse wet en rechtspraak onderzocht. Eveneens is gekeken naar de Nederlandse literatuur over het representativiteitsvereiste. Ten tweede is de betekenis van het Europees Verdrag voor de Rechten van de Mens (EVRM) en het Verdrag van Aarhus voor het representativiteitsvereiste onderzocht. Ten derde is de ontvankelijkheidsbeoordeling in algemeenbelangacties tegen de overheid in België, Duitsland, Engeland & Wales, Frankrijk, Noorwegen en Zweden onderzocht. In het bijzonder is daarbij onderzocht op welke wijze de representativiteit van de procederende belangenorganisatie bij de ontvankelijkheidsbeoordeling wordt meegenomen. Aan de hand van een vooraf opgestelde questionnaire, hebben experts in deze jurisdicties een Engelstalig jurisdictierapport geschreven. Die jurisdictierapporten vormen de basis voor de rechtsvergelijkende inzichten in dit rapport.

Bevindingen

In het rapport wordt een onderscheid gemaakt tussen twee typen representativiteitseisen die gehanteerd kunnen worden bij de ontvankelijkheidsbeoordeling. Het eerste type heeft betrekking op de vraag of de desbetreffende belangenorganisatie *geschikt is om op te komen voor de belangen die onderwerp zijn van de procedure*. Criteria die gehanteerd worden bij de beantwoording van deze vraag zijn gericht op de belangenorganisatie, en de wijze waarop zij de door haar beoogde belangenbescherming nastreeft en heeft nagestreefd. Daarbij kan worden gekeken naar de staat van dienst van de desbetreffende belangenorganisatie in het nastreven van (onder meer) de belangen die onderwerp zijn van de procedure, het feit dat de organisatie zich eerder al heeft ingezet voor de bescherming van deze of soortgelijke belangen, de verschillende activiteiten die hiertoe zijn ontplooid (media-optredens, protesten etc.), of al eerder door de organisatie collectieve acties zijn gevoerd, alsmede naar hoelang de belangenorganisatie bestaat en de specifieke kennis en ervaring van de organisatie ten aanzien van de belangen waarvoor zij opkomt. Het tweede type heeft betrekking op de *relatie van de belangenorganisatie met de achterban waarvoor de organisatie opkomt*. Criteria die in dit verband kunnen worden gehanteerd zijn onder meer het aantal leden bij een vereniging, aangeslotenen bij een stichting, steun van de achterban, bijvoorbeeld blijkend uit het aantal steunbetuigingen, en de omvang van de achterban.

De Nederlandse context

Uit artikel 3:305a BW en de daarbij behorende wetsgeschiedenis blijkt slechts in beperkte mate hoe het representativiteitsvereiste moet worden uitgewerkt bij ideële algemeenbelangacties. In de (lagere) rechtspraak is inmiddels wel nadere uitwerking gegeven aan het vereiste. Die uitwerking is contextgebonden, waardoor algemene conclusies over de toepasselijke criteria en hun onderlinge gewicht moeilijk(er) te trekken zijn. Deze situatie leidt tot rechtsonzekerheid. Wel kan worden vastgesteld dat rechters criteria hanteren die betrekking hebben op de geschiktheid van de belangenorganisatie om voor de belangen op te komen die onderwerp zijn van de procedure en criteria die zien op de relatie van de belangenorganisatie tot haar achterban. De afgelopen tijd lijkt in ideële algemeenbelangacties door rechters daarbij met name waarde te worden gehecht aan het eerste type representativiteitseis (met toepassing van criteria die zien op de geschiktheid van de belangenorganisatie om op te komen voor de litigieuze belangen).

In de Nederlandse literatuur is kritisch gereageerd op de toepasselijkheid en de uitwerking van het representativiteitsvereiste bij de ideële algemeenbelangactie. Het kernpunt van kritiek is dat het criterium niet hanteerbaar is, tot willekeur kan leiden en toegang tot de rechter op oneigenlijke wijze uitholt. Dit alles is met name het geval wanneer criteria worden gehanteerd die betrekking hebben op de relatie van de belangenorganisatie tot de achterban, omdat bij ideële algemeenbelangacties veelal de achterban diffuus is, moeilijk tot niet af te bakenen is of niet kan worden bereikt.

EVRM en het Verdrag van Aarhus

Zowel het EVRM als het Verdrag van Aarhus bevat regels die relevant zijn voor de Nederlandse regels die gelden bij de ontvankelijkheidsbeoordeling in een ideële algemeenbelangactie. De huidige uitwerking van het representativiteitsvereiste lijkt weliswaar niet direct op gespannen voet te staan met het EVRM, maar wél met het Verdrag van Aarhus. Het Verdrag van Aarhus is relevant voor algemeenbelangacties die betrekking hebben op, door het Verdrag van Aarhus bestreken, milieuregels. Met name het hanteren van criteria die betrekking hebben op de relatie van de belangenorganisatie tot de achterban staat op gespannen voet met, in het bijzonder artikel 9 van, het Verdrag van Aarhus, aangezien bij milieubelangen de achterban vaak diffuus en onbepaalbaar is.

Rechtsvergelijking

Alle onderzochte jurisdicties geven belangenorganisaties de bevoegdheid om voor de bescherming van belangen en rechten van anderen een algemeenbelangactie (of een variant daarop) aanhangig te maken. Die bevoegdheid kennen zij op verschillende manieren toe (bijvoorbeeld via generieke regelingen of specifieke domeingebonden regelingen). Ook verschillen de jurisdicties in bij welke rechter belangenorganisaties zulke zaken kunnen aanbrengen (bijv. de bestuursrechter, civiele rechter, constitutionele rechter of de strafrechter). De onderzochte jurisdicties kennen een ruime variëteit aan belangen waarvoor belangenorganisaties kunnen opkomen. Te denken valt aan mogelijkheden op het terrein van arbeid, asiel & migratie, belastingen, constitutionele bevoegdheden van de overheid, consumentenbescherming, corruptie, dierenwelzijn, discriminatie, fundamentele rechten, gegevensbescherming, milieubescherming, klimaatverandering, kinderbescherming, oorlogsmisdaden, verkeersveiligheid en verzekeringen. De jurisdicties verschillen in de omvang van de bevoegdheden van belangenorganisaties. In België, Engeland & Wales, Frankrijk, Nederland en Noorwegen kent men ruimere mogelijkheden toe aan belangenorganisaties dan in Duitsland en Zweden. Een gemeenschappelijke deler tussen alle onderzochte jurisdicties is dat belangenorganisaties algemeenbelangacties ter bescherming van milieu-, klimaat- en consumentenbelangen aanhangig kunnen maken.

Bij de ontvankelijkheidsbeoordeling wordt in alle onderzochte jurisdicties gekeken naar de representativiteit van de procederende belangenorganisatie. Daarbij geldt wel dat niet alle jurisdicties expliciet de term representativiteit hanteren. Desalniettemin hanteren alle jurisdicties ontvankelijkheidscriteria die hier betrekking op hebben. De verdere uitwerking van de notie van representativiteit is evenwel diffuus en verschilt per onderzochte jurisdictie. Wel geldt dat in alle onderzochte jurisdicties criteria worden gehanteerd die zien op de geschiktheid van de procederende belangenorganisatie om op te komen voor de belangen die onderwerp zijn van de procedure. Criteria die zien op de relatie van de belangenorganisatie tot de achterban worden in de meeste jurisdicties gehanteerd. In de jurisdicties waar dit soort criteria worden gehanteerd, worden deze veelal ruimhartig en flexibel toegepast. In die jurisdicties komt echter uiteindelijk het meeste gewicht toe aan criteria die betrekking hebben

op de geschiktheid van de belangenorganisatie om op te komen voor het belang dat centraal staat in de procedure.

English summary

Reasons for the study

In recent years, in the Netherlands various interest organizations have initiated public interest litigation against companies and the government. A key feature of such proceedings is that the litigating organization itself brings a legal action to protect the rights and interests of others. These actions typically seek non-monetary remedies, such as a court order or a declaratory judgment of unlawful conduct. In this report, the term public interest litigation refers to legal proceedings with these characteristics.

Since 1994, the Dutch Civil Code (DCC) has included a legal provision for such procedures, laid down in article 3:305a DCC. On January 1, 2020, the Act on Collective Damages Claims (Wet afwikkeling massaschade in collectieve actie, WAMCA) came into force, allowing for the initiation of collective damages claims. With the entry into force of the WAMCA, article 3:305a DCC was also amended. A major change is the introduction of the representativeness requirement. The revised article 3:305a DCC stipulates that in assessing admissibility in both public interest litigation and collective damages claims, the court must assess whether the litigating interest organization is sufficiently representative, considering its constituency and the scope of the claims represented.

In 2023, a majority of the Dutch House of Representatives requested the government to explore to what extent additional representativeness requirements should be imposed on interest organizations with an ideological purpose (i.e., those cases where the interest group is litigating for the public interest and is not claiming for collective damages) under article 3:305a DCC (Parliamentary Papers II 2022/23, 36169, no. 37 (motion Stoffer et. al.)). The government promised the House that it would investigate how neighboring countries deal with public interest litigation and what (representativeness) requirements they impose on the admissibility of interest organizations in those cases (Parliamentary Papers II 2023/24, 36169, no. 42). This report presents the findings of that research.

Structure of the study

The study consists of three parts. First, the representativeness requirement in the civil code (article 3:305a DCC), parliamentary documents and case law have been studied, as well as Dutch legal literature on the requirement. Second, the implications for the representativeness requirement of the European Convention on Human Rights (ECHR) and the Aarhus Convention have been analyzed. Third, the admissibility assessment in public interest litigation against the government in Belgium, Germany, England & Wales, France, Norway, and Sweden has been studied. In particular, the study focused on how the representativeness of the litigating interest organization is considered and assessed in these jurisdictions. Based on a pre-drafted questionnaire, experts from the jurisdictions prepared reports for each jurisdiction. These reports formed the basis for the comparative legal insights in this study.

Findings

The report distinguishes two types of representativeness requirements. The first type concerns whether the interest organization is suitable to advocate for the interests involved in the procedure. Criteria for this include the organization's track record in pursuing these (or similar) interests, prior litigation, public activities (e.g., media appearances, protests), its duration of existence, and its knowledge and experience regarding the interests at stake. The second type concerns the relationship between the interest organization and its constituency. Criteria here include the number of members (for associations), affiliated supporters (for foundations), the amount of expressed support by the constituency, and the size of the constituency.

The Dutch Context

Article 3:305a DCC and its legislative history provide only limited guidance on how the representativeness requirement should be applied in public interest litigation. However, lower court decisions have developed the requirement further. This elaboration is context-specific, making it difficult to draw general conclusions about the applicable criteria and their relative importance. This situation leads to legal uncertainty.

Nonetheless, it can be observed that judges apply both types of requirements that have been discussed above, i.e., concerning the organization's suitability in advocating for the litigious interests and those regarding its relationship with its constituency. Recently, Dutch courts seem to particularly emphasize the first type.

Dutch legal literature has criticized the application of the representativeness requirement in public interest litigation. The main criticism is that the criterion is unworkable, may lead to arbitrariness, and inappropriately undermines access to justice. This is especially the case when criteria related to the organization’s relationship with its constituency are applied, since in many (ideological) public interest litigation cases the constituency is too diffuse, difficult or impossible to delineate, or cannot be reached.

ECHR and the Aarhus Convention

Both the ECHR and the Aarhus Convention contain provisions relevant to the Dutch rules on admissibility in public interest litigation. While the current interpretation of the representativeness requirement does not appear to conflict directly with the ECHR, it does raise concerns under the Aarhus Convention. This Convention is particularly relevant for public interest litigation concerning environmental matters. The use of criteria regarding the relationship between the interest organization and its constituency is especially problematic under article 9 of the Aarhus Convention, as environmental constituencies are often diffuse and undefined.

Comparative legal analysis

All jurisdictions studied give interest organizations the legal competence to initiate public interest litigation to protect the rights and interests of others. These competences are granted in various ways (e.g., through general provisions or issue-specific regulations). The jurisdictions vary with respect to the competent courts (e.g., civil, administrative, constitutional, or criminal courts).

The jurisdictions offer a wide range of interests that organizations can represent via public interest litigation, such as labor, asylum and migration, taxation, constitutional powers, consumer protection, corruption, animal welfare, discrimination, fundamental rights, data protection, environmental protection, climate change, child protection, protection against war crimes, traffic safety, and insurance. Belgium, England & Wales, France, the Netherlands, and Norway grant broader powers to interest organizations than Germany and Sweden. A commonality across all jurisdictions is that interest organizations can bring public interest litigation in relation to environmental, climate, and consumer law matters.

In all jurisdictions, the admissibility assessment includes some consideration of the representativeness of the litigating interest organization. Not all jurisdictions use the term representativeness explicitly, but they all apply admissibility criteria that relate to it. The elaboration of the concept of representativeness varies between countries. In all jurisdictions, criteria are used to assess the suitability of the organization to advocate for the interests involved in the case. In most jurisdictions, criteria regarding the organization's relationship with its constituency are also used. However, where these are applied, they tend to be interpreted broadly and flexibly. Ultimately, in these jurisdictions, the most weight is given to criteria concerning the suitability of the organization to represent the litigious interests.

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1 Introductie

1.1 Aanleiding

De afgelopen jaren zijn door belangenorganisaties verschillende (civielrechtelijke) algemeenbelangacties tegen bedrijven en de overheid ingesteld. In die rechtszaken vragen zij de civiele rechter onder meer het bedrijf of de overheid te bevelen een onrechtmatig doen of nalaten te stoppen of te voorkomen. Voorbeelden hiervan zijn de *Urgenda*-zaak,[2] de klimaatzaak tegen Shell,[3] de zaak over de levering van F-35 onderdelen aan Israël,[4] over aanhoudende geluidshinder van luchthaven Schiphol,[5] over de vergoeding van anticonceptiemiddelen,[6] over afsluiting van gezinnen met kinderen van drinkwater als gevolg van wanbetaling,[7] over de corona-avondklok,[8] en over het Nederlandse stikstofbeleid.[9] In een aantal gevallen is (een deel van) de vordering(en) van de eisende belangenorganisatie toegewezen, en zijn er rechterlijke bevelen strekkende tot het stoppen of voorkomen van onrechtmatig handelen opgelegd.

Kenmerkend aan dit soort procedures is onder meer dat de procederende belangenorganisatie *zelf* een rechtsvordering instelt om de rechten en belangen van *anderen* te beschermen. Sinds 1994 bevat het Burgerlijk Wetboek (BW) een wettelijke regeling voor deze procedure, neergelegd in artikel 3:305a BW. Met de inwerkingtreding van de Wet afwikkeling massaschade in collectieve actie (WAMCA) is die bepaling in 2020 aangepast. Het huidige artikel 3:305a lid 1 BW bepaalt dat een stichting of vereniging met volledige rechtsbevoegdheid een rechtsvordering kan instellen die strekt tot bescherming van gelijksoortige belangen van andere personen, voor zover zij deze belangen ingevolge haar statuten behartigt en deze belangen voldoende zijn gewaarborgd. Lid 2 bepaalt onder meer dat de belangen van de personen tot bescherming van wier belangen de rechtsvordering strekt, voldoende zijn gewaarborgd, wanneer de rechtspersoon als bedoeld in lid 1, voldoende representatief is, gelet op de achterban en de omvang van de vertegenwoordigde vorderingen. Een belangrijke wijziging die de WAMCA in 2020 met zich bracht voor de algemeenbelangactie is de

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2 HR 20 december 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, m.nt. J. Spier; *AB* 2020/24, m.nt. G.A. van der Veen & C.W. Backes (*Staat/Urgenda*).

3 Hof Den Haag 12 november 2024, ECLI:NL:GHDHA:2024:2099, *MenR* 2025/12, m.nt. T.R. Bleeker; *JM* 2025/5, m.nt. W.Th. Douma; *AA*20250050, m.nt. S.M. Bartman; *JA* 2025/27, m.nt. R.E. Kautz; *JOR* 2025/81, m.nt. M.J. Faber (*Shell/Milieudefensie*).

4 Hof Den Haag 12 februari 2024, ECLI:NL:GHDHA:2024:191, *AB* 2024/132, m.nt. L.M. Nijenhuis & K. de Goede; *O&A* 2024/25, m.nt. G. Cornelisse (*Oxfam Novib ea/Staat*).

5 Hof Den Haag 25 februari 2025, ECLI:NL:GHDHA:2025:195 (*Staat/Stichting Recht op Bescherming tegen Vliegtuighinder*).

6 HR 21 februari 2025, ECLI:NL:HR:2025:321 (*Bureau Clara Wichmann ea/Staat*).

7 Hof Den Haag 19 april 2024, ECLI:NL:GHDHA:2024:363, *AB* 2024/209, m.nt. K.F.M. Klep (*Vereniging Nederlands Juristen Comité voor de Mensenrechten/Staat*).

8 HR 18 maart 2022, ECLI:NL:HR:2022:380, *NJ* 2022/302, m.nt. L.A.D. Keus, *AB* 2022/161, m.nt. R. Stijnen; *NJ* 2022/302, m.nt. L.A.D. Keus (*Stichting Viruswaarheid.nl ea/Staat*).

9 Rb. Den Haag 22 januari 2025, ECLI:NL:RBDHA:2025:578, *JM* 2025/37, m.nt. R. Olivier; *JA* 2025/39, m.nt. S. van Deursen; *TvAR* 2025/8203, m.nt. R. Ligtvoet; *JB* 2025/73, m.nt. C.N.J. Kortmann & S. Goldstein; *MenR* 2025/36, m.nt. C.W. Backes & E.R. de Jong; *VGR* 2025/7, p. 27, m.nt. E. Haverkamp (*Greenpeace/Staat*).

introductie in de wettekst van het ontvankelijkheidsvereiste dat de belangenorganisatie voldoende representatief is.

In het parlement is de afgelopen jaren discussie ontstaan over de hiervoor beknopt weergegeven mogelijkheid die is toegekend aan belangenorganisaties om een civiele algemeenbelangactie te starten. Die discussie heeft zich in het bijzonder gericht op algemeenbelangacties tegen de overheid en de daarbij gehanteerde criteria voor de ontvankelijkheidsbeoordeling. In 2023 heeft een meerderheid van de Tweede Kamer een motie van de Kamerleden Stoffer, Van der Plas en Eerdmans (motie Stoffer c.s.) aangenomen. In die motie wordt de regering verzocht om te 'verkennen in hoeverre voor belangenorganisaties met een ideëel doel op grond van artikel 3:305a BW nadere vereisten met het oog op de representativiteit gesteld moeten worden'.[10] Een van de redenen voor de motieopstellers om te kijken of nadere eisen aan de representativiteit van procederende belangenorganisaties kunnen worden gesteld, is gelegen in de, in de ogen van de opstellers, geringe representativiteit van de procederende organisaties en de aanzienlijke maatschappelijke impact die algemeenbelangacties kunnen hebben. De Minister voor Klimaat en Energie heeft aanvaarding van de motie ontraden. De motie is desondanks aangenomen met 81 stemmen vóór. Bij brief van 17 april 2023 heeft de Minister voor Rechtsbescherming een nadere kabinetsreactie op de motie gegeven. In die brief wijst hij onder meer op het belang van toegang tot de rechter en de rol van belangenorganisaties in het beschermen van stemloze belangen.[11] Op 16 januari 2024 heeft de Minister schriftelijke vragen naar aanleiding van de reactie op de motie beantwoord.[12] Op 7 februari 2024 is een nieuwe motie ingediend door de Kamerleden Van Dijk, Eerdmans, Helder en Ellian, waarin wordt geconstateerd dat de motie Stoffer c.s. 'tot op heden niet is uitgevoerd' en wordt de regering verzocht de Kamer binnen zes weken te informeren over de uitvoering van de motie Stoffer c.s.[13] Bij brief van 4 april 2024 bevestigde de Minister voor Rechtsbescherming onder meer dat in de evaluatie van de WAMCA tevens een rechtsvergelijking wordt verricht naar de vraag hoe ons omringende landen omgaan met ideële algemeenbelangacties en welke (representativiteits)eisen zij stellen aan deze organisaties.[14] In oktober 2024 heeft het WODC op verzoek van het Ministerie van Justitie en Veiligheid de opdracht tot uitvoering van de WAMCA-evaluatie toegewezen aan een samenwerkingsverband van rechtswetenschappers van de Universiteit Utrecht, Erasmus Universiteit Rotterdam en de Radboud Universiteit Nijmegen. Het onderzoek is gesplitst in (1) de WAMCA-evaluatie als zodanig en (2) de rechtsvergelijking ten aanzien van hoe ons omringende landen omgaan met ideële algemeenbelangacties en welke (representativiteits)eisen zij stellen aan belangenorganisaties in het kader van de

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10 *Kamerstukken II* 2022/23, 36169, nr. 37 (Wijziging van de Klimaatwet, Gewijzigde motie van de leden Stoffer (SGP), van der Plas (BBB) en Eerdmans (JA21) ter vervanging van die gedrukt onder nr. 36, vergaderjaar 2022-2023, 21 februari 2023). Die motie is overigens onderwerp van stevige kritiek geweest in de rechtsliteratuur, zie hierna par. 2.4.

11 *Kamerstukken II* 2022/23, 36169, nr. 39 (Brief van de Minister voor Rechtsbescherming)

12 *Kamerstukken II* 2023/24, 36169, nr. 40 (VSO).

13 *Kamerstukken II* 2023/24, 36169, nr. 41 (Motie lid Van Dijk (SGP) c.s.).

14 *Kamerstukken II* 2023/24, 36169, nr. 42 (Brief van de Minister voor Rechtsbescherming).

ontvankelijkheidsbeoordeling. Beide deelonderzoeken zijn begeleid door dezelfde begeleidingscommissie (zie de colofon aan het einde van dit rapport). In dit rapport vindt u de bevindingen van deze rechtsvergelijking.

1.2 Probleemstelling

In dit rechtsvergelijkende onderzoek naar de (representativiteits)eisen die gesteld worden aan belangenorganisaties in algemeenbelangacties staat de volgende probleemstelling centraal.

Hoe verhouden de Nederlandse mogelijkheden en procesrechtelijke regels voor belangenorganisaties om een algemeenbelangactie tegen de overheid te starten zich tot die mogelijkheden en procesrechtelijke regels in België, Duitsland, Engeland en Wales, Frankrijk, Noorwegen en Zweden alsmede het EVRM en het Verdrag van Aarhus?

Ter beantwoording van deze probleemstelling zijn de volgende deelvragen gehanteerd:

1. Wat zijn de regels voor belangenorganisaties om een algemeenbelangactie te starten ex artikel 3:305a BW?
2. Hoe wordt in de rechtspraak invulling gegeven aan het representativiteitsvereiste in algemeenbelangacties en hoe wordt in de literatuur over dat vereiste gedacht?
3. Wat zijn de mogelijkheden tot het initiëren van een algemeenbelangactie in België, Duitsland, Engeland en Wales, Frankrijk, Noorwegen en Zweden?
4. Aan wie is de mogelijkheid tot het initiëren van een algemeenbelangactie toegekend (belangenorganisaties, public prosecutor, individuen etc.) in deze landen?
5. Indien verschillende actoren een algemeenbelangactie kunnen initiëren: bestaan er regels aangaande samenloop?
6. Welke rechter is/rechters zijn competent om te beslissen in algemeenbelangacties in deze landen? Is dat de civiele rechter, de bestuursrechter en/of de constitutionele rechter? En maakt het uit als er meerdere competente rechters zijn?
7. Wat zijn de procesrechtelijke regels voor individuen resp. belangenorganisaties om een algemeenbelangactie te starten in deze landen? Denk daarbij aan ontvankelijkheidsvereisten (incl. representativiteitseisen), regels aangaande justitiability, en belangen waarvoor in rechte kan worden opgekomen?
8. Wat zijn de relevante regels in het EVRM omtrent de toegang tot de rechter van belangenorganisaties in algemeenbelangacties?
9. Wat zijn de relevante regels in het Verdrag van Aarhus omtrent de toegang tot de rechter van belangenorganisaties in algemeenbelangacties?
10. Hoe verhouden deze regels zich tot het regime van artikel 3:305a BW?

11. Maakt het voor de bovenstaande antwoorden uit of de algemeenbelangactie is gestart tegen een private partij of tegen een overheid(sorgaan)?[15]
12. Maakt het voor de bovenstaande antwoorden uit of de algemeenbelangactie tegen een overheid(sorgaan) is gestart door een individu of een belangenorganisatie?

Het doel van dit onderzoek is om inzicht te krijgen in de verschillen en overeenkomsten in de ontvankelijkheidsbeoordeling in algemeenbelangacties tegen de overheid in de geselecteerde jurisdicties, en dan in het bijzonder op welke wijze de representativiteit van de procederende belangenorganisatie bij die beoordeling wordt betrokken. De probleemstelling en de deelvragen zijn breed geformuleerd.[16] Dat is gedaan om een zo volledig mogelijk beeld te krijgen van de ontvankelijkheidsbeoordeling in de geselecteerde jurisdicties. Desalniettemin zijn sommige deelvragen, zo blijkt uit het onderzoek, minder relevant voor die ontvankelijkheidsbeoordeling. Hierna behandelen we de uitkomsten van het onderzoek die relevant zijn voor de ontvankelijkheidsbeoordeling en de rol die representativiteit van de belangenorganisatie daarbij speelt.

1.3 Methodologie & geselecteerde jurisdicties

In het onderzoek is een functionele rechtsvergelijking uitgevoerd,[17] met als primair doel om de overeenkomsten en verschillen tussen de onderzochte jurisdicties in de bevoegdheden van belangenorganisaties om algemeenbelangacties aan te brengen en, in het bijzonder, de daarbij geldende (representativiteits) eisen in de ontvankelijkheidsbeoordeling in kaart te brengen. Daarbij zijn, naast Nederland, de volgende jurisdicties onderzocht; België, Duitsland, Engeland & Wales, Frankrijk, Noorwegen en Zweden.

Deze jurisdicties zijn allereerst gekozen vanwege het feit dat ze de mogelijkheden van belangenorganisaties om in rechte op te komen ter bescherming van de belangen en rechten van anderen, op uiteenlopende wijze hebben vormgegeven (zie nader par. 4). Daarmee kunnen ze dus een variëteit aan inzicht bieden. Dit blijkt alleen al uit het feit dat in deze jurisdicties belangenorganisaties op uiteenlopende terreinen zelf in rechte kunnen opkomen voor de bescherming van de belangen van anderen (onder meer op het terrein van arbeid, asiel & migratie, belastingen, constitutionele bevoegdheden van de overheid, consumentenbescherming, corruptie, dierenwelzijn, discriminatie, fundamentele rechten,

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15 Het onderzoek ziet op algemeenbelangacties tegen de overheid. We hebben deze vraag gesteld om in kaart te brengen of het gegeven dat de overheid aangesproken wordt, invloed heeft op de ontvankelijkheidsbeoordeling in de onderzochte jurisdicties. Dat is niet het geval.

16 Ook is het begrip overheid breed opgevat en niet nader afgebakend, met dien verstande dat het onderzoek zich primair heeft toegespitst op zaken tegen de nationale overheid. We hebben ons hiertoe echter niet beperkt.

17 Kern hiervan is dat een bepaald fenomeen – in dit geval het feit dat belangenorganisaties procederen tegen de overheid ten behoeve van de bescherming van rechten en belangen van anderen – als uitgangspunt wordt genomen en dat vervolgens wordt onderzocht hoe de geselecteerde rechtsstelsels omgaan met dit fenomeen. Zie hierover nader R. Michaels, 'The functional method of comparative law', in: M. Reimann & Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (2nd ed.), OUP 2019, pp. 346-389.

gegevensbescherming, milieubescherming, klimaatverandering, kinderbescherming, oorlogsmisdaden, verkeersveiligheid, verzekering etc.).

Voorts zijn ze gekozen omdat het deels ons omringende jurisdicties betreft.[18] Daarnaast vormen het Duitse, Franse en Engelse recht de drie belangrijkste rechtsfamilies in Europa. Frankrijk, en Engeland & Wales vallen daarbij overigens op met (relatief) ruime mogelijkheden voor belangenorganisaties, terwijl in Duitsland die mogelijkheden beperkter zijn.[19] Noorwegen en Zweden zijn gekozen vanwege de uiteenlopende wijze waarop zij bevoegdheden aan belangenorganisaties toekennen om zelf rechtszaken aan te brengen ter behartiging van de belangen van anderen. Noorwegen kent een generieke wettelijke bepaling die belangenorganisaties de bevoegdheid geeft om in rechte op te komen ter behartiging van de belangen van anderen, en kent een lange (en sterke) traditie op dit vlak,[20] terwijl men in Zweden een minder sterke traditie kent. Behalve dat België een van de ons omringende jurisdicties is, kent het Belgische systeem aspecten die vergelijkbaar zijn met zowel het Franse als Nederlandse systeem.[21] Ook in België kent men, net als in Frankrijk, Engeland & Wales en Noorwegen, relatief ruime mogelijkheden aan belangenorganisaties toe.[22] Vanwege tijdsredenen en budgettaire redenen is de rechtsvergelijking beperkt tot Europese jurisdicties. Niet-Europese jurisdicties die bekend staan om de mogelijkheden die zij bieden aan onder meer belangenorganisaties om op te komen voor de belangen van anderen, zoals India, de Verenigde-Staten en Zuid-Afrika, zijn niet meegenomen in dit onderzoek.

Het rechtsvergelijkende onderzoek is als volgt uitgevoerd. Voor de hiervoor genoemde jurisdicties zijn in totaal acht rapporteurs bereid gevonden om een vooraf opgestelde questionnaire (in het Engels) te beantwoorden. De desbetreffende rapporteurs zijn benaderd vanwege hun procesrechtelijke expertise en hun expertise op het terrein van *public interest litigation* (zie par. 1.4 voor de toelichting op deze term).[23] De questionnaire is opgenomen als bijlage 1 bij dit rapport. De in paragraaf 1.2 opgenomen probleemstelling en deelvragen vormden de basis voor de questionnaire. De questionnaire is vastgesteld door het onderzoeksteam en is positief ontvangen door de begeleidingscommissie.

De beantwoording van de questionnaire door de rapporteurs heeft geresulteerd in zes Engelstalige jurisdictierapporten, die eveneens als bijlage bij dit rapport zijn gevoegd (nr. 2-7). Op 28 februari 2025 vond aan de Universiteit Utrecht een eendaags seminar plaats waaraan de zowel de onderzoekers als de rapporteurs deelnamen. Dat seminar stond in het teken van het

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18 Zie voor de achtergrond van dit selectiecriterium par. 1.1.

19 Zie par. 4.4.

20 Rapport Noorwegen, p. 3.

21 De Belgische klimaatzaak kent bijvoorbeeld sterke overeenkomsten met de *Urgenda*-zaak. Zie nader Rapport België, p. 4; E.L.L. De Clerc, S. Dethier & P. Gillaerts, 'Klimaatrechtspraak na Urgenda, de Belgische klimaatzaak en KlimaSeniorinnen: het blijft erom spannen', *Nederlands Tijdschrift voor Burgerlijk Recht* 2025/3.

22 Bij de selectie van de te onderzoeken jurisdicties hebben we mede gekeken naar de (ruimere en/of beperktere) mogelijkheden die in de onderzochte jurisdicties bestaan voor belangenorganisaties om te procederen ter bescherming van de belangen en rechten van anderen.

23 Het Duitse rapport is geschreven door één rapporteur, maar is in samenspraak met twee andere rapporteurs tot stand gekomen.

verschaffen van verheldering en toelichting op de rapporten en het identificeren en duiden van de verschillen en overeenkomsten tussen de jurisdicties. Om de discussie te stroomlijnen zijn tijdens een deel van het seminar de rapporteurs twee casus voorgelegd. Die casus zijn bijgevoegd als bijlage bij dit rapport (bijlage 8). De casus hebben we vervolgens aan de hand van de questionnaire en jurisdictierapporten besproken, met als primair doel om verschillen en overeenkomsten in de jurisdicties te identificeren en te analyseren. Ook is aan de rapporteurs voorafgaand aan het seminar een Engelse vertaling van artikel 3:305a BW (redactie 1994) en artikel 3:305a BW (redactie 2020) ter beschikking gesteld. Aan het einde van het seminar is voorts gesproken over de algemene inzichten die naar voren kwamen uit de rapporten en het seminar. Naast het opstellen van een jurisdictierapport en participatie in het seminar, is alle rapporteurs verzocht een in het Engels vertaalde versie van dit onderzoeksrapport te controleren, zodat geverifieerd kon worden of inzichten uit hun jurisdictierapporten correct zijn weergegeven.

Ten slotte, geven zowel het Europees Verdrag voor de Rechten van de Mens (EVRM) als het Verdrag betreffende toegang tot informatie, inspraak in besluitvorming en toegang tot de rechter inzake milieuaangelegenheden (Verdrag van Aarhus), regels die relevant zijn voor de ontvankelijkheidsbeoordeling bij algemeenbelangacties. In aanvulling op de questionnaire hebben we zelf een verkennende literatuur- en rechtspraakstudie uitgevoerd naar de betekenis voor artikel 3:305a BW van het Verdrag van Aarhus en het EVRM, waarbij in het kader van het EVRM de nadruk lag op de uitspraak van het Europese Hof voor de Rechten van de Mens (EHRM) in de klimaatzaak *KlimaSeniorinnen/Zwitserland*.

1.4 Gehanteerde concepten & definities

Met het oog op het onderzoek is het van belang een duidelijke, onderscheidende en afgebakende werkdefinitie te hanteren. Een moeilijkheid daarbij is dat in zowel de internationale als nationale literatuur geen eenduidige definitie en/of conceptualisering bestaat van (het equivalent) van de Nederlandse (ideële) algemeenbelangactie. Bovendien, zo zal nader blijken in paragraaf 4, verschillen de jurisdicties in de mogelijkheden die ze bieden aan belangenorganisaties om in rechte op te komen voor de belangenbescherming van anderen. Zij hanteren daarbij hun eigen terminologie die sterk is ingegeven door de systematiek van de desbetreffende jurisdictie. Ter illustratie: in Duitsland spreekt men van *Verbandsklagen*, in Engeland & Wales vinden dit soort procedures plaats in de context van *judicial review*, in Frankrijk spreekt men van *Les actions en justice au-delà de l'intérêt personnel* en in Noorwegen van *representative søksmål*.

Om deze reden is er voor gekozen om niet te werken met een vastomlijnde definitie, maar om de rapporteurs te vragen naar rechtszaken met een drietal onderscheidende karakteristieken. Omdat het onderzoek is uitgezet in de context van de Nederlandse algemeenbelangactie, hebben we (mede indachtig lid 6 van artikel 3:305a BW)[24] ervoor gekozen om de

[24] Zie verder par. 2.2.

karakteristieken van de Nederlandse civiele (ideële) algemeenbelangactie centraal te stellen in het onderzoek. Derhalve richten de questionnaire, de jurisdictierapporten, en de analyse hiervan, zich op de bevoegdheden van belangenorganisaties in de verschillende jurisdicties:

1) om *zelf* een rechtsvordering in te stellen;
2) ter bescherming van belangen en rechten *van anderen*, met de nadruk op, maar niet beperkt tot, diffuse en moeilijk individualiseerbare belangen;
3) door middel van het verzoeken van niet-geldelijke remedies, zoals een rechterlijk bevel en/of een verklaring voor recht van onrechtmatig handelen.[25]

Deze omschrijving omvat rechtszaken die belangenorganisaties aanhangig kunnen maken ter bescherming van uiteenlopende belangen (milieubelangen, economische belangen en gezondheidsbelangen etc.). Alle rapporteurs hebben deze omschrijving meegenomen in de uitwerking van hun jurisdictierapport. Uit de rapporten komt naar voren dat deze karakteristieken voor het analyseren van de verschillende jurisdicties bruikbaar waren. Tijdens de expert-bijeenkomst is dit bevestigd.

In het onderzoek is de Engelse term *public interest litigation* (PIL) gehanteerd.[26] Wanneer wij die term hierna gebruiken doelen wij op rechtszaken met de hiervoor drie benoemde karakteristieken.

1.5 Afbakening

Het onderzoek is op verschillende manieren afgebakend.

Allereerst betreft het onderzoek een scan van de mogelijkheden van belangenorganisaties in PIL-zaken in de onderzochte jurisdicties. In de rapporten wordt ingegaan op het geldende recht in de desbetreffende jurisdicties en in beperkte mate op de discussiepunten in de literatuur daarover. De rapporteurs baseren zich hierbij op hun kennis van hun jurisdictie en de toepasselijke rechtspraak.[27]

Er bestaan, zo zal blijken, belangrijke verschillen tussen de onderzochte jurisdicties, onder meer in relatie tot de bevoegdheden die aan belangenorganisaties zijn toegekend om PIL-zaken aanhangig te maken, de wijze van de ontvankelijkheidsbeoordeling en de toepasselijke

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25 Regels die specifiek zien op schadevergoedingszaken zijn aldus buiten beschouwing gelaten.

26 Daarbij realiseren we ons dat de definitie van *public interest litigation* zoals die ten grondslag ligt aan dit rapport, beperkter is dan gangbaar is in de internationale en nationale literatuur. Zie voor een bespreking van het begrip, en daaraan te relateren begrippen, onder meer Rapport België, p. 1; Rapport Engeland & Wales, p. 1-5; Rapport Frankrijk, p. 2; Rapport Noorwegen, p. 1. Zie verder A. Maglica, 'Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe', *Erasmus Law Review*, 2023, nr. 2, pp. 71-85. Dit verschil is overigens in methodologische zin niet problematisch, aangezien voor ons met name van belang is om duidelijk te krijgen welk type zaken we bestuderen, en minder noodzakelijk is om daarop een sluitende definitie te plakken.

27 Uitgebreide rechtspraakanalyses zijn in het kader van dit onderzoek niet uitgevoerd door de rapporteurs – zodat eventuele ontwikkelingen, onduidelijkheden of tegenstrijdigheden in de uitwerking van het geldende recht in de rechtspraak slechts zijdelings naar voren zijn gekomen. Een uitzondering hierop vormt het Rapport voor Engeland & Wales, aangezien in die jurisdictie de ontvankelijkheidsbeoordeling primair via rechtersrecht is vormgegeven.

ontvankelijkheidsvereisten. Hieruit vloeit de tweede afbakening voort dat men de gevonden overeenkomsten en verschillen, en de mogelijke relevantie daarvan voor de Nederlandse context, steeds moet bezien tegen de achtergrond van de gehele systematiek en context van de onderzochte jurisdicties. Anders gezegd, specifieke regels en praktijken uit de onderzochte jurisdictie kunnen niet getransformeerd worden naar de Nederlandse context zonder daarbij ook de systematiek van de desbetreffende jurisdictie te betrekken.

Een derde afbakening van het onderzoek is dat de rapporteurs is gevraagd naar de *juridische bevoegdheden* van belangenorganisaties om PIL-zaken aanhangig te maken, en de daarbij geldende ontvankelijkheidsregels. Er is geen kwantitatief onderzoek verricht, ook niet door de rapporteurs, naar bijvoorbeeld een toe- of afname in het aantal PIL-zaken, de rechtsgebieden en/of beleidsdomeinen waarin deze zaken zich het meeste of minste voordoen en eventuele slagingspercentages. Het voorliggende onderzoek biedt dus enkel inzicht in de juridische systematiek van de onderzochte jurisdicties (zie nader par. 3.4).[28]

Als vierde punt van afbakening geldt dat sommige hieronder te bespreken regels een Europeesrechtelijke herkomst hebben. Dat geldt in het bijzonder op het gebied van het consumentenrecht. Wij hebben de rapporteurs *niet* gevraagd om aan te geven hoe de nationale regels zich verhouden tot dergelijke Europeesrechtelijke regels. Zo hebben we niet specifiek gevraagd naar de implicaties van de Richtlijn representatieve vorderingen voor het nationale recht.[29] Mede om die reden duiden wij de inzichten uit de rapporten *niet* in het licht van hun Europeesrechtelijke (of mogelijk internationaal-verdragsrechtelijke) herkomst.[30] Een eerste uitzondering vormt het Verdrag van Aarhus; in de questionnaire is een vraag opgenomen naar de betekenis van dat verdrag voor de toegang van belangenorganisaties tot de nationale rechter. Een tweede uitzondering vormt het EVRM, en dan in het bijzonder de betekenis van de uitspraak van het EHRM in *KlimaSeniorinnen/Zwitserland* voor de mogelijkheden van belangenorganisaties om klimaatmitigatiezaken aan te brengen.

Ten slotte ziet dit onderzoek op de wijze waarop toegang tot de rechter van belangorganisaties is vormgegeven in de desbetreffende jurisdicties, en dan in het bijzonder op de toepasselijke ontvankelijkheidsvereisten. De controverse over de (legitimiteit van de) algemeenbelangactie kan zich echter richten op verschillende aspecten van de algemeenbelangactie. Mede om de verschillende punten van controverse die spelen te identificeren maken Van Gestel en Loth een onderscheid tussen drie fasen van de algemeenbelangactie; de input-, throughput- en de output-fase.[31] De input-fase ziet in wezen op de toegang tot de rechter, en draait om de vraag wie, wanneer en voor welke belangen bij de civiele rechter kan opkomen. De

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28 Wel blijkt uit de rapporten dat wanneer de mogelijkheden tot het aanbrengen van PIL-zaken beperkter zijn, belangenorganisaties op andere wijze het recht inschakelen om te komen tot de gewenste belangenbescherming. Zie par. 4.4.

29 Richtlijn (EU) 2020/1828 van het Europees Parlement en de Raad van 25 november 2020 betreffende representatieve vorderingen ter bescherming van de collectieve belangen van consumenten en tot intrekking van Richtlijn 2009/22/EG [2020] PbEU L409/1.

30 Soms ligt dat wel voor de hand, met name op het gebied van het consumentenrecht.

31 R.A.J. van Gestel & M. Loth, 'Het beleid van de rechter in public interest zaken', *Rechtstreeks* 1/2022.

ontvankelijkheidsregels van artikel 3:305a BW, en dan met name de discussie over het representativiteitsvereiste, staan centraal in deze fase. Het voorliggende rapport richt zich op deze fase. De andere twee fasen zijn geen onderdeel van de centrale onderzoeksvraag.

De throughput-fase ziet op de feitelijke en juridische beoordeling door de rechter van het aan de overheid (of het bedrijf) gemaakte verwijt.[32] Daarbij is het toepasselijke juridische kader van belang en de wijze waarop de rechter dat kader toepast op de voorliggende feiten (denk aan de mate van beleidsvrijheid die daarin voor de overheid ligt besloten, hoe indringend de rechter het overheidsbeleid toetst en hoe en in welke mate hij daarbij doet aan rechtsontwikkeling). De output-fase ziet op de naleving van rechtsplichten en rechterlijke uitspraken en (de inzet van) het beschikbare remedie-arsenaal in dat verband (bijvoorbeeld een gebod- of verbod, een verklaring voor recht, dwangsommen etc.).

Voor een goed begrip van de algemeenbelangactie in Nederland – juist ook met het oog op de discussie over de wenselijkheid en legitimiteit daarvan – en andere jurisdicties is noodzakelijk dat óók wordt gekeken naar de onrechtmatigheidstoets en het remedie-arsenaal (en de wijze waarop de rechter invulling geeft aan beide aspecten). We hebben die aspecten zijdelings uitgevraagd in de questionnaire, maar slechts voor zoverre deze elementen relevant zijn voor de ontvankelijkheidsbeoordeling, de input-fase.

Het onderzoek is afgerond op 6 mei 2025.

1.6 Leeswijzer

Hieronder behandelen we eerst de Nederlandse context, waarbij we ingaan op het representativiteitsvereiste in de wet, wetsgeschiedenis, rechtspraak en literatuur (par. 2). Daarna behandelen we de implicaties van het Verdrag van Aarhus en het EVRM voor de ontvankelijkheidsbeoordeling in Nederlandse civiele algemeenbelangacties (par. 3). Vervolgens bespreken we de bevindingen uit de rechtsvergelijking. We bespreken eerst de bevoegdheden die belangenorganisaties hebben in de verschillende jurisdicties om PIL-zaken aanhangig te maken, alsmede hoe die mogelijkheden zijn vormgegeven (par. 4). Daarna bespreken we hoe in de onderzochte jurisdicties de ontvankelijkheidsbeoordeling plaatsvindt (par. 5). Hierop voortbouwend behandelen we of, en zo ja hoe in die ontvankelijkheidsbeoordeling de representativiteit van de procederende belangenorganisatie wordt meegenomen (par. 6). De rechtsvergelijkende paragrafen sluiten telkens af met een bespreking van de overeenkomsten en verschillen tussen de onderzochte jurisdicties. We sluiten af met een conclusie met daarin de kernbevindingen van dit onderzoek (par. 7).

[32] Van Gestel & Loth 2022, p. 25.

2 Nederlandse context: artikel 3:305a BW

2.1 Introductie

Hierna gaan we in op de beoordeling van de representativiteit van een procederende belangenorganisatie in een algemeenbelangactie in Nederland. Eerst wordt de wetsgeschiedenis van het huidige artikel 3:305a BW besproken (par. 2.2). Vervolgens komt de uitwerking van het representativiteitsvereiste in de rechtspraak aan de orde (par. 2.3) en worden reacties uit de literatuur opgetekend (par. 2.4). Op basis van de rechtspraak en literatuur wordt een onderscheid gemaakt tussen twee typen representativiteitseisen (par. 2.5). Dat onderscheid wordt in paragraaf 6.4 gebruikt om de rechtsvergelijkende inzichten te categoriseren. Afgesloten wordt met een bespreking van de belangrijkste bevindingen (par. 2.6).

2.2 Het representativiteitsvereiste ex artikel 3:305a BW

Bij wet van 6 april 1994[33] is in artikel 3:305a BW een wettelijke regeling voor de collectieve actie in het BW opgenomen.[34] Vanaf 1 juli 1994[35] kan een 305a-organisatie een eigen rechtsvordering instellen tot bescherming van de gelijksoortige belangen van anderen c.q. haar achterban. Hiermee wordt aan belangenorganisaties de bevoegdheid (*ius agendi*) verleend om rechtsvorderingen in te stellen om daarmee de materiële rechten van anderen geldend te maken. Tot 1 januari 2020 konden 305a-organisaties géén rechtsvordering tot schadevergoeding in geld instellen.[36] Op 1 januari 2020 is de Wet afwikkeling massaschade in collectieve actie (WAMCA) in werking getreden.[37] De WAMCA heeft het mogelijk gemaakt voor organisaties om een rechtsvordering tot schadevergoeding in te stellen; met haar inwerkingtreding is de beperking op dit punt in artikel 3:305a lid 3 BW vervallen.

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33 *Stb.* 1994, 269.

34 Zie voor overzichtswerken van de collectieve actie naar huidig recht: B.M. Katan, J.H. Lemstra & W.H. van Boom, *Handboek Massaschade*, Deventer: Kluwer 2025 (te verschijnen sept 2025); N. Boomsma & S. Timerman (red.), *Collectieve acties in de financiële sector* (Financieel Juridische Reeks deel 25), Zutphen: Uitgeverij Paris 2024; M. Goorts & T. Mimpen, *Procesrechtelijke aspecten van de Wet afwikkeling massaschade in collectieve actie (WAMCA)*, Zutphen: Paris 2024; W.H. van Boom, 'WCA → WCAM → WAMCA', *TvC* 2019, afl. 4, p. 154 e.v.

35 *Stb.* 1994, 391.

36 Art. 3:305a lid 3 laatste zin (oud) BW. Op grond van art. 6:103 tweede zin BW kan de rechter op vordering van de benadeelde schadevergoeding in andere vorm dan betaling van een geldsom toekennen. Schadevergoeding in natura dient ertoe de schuldenaar niet alleen financieel, maar ook feitelijk in een vergelijkbare toestand te brengen als die waartoe correcte nakoming dan wel het achterwege blijven van de onrechtmatige daad had geleid.

37 *Stb.* 2019, 130, laatstelijk gewijzigd bij Implementatiewet richtlijn representatieve vorderingen voor consumenten (*Stb.* 2022, 459), die op 25 juni 2023 in werking trad. Met deze wetswijziging werd onder meer de mogelijkheid om als Nederlandse stichting of vereniging via de Minister voor Rechtsbescherming tot bevoegde instantie als bedoeld in art. 4 lid 3 Richtlijn (EU) 2020/1828 te worden aangewezen, in art. 3:305e BW geïntroduceerd. Deze organisaties kunnen dan in een andere EU-lidstaat een collectieve procedure voor consumentenbelangen instellen zonder dat de bevoegde buitenlandse rechter aan een aantal governance-gerelateerde ontvankelijkheidsvoorwaarden mag toetsen; toetsing van de ontvankelijkheid van de collectieve vordering zelf blijft onverlet.

Met de inwerkingtreding van de WAMCA, en de mogelijkheid tot het instellen van een collectieve schadevergoedingsactie, zijn ook de ontvankelijkheidsvereisten van artikel 3:305a BW aangepast. In artikel 3:305a lid 2 BW is onder meer vastgelegd dat de rechter bij de ontvankelijkheidsbeoordeling in een (ideële) algemeenbelangactie en collectieve schadevergoedingsactie beoordeelt of de procederende belangenorganisatie voldoende representatief is, gelet op de achterban en de omvang van de vertegenwoordigde vorderingen. Bij de totstandkoming van de WAMCA is door de wetgever onderkend dat de (vanwege de geïntroduceerde mogelijkheid tot een collectieve schadevergoedingsactie) aangescherpte eisen in artikel 3:305a BW te streng kunnen zijn voor belangenorganisaties die niet uit zijn op een schadevergoeding maar een ideële actie willen instellen. Het gaat dan om rechtsvorderingen die worden ingesteld met een ideëel doel en een zeer beperkt financieel belang.[38] In het oorspronkelijke wetsvoorstel kon de rechter in die gevallen bepalen dat een organisatie niet hoefde te voldoen aan de eisen van de leden 2, 3 en 5 van artikel 3:305a BW, zodat onder meer het representativiteitsvereiste niet gold. Tijdens de parlementaire behandeling is lid 6 uiteindelijk aangescherpt door een amendement van het Kamerlid Van Gent.[39] Onder het gewijzigde lid 6 moeten belangenorganisaties ook bij een ideële algemeenbelangactie voldoen aan het representativiteitsvereiste uit de aanhef van lid 2 (en aan onderdeel f van lid 2) en aan artikel 3:305a lid 3 BW.[40] In 1994, werd overigens nog afgezien van het neerleggen van een representativiteitsvereiste: het vereiste zou onder meer niet hanteerbaar zijn en rechtsonduidelijkheid in de hand werken (zie ook hieronder par. 2.4).[41]

Omdat het representativiteitsvereiste met name is opgesteld met de collectieve schadevergoedingsactie in het achterhoofd, rijst de vraag hoe dit vereiste moet worden toegepast in de andere context van de ideële algemeenbelangactie. Het huidige artikel 3:305a BW geeft geen nadere omschrijving of definitie van de term 'representatief'. Evenmin bevat de wettekst gezichtspunten of criteria die gehanteerd moeten worden bij de nadere uitwerking

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38 Voor de toepasselijkheid van het lichte ontvankelijkheidsregime geldt als voorwaarde dat de in de collectieve actie ingestelde vordering niet mag strekken tot schadevergoeding in geld (art. 3:305a lid 6 tweede zin BW). Ingestelde vorderingen waaronder een verklaring voor recht mogen ook niet een opmaat zijn tot schadevergoeding in geld of schadevaststelling. *Kamerstukken II* 2016/17, 34608, nr. 3 (MvT), p. 29; *Kamerstukken II* 2017/18, 34608, nr. 6, p. 20-21 (NnV).

39 *Kamerstukken II* 2018/19, 34608, nr. 14 (Amendement Van Gent cs).

40 *Kamerstukken II* 2018/19, 34608, nr. 14 (Amendement Van Gent cs).

41 De staatssecretaris vond het destijds een "nauwelijks nader inhoud te geven eis." Zie *Kamerstukken I* 1993/94, 22486, nr. 103b, p. 3 (MvA); *Kamerstukken II* 1991/1992, 22486, nr. 3, p. 21 (MvT). Dit laat onverlet dat onder het tot 2020 geldende ontvankelijkheidsregime door de rechter bij de ontvankelijkheidsbeoordeling ook noties van representativiteit werden meegenomen. Zie voor een overzicht J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2. Zie ook *Kamerstukken II* 1991/92, 22486, nr. 3, p. 7 (MvT) voor een overzicht van de in de jurisprudentie van de Hoge Raad geformuleerde voorwaarden voor het toekennen van een collectieve actiebevoegdheid vóór de wettelijke regeling van 1994: "In het bijzonder vindt men met regelmaat als aanvullende voorwaarden de eis dat bundeling een efficiënte en/of effectieve rechtsbescherming bevordert, en de eis dat de organisatie feitelijke werkzaamheden heeft ontplooid en/of representatief kan worden geacht voor de door haar behartigde belangen. Deze laatste voorwaarde kan wijken indien de eisende rechtspersoon een wettelijk gewaarborgde inspraak-, bezwaar- of beroepsbevoegdheid bezit die gefrustreerd dreigt te worden als niet tevens de mogelijkheid bestaat, de burgerlijke rechter te adiëren."

van dat begrip.[42] De memorie van toelichting bij de WAMCA gaat ook niet expliciet in op de vraag hoe het representativiteitsvereiste in (ideële) algemeenbelangacties moet worden toegepast. Dat verwondert niet, omdat die memorie is geschreven ten behoeve van het wetsvoorstel waarbij lid 6 van artikel 3:305a BW nog niet was aangescherpt en het representativiteitsvereiste dus niet zou gaan gelden bij ideële algemeenbelangacties. De toelichting bij het amendement, waarin lid 6 is aangescherpt, geeft evenmin helderheid over de invulling van het representativiteitsvereiste.

Wel is in de memorie een toelichting gegeven op toepassing van het representativiteitsvereiste in een collectieve schadevergoedingsactie. In dat verband vermeldt de memorie van toelichting dat

> "naast de kwaliteit van de belangenorganisatie, eveneens van belang is in hoeverre deze organisatie, gelet op haar achterban, als opkomend voor de groep gedupeerden kan worden gezien. Het gaat dan om de mate waarin een belangenorganisatie als representatief voor deze groep gedupeerden kan worden gezien. Indicaties hiervoor zijn het aantal aangesloten gedupeerden en de omvang van hun vorderingen ten opzichte van het totaal aantal gedupeerden van een massagebeurtenis en de door hen gevorderde schadevergoeding. Voor elke collectieve vordering zal de belangenorganisatie dus duidelijk moeten maken voor wie zij opkomt. Dit betekent niet dat een lijst met namen en andere gegevens van de achterban hoeft te worden overgelegd. Voldoende is dat de belangenorganisatie nauwkeurig omschrijft voor welke groep van personen zij opkomt, bijvoorbeeld alle consumenten die op datum X bij bedrijf Y product Z hebben gekocht of alle personen die wonen op plek X en schade hebben geleden door de brand die plaatsvond op datum Y bij bedrijf Z. Met de omschrijving van de groep van personen voor wie wordt opgekomen is alleen voldaan aan het vereiste dat duidelijk moet zijn voor wie een belangenorganisatie opkomt."[43]

Verder vermeldt de toelichting dat de representativiteitseis

> "voorkomt dat een stichting of vereniging een rechtsvordering kan instellen zonder de vereiste ondersteuning van een achterban. Niet iedere willekeurige organisatie kan zich opwerpen als verdediger van de belangen van gedupeerden. Op voorhand moet duidelijk zijn dat zij kwantitatief gezien voor een voldoende groot deel van de groep getroffen gedupeerden opkomt. Wat genoeg is, verschilt per geval en kan alleen bepaald worden in relatie tot het totaal aantal gedupeerden. Dit kan bijvoorbeeld worden getoetst op basis van de bij een vereniging aangesloten leden of door middel van het aantal gedupeerden dat zich actief voor de vordering heeft aangemeld."[44]

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42 Wel vermeldt de wet dat gelet moet worden op de achterban en de omvang van de vertegenwoordigde vorderingen.

43 *Kamerstukken II* 2016/17, 34608, nr. 3, p. 12-13 (MvT).

44 *Kamerstukken II* 2016/17, 34608, nr. 3, p. 18-19 (MvT).

In zijn brief van 16 januari 2024 geeft de Minister voor Rechtsbescherming aan dat in algemeenbelangacties, met name algemeenbelangacties die de belangen van een ongericht aantal personen beogen te beschermen, een beoordeling van de omvang van de achterban en de vordering onvoldoende houvast biedt om de representativiteit van de belangenorganisatie te beoordelen.[45] De Minister merkt voorts op, zoals ook tijdens het wetgevingsproces voor de 1994-regeling is opgemerkt,[46] en in de recente literatuur wordt beaamd,[47] dat de diversiteit aan omstandigheden die zich in de rechtspraktijk voordoen met zich brengt dat verschillende criteria relevant zijn voor de vraag of een organisatie voldoende representatief is, en dat daarbij op voorhand geen strak omlijnde lijst van criteria is te noemen. De Minister benoemt wel enkele criteria die in zijn ogen van belang kunnen zijn bij de representativiteitsbeoordeling. Onder andere wordt genoemd of de organisatie een "gesprekspartner is voor de overheid", waarbij onder meer van belang kan zijn of de organisatie "spreekbuis in de media [is] en andere activiteiten [ontplooit] waaruit blijkt dat de belangenorganisatie een geschikte vertegenwoordiger is voor dit belang."[48]

2.3 Toepassing van het representativiteitsvereiste in de rechtspraak

Tegen de achtergrond van een gebrek aan duidelijkheid in de wet en WAMCA-wetsgeschiedenis, is in de rechtspraak nader invulling gegeven aan het representativiteitsvereiste bij (ideële) algemeenbelangacties.

In eerste instantie is door enkele rechters de toepassing van het representativiteitsvereiste - ten onrechte - achterwege gelaten.[49] Inmiddels lijkt bij de ontvankelijkheidsbeoordeling steevast aan het vereiste te worden getoetst.[50] Algemeen uitgangspunt bij die toetsing is dat de procederende organisatie moet aangeven dat zij over een relevante achterban beschikt.[51] De wijze waarop de representativiteit verder wordt beoordeeld is sterk afhankelijk van de omstandigheden van het geval. In een enkele uitspraak is daarbij door de rechter aangegeven dat niet helemaal duidelijk is (hoe moet worden vastgesteld) of de achterban voldoende omvang heeft.[52] Ook is door rechters overwogen dat in de gevallen waarbij de achterban niet

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45 *Kamerstukken II* 2023/24, 36169 nr. 40, p. 7 en 11 (VSO).

46 Zie voetnoot 41.

47 Zie par. 2.4.

48 *Kamerstukken II* 2023/24, 36169 nr. 40, p. 3, 10 en 19 (VSO).

49 Zie ook T.M. Sweerts & J.F. Hackeng, 'Eén voor allen en allen door één: over representativiteit in het collectieve actierecht', *Nederlands Tijdschrift voor Burgerlijk Recht* 2022/33, p. 287; D. Pistora & R. van Gestel, 'Representativiteit van procederende belangenorganisaties in algemeenbelangacties', *Ars Aequi* 2024, pp. 660-671, p. 664.

50 J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2, p. 7.

51 Rb. Rotterdam (vzr.) 18 september 2020, ECLI:NL:RBROT:2020:8228, r.o. 4.3 (*Stichting Both ENDS/Bokalis*); Hof Arnhem-Leeuwarden 8 december 2020, ECLI:NL:GHARL:2020:10177 (*Warner Music Benelux BV/Stichting Music#MeToo (SMMT)*); Rb. Midden-Nederland 11 augustus 2021, ECLI:NL:RBMNE:2021:3778, r.o .3.13 (*Algemene Nederlandse BurgerBelangen Vereniging (ANBB)/Nederlands Huisartsen Genootschap (NHG)*); Hof Amsterdam 9 november 2021, ECLI:NL:GHAMS:2021:3418, r.o. 3.5 (*SMMT/Universal International Music*); HR 11 maart 2022, ECLI:NL:HR:2022:347, *JIN* 2022/68, m.nt. P.H. Bossema-de Greef; *JBPr* 2022/24, m.nt. D.L. Barbiers, r.o. 3.1.5 (*SMMT/Warner Music Benelux BV*).

52 Hof Den Haag 25 april 2023, ECLI:NL:GHDHA:2023:735 en ECLI:NL:GHDHA:2023:736 (*Shell/Milieudefensie*).

kan worden geïndividualiseerd, bijvoorbeeld om de belanghebbende behoren tot een grotere groep personen die diffuus en onbepaald is, de rechtspraak op pragmatische wijze toetst of aan het representativiteitsvereiste is voldaan.[53] Dit is mede het geval omdat het in het kader van een algemeenbelangactie niet doenlijk zou zijn voor de belangenorganisatie (in het bijzonder: stichtingen) om haar achterban met naam en toenaam te noemen.[54] Mede om die reden wordt door verschillende rechters beoordeeld of de belangenorganisatie een adequate spreekbuis of adequate vertegenwoordiger is voor de belangen waarvoor zij zegt op te komen.[55]

In de rechtspraak zijn bij de representativiteitsbeoordeling verschillende omstandigheden meegewogen. Die omstandigheden zijn steeds in samenhang bekeken en op het voorliggende geval toegespitst. Zo is gekeken naar steunbetuigingen van de achterban, steunbetuigingen van burgers, bedrijven, (lokale) overheden en andere organisaties (en de betrouwbaarheid van die verklaringen),[56] de omvang van de achterban (soms afgezet tegen de gehele Nederlandse bevolking),[57] het ledenaantal (in geval van een vereniging),[58] de staat van dienst van de belangenorganisatie [59] onder meer in relatie tot het behartigen van de (litigieuze) belangen, en de in dat verband eerder ontplooide activiteiten (waaronder mogelijk de inzet van collectieve

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53 Rb. Den Haag 12 maart 2025, ECLI:NL:RBDHA:2025:3488, r.o. 5.21 (*Vereniging Natuur en Milieufederatie Noord-Holland ea/Staat*).

54 Rb. Amsterdam 7 juni 2023, ECLI:NL:RBAMS:2023:3499, *JOR* 2023/240, m.nt. B.T. Klinger, r.o. 4.17 (*Stichting ter bevordering van de 'Fossielvrij-Beweging/KLM*). Dat hoeft ook niet, zo blijkt uit de MvT: 'Dit betekent niet dat een lijst met namen en andere gegevens van de achterban hoeft te worden overgelegd.' Zie *Kamerstukken II* 2016/17, 34608, nr. 3, p. 12-13 (MvT).

55 Rb. Amsterdam 7 juni 2023, ECLI:NL:RBAMS:2023:3499, r.o. 4.17; Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, *JOR* 2024/303, m.nt. M.J. Bosselaar, r.o. 3.11 (*Greenpeace/Staat*); Rb. Den Haag 12 maart 2025, ECLI:NL:RBDHA:2025:3488, r.o. 5.22 (*Vereniging Natuur en Milieufederatie Noord-Holland ea/Staat*). In bepaalde gevallen wordt hierbij naar het Verdrag van Aarhus verwezen, zie par. 3.3.

56 Hof Den Haag 19 april 2022, ECLI:NL:GHDHA:2022:643, *JBPr* 2022/39, m.nt. M.J. Bosselaar, r.o. 6.5 (*Stichting Viruswaarheid.nl/Staat*); Hof Den Haag 25 april 2023, ECLI:NL:GHDHA:2023:735 en ECLI:NL:GHDHA:2023:736 (*Shell/Milieudefensie*); Rb. Den Haag 6 september 2023, ECLI:NL:RBDHA:2023:14320, *AB* 2024/34, m.nt. R. Stolk & H.W. van der Gaag (*Stichting Sinti, Roma en Reizigers/Gemeente Den Haag*); Rb. Den Haag (vzr.) 23 november 2021, ECLI:NL:RBDHA:2021:12811, r.o. 3.4 en 3.7 (*Stichting X/Staat*); Rb. Midden-Nederland 11 augustus 2021, ECLI:NL:RBMNE:2021:3778, r.o. 3.13 (*ANBB/NHG*); Rb. Den Haag 6 maart 2024, ECLI:NL:RBDHA:2024:3007, *MenR* 2024/51, m.nt. B. Arentz, r.o. 5.16-5.17 (*Greenpeace/Staat & Stichting Stikstofclaim*); Rb. Den Haag 15 november 2023, ECLI:NL:RBDHA:2023:17145, *MenR* 2024/12, m.nt. B. Arentz; *JBPr* 2024/29, m.nt. P.E. Sprietsma & I.C.C. Bloemen, r.o. 5.17-5.18 (*Stichting Recht op Bescherming tegen Vlieghinder* (*RBV)/Staat*).

57 Rb. Den Haag 27 december 2023, ECLI:NL:RBDHA:2023:20779, r.o. 5.16 (*Greenpeace/Staat & Stichting Stikstofclaim*); Rb. Den Haag 6 maart 2024, ECLI:NL:RBDHA:2024:3007, r.o. 5.16-5.17 (*Greenpeace/Staat & Stichting Stikstofclaim*); Rb. Den Haag 12 maart 2025, ECLI:NL:RBDHA:2025:3488, r.o. 5.23 (*Vereniging Natuur en Milieufederatie Noord-Holland ea/Staat*).

58 Rb. Amsterdam 13 juli 2022, ECLI:NL:RBAMS:2022:4035, r.o. 4.28 (*FNV&CNV/Temper*).

59 Rb. Amsterdam 13 juli 2022, ECLI:NL:RBAMS:2022:4035, r.o. 4.28 (*FNV&CNV/Temper*); Rb. Den Haag 6 maart 2024, ECLI:NL:RBDHA:2024:3007, r.o. 5.16-5.17(*Greenpeace/Staat & Stichting Stikstofclaim*); Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.1-3.11.2 (*Greenpeace/Staat*).

acties),[60] de kennis en ervaring van de organisatie,[61] het feit dat de organisatie eerder door de rechter is erkend als adequate vertegenwoordiger van een belang waarvoor het in rechte opkomt,[62] en geen commerciële of andere eigen belangen heeft bij de rechtsvordering.[63] Door sommige rechters is bovendien opgemerkt dat niet ter zake doet dat niet ieder lid van de samenleving evenveel waarde aan de litigieuze belangen hecht en dat de nagestreefde belangenbescherming (mogelijk) botst met de ideeën en opvattingen van andere groeperingen in de samenleving.[64]

De uitwerking van de hiervoor genoemde gezichtspunten is (zeer) contextgebonden. Er is derhalve terughoudendheid geboden bij het destilleren van algemene stelregels op basis van de thans beschikbare (eerstelijns- en tweedelijns-) rechtspraak. Ook valt niet vast te stellen wat het (onderlinge) gewicht is tussen de hiervoor genoemde criteria. Desalniettemin lijkt zich een algemene lijn te ontwaren waarin rechters met name beoordelen of de belangenorganisatie een adequate behartiger is voor het belang waarvoor zij in rechte opkomt, waarbij meer de nadruk ligt op kwalitatieve aspecten (zoals de staat van dienst van de organisatie in het behartigen van het belang waarvoor het opkomt) dan op kwantitatieve aspecten (zoals het aantal steunbetuigingen). In paragraaf 2.5 gaan wij nader in op dit onderscheid.

2.4 Reacties in de literatuur op het representativiteitsvereiste en de motie Stoffer c.s.

De afgelopen jaren heeft het representativiteitsvereiste de nodige rechtswetenschappelijke pennen in beweging gebracht. Over het algemeen is daarbij kritisch gereageerd op de aan de motie Stoffer c.s. ten grondslag liggende wens om toegang tot de (civiele) rechter voor belangenorganisaties aan te scherpen.[65]

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60 Rb. Amsterdam 13 juli 2022, ECLI:NL:RBAMS:2022:4035, r.o. 4.28 (*FNV&CNV/Temper*); Rb. Den Haag 7 juni 2023, ECLI:NL:RBAMS:2023:3499, r.o. 4.17 (*Stichting ter bevordering van de 'Fossielvrij-Beweging/KLM*); Rb. Den Haag 6 maart 2024, ECLI:NL:RBDHA:2024:3007, r.o. 5.16-5.17 (*Greenpeace/Staat & Stichting Stikstofclaim*); Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.1-3.11.2 (*Greenpeace/Staat*).

61 Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.1-3.11.2 (*Greenpeace/Staat*); Rb. Den Haag 12 maart 2025, ECLI:NL:RBDHA:2025:3488, r.o. 5.22 (*Vereniging Natuur en Milieufederatie Noord-Holland ea/Staat*).

62 Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.1-3.11.2 (*Greenpeace/Staat*).

63 Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.1-3.11.2 (*Greenpeace/Staat*).

64 Rb. Den Haag, 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11.4 (*Greenpeace/Staat*), met verwijzing naar: *Kamerstukken II* 1991/92, 22486, nr. 3; Rb. Den Haag 28 april 2023, ECLI:NL:RBDHA:2023:6047, *GJ* 2023/85, m.nt. M.C. Ploem, r.o. 5.6 (*Stichting Donorkind/X*). Zie voor de herkomst hiervan: HR 9 april 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388, m. nt. E.A. Alkema.

65 E. Bauw, 'Vechten tegen windmolens, Het representativiteitsvereiste bij ideële vorderingen als ideefixe', *Ars Aequi* 2023, afl. 6, p. 434; R.A.J. van Gestel, 'De representativiteitseis bij algemeenbelangacties: geen kwestie van democratische legitimatie van eisende belangenorganisaties, maar van adequate bundeling van belangen ten behoeve van efficiënte en effectieve rechtsbescherming', annotatie bij Rb. Den Haag 15 november 2023, ECLI:NL:RBDHA:2023:17145, *Nederlands Tijdschrift voor Burgerlijk Recht* 2024/3; J.J. van der Helm, 'De representativiteitseis bij ideële acties', *O&A* 2024/2; D. Pistora & R. van Gestel, 'Representativiteit van procederende belangenorganisaties in algemeenbelangacties', *Ars Aequi* 2024, pp. 660-671, p. 671. In soortgelijke zin: R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970 & H.F.M. Hofhuis, 'Bundeling van civiele vorderingen: representativiteit en de verhouding tussen de staatsmachten', *Nederlands Juristenblad* 2034/775/775. Zie ook Reactie maatschappelijke organisaties op

Reeds bij de totstandkoming van de regeling van 1994 was de representativiteit bij collectieve acties onderwerp van parlementair debat, mede in het licht van de vrees

> "dat van uitbreiding van de mogelijkheden voor een collectief actierecht een polariserend maatschappelijk effect zou kunnen uitgaan, in het bijzonder daar waar zich ideologisch geladen conflicten voordoen."[66]

De staatssecretaris heeft toen in de Tweede Kamer onder meer gereageerd door te stellen:

> "Mijn antwoord is dat zo'n controversiële vordering door de rechter wordt afgewezen.'[67] Op de vraag over de representativiteit luidt het antwoord in de Eerste Kamer dat met name het oude lid 5 ervoor moet zorgen dat leden van de achterban waarvoor wordt opgekomen zich aan een bindende werking van de uitspraak kunnen onttrekken. Verder vroegen deze leden op welke wijze wordt voorzien in de eis dat de rechtspersoon representatief is voor de door haar behartigde belangen, nu de wet daarover niet uitdrukkelijk spreekt. Gedachtig dat het hier een nauwelijks nader inhoud te geven eis betreft is er in het wetsvoorstel in overeenstemming met de recentere rechtspraak van de Hoge Raad voor gekozen deze voorwaarde voor ontvankelijkheid niet te stellen. Wel zijn er een aantal waarborgen opgenomen die moeten voorkomen dat tegen iemands zin voor zijn belangen wordt opgekomen. Met name de in lid 5 van artikel 305a aan direct betrokkenen gegeven mogelijkheid zich aan de gevolgen van de procedure te onttrekken door zich te verzeten tegen de werking van de uitspraak ten opzichte van hen, is hier van belang. Aldus wordt aan degene voor wiens belangen wordt opgekomen zelf de keus gegeven of hij de vertegenwoordiging door een (al dan niet representatieve) organisatie aanvaardt."[68]

Hierbij is ten slotte wel relevant dat artikel 3:305a lid 5 (oud) BW ook bepaalt dat deze mogelijkheid niet bestaat wanneer de uitspraak naar haar aard bindend is voor eenieder. Dit zal vaak het geval zal bij ideële algemeenbelangacties.

In het bijzonder verdienen drie samenhangende punten de aandacht die naar voren zijn gebracht in de literatuur. Allereerst wijst een aantal auteurs erop dat de uitwerking van het representativiteitsvereiste in de context van de algemeenbelangactie onduidelijk is, mede vanwege een gebrek aan duidelijke wetgeving en een toelichting daarop, maar ook doordat

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motie-Stoffer c.s. (nr. 36169-37), www.greenpeace.org/ static/planet4-netherlandsstateless/2023/03/399e0496-2303-reactie-maat schappelijke-organisatiesop-motie-stoffer-c.s.-aan. Een pleidooi om de rechter als laatste redmiddel te gebruiken is van Jelmer Mommers, 'Hoe de rechtszaal het strijdtoneel werd van de vraag: wie heeft nu echt de macht in een democratie?', https://decorrespondent.nl/16049/hoe-de-rechtszaal-het-strijdtoneel-werd-van-de-vraag-wie-heeft-nu-echt-de-macht-in-een-democratie/ae75d2a4-c1d0-02ee-070d-9460c0e10cd9?trk=feed_main-feed-card_feed-article-content.

66 *Kamerstukken I* 1993/94, 22486, nr. 103a, p. 3 (VV).

67 *Handelingen II* 28 oktober 1993, 18-1299, rechter kolom.

68 *Kamerstukken I* 1993/94, 22486, nr. 103b, p. 3 (MvA).

het begrip zelf onvoldoende omlijnd en bepaald is, en daardoor weinig rechtszekerheid biedt.[69] Hierdoor kan het vereiste willekeur in de hand werken.[70] Bovendien kan dit leiden tot hoge(re) procedeerkosten en lange(re) doorlooptijden van zaken.[71]

Een tweede punt van aandacht is dat het representativiteitsvereiste in de huidige vorm slecht tot niet hanteerbaar zou zijn in de context van de algemeenbelangactie.[72] Het criterium zou in het bijzonder moeilijk hanteerbaar zijn in kwesties waarbij de achterban moeilijk(er) is te specificeren en dus af te bakenen (bijvoorbeeld: bescherming van de Waddenzee gaat alle Nederlanders aan, net als bescherming tegen gevaarlijke klimaatverandering), geprocedeerd wordt ter bescherming van een belang dat moeilijk aan (levende) mensen te relateren is (denk aan cultuurbelangen, dierenwelzijn, of belangen van toekomstige generaties), de achterban moeilijk of zelfs niet inzichtelijk kan worden gemaakt, en/of de achterban niet kan worden bereikt door de organisatie (bijvoorbeeld: mogelijke slachtoffers van mensenhandel in de prostitutie, die duidelijk een belang hebben bij rechtsbescherming, maar zich niet snel kenbaar zullen maken als slachtoffer. Denk ook aan zaken die betrekking hebben op het zonder toestemming online zetten van persoonlijk beeldmateriaal). Zoals hiervoor is aangeven, lijken rechters zich bewust te zijn van deze obstakels en er rekening mee te houden bij de toepassing van het representativiteitsvereiste. De rechtbank Den Haag overweegt bijvoorbeeld dat

> "De onbepaaldheid van de grootte van de achterban, die inherent is aan ideële belangen, maakt dat de representativiteitseis lastig is in te vullen; dit geldt overigens ook voor het hierna onder 3.23 te bespreken begrip *'nauw omschreven groep'*. Het is niet duidelijk of de wetgever vindt dat er desondanks ook bij ideële belangen gezocht moet worden naar een groep mensen aan wie die belangen kunnen worden toegerekend, en zo ja: hoe dit dan zou moeten."[73]

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69 Zie in aanvulling op de literatuur genoemd in voetnoot 65 in het bijzonder D. Pistora & R. van Gestel, 'Representativiteit van procederende belangenorganisaties in algemeenbelangacties', *Ars Aequi* 2024, pp. 660-671, p. 664; J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024, p. 7. Zie ook T.M. Sweerts & J.F. Hackeng, 'Eén voor allen en allen door één: Over representativiteit in het collectieveactierecht', *Nederlands Tijdschrift voor Burgerlijk Recht* 2022/33, pp. 284-294 en H.K. Schrama & M.J. Bosselaar, 'Een jaar WAMCA; het eerste stof neergedaald?', *TOP* 2021/111.

70 Hetgeen, en de andere punten van kritiek, ook al door de Raad van State werd geconstateerd: *Kamerstukken II* 2011/12. 33126, nr. 4, p. 2.

71 Zie i.h.b. over dit punt F.M. Peters & A.J. van Wees, 'Wachten op Godot – de problematische toepasbaarheid van de WAMCA op ideële zaken', *Tijdschrift Ondernemingsrechtpraktijk* 2022/04.

72 R.J.B. Schutgens & J.J.J. Sillen, 'Algemeenbelangacties bij de burgerlijke rechter', in: A. Wirtgen e.a., *Vereniging voor de vergelijkende studie van het recht van België en Nederland. Preadviezen 2020-2021. De algemeenbelangactie en de civiele rechter,* Boomjuridisch Antwerpen 2021, p. 185; F.M. Peters & A.J. van Wees, 'Wachten op Godot – de problematische toepasbaarheid van de WAMCA op ideële zaken'' *Tijdschrift Ondernemingsrechtpraktijk* 2022/04, p. 27; J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2, p. 9; H.K. Schrama & M.J. Bosselaar, 'Een jaar WAMCA; het eerste stof neergedaald?', *TOP* 2021/111 en R.A.J. van Gestel, 'De representativiteitseis bij algemeenbelangacties: geen kwestie van democratische legitimatie van eisende belangenorganisaties, maar van adequate bundeling van belangen ten behoeve van efficiënte en effectieve rechtsbescherming', *Nederlands Tijdschrift voor Burgerlijk Recht* 2024/3, afl. 1.

73 Rb. Den Haag, 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.10.2 (*Greenpeace/Staat*).

Een derde fundamenteel punt van aandacht is dat een representativiteitsvereiste waarbij de nadruk ligt op de relatie van de belangenorganisatie tot de achterban, en dan in het bijzonder de steun van die achterban, op gespannen voet staat met het doel en bestaansrecht van de algemeenbelangactie. In dat verband is er in de literatuur ook kritiek op de motie Stoffer c.s., de wijze waarop de motie invulling geeft aan de notie van representativiteit,[74] en de daaraan ten grondslag liggende wens om de toegang tot de civiele rechter aan te scherpen.[75] Aanscherping van het representativiteitsvereiste – en in algemene zin de ontvankelijkheidsbeoordeling – zou uiteindelijk de effectieve rechtsbescherming en de waarborging van fundamentele rechten op oneigenlijke wijze ondermijnen.[76]

De algemeenbelangactie ontleent haar bestaansrecht onder meer aan het waarborgen van rechtsbescherming van belangen waarvoor een individuele eiser zich niet of moeilijker tot de rechter zal wenden, hetgeen door wetgever bij de totstandkoming van artikel 3:305a BW in 1994 expliciet is erkend.[77] Dat is bijvoorbeeld het geval bij collectieve belangen waarvoor individuen zelf niet snel zouden procederen omdat de kosten niet opwegen tegen de baten van procederen,[78] terwijl individuen uiteindelijk wél belang hebben bij bescherming van dergelijke collectieve belangen.[79] Het klassieke voorbeeld hiervan zijn 'collectieve goederen' zoals milieu- en klimaatbelangen. Voorts biedt de algemeenbelangactie (de mogelijkheid tot) rechtsbescherming van kwetsbare en gemarginaliseerde (groepen van) individuen die om verschillende redenen niet een rechtszaak ter behartiging van hun eigen belang aanhangig kunnen maken (zie het voorbeeld van mensenhandel hiervoor, maar denk ook aan de belangen van toekomstige generaties). De algemeenbelangactie strekt aldus (mede) ter bescherming van kwetsbare en stemloze belangen,[80] waarbij het bovendien niet altijd gaat om het beschermen van individuele *personen*, maar ook om het beschermen van collectieve publieke *belangen*.[81] In sommige gevallen kan de achterban in theorie wel worden

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74 D. Pistora & R.A.J. van Gestel, 'Representativiteit van procederende belangenorganisaties in algemeenbelangacties', *Ars Aequi* 2024, pp. 660-671; J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2; R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970.

75 E. Bauw, 'Vechten tegen windmolens, Het representativiteitsvereiste bij ideële vorderingen als idee-fixe', *Ars Aequi* 2023, afl. 6, p. 434.

76 Zie onder meer D. Pistora & R.A.J. van Gestel, 'Representativiteit van procederende belangenorganisaties in algemeenbelangacties', *Ars Aequi* 2024, pp. 660-671, p. 671. In soortgelijke zin; R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970.

77 *Kamerstukken II* 1991/92, 22 486, nr. 3 (MvT), p. 2.

78 Bijvoorbeeld omdat de prikkels en belangen voor individuen, afgezet tegen de kosten, te gering zijn om te procederen.

79 Zie bijvoorbeeld al *Handelingen II* 1993/94, nr. 12, p. 1298, Staatssecretaris Kosto: "Het collectieve-actierecht kan in dit probleem gedeeltelijk voorzien, omdat het het in ieder geval immers mogelijk maakt in een procedure de aanspraken van velen geldend te maken, waar het voor ieder van deze personen individueel te kostbaar is om naar de rechter te stappen."

80 R. Schutgens & J. Sillen, 'Algemeenbelangacties bij de burgerlijke rechter', in: A. Wirtgen e.a. (red.), *De algemeenbelangactie en de civiele rechter* (Preadviezen 2020-2021 voor de Vereniging voor de vergelijkende studie van het recht van België en Nederland), Den Haag: Boom juridisch 2021, p. 155-208;

81 R.A.J. van Gestel, 'De representativiteitseis bij algemeenbelangacties: geen kwestie van democratische legitimatie van eisende belangenorganisaties, maar van adequate bundeling van belangen ten

geïdentificeerd, maar is dat in de praktijk niet mogelijk. Stolk noemt het voorbeeld van een belangenorganisatie die opkomt voor slachtoffers van seksueel geweld. Aangezien dergelijke slachtoffers vaak anoniem willen blijven, rijst volgens haar de vraag in welke mate de belangenorganisatie in staat moet worden geacht nader inzicht te geven in de achterban.[82] Kortom, het hanteren van een representativiteitsvereiste dat zich richt op de relatie van de belangenorganisatie tot de achterban kan een contraproductieve uitwerking hebben en haaks staan op de ratio van de algemeenbelangactie: het hanteren van een eis die ziet op de achterban van de organisatie, kan namelijk met zich brengen dat een van de kerndoelen van de algemeenbelangactie (het bieden van rechtsbescherming in gevallen waarin de achterban niet (goed) te bepalen is, of in mindere mate, kan worden bereikt).[83] Zoals blijkt uit par. 2.3 nemen sommige rechters dit aspect, al dan niet impliciet, al mee in hun ontvankelijkheidsbeoordeling, onder meer door op pragmatische wijze om te gaan met het representativiteitsvereiste en niet te vereisen dat de belangenorganisatie de achterban met naam en toenaam noemt.

2.5 Herijking van het representativiteitsbegrip

Op basis van de literatuur en de rechtspraak kunnen twee typen representativiteitseisen worden onderscheiden. In paragraaf 6 wordt dit onderscheid ook gehanteerd om de rechtsvergelijkende inzichten te ordenen.

Het eerste type heeft betrekking op de vraag of de desbetreffende belangenorganisatie *geschikt is om op te komen voor de belangen die onderwerp zijn van de procedure*.[84] In de literatuur wordt in dit verband soms ook gesproken van kwalitatieve criteria. In de rechtspraak wordt bijvoorbeeld onderzocht of de belangenorganisatie een 'adequate spreekbuis' of 'adequate belangenbehartiger' vormt voor de belangen waar het voor opkomt. Criteria die dienen ter beantwoording van deze vraag zijn aldus gericht op de belangenorganisatie, en de wijze waarop zij de door haar beoogde belangenbescherming nastreeft en heeft nagestreefd.[85] In de literatuur is bijvoorbeeld gewezen op de kennis en kunde, ervaring, expertise en (financiële en andere) middelen van de organisatie.[86] In de rechtspraak vindt men ook voorbeelden van dit type criteria. Denk aan de hiervoor aangehaalde uitspraken waarin onder andere is gekeken naar de staat van dienst van de desbetreffende belangenorganisatie in het nastreven van (onder meer) de litigieuze belangen, het feit dat de organisatie zich eerder al

behoeve van efficiënte en effectieve rechtsbescherming', *Nederlands Tijdschrift voor Burgerlijk Recht* 2024/3, afl. 1, p. 19.

82 R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970, p. 365-366.

83 R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970; J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2.

84 Zie ook Rechtbank Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11 (*Greenpeace/Staat*).

85 Dat zijn overigens ook elementen die deels in artikel 3:305a lid 2, sub a, b en c besloten liggen.

86 M. Peters & A.J. van Wees, 'Wachten op Godot – de problematische toepasbaarheid van de WAMCA op ideële zaken', *Tijdschrift Ondernemingsrechtpraktijk* 2022/04,p. 27 en R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970,, p. 1070. Ook dit zijn elementen die deels in artikel 3:305a lid 2, sub a, b en c BW besloten liggen.

had ingezet voor de bescherming van de (litigieuze of soortgelijke) belangen, de verschillende activiteiten die hiertoe zijn ontplooid (media-optredens, protesten etc.), naar de vraag of al eerder door de organisatie collectieve acties zijn gevoerd, alsmede naar de omstandigheid dat de belangenorganisatie al geruime tijd bestaat en specifieke kennis en ervaring heeft ten aanzien van de belangen waarvoor zij in rechte opkomt.

Het tweede type heeft betrekking op de *relatie van de belangenorganisatie tot de achterban*. In de literatuur wordt hierbij ook gesproken over kwantitatieve criteria. Hierbij kan het gaan, zoals we ook reeds terugzien in enkele voorbeelden uit de rechtspraak, om het aantal leden bij verenigingen, aangeslotenen bij stichtingen, steun van de achterban, bijvoorbeeld blijkend uit steunbetuigingen, en de omvang van de achterban. In de literatuur is, tegen de achtergrond van de in paragraaf 2.4 besproken aandachtspunten, bepleit dat bij de toepassing van dit type criteria de rechter oog moet hebben voor eventuele bijzondere eigenschappen van de achterban waarvoor de organisatie opkomt en daarmee verband houdende belemmeringen om de achterban te identificeren, te bereiken, te specificeren en af te bakenen.[87] Ook zou rekening moeten worden gehouden met belemmeringen aan de zijde van de achterban om zich kenbaar te maken en/of steun te uiten aan de belangenorganisatie. De aanwezigheid van zulke belemmeringen zou een reden zijn om de representativiteitsbeoordeling te enten op criteria die primair verbandhouden met de *geschiktheid van de belangenorganisatie* om op te komen voor de litigieuze belangen. In de rechtspraak vindt men voorbeelden van uitwerkingen van deze gedachte (zie par. 2.3).

Ten slotte wordt er in de literatuur op gewezen dat de representativiteitsbeoordeling contextgebonden dient te worden uitgevoerd. De rechter moet recht kunnen doen aan de bijzondere omstandigheden van het geval, en daarvoor zou nodig zijn dat hem flexibiliteit en vrijheid toekomt bij de nadere invulling van de representativiteitsbeoordeling.[88]

2.6 Afsluiting

In artikel 3:305a BW is het representativiteitsvereiste opgenomen. Dat vereiste geldt ook bij de ontvankelijkheidsbeoordeling van een belangenorganisatie in de (ideële) algemeenbelangactie. Bij de totstandkoming van artikel 3:305a BW, in 1994, is bewust afgezien van het introduceren van zo'n vereiste, onder meer omdat het criterium slecht hanteerbaar zou zijn en willekeur in de hand zou werken. Uit de thans geldende wettekst en de daarbij behorende wetsgeschiedenis blijkt slechts in beperkte mate hoe dat vereiste moet worden ingevuld bij (ideële) algemeenbelangacties. In de rechtspraak is inmiddels wel nadere uitwerking gegeven aan het vereiste. Die uitwerking is contextgebonden en de beoordeling of aan de representativiteitseis is voldaan afhankelijk van de specifieke omstandigheden van het geval. Hierdoor kunnen slechts beperkt algemene conclusies worden getrokken over de

87 Bijvoorbeeld R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970.

88 J.J. van der Helm, 'De representativiteitseis bij ideële acties', *Overheid & Aansprakelijkheid* 2024/2 (die overigens zelf rechter is, maar het artikel niet in die hoedanigheid heeft geschreven).

toepasselijke criteria en hun onderlinge gewicht. Deze situatie leidt tot rechtsonzekerheid. Wel kan worden vastgesteld dat rechters criteria hanteren die betrekking hebben op de geschiktheid van de belangenorganisatie om voor de (litigieuze) belangen op te komen en op de relatie van de belangenorganisatie tot haar achterban, waarbij met name het eerste type eis (de geschiktheid van de belangenorganisatie om op te komen voor de litigieuze belangen) de overhand lijkt te hebben gekregen. Ten slotte, is in de literatuur kritisch gereageerd op het hanteren van een representativiteitsvereiste bij de algemeenbelangactie en een mogelijke nadere aanscherping daarvan. Het kernpunt van kritiek is dat het criterium niet hanteerbaar is, tot willekeur kan leiden en toegang tot de rechter op oneigenlijke wijze uitholt. Dat is met name het geval wanneer bij de beoordeling wordt gekeken naar de relatie van de belangenorganisatie tot de achterban.

3 Europees Verdrag voor de Rechten van de Mens & het Verdrag van Aarhus

3.1 Introductie

Zowel het Europees Verdrag voor de Rechten van de Mens (EVRM) en het Verdrag van Aarhus bevatten regels die relevant zijn voor artikel 3:305a BW, en dan in het bijzonder het daarin vervatte representativiteitsvereiste. Hierna behandelen we eerst het EVRM (par. 3.2) en vervolgens het Verdrag van Aarhus (par. 3.3). Afgesloten wordt met een bespreking van de belangrijkste bevindingen (par. 3.4).

3.2 EVRM & KlimaSeniorinnen (2024)

Artikel 34 EVRM regelt de toegang tot het Europees Hof voor de Rechten van de Mens (EHRM) en stelt natuurlijke personen, niet-gouvernementele organisaties (ngo's) en groepen personen in staat een klacht bij het Hof in te dienen. Op grond van artikel 34 EVRM moet een klager aan twee voorwaarden voldoen om ontvankelijk te zijn: 1) de klager moet tot een van de in artikel 34 EVRM genoemde klagerscategorieën behoren en 2) moet kunnen aantonen slachtoffer te zijn van één of meer schendingen van de in het EVRM neergelegde rechten.[89] Uitgangspunt van het EVRM en EHRM is dat ngo's kunnen opkomen voor schendingen van hun eigen rechten. Een organisatie die klaagt over schendingen van de rechten van derden of een zaak aanbrengt in een algemeen of collectief belang, is in beginsel niet-ontvankelijk.[90] Het EHRM heeft de afgelopen jaren echter een aantal belangrijke uitzonderingen op deze regel aanvaard, welke hebben geleid tot meer ruimte voor belangenorganisaties om zaken die strekken tot bescherming van de rechten van anderen aanhangig te maken.

Zo heeft het Hof in uitzonderlijke gevallen slachtofferstatus toegekend aan organisaties die procederen namens zeer kwetsbare slachtoffers. Klagers die bij het EHRM een verzoekschrift indienen, kunnen ervoor kiezen zich te laten vertegenwoordigen,[91] maar dan moet er wel een volmacht worden afgegeven.[92] In *Centre for Legal Resources namens Valentin Câmpeanu t. Roemenië* heeft de Grote Kamer op basis van Artikel 34 EVRM een uitzondering aanvaard op deze eis.[93] In deze zaak maakte de ngo Centre for Legal Resources (CLR) een zaak aanhangig ten behoeve van Valentin Câmpeanu, een zeer ernstig verstandelijk gehandicapte hiv-positieve

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89 Zie over dit slachtoffervereiste onder meer nader EHRM 17 juli 2014, ECLI:CE:ECHR:2014:0717JUD004784808 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Roemenië*), r.o. 96.

90 Een zaak waarin een organisatie de belangen van haar leden vertegenwoordigd maar ook een algemeen belang nastreeft, kan wel ontvankelijk worden verklaard. In dat geval is echter 'geen sprake (meer) van een 'actio popularis' het gaat dan weer 'gewoon' om de particuliere belangen van een (rechts)persoon…', zie: I. Giesen, *Asser Procesrecht 1: Beginselen van burgerlijk procesrecht*, Deventer: Wolters Kluwer 2024, p. 195.

91 Regel 36(2) van de Regels van het Hof.

92 Regel 45(3) van de Regels van het Hof. Ook ngo's kunnen deze rol op zich nemen, onder meer met het doel om slachtoffers te ondersteunen bij het verkrijgen van vergoeding voor geleden schade of met een strategisch belang om de jurisprudentie van het Hof te beïnvloeden. De mate waarin ngo's dit doen, en de impact die dit heeft, is niet geheel te achterhalen, onder meer omdat advocaten in hun verzoekschrift niet altijd kenbaar maken aan een ngo geaffilieerd te zijn.

93 EHRM 17 juli 2014, ECLI:CE:ECHR:2014:0717JUD004784808 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Roemenië),* r.o. 112.

jongen van Roma-afkomst die in een psychiatrische instelling is komen te overlijden.[94] Vlak voor zijn dood bracht CLR een bezoek aan de instelling waar de jongen – een wees – verbleef, en constateerde dat de medische zorg ernstig te kort schoot. Bij het Hof klaagt de ngo onder meer over een schending van Artikel 2 (recht op leven) en 3 (onmenselijke of vernederende behandeling) van het EVRM.[95] In deze zaak oordeelt het Hof dat in uitzonderlijke gevallen een ngo, hoewel zelf geen direct slachtoffer, namens een slachtoffer mag optreden, zonder kenbare volmacht.[96] Of een belangenorganisatie namens een slachtoffer mag optreden, is afhankelijk van meerdere factoren waaronder de kwetsbaarheid van het directe slachtoffer en zijn of haar onvermogen om bij leven een klacht in te dienen bij het Hof,[97] de ernst van de beschuldigingen die aan het Hof zijn voorgelegd, het al dan niet bestaan van familieleden of een wettelijke vertegenwoordiger die zelf een juridische procedure kunnen starten en het ontbreken van bekende erfgenamen of wettelijke vertegenwoordigers die een verzoekschrift bij het Hof kunnen indienen. Ook onderzoekt het Hof of er contacten waren tussen de desbetreffende organisatie en het slachtoffer vóór diens overlijden, of de belangenorganisatie betrokken was bij de nationale procedure na het overlijden, en of de nationale autoriteiten bezwaar hebben geuit tegen de betrokkenheid van de organisatie bij die nationale procedure.[98] De criteria die het Hof heeft geformuleerd in *Câmpeanu* om te beoordelen of een belangenorganisatie de bevoegdheid toekomt om ten behoeve van een ander een klacht in te dienen,[99] zijn maar in een beperkt aantal zaken toegepast. In die zaken is er een aanwijsbaar, direct slachtoffer dat niet in eigen naam kan procederen en namens wie de organisatie optreedt.[100]

In *Verein KlimaSeniorinnen Schweiz en anderen/Zwitserland* (KlimaSeniorinnen) gaat het Hof een stap verder en formuleert het een nieuwe benadering met betrekking tot de rol van ngo's in klimaatzaken.[101] In deze zaak stellen vier Zwitserse vrouwen en de belangenorganisatie

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94 EHRM 17 juli 2014, ECLI:CE:ECHR:2014:0717JUD004784808 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Roemenië)*, r.o. 7-24.

95 EHRM 17 juli 2014, ECLI:CE:ECHR:2014:0717JUD004784808 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Roemenië)*, r.o. 79.

96 EHRM 17 juli 2014, ECLI:CE:ECHR:2014:0717JUD004784808 (*Centre for Legal Resources on behalf of Valentin Câmpeanu/Roemenië)*, r.o.112.

97 Het feit dat het slachtoffer tijdens zijn of haar leven klachten kon indienen, sluit op zichzelf geen vertegenwoordiging door een organisatie of vereniging uit bij gebrek aan een volmacht na zijn of haar overlijden, zo overwoog het Hof in Association Innocence en Danger en Association Enfance et Partage/Frankrijk, 2020, r.o. 125-129.

98 Deze kenmerken zijn recentelijk samengevat in EHRM 10 oktober 2024, ECLI:CE:ECHR:2024:1010JUD003197020 (*Validity Foundation on Behalf of T.J./Hongarije)*.

99 Deze kenmerken zijn recentelijk samengevat in EHRM 10 oktober 2024, ECLI:CE:ECHR:2024:1010JUD003197020 (*Validity Foundation on Behalf of T.J./Hongarije)*, r.o. 42.

100 Zie EHRM 10 oktober 2024, ECLI:CE:ECHR:2024:1010JUD003197020 (*Validity Foundation on Behalf of T.J./Hongarije);* EHRM, 4 juni 2020, ECLI:CE:ECHR:2020:0604JUD001534315 (*Association Innocence en Danger en Association Enfance et Partage/Frankrijk*); EHRM, 20 september 2016, ECLI:CE:ECHR:2016:0920JUD001298715 (*Kondrulin/Rusland*); EHRM, 24 maart 2015, ECLI:CE:ECHR:2015:0324JUD000295911 (*Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea/Roemenië*). EHRM, 28 juni 2016, ECLI:CE:ECHR:2016:0628DEC003565312 (*Bulgarian Helsinki Committee/Bulgarije*); in deze laatste zaak stelt het Hof dat de belangenorganisatie Bulgarian Helsinki Committee niet ontvankelijk is.

101 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (Verein KlimaSeniorinnen Schweiz/Zwitserland).

KlimaSeniorinnen Schweiz (waar de individuele klagers ook lid van zijn) dat hun mensenrechten worden geschonden door het Zwitserse klimaatbeleid (en een gebrek daaraan). Het Hof verklaart de klachten van de vier Zwitserse vrouwen niet-ontvankelijk, en werpt een drempel op voor individuele klagers om in klimaatmitigatiezaken te voldoen aan de eisen van artikel 34 EVRM.[102]

Het Hof kent de belangenorganisatie wél slachtofferstatus toe, en vereist niet dat de individuen namens wie de belangenorganisatie optreedt voldoen aan de hierboven genoemde individuele slachtoffervereisten.[103] Met verwijzing naar eerdere rechtspraak overweegt het Hof dat 'collectieve organen' een van de toegankelijke middelen, en soms het enige middel, zijn waarover burgers beschikken om hun specifieke belangen adequaat te verdedigen.[104] Het Hof erkent in deze zaak de bijzondere rol van organisaties in zaken over klimaatverandering, gezien het bijzondere en collectieve karakter van dit probleem, de gemeenschappelijke en urgente zorg voor de mensheid en de ernst van de gevolgen daarvan, alsook het belang van intergenerationele lastenverdeling in deze context.[105] Met verwijzing naar het Verdrag van Aarhus – waarbij het ook oog heeft voor de verschillen tussen het EVRM en dit Verdrag[106] – formuleert het Hof een uitzondering voor klimaatorganisaties om ontvankelijk te worden verklaard voor het Hof wanneer zij opkomen voor de rechten van anderen.[107] Het Hof overweegt dat 1) de organisatie rechtmatig moet zijn opgericht of op nationaal niveau bevoegdheid moet hebben om een zaak aanhangig te maken; 2) de organisatie moet kunnen aantonen dat zij een specifiek doel nastreeft in overeenstemming met haar statutaire doelstelling ter verdediging van de rechten van haar leden of anderen getroffenen en 3) de organisatie moet gekwalificeerd en representatief zijn om namens haar leden of getroffen partijen op te treden.[108]

In de *KlimaSeniorinnen* formuleert het Hof géén uitgebreide toets om te beoordelen wanneer een belangenorganisatie gekwalificeerd en representatief is om voor haar leden of andere getroffen partijen op te treden. Het overweegt dat de vereniging KlimaSeniorinnen in haar verzoekschrift bij het Hof heeft toegelicht dat de vereniging procedeert om haar leden in staat

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102 Bij het beoordelen van de klacht van een individuele klager kijkt het Hof naar de: 1) de intensiteit van de blootstelling van de klager aan de gevolgen van klimaatverandering en 2) de dringendheid van de noodzaak om de individuele bescherming van de klager te waarborgen. Zie, EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (Verein KlimaSeniorinnen Schweiz/Zwitserland), r.o. 527.

103 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 502.

104 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 489. Zie ook *Gorraiz Lizarraga e.a./Spanje*, 27 april 2004, ECLI:CE:ECHR:2004:0427JUD006254300.

105 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 499.

106 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 501.

107 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 490-498.

108 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 502.

te stellen hun rechten uit te oefenen met betrekking tot de effecten van klimaatverandering.[109] Daarnaast komt de vereniging volgens het Hof ook op voor het algemeen belang, en voor de belangen van toekomstige generaties.[110] Voor het Hof is de 'membership basis' en representativiteit van KlimaSeniorinnen – zonder toe te lichten wat het verstaat onder representativiteit – evenals het doel van de organisatie voldoende om de organisatie te aanvaarden als

> "*the vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State*."[111]

Recentelijk heeft het Hof geoordeeld dat de overwegingen zoals neergelegd in *KlimaSeniorinnen* beperkt zijn tot de klimaatcontext, en niet gelden bij verwante materie, zoals (lokale) milieuvervuiling.[112]

Mogelijk kan de uitspraak in *KlimaSeniorinnen* relevant zijn voor de Nederlandse ontvankelijkheidsbeoordeling ex. artikel 3:305a BW via de band van artikel 6 EVRM (Recht op een eerlijk proces). Hoewel niet expliciet in dit artikel vermeld, omvat artikel 6 EVRM ook het recht op toegang tot de rechter.[113] Dat recht is niet absoluut, en kan aan beperkingen worden onderworpen, zolang deze beperkingen de toegang van het individu niet zodanig beperken of verminderen dat de essentie van het recht wordt aangetast.[114] Het recht op toegang tot de rechter dient 'practical' en 'effective' te zijn, en beperkingen moeten onder meer proportioneel te zijn ten opzichte van een gelegitimeerd doel.[115]

Met verwijzing naar de uitspraak van het Zwitsers Hooggerechtshof waarin de klacht van de vereniging onder verwijzing naar een verbod op het instellen van een *actio popularis* werd afgewezen, en werd geoordeeld dat het beslissen over het Zwitsere klimaatbeleid via politieke besluitvorming zou moeten lopen,[116] oordeelt het EHRM dat het in eerdere rechtspraak oordeelde dat de scheiding tussen de wetgevende en de rechterlijke macht "a legitimate aim [is] as regards the limitations on the right of access to a court."[117] Aan de andere kant benadrukt het Hof ook dat rechtsbescherming moet kunnen worden geboden tegen (mogelijke) mensenrechtenschendingen. Zo overweegt het Hof dat

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109 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 523.

110 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o. 521.

111 EHRM 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz/Zwitserland*), r.o.532.

112 EHRM 30 januari 2025, ECLI:CE:ECHR:2025:0130JUD005156714 (*Cannavacciuolo e.a. /Italië*), r.o. 220-221.

113 I. Giesen, *Asser Procesrecht 1: Beginselen van burgerlijk procesrecht*, Deventer: Wolters Kluwer 2024, p. 156.

114 EHRM, Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb), https://rm.coe.int/1680700aaf, par. 43.

115 EHRM, Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb), https://rm.coe.int/1680700aaf, par. 43-44 en 48. Zie ook I. Giesen, *Asser Procesrecht 1: Beginselen van burgerlijk procesrecht*, Deventer: Wolters Kluwer 2024, p. 157.

116 *Verein KlimaSeniorinnen Schweiz/Zwitzerland*, 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020, r.o. 60.

117 *Verein KlimaSeniorinnen Schweiz /Zwitzerland*, 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020, r.o. 631.

> *"[t]o the extent that it was seeking to vindicate these rights in the face of the threats posed by the allegedly inadequate and insufficient action by the authorities to implement the relevant measures for the mitigation of climate change already required under the existing national law, this kind of action cannot automatically be seen as an actio popularis or as involving a political issue which the courts should not engage with."*[118]

In *KlimaSeniorinnen* oordeelt het Hof dat het recht op toegang tot de rechter van de vereniging is geschonden aangezien de Zwitserse rechter de procesbevoegdheid en klacht van de vereniging niet inhoudelijk heeft beoordeeld.

In reactie op de uitspraak in *KlimaSeniorinnen* heeft de Minister voor Klimaat en Energie de Kamer geïnformeerd dat de Nederlandse wet- en regelgeving, evenals de rechtspraktijk, in overeenstemming zijn met de door het Hof omschreven eisen van artikel 6, lid 1 EVRM in de context van klimaatmitigatiezaken,[119] gezien de in het Burgerlijk Wetboek en in de Algemene wet bestuursrecht opgenomen mogelijkheden tot het aanbrengen van een algemeenbelangactie (i.h.b. de mogelijkheden om op te komen voor de belangen en rechten van ander/en).[120]

3.3 Verdrag van Aarhus (1998)

Het doel van het Verdrag van Aarhus,[121] aldus artikel 1, is om bij te dragen aan de bescherming van het recht van elke persoon van de huidige en toekomstige generaties om te leven in een milieu dat passend is voor zijn of haar gezondheid en welzijn. Daartoe waarborgt elke Partij de rechten op toegang tot informatie, inspraak in de besluitvorming en toegang tot de rechter inzake milieuaangelegenheden in overeenstemming met de bepalingen van dit Verdrag. Een van de kernpijlers van het Verdrag van Aarhus is om te verzekeren dat burgers en belangenorganisaties toegang hebben tot bestuursrechtelijke of rechterlijke procedures om het handelen en nalaten van privé-personen en overheidsinstanties te betwisten die strijdig zijn met bepalingen van haar nationale recht betreffende het milieu (artikel 9 lid 3 Verdrag van Aarhus).[122]

Het uitgangspunt van het Verdrag van Aarhus is aldus dat belangenorganisaties een belangrijke rol spelen in het beschermen van milieubelangen. In zijn brief van 13 april 2023, waarin de Minister voor Rechtsbescherming, ingaat op de wijze waarop de regering invulling gaat geven aan de eerder ontraden Motie Stoffer c.s., wijst hij op dit aspect. Indachtig het Verdrag van Aarhus merkt hij op dat

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118 *Verein KlimaSeniorinnen Schweiz /Zwitzerland*, 9 april 2024, ECLI:CE:ECHR:2024:0409JUD005360020, r.o. 633-634.

119 *Kamerstukken II* 2023/24, 31793, nr. 269 (Brief van de Minister voor Klimaat en Energie).

120 Zie ook A.A. al Khatib en T.M. Linders, Verein KlimaSeniorinnen, Duarte Agostinho, Carême (EHRM, 53600/20, 39371/20, 7189/21) – Klimaatproblematiek onder het EVRM, 4 oktober 2024, https://www.ehrc-updates.nl/commentaar/212977 para 20.

121 Verdrag betreffende toegang tot informatie, inspraak in besluitvorming en toegang tot de rechter inzake milieuaangelegenheden 1998.

122 Zie voor toepasselijkheid van dat Verdrag op belangenorganisaties, artikel 2 lid 4 Verdrag van Aarhus.

> "in internationaal- en Europeesrechtelijk perspectief nemen non-gouvernementele organisaties (ngo's) bovendien een bijzondere positie in bij het behartigen van stemloze belangen.''[123]

De vraag is in welke mate een verdere aanscherping van het representativiteitsvereiste al dan niet in lijn is met dit uitgangspunt van het Verdrag van Aarhus.

Hoewel artikel 9 lid 3 van het Verdrag van Aarhus geen rechtstreekse werking toekomt, dient de nationale rechter nationale wetgeving, bijvoorbeeld ten aanzien van de ontvankelijkheidsbeoordeling, in het licht van het Verdrag van Aarhus en de daaraan ten grondslag liggende doelstellingen uit te leggen.[124] Bovendien moeten nationale regels van, onder meer, het procesrecht door de nationale rechter buiten toepassing worden gelaten als zij in strijd zijn met het verdrag.[125] Het nationale recht mag daarbij eisen stellen aan de ontvankelijkheid van belangenorganisaties (zie artikel 9 lid 3: 'wanneer zij voldoen aan de eventuele in haar nationale recht neergelegde criteria'). Die eisen moeten wel in lijn zijn met het Verdrag van Aarhus en de strekking van het verdrag om ruime toegang tot de rechter te waarborgen. Gegeven het uitgangspunt van het verdrag dat belangenorganisaties ruime toegang dienen te hebben tot de rechter om op te komen voor de bescherming van (door het Verdrag bestreken) milieubelangen, mag de nationale ontvankelijkheidsbeoordeling niet te streng zijn.[126] Daarvan is in ieder geval sprake als de toepasselijke regels en criteria het voor belangenorganisaties feitelijk onmogelijk of uiterst moeilijk maken om via rechtszaken te verzekeren dat (door het Verdrag van Aarhus bestreken) milieuregels worden nageleefd.[127]

In rechtspraak van de Nederlandse civiele rechter is het Verdrag van Aarhus, in relatie tot de ontvankelijkheidsbeoordeling, in beperkte mate aangehaald. In *Urgenda* – dat werd gewezen onder het oude artikel 3:305a BW, waarin geen representativiteitsvereiste was neergelegd – adresseert de Hoge Raad de legitimiteit die onder meer het Verdrag van Aarhus aan belangenorganisaties verschaft om op te komen bij de civiele rechter voor de bescherming van milieubelangen. De Hoge Raad overweegt dat:

> "Urgenda kan als belangenorganisatie die in dit geding op de voet van art. 3:305a BW opkomt voor de belangen van de ingezetenen van Nederland jegens wie de hiervoor

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123 *Kamerstukken II* 2022/23, 36169, nr. 39.

124 HvJ EU 8 maart 2011, zaak C-240/09, ECLI:EU:C:2011:125, r.o. 45 en 51 (*Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky*) en HvJ EU 20 december 2017, zaak C-664/15 ECLI:EU:C:2017:987 r.o. 45 (*Protect Natur-, Arten- und Landschaftschutz Umweltorganisation/ Bezirkshauptmannschaft Gmünd)*. Zie ook Mededeling van de Commissie betreffende toegang tot de rechter in milieuaangelegenheden, 18 augustus 2018, 2017/C 275/01, par. 93.

125 A. Buijze& C. Backes, (2024). *Naar een robuuste implementatie van het Verdrag van Aarhus? (Een onderzoek in opdracht van het Ministerie van IenW),* Utrecht University, p. 127.

126 HvJ EU 8 maart 2011, zaak C-240/09, ECLI:EU:C:2011:125, r.o. 54. Aarhus Convention Compliance Committee, Findings and Recommendations with regard to compliance by Belgium under the Aarhus Convention in relation to the rights of environmental organization to have access to justice, ACCC/C/2005/11 (16 juni 2006), UN DOC ECE/MP.PP/C.1/2006/4/Add.2, par. 36 en Aarhus Convention Compliance Committee, Compliance by Denmark with its obligations under the convention, ECE/MP.PP/2008/5/Add.4, 29 april 2008, par. 29

127 HvJ EU 20 december 2017, zaak C-664/15, ECLI:EU:C:2017:987, r.o. 47-48 (*Protect Natur-, Arten- und Landschaftschutz Umweltorganisation/ Bezirkshauptmannschaft Gmünd*); en HvJ EU 8 maart 2011, zaak C-240/09, ECLI:EU:C:2011:125, r.o. 49 (*Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky*).

in 5.9.1 bedoelde verplichting geldt, een beroep doen op deze verplichting. De hierbij aan de orde zijnde belangen van die ingezetenen zijn immers voldoende gelijksoortig en lenen zich dan ook voor bundeling, zodat een efficiënte en effectieve rechtsbescherming ten behoeve van hen wordt bevorderd. Juist bij milieubelangen zoals de onderhavige is rechtsbescherming door een dergelijke bundeling van belangen bij uitstek efficiënt en effectief. Dit is ook in overeenstemming met art. 9 lid 3 in verbinding met art. 2 lid 5 van het Verdrag van Aarhus, dat belangenorganisaties toegang tot de rechter garandeert om op te komen tegen de schending van het milieurecht, en in overeenstemming met art. 13 EVRM (zie hiervoor in 5.5.1-5.5.3)."[128]

In de zaak van Greenpeace tegen de Nederlandse Staat over de bescherming van Bonaire tegen de gevolgen van klimaatverandering, signaleert de Rechtbank Den Haag allereerst dat de representativiteitseis lastig is in te vullen bij ideële algemeenbelangacties, mede vanwege de onbepaaldheid van de achterban waarvoor Greenpeace opkomt (zie hierover ook al paragraaf 2.3 e.v.). Onder verwijzing naar het Verdrag van Aarhus, hanteert de rechtbank als representativiteitsmaatstaf of de belangenbehartiger een *adequate vertegenwoordiger* is voor de belangen waarvoor zij zegt op te komen (zie ook par. 2.3).[129] Hoewel de rechtbank dit niet expliciet vermeldt, kan hier mogelijk uit worden afgeleid dat criteria die betrekking hebben op de relatie van de belangenorganisatie tot de achterban (zie par. 2.5), in de ogen van de rechtbank niet hanteerbaar zijn en mogelijk zelfs in strijd zijn met het Verdrag van Aarhus.

In de literatuur wordt gewezen op de spanning tussen het representativiteitsvereiste zoals thans besloten ligt in artikel 3:305a BW en het Verdrag van Aarhus. Ten aanzien van de motie Stoffers c.s. wordt daarbij door verschillende auteurs opgemerkt dat de strekking daarvan in wezen is om toegang van belangenorganisaties tot de civiele rechter nader in te perken, en dat deze wens op gespannen voet staan met het uitgangspunt van Aarhus om toegang tot de rechter in ruime zin te borgen.[130] Bovendien lijkt de huidige uitwerking van het representativiteitsvereiste al scherp aan de wind te zeilen wat betreft de toelaatbaarheid daarvan in het licht van het Verdrag van Aarhus. Die huidige uitwerking van het representativiteitsvereiste, die is beschreven in paragraaf 2.3 e.v., staat allereerst mogelijk op gespannen voet met het Verdrag van Aarhus omdat de invulling ervan op dit moment onduidelijk is. Deze rechtsonzekerheid kan uiteindelijk (mogelijk ontoelaatbare) drempels tot toegang tot de rechter opwerpen voor belangenorganisaties, bijvoorbeeld omdat zij anticiperen op het gegeven dat de rechter mogelijk ook steun van de achterban betrekt in zijn ontvankelijkheidsoordeel en zij zich dus gaan inspannen om de achterban in kaart brengen en te identificeren.[131] Ook kan het leiden tot hogere proceskosten en lange doorlooptijden van

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128 HR 20 december 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, m.nt. J. Spier; *AB* 2020/24, m.nt. G.A. van der Veen & C.W. Backes (*Staat/Urgenda*).

129 Rb. Den Haag 25 september 2024, ECLI:NL:RBDHA:2024:14834, r.o. 3.11 e.v. (*Greenpeace/Staat*).

130 Zie onder meer R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970 en E. Bauw, 'Vechten tegen windmolens. Het representativiteitsvereiste bij ideële vorderingen als idee-fixe', *Ars Aequi* 2023, afl. 6, p. 434-440; F.M. Peters, D.R. Brouwer & N.C. Nilwik, 'De Invloed van het Aarhus Verdrag op de WAMCA', *Onderneming en Financiering* 2023 (31) 3, p. 44..

131 Zie over een bespreking van dit soort kritiek ook par. 2.4.

zaken.[132]Hierop aansluitend wordt in de literatuur erop gewezen dat in het licht van het Verdrag van Aarhus met name problematisch is wanneer bij de representativiteitsbeoordeling wordt gekeken naar criteria die zien op de relatie van de belangenorganisatie tot de achterban.[133] Zulke criteria zijn in het bijzonder veelal niet hanteerbaar in ideële algemeenbelangacties waarin wordt opgekomen voor milieubelangen, omdat juist daar de achterban te diffuus, niet valt te identificeren, specificeren en/of voldoende af te bakenen (zie ook par. 2.4). Ook wordt erop gewezen dat het representativiteitsvereiste, en dan wederom in het bijzonder het hanteren van criteria die zien op de relatie van de belangenorganisatie tot de achterban, op gespannen voet staat met een van de doelen van het Verdrag van Aarhus om voor *toekomstige generaties* te borgen dat zij leven in een milieu dat passend is voor zijn of haar gezondheid en welzijn (artikel 1). Wanneer wordt opgekomen voor de bescherming van belangen van toekomstige generaties kan de achterban, logischerwijze, niet worden geïdentificeerd en gespecificeerd. Het wel hanteren van dergelijke criteria zal betekenen dat zulke belangenorganisaties vanwege de aard van het belang waarvoor zij opkomen niet aan de ontvankelijkheidsvereisten voldoen, met als gevolg dat deze belangenorganisaties zich niet of in beperkte mate tot de rechter kunnen wenden voor de bescherming van milieubelangen. Dit staat uiteindelijk haaks op het Verdrag van Aarhus.

3.4 Afsluiting

Zowel het EVRM als het Verdrag van Aarhus bevat regels die relevant zijn voor de regels die gelden bij de beoordeling van de ontvankelijkheid van een procederende belangenorganisatie in een algemeenbelangactie. De huidige uitwerking van het representativiteitsvereiste lijkt weliswaar niet direct op gespannen voet te staan met het EVRM, maar wél met het Verdrag van Aarhus. Het Verdrag van Aarhus is relevant voor algemeenbelangacties die betrekking hebben op, door het Verdrag van Aarhus bestreken, milieuregels. Met name het hanteren van ontvankelijkheidscriteria die betrekking hebben op de relatie van de belangenorganisatie tot de achterban staat op gespannen voet met, in het bijzonder artikel 9, van het Verdrag van Aarhus, aangezien bij milieubelangen de achterban vaak diffuus en onbepaalbaar is.

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132 F.M. Peters, D.R. Brouwer & N.C. Nilwik, 'De Invloed van het Aarhus Verdrag op de WAMCA', *Onderneming en Financiering* 2023 (31) 3, p. 40-41. De auteurs zijn overigens ook als advocaat aan de zijde van een procederende belangenorganisatie betrokken geweest bij een algemeenbelangactie.

133 R. Stolk, 'De algemeenbelangactie in strijd met het algemeen belang?', *Nederlands Juristenblad* 2023/970.

4 Bevoegdheden van belangenorganisaties in de onderzochte jurisdicties

4.1 Introductie

De onderzochte buitenlandse jurisdicties (België, Duitsland, Engeland & Wales, Frankrijk, Noorwegen en Zweden) kennen op uiteenlopende wijzen aan belangenorganisaties de bevoegdheid toe tot het aanhangig maken van PIL-zaken. Hieronder geven wij eerst een (op alfabetische volgorde geordend) overzicht van die bevoegdheden per jurisdictie (par. 4.2). We besteden daarbij afzonderlijk aandacht aan de betekenis van het Verdrag van Aarhus en *KlimaSeniorinnen* in die jurisdicties (par. 4.3). Uit de jurisdictierapporten komt naar voren dat, naast het aanbrengen van een PIL-zaak,[134] belangenorganisaties ook op andere wijze rechtszaken inzetten om te komen tot het beschermen van de rechten en belangen van anderen (par. 4.4). Vervolgens bespreken we de overeenkomsten en verschillen in de bevoegdheden die de jurisdicties toekennen aan belangenorganisaties om PIL-zaken aanhangig te maken. Die verschillen en overeenkomsten hebben onder meer betrekking op de bevoegde rechter(s), de (specifieke) rechtsgebieden waar PIL-zaken mogelijk zijn en de aan te spreken actoren (private en/of publieke) actoren (par. 4.5).

4.2 Hoofdlijnen van de onderzochte jurisdicties

In **België** kunnen belangenorganisaties procederen ten behoeve van de belangenbescherming van anderen in het bestuursrecht, civiele recht, strafrecht en constitutionele recht. Ten aanzien van het civiele recht geldt als uitgangspunt dat belangenorganisaties in beginsel enkel in rechte kunnen opkomen ter bescherming van hun eigen belangen en rechten.[135] Op dat uitgangspunt bestaan evenwel belangrijke uitzonderingen, die zowel in de rechtspraak als in specifieke wettelijke bepalingen zijn neergelegd.[136] Het resultaat hiervan is dat in uiteenlopende gevallen in het civiele recht belangenorganisaties PIL-zaken kunnen aanbrengen, tegen zowel private als publieke actoren.[137] Ten aanzien van de bestuursrechter en de constitutionele rechter geldt dat belangenorganisaties, vanwege een voor hen gunstig ontvankelijkheidsregime, tamelijk eenvoudig ingang vinden in zaken waarin zij opkomen voor de belangen en rechten van anderen.[138] Voor de bestuursrechter en de constitutionele rechter vindt men dan ook PIL-zaken over uiteenlopende kwesties.[139] Specifieke regelingen, al dan niet mede vormgegeven door de rechter, die relevant zijn voor de civielrechtelijke bevoegdheden tot het aanbrengen van PIL-zaken kent men in België onder meer in het consumentenrecht, het milieu- en klimaatrecht,[140] voor organisaties die opkomen voor de bescherming van mensenrechten en fundamentele vrijheden,[141] geaccrediteerde zorgfondsen die opkomen voor de collectieve belangen van hun

134 Zie voor de term public interest litigation (PIL), par. 1.4.
135 Rapport België, p. 5 & 9.
136 Rapport België, p. 5-6.
137 Rapport België, p. 4-5.
138 Rapport België, p. 7 & p. 9-10, zie ook p. 11 e.v.
139 Rapport België, p. 5.
140 Rapport België, p. 6-8.
141 Rapport België, p. 6-7.

leden,[142] werknemers- en werkgeversorganisaties, en zzp-organisaties die opkomen tegen racisme en/of discriminatie,[143] en organisaties die opkomen tegen schendingen van het verbod op het ontkennen van nazi-oorlogsmisdaden.[144] Een wetsvoorstel om dierenrechtenorganisaties eveneens bij wet PIL-bevoegdheden toe te kennen, en de daarbij behorende amendementen, zijn recentelijk verworpen door de Commissie Justitie van het Belgische parlement.[145] Ten slotte kent België ook bevoegdheden tot het aanbrengen van PIL-zaken toe aan publieke instanties.[146]

Ten opzichte van de andere onderzochte jurisdicties zijn de bevoegdheden tot het aanbrengen van PIL-zaken door belangenorganisaties in **Duitsland** het meest beperkt. Uitgangspunt aldaar is dat rechtszoekenden kunnen opkomen voor de bescherming van hun eigen (individuele) belangen en rechten.[147] Dit geldt voor het bestuursrecht, civiele recht en constitutionele recht. Er bestaan drie uitzonderingen op dit uitgangspunt op het terrein van het civiele recht en mensenrechten, bestuursrechtelijke milieurecht en het (civiele) consumentenrecht (*Verbandsklagen*).[148] In het bestuursrechtelijke milieurecht is belangenorganisaties de bevoegdheid toegekend om via PIL-zaken op te komen tegen vermeende schendingen (door overheidsactoren) van bepaalde milieurechtelijke bepalingen.[149] En op basis van de consumentenrechtelijke bevoegdheden ziet men in Duitsland de afgelopen jaren met name een toename van het aantal zaken over greenwashing tegen bedrijven.[150]In de Duitse context blijkt overigens dat, zeer waarschijnlijk vanwege de beperktere mogelijkheden voor belangenorganisaties om zelf procedures aanhangig te maken voor de bescherming van de belangen van anderen, belangenorganisaties procedures op andere wijze inzetten om te komen tot de bescherming van algemene belangen (zie par. 4.4).

In **Engeland & Wales** is het aanbrengen van PIL-zaken mogelijk via de band van *judicial review*. Dat zijn zaken waarin de rechter de rechtmatigheid van het handelen of een beslissing van een instantie die een publieke functie uitoefent beoordeelt.[151] Hoewel de notie van het uitoefenen van een publieke functie in de rechtspraak ruim wordt geïnterpreteerd, is de toetsingsintensiteit die de rechter hanteert beperkter. Rechters zijn niet bevoegd om een algemene evenredigheidstoets uit te voeren of wetgeving buiten werking te stellen.[152] De bevoegdheid tot het aanhangig maken van judicial review-zaken is toegekend aan individuen, belangenorganisaties en publieke actoren. Judicial review is in generieke zin mogelijk en is dus niet beperkt tot handelingen of beslissingen die relateren aan bepaalde rechtsgebieden of

142 Rapport België, p. 6-7.
143 Rapport België, p. 6-7.
144 Rapport België, p. 6-7.
145 Rapport België, p. 20.
146 Rapport België, p. 7 (bijvoorbeeld op het vlak van racisme & discriminatie door twee openbare instellingen, van consumentenbeschermingen en van financiële regels door de bevoegde minister(s)).
147 Rapport Duitsland, p. 2-3.
148 Rapport Duitsland, p. 3.
149 Rapport Duitsland, p. 3.
150 Rapport Duitsland, p. 3.
151 Rapport Engeland & Wales, p. 13.
152 Rapport Engeland & Wales, p. 13-14.

beleidsdomeinen. Dientengevolge hebben judicial review (PIL-)zaken betrekking op vele verschillende kwesties. Voorbeelden vindt men in relatie tot asiel & migratie, sociale zekerheid, kernafval, mijnbouw, luchtkwaliteit, klimaatverandering, wegwerkzaamheden, COVID-19, puberteitsremmers, rechten van gedetineerden, militaire uitgaven, Brexit en persvrijheid (etc.).[153] In Engeland & Wales is eveneens aan bepaalde publieke actoren de mogelijkheid toegekend om judicial review-zaken aanhangig te maken.[154]

Frankrijk kent bevoegdheden toe aan belangenorganisaties om PIL-zaken aanhangig te maken in het bestuursrecht, civiele recht en strafrecht. PIL-zaken zijn hier mogelijk tegen zowel private als publieke actoren. In het civiele recht geldt, net als in België en Duitsland, het uitgangspunt dat belangenorganisatie kunnen opkomen voor de bescherming van hun eigen rechten en belangen. Er bestaan echter verschillende wettelijke bepalingen en rechterlijke uitspraken die hierop een ruime uitzondering aanbrengen, en het aldus mogelijk maken voor belangenorganisaties om op te komen voor de belangen en rechten van anderen.[155] Mogelijkheden tot het aanhangig maken van civiele PIL-zaken bestaan onder meer op het gebied van het arbeidsrecht, consumentenrecht, en milieu- en klimaatrecht.[156] In de bestuursrechtelijke context is in eerste instantie via rechtersrecht vormgegeven aan de bevoegdheden tot het aanbrengen van PIL-zaken, en later is dat via specifieke wetgeving gebeurd.[157] De mogelijkheden bestaan op uiteenlopende terreinen, waaronder het milieurecht. Vermeldenswaardig is bovendien de *le référé-liberté'-procedure*, waar *eenieder* zich onder bepaalde condities tot de rechter kan wenden om herstel te vorderen van een schending van een fundamenteel recht door een publieke actor.[158] Frankrijk kent daarnaast de bevoegdheid om in strafrechtelijke zaken civiele PIL-zaken aan te brengen. In die strafrechtelijke context vindt men voorbeelden van civiele PIL-zaken in relatie tot verschillende kwesties, zoals racisme, zedendelicten, oorlogsmisdaden, kindermisbruik, armoede, huisvestingscondities, verkeersveiligheid, corruptie en milieuverontreiniging.[159] Ook in Frankrijk hebben publieke actoren, met name in het milieurecht, de mogelijkheid tot het aanbrengen van PIL-zaken.[160]

Het Noorse rechtssysteem kent één rechter die bevoegd is in zowel, wat men in Nederland zou duiden als, bestuursrechtelijke als civielrechtelijke zaken.[161] Er bestaat in **Noorwegen** een generieke bepaling die het voor belangenorganisaties mogelijk maakt om PIL-zaken aanhangig te maken.[162] Voorts bepaalt de Noorse wet dat organisaties wier bevoegdheid tot procederen niet expliciet uit de wet voortvloeit onder bepaalde omstandigheden óók de

153 Rapport Engeland & Wales, p. 7 - 9 & p. 13.
154 Rapport Engeland & Wales, p. 18, waaronder het *Office of Environmental Protection*, de *Attorney General* en lokale autoriteiten.
155 Rapport Frankrijk, p. 2-4.
156 Rapport Frankrijk, p. 5.
157 Rapport Frankrijk, p. 4.
158 Rapport Frankrijk, p. 24.
159 Rapport Frankrijk, p. 5, 11 & 18.
160 Rapport Frankrijk, p. 7-8. Denk aan lokale autoriteiten, gemeenten en de Franse Staat. Denk voorts aan enkele milieu- en energieagentschappen.
161 Rapport Noorwegen, p. 3.
162 Rapport Noorwegen, p. 1-2, & p. 6.

bevoegdheid tot procederen hebben.[163] Er zijn geen restricties gesteld ten aanzien van de rechtsgebieden waarover belangenorganisaties PIL-zaken kunnen aanbrengen. Uit de rechtspraak blijkt bovendien dat ook rechtsvorderingen die betrekking hebben op abstracte, niet individualiseerbare, algemene belangen kunnen worden aangebracht.[164] PIL-zaken zijn mogelijk tegen zowel private als publieke actoren.[165] In Noorwegen vindt men dan ook PIL-zaken over uiteenlopende kwesties, zoals broeikasgasemissies, wolvenjacht, het behoud van monumentale gebouwen, windenergie, jeugdzorg, verzekeringsrecht en aanbestedingsrecht.[166] In Noorwegen kunnen ook publieke actoren PIL-zaken aanhangig maken.[167]

In **Zweden** geldt als uitgangspunt dat belangenorganisaties in beginsel enkel kunnen opkomen voor hun eigen belangen en rechten. De bevoegdheid tot het aanhangig maken van PIL-zaken is toegekend aan belangenorganisaties via specifieke wettelijke bepalingen, die onder meer betrekking hebben op het arbeidsrecht, consumentenrecht, gelijkebehandelingsrecht en het milieurecht, waaronder klimaataangelegenheden.[168] PIL-zaken kunnen worden gestart tegen zowel private als publieke actoren. Ook in Zweden is in bepaalde gevallen de bevoegdheid tot het aanbrengen van een PIL-zaak toegekend aan publieke actoren.[169]

4.3 De betekenis van Aarhus en KlimaSeniorinnen

Alle jurisdicties kennen belangenorganisaties de bevoegdheid toe om PIL-zaken te starten in relatie tot milieu- en klimaatvraagstukken. De rapporteurs is gevraagd naar de (mogelijke) betekenis van het Verdrag van Aarhus en *KlimaSeniorinnen* (zie voor een beschrijving van beide, par. 3) voor de bevoegdheden van belangenorganisaties om PIL-zaken aan te brengen in het milieu- en klimaatdomein. We geven hieronder per jurisdictie kort de – overigens veelal indicatieve – bevindingen weer.

Zowel in het bestuursrecht als in het civiele recht heeft de rechter in **België** de bevoegdheden voor belangenorganisaties om PIL-zaken aan te brengen mede op grond van artikel 9 van het Verdrag van Aarhus ruim geïnterpreteerd, onder meer door niet te strenge eisen te stellen aan hun ontvankelijkheid.[170] Voor België geldt dat *KlimaSeniorinnen* waarschijnlijk geen implicaties heeft voor belangenorganisaties om PIL-zaken in het bestuurs- en constitutionele recht aan te brengen, gegeven de bestaande (ruime) mogelijkheden voor belangenorganisaties om PIL-zaken aan te brengen. Wat betreft het civiele recht geldt enerzijds dat de bevoegdheden voor belangenorganisaties om PIL-zaken aan te brengen al '*KlimaSeniorinnen*-proof' ogen.

163 Rapport Noorwegen, p. 4-5.
164 Rapport Noorwegen, p. 6-7.
165 Rapport Noorwegen, p. 3-4.
166 Rapport Noorwegen, p. 2.
167 Rapport Noorwegen, p. 5. Denk aan de Staat, lokale autoriteiten etc.
168 Rapport Zweden, p. 1, p. 3-4.
169 Rapport Zweden, p. 1. P. 4-5 Denk in het bijzonder aan de ombudsman.
170 Rapport België, p. 6, 9 & 16.

Anderzijds geldt dat de mogelijkheid bestaat dat uit de uitspraak een argument wordt gedestilleerd tegen de ontvankelijkheid van individuele eisers in klimaatmitigatiezaken.[171]

Door de Duitse rapporteur wordt opgemerkt dat het Verdrag van Aarhus mede ten grondslag heeft gelegen aan de introductie van de *Verbandsklagen* in het milieurecht in **Duitsland**. In de literatuur lijkt bovendien overeenstemming te bestaan over het feit dat het Duitse systeem, in het licht van *KlimaSeniorinnen*, de mogelijkheid moet bieden om PIL-zaken aan te brengen die zien op klimaatverandering, en dan in het bijzonder klimaatmitigatie, hetgeen thans niet mogelijk is en dus aanpassing van de wet vergt.[172]

De mogelijkheden tot het aanbrengen van judicial review-zaken zijn in **Engeland & Wales** al dusdanig ruim dat het Verdrag van Aarhus daarop geen noemenswaardige invloed heeft.[173] Op basis van de *Human Rights Act* is de Engelse rechter formeel niet gebonden aan uitspraken van het EHRM, maar moet hij die wel in acht nemen.[174]

Voor **Frankrijk** geldt dat de mogelijkheden voor belangenorganisaties om PIL-zaken aan te brengen al ruim zijn. De Franse rapporteurs merken ten aanzien van artikel 9 van het Verdrag van Aarhus op dat de lijn in de Franse rechtspraak is dat het artikel verplichtingen tussen de verdragstaten schept, en dat op die verplichtingen geen (rechtstreeks) beroep kan worden gedaan door belangenorganisaties of individuen voor de Franse rechter. De rapporteurs wijzen met name op rechtspraak waarin individuen zich, tevergeefs, mede op artikel 9 van het Verdrag van Aarhus hebben beroepen voor hun ontvankelijkheid.[175] Wat betreft de betekenis van *KlimaSeniorinnen* geldt dat het Franse recht thans ruimer en flexibeler oogt voor belangenorganisaties dan het *KlimaSeniorinnen*-ontvankelijkheidsregime.[176] In Frankrijk rijst met name de vraag naar de implicaties van het inhoudelijke oordeel in *KlimaSeniorinnen* ten aanzien van artikel 2 en 8 van het EVRM. Mogelijk kan de kwalificatie van een gebrek aan voldoende mitigatiemaatregelen als mensenrechtenschending met zich brengen dat in Frankrijk tegen (vermeend) gebrekkig klimaatbeleid *le référé-liberté*-procedure openstaat (zie over die procedure par. 4.2).[177]

Ten aanzien van het Verdrag van Aarhus geldt in **Noorwegen** dat het hooggerechtshof van oordeel is dat artikel 9 van dat verdrag niet de ontvankelijkheid van belangenorganisaties regelt, en dat de toepasselijke ontvankelijkheidsregels derhalve een kwestie zijn van nationaal recht. In de standaarduitspraak onderstreepte de meerderheid van de rechters, indachtig het Verdrag van Aarhus, wel het rechtstatelijk belang van ruime mogelijkheden voor belangenorganisaties om PIL-zaken te initiëren. Ten aanzien van *KlimaSeniorinnen* wordt opgemerkt dat de bevoegdheden onder Noors recht thans al ruim zijn, en dat om die reden

171 Rapport België, p. 15-16.
172 Rapport Duitsland, p. 11.
173 Rapport Engeland & Wales, p. 37.
174 Rapport Engeland & Wales, p. 36-37.
175 Rapport Frankrijk, p. 25.
176 Rapport Frankrijk, p. 23-24.
177 Rapport Frankrijk, p. 23-24.

géén invloed wordt verwacht van de uitspraak op de bevoegdheden van belangenorganisaties om PIL-zaken op het terrein van klimaatverandering te entameren.[178]

In **Zweden** refereren rechters uitgebreid aan uitspraken van het Europees Hof van Justitie in relatie tot artikel 9 van het Verdrag van Aarhus, hetgeen zou hebben geleid tot een verruiming van de PIL-bevoegdheden in milieuaangelegenheden.[179] In een recente klimaatzaak, uit februari 2025, ging het Zweedse hooggerechtshof in op de implicaties van *KlimaSeniorinnen* voor het Zweedse recht. Daarbij nam het als uitgangspunt dat de toegang voor individuele eisers in klimaatmitigatiezaken beperkter is dan voor belangenorganisaties. Het hof overwoog verder dat het Zweedse constitutionele recht beperkingen stelt aan de ontvankelijkheid, in die zin dat een belangenorganisatie die een vordering instelt die ertoe strekt de Staat te bevelen om wetgeving aan te nemen of aan te passen, of om te verplichten zich te committeren aan specifieke klimaatdoelen, niet-ontvankelijk is. Volgens het hof vloeit uit artikel 6 EVRM en *KlimaSeniorinnen*, niet voort dat zulke vorderingen wél ontvankelijk moeten kunnen zijn.[180]

4.4 Juridische mobilisatie door belangenorganisaties

De questionnaire die is voorgelegd aan de rapporteurs, richt zich op de bevoegdheden van belangenorganisaties om *zelf* in rechte op te komen ten behoeve van de bescherming van de rechten en belangen van *anderen*, met de nadruk op algemene, diffuse en moeilijk te individualiseren belangen (par. 1.4). Belangenorganisaties kunnen evenwel ook op andere wijze rechtszaken gebruiken om te komen tot bescherming van dergelijke belangen. Om een breder begrip te krijgen van de PIL-context in de verschillende jurisdicties, is de rapporteurs daarom ook gevraagd hoe belangenorganisaties op andere wijze dan door het zelf instellen van een rechtsvordering, via de rechter trachten te komen tot bescherming van een algemeen belang.

Naast het gegeven dat in nagenoeg alle jurisdicties belangenorganisaties interveniëren in rechtszaken die aanhangig zijn gemaakt door individuele eisers,[181] komt met name naar voren dat in alle jurisdicties juridische mobilisatie plaatsvindt. Met de term juridische mobilisatie doelen we erop dat belangenorganisaties individuele eisers ondersteunen - bijvoorbeeld financieel, met mediastrategie en/of juridisch-inhoudelijk - in het opstarten en voeren van een rechtszaak tegen een onderneming of de overheid. In de rechtszaak gaat het dan weliswaar in juridische zin om (rechts)bescherming van de individuele belangen en rechten van de individuele eiser, maar de voorliggende kwestie houdt nauw verband met de bescherming van een algemeen belang. Bovendien is het achterliggende doel van dit type zaken veelal om via een rechtszaak zowel juridische als niet-juridische effecten te genereren die verder strekken dan het voorliggende geschil tussen individuele eiser en de aangesprokene. Denk hierbij aan

178 Rapport Noorwegen, p. 10-11.
179 Rapport Zweden, p. 11.
180 Rapport Zweden, p. 10.
181 In alle onderzochte jurisdicties maken belangenorganisatie gebruik van procesrechtelijke mogelijkheden om betrokken te raken bij procedures van individuele eisers, bijvoorbeeld via voeging of tussenkomst. Rapport België, p. 14; Rapport Duitsland, p. 10; Rapport Engeland & Wales, p. 32; Rapport Frankrijk, p. 20; Rapport Noorwegen, p. 2, p. 9-10; Rapport Zweden, p. 10.

de mogelijke precedentwerking van een uitspraak, de effecten van een uitspraak op (toekomstig) beleid van zowel private als publieke actoren, de invloed van (mogelijke) rechtszaken op hun beleid, en de algemene bredere maatschappelijke impact van dergelijke rechtszaken. De gedachte is dus al met al dat een rechtszaak van een gemobiliseerde individuele eiser kan bijdragen aan de door de belangenorganisatie nagestreefde belangenbescherming en maatschappelijke verandering.

In België vindt mobilisatie plaats ten behoeve van bescherming van uiteenlopende belangen. De rapporteurs lichten de recente zaak eruit van een boer tegen *Total Energies*. De boer vordert vergoeding van (vermogens)schade die het bedrijf zou aanrichten met haar (vermeende) onrechtmatige bijdrage aan het ontstaan en verergeren van klimaatverandering.[182] Ngo's spelen een belangrijke mobiliserende rol in deze zaak, hetgeen ook blijkt uit het feit dat zij hebben geïntervenieerd in de procedure.[183] In België vond in de klimaatzaak tegen de overheid, die sterke gelijkenis toont met *Urgenda*, ook mobilisatie plaats door individuen te laten deelnemen aan een algemeenbelangactie en hen publiekelijk support te laten uiten voor de zaak.[184]

Wat betreft Duitsland geldt dat, zoals hiervoor in paragraaf 4.2 aangegeven, de bevoegdheden voor belangenorganisaties om in rechte op te komen voor de rechten en belangen van anderen beperkt(er) ogen dan in de andere jurisdicties. Tegen die achtergrond valt op dat mobilisatie door belangenorganisaties plaatsvindt op uiteenlopende terreinen, zowel in bestuursrechtelijke, staatsrechtelijke als civielrechtelijke context. Voorbeelden vindt men op het terrein van fundamentele rechten in het algemeen, asiel & migratie, klimaatverandering, persvrijheid, privacy en het gelijkebehandelingsrecht.[185] De afgelopen jaren zijn met name op het gebied van klimaatverandering, mede met behulp van belangenorganisaties, verschillende klimaatprocedures door individuele eisers aanhangig gemaakt. In enkele zaken tegen Duitse autofabrikanten – waaronder Volkswagen, BMW en Mercedes-Benz – vorderden individuele eisers een rechterlijk bevel dat de bedrijven verplicht te stoppen met het op de markt brengen van auto's met verbrandingsmotoren.[186] De zaken tonen gelijkenis met de Nederlandse klimaatzaak tegen Shell. Ook de zaak waarin een Peruviaanse boer schadevergoeding vordert van energiebedrijf RWE voor de gevolgen van klimaatverandering is gemobiliseerd door ngo's. Tenslotte, waren in de constitutionele klimaatzaak *Neubauer e.a. t. Duitsland* de individuele eisers wel ontvankelijk, maar de ngo's niet.[187] Het hof oordeelde (zeer beknopt weergegeven) uiteindelijk dat elementen van het Duitse klimaatbeleid in strijd waren met fundamentele rechten en verplichtte de Staat reductiedoelstellingen vast te stellen. Uiteindelijk betrof het dus

182 Rapport België, p. 3-4.
183 Rapport België, p. 3-4.
184 Rapport België, p. 3-4.
185 Rapport Duitsland, p. 3-4.
186 Rapport Duitsland, p. 2-3, zie verder S. Schwemmer (et. al.), *Global Perspectives on Corporate Climate Legal Tactics: Germany National Report,* British Institute of International and Comparative Law 2024, p. 21 et. seq.
187 Rapport Duitsland, p. 2.

een zaak van individuele eisers, maar de uitkomst had een aanzienlijke maatschappelijke impact.

Vanwege de ruime mogelijkheden voor belangenorganisaties (en ook individuen) om judicial review-zaken aanhangig te maken is het in Engeland & Wales minder noodzakelijk voor belangenorganisaties om individuele eisers te mobiliseren. Mobilisatie vindt daar met name plaats om redenen die verband houden met de kosten van procederen.[188]

In Frankrijk is het beeld soortgelijk als in Engeland & Wales: ook daar vindt mobilisatie plaats, maar is zij voor belangenorganisaties minder noodzakelijk gezien de mogelijkheden tot het aanbrengen van PIL-zaken in zowel het bestuurs-, civiele, als strafrecht.[189] Datzelfde geldt *mutatis mutandis* voor Noorwegen. In Zweden, ten slotte, zou sprake zijn van een toename van mobilisatie.[190]

4.5 Overeenkomsten en verschillen

Alle jurisdicties geven belangenorganisaties de bevoegdheid om voor de bescherming van de belangen en rechten van anderen rechtszaken aanhangig te maken. Die bevoegdheid kennen zij toe op basis van generieke wettelijke regelingen en/of specifieke wettelijke regelingen. Ook kennen zij die bevoegdheid toe op uiteenlopende terreinen, waarbij er verschillen bestaan ten aanzien van de (rechts- en beleids)domeinen waarvoor specifieke regelingen bestaan. Met name ten aanzien van België, Frankrijk, Engeland & Wales en Noorwegen vallen de ruime(re) mogelijkheden tot het aanbrengen van PIL-zaken op. Soms zijn PIL-zaken enkel mogelijk tegen de overheid, zoals het geval is in Engeland & Wales. In Engeland & Wales kunnen daarentegen wel op uiteenlopende terreinen PIL-zaken aanhangig worden gemaakt. Een gemeenschappelijke deler is dat in alle systemen belangenorganisaties PIL-zaken ter bescherming van milieu-, klimaat- en consumentenbelangen aanhangig kunnen maken. Duitsland valt op vanwege de, in vergelijking met de andere jurisdicties, beperktere bevoegdheden voor belangenorganisaties om rechtszaken ter bescherming van de belangen en rechten van anderen aanhangig te maken. Ook in Zweden zijn de mogelijkheden, in vergelijking met de andere jurisdicties, beperkter. Ten slotte blijkt dat in alle onderzochte jurisdicties belangenorganisaties via de mobilisatie van individuele eisers trachten te komen tot de bescherming van maatschappelijke belangen.

188 Rapport Engeland & Wales, p. 9-10.
189 Rapport Frankrijk, p. 5-6.
190 Rapport Zweden, p. 3.

5 Systematiek van de ontvankelijkheidsbeoordeling

5.1 Introductie

Alle onderzochte jurisdicties kennen regelingen voor de ontvankelijkheidsbeoordeling, waarbij de rechter op grond van wettelijke en jurisprudentiële criteria een ontvankelijkheidsbeoordeling uitvoert (par. 5.2). In sommige jurisdicties kan ook een wettelijke of van overheidswege toegekende autorisatie van een specifieke belangenorganisatie of categorie van belangenorganisaties, van belang zijn bij de ontvankelijkheidsbeoordeling (par. 5.3). We geven hieronder een overzicht van de gehanteerde ontvankelijkheidscriteria. Daarbij beperken we ons tot criteria die specifiek zien op de beoordeling of de *specifieke belangenorganisatie* ontvankelijk is. Ontvankelijkheidscriteria die zien op het belang waarvoor zij opkomen, en een eventuele noodzakelijke kwalificatie van dat belang als algemeen belang, laten we buiten beschouwing. In paragraaf 6 gaan we nader in op het belang van representativiteit bij de ontvankelijkheidsbeoordeling.

5.2 Wettelijke en in jurisprudentie vastgelegde criteria

In alle jurisdicties geldt dat bij de ontvankelijkheidsbeoordeling wordt gekeken naar de statutair vastgelegde doelen van de organisatie en de relatie van de vordering met die statutair vastgestelde doelen.[191] Verder gelden criteria die onder meer verband houden met:[192]

- de interne organisatie van de belangenorganisatie,[193]
- de vraag of de organisatie een organisatie zonder winstoogmerk is,[194]
- de vraag of de belangenorganisatie een ideëel doel nastreeft,[195]
- de externe vertegenwoordiging van de belangenorganisatie,[196]
- de mogelijkheden om lid te worden van de belangenorganisatie,[197]
- de vraag of de belangenorganisatie eigen middelen heeft,[198]
- de expertise en ervaring van de belangenorganisatie,[199]
- het aantal jaren dat de belangenorganisatie de statutair vastgelegde doelen nastreeft,[200]

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191 Rapport België, p. 9 voor het civiele recht; Rapport Duitsland, p. 8 en p. 9; Rapport Frankrijk, p. 7-8, 15, 166 voor bijvoorbeeld het milieurecht, p. 17 voor het consumentenrecht; Rapport Noorwegen, p. 5; Rapport Zweden, p. 7-8.

192 Zie voor deze criteria onder meer: Rapport België, p. 9-11; Rapport Duitsland, p. 8.; Rapport Engeland & Wales, p. 17, p. 23-25; Rapport Frankrijk, p. 11, 15-18; Rapport Noorwegen, p. 4-6 & 8-9; Rapport Zweden, p. 7-8.

193 Bijv. Rapport Noorwegen, p. 5.

194 Bijv. Rapport Zweden, p. 4 en p. 5.

195 Bijv. Rapport Duitsland, p. 10.

196 Bijv. Rapport Noorwegen, p. 4-5.

197 Bijv. Rapport Duitsland, p. 8; Rapport Noorwegen, p. 4-5.

198 Bijv. Rapport België, p. 8 voor het civiele recht; Rapport Frankrijk, p. 16 voor het milieurecht, p. 17 voor het consumentenrecht; Rapport Noorwegen, p. 4-5.

199 Bijv. Rapport Engeland & Wales, p. 21.

200 Bijv. Rapport Duitsland, p. 8, Rapport Noorwegen, p. 6.

- het aantal jaren dat de belangenorganisatie bestaat,[201]
- de wijze waarop de belangenorganisatie die doelen nastreeft[202] en in het bijzonder of het dit doet op duurzame, niet ad hoc,[203] en effectieve wijze.[204]
- de wijze waarop de gestelde onrechtmatige gedraging het door de organisatie nagestreefde belang raakt.[205]

Ten aanzien van sommige jurisdicties is door de rapporteurs opgemerkt dat rechters een niet al te restrictieve, niet-formalistische en flexibele koers varen bij het toepassen van de ontvankelijkheidscriteria. Dit zou onder meer het geval zijn in België (i.h.b. in het bestuursrecht en het constitutionele recht), Engeland & Wales (over de gehele linie van judicial review), Frankrijk (i.h.b. in bestuursrechtelijke context) en in Noorwegen. [206]

In Engeland & Wales wordt een holistisch te noemen benadering gevolgd bij de ontvankelijkheidsbeoordeling. Hiermee bedoelen wij dat in de ontvankelijkheidsbeoordeling *ook* al (inhoudelijk) kan worden gekeken naar de aard en ernst van de gestelde onrechtmatigheid en de adequaatheid van de gevraagde remedie. De ontvankelijkheidsbeoordeling, en de daarbij gehanteerde criteria zijn afhankelijk van de omstandigheden van het geval.[207] In de rechtspraak worden uiteenlopende criteria gehanteerd. Deze gezichtspunten zijn enuntiatief en niet-uitputtend. Ze worden bovendien in samenhang beoordeeld. Over het algemeen geldt dat rechters ruimhartig zijn bij de ontvankelijkheidsbeoordeling, waarmee wordt bedoeld dat organisaties relatief snel ontvankelijk worden geacht.[208]

Enkele in Engeland & Wales gehanteerde criteria houden, zoals aangegeven, verband met de aard en ernst van de gestelde onrechtmatige gedraging en de gevraagde remedie. Zo wordt in de rechtspraak onder meer gekeken naar de inhoud van de vordering, de juridische of beleidsmatige context waarbinnen de vordering zich aandient,[209] de ernst en zwaarte van de gemaakte verwijten,[210] de beschikbaarheid van alternatieve (juridische) mogelijkheden om het onrechtmatige gedrag te remediëren,[211] en de aan- of afwezigheid van andere mogelijke actoren die dezelfde vordering kunnen instellen en hun positie ten opzichte van de procederende belangenorganisatie.[212] In sommige zaken leek de ernst en zwaarte van de gestelde onrechtmatige gedraging reeds voldoende voor het toelaten van de

201 Bijv. Rapport Frankrijk, p. 15-18.
202 Bijv. Rapport Duitsland, p. 9; Rapport Zweden, p. 7-8.
203 Bijv. Rapport Duitsland, p. 8.
204 Bijv. Rapport België, p. 11.
205 Bijv. Rapport België, p. 9, voor het bestuursrecht en constitutionele recht; Rapport Engeland & Wales, p. 17.
206 Rapport België, p. 10 voor het bestuursrecht en constitutionele recht; Rapport Frankrijk, p. 11 & p. 15 voor het bestuursrecht; Rapport Noorwegen, p. 8-9.
207 Rapport Engeland & Wales, p. 16-17 & p. 21-28.
208 Rapport Engeland & Wales, p. 21 et. seq.
209 Rapport Engeland & Wales, p. 16-17.
210 Rapport Engeland & Wales, p. 23-25.
211 Rapport Engeland & Wales, p. 16-17.
212 Rapport Engeland & Wales, p. 23.

belangenorganisatie.[213] Aan de andere kant is soms geoordeeld dat een belangenorganisatie niet-ontvankelijk is als een andere, veelal individuele, eiser ook de mogelijkheid heeft om een vordering in te dienen ter bescherming van het voorliggende belang en/of wanneer het meer voor de hand ligt dat die individuele eiser een zaak start, hoewel in zo'n zaak een belangenorganisatie kan interveniëren als derde.[214]

5.3 Autorisatiemechanismen

Voorts kennen sommige jurisdicties, wat wij noemen, autorisatiemechanismen die van belang (kunnen) zijn in het kader van de ontvankelijkheidsbeoordeling. Op grond van de wet, eventueel in combinatie met een daarop gebaseerd besluit door de overheid, krijgen specifieke belangenorganisaties of categorieën van belangenorganisaties, een autorisatie die met zich kan brengen dat de toegang tot de rechter is gegeven of dat een andere, lichtere ontvankelijkheidsbeoordeling door de rechter wordt uitgevoerd.

In België zien we autorisatiemechanismen met name terug in het kader van het consumentenrecht. Belangenorganisaties moeten in die context worden erkend door de Minister van Economische zaken (zie hieronder par. 6.2 voor de voorwaarden). Onder omstandigheden kan de president van een gerecht ook beoordelen of aan de criteria voor erkenning is voldaan.[215] Voorts verschaft de bevoegdheid tot het initiëren van PIL-zaken die zijn toegekend aan zorgverzekeringsfondsen een voorbeeld: geaccrediteerde zorgverzekeringsfondsen kunnen procederen ten behoeve van de collectieve rechten van hun leden.[216]

In Duitsland geldt in de milieurechtelijke *Verbandsklagen* onder meer als ontvankelijkheidsvoorwaarde dat de belangenorganisatie moet zijn erkend door het *Umweltbundesamt und Bundesumweltministerium*.[217] Slechts geautoriseerde organisaties kunnen PIL-zaken aanbrengen.

Ook in Frankrijk bestaan dergelijke autorisatiemechanismen.[218] Men maakt daarbij een onderscheid tussen *habilitation* en *certification*.[219] Habilitation vloeit voort uit specifieke wetten die door het parlement zijn aangenomen (en in bepaalde gevallen door de rechter zijn uitgebreid). Habilitatie geeft organisaties de bevoegdheid om te procederen namens anderen of ter behartiging van andermans belangen. In de praktijk hoeven zij geen rechtmatig belang aan te tonen om te kunnen procederen, dit wordt namelijk verondersteld. Certificering wordt door de bevoegde minister bij besluit toegekend aan een vereniging, voor een bepaalde duur.

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213 Rapport Engeland & Wales, p. 23 & p. 25.
214 Rapport Engeland & Wales, p. 32 e.v.
215 Rapport België. p. 12-13.
216 Rapport België, p. 6.
217 Zie voor de criteria Sec. 3. UmwRG Rapport Duitsland, p. 9. Zie voor een lijst met erkende organisaties: https://www.umweltbundesamt.de/sites/default/files/medien/13736/dokumente/anerkannte_umwelt-_und_naturschutzvereinigungen_0.pdf, laatst geraadpleegd 6 mei 2025.
218 Rapport Frankrijk, p. 5, 7, 9-12,15-17.
219 Zie in relatie tot representativiteit Rapport Frankrijk, p. 15 e.v.

Het is een formele erkenning van de representativiteit van de vereniging. Als we kijken naar de achterliggende reden van habilitatiewetgeving (de impliciete reden waarom de wetgever een bepaalde entiteit bevoegdheid geeft om in rechte op te treden), dan zijn sommige habilitations gebaseerd op het vertrouwen in de entiteit. Andere habilitations zijn gebaseerd op de representativiteit van de entiteit. Binnen deze categorie van habilitatiewetgeving geldt dat sommige bevoegde entiteiten geen certificering nodig hebben (zoals vakbonden), sommige enkel geregistreerd moeten zijn gedurende een bepaald aantal jaren (zoals verenigingen voor mensen met een handicap), en voor andere is certificering een verplichte voorwaarde (bijv. in het milieurecht).

Opmerking verdient dat ook organisaties die niet van overheidswege zijn geautoriseerd ontvankelijk kunnen zijn.[220] Daarnaast is niet in alle gevallen autorisatie een vereiste of een relevant criterium bij de ontvankelijkheidsbeoordeling. In het civiele recht geldt bijvoorbeeld dat een belangenorganisatie kan opkomen voor een collectief belang dat valt binnen de doelomschrijving van de belangenorganisatie en waarbij de (gestelde) onrechtmatige gebeurtenis persoonlijk letsel heeft veroorzaakt.[221] In het milieurecht heeft een autorisatie van overheidswege als belangrijkste gevolg dat wordt verondersteld dat de belangenorganisatie een belang bij procederen heeft.[222] Als de belangenorganisatie niet geautoriseerd is, beoordeelt de rechter of het collectieve belang waarvoor de organisatie opkomt valt binnen het (statutaire) doel van de organisatie én of de organisatie zelf een belang heeft om te procederen. De strafrechter, ten slotte, is restrictief in het toelaten van niet-geautoriseerde belangenorganisaties.

5.4 Overeenkomsten en verschillen

Uit het voorgaande komt naar voren dat alle jurisdicties werken met generieke (wettelijke) regels op basis waarvan de rechter de ontvankelijkheid van de procederende belangenorganisatie beoordeelt. Sommige systemen kennen daarnaast autorisatiemechanismen. Op grond van de wet, eventueel in combinatie met een daarop gebaseerd besluit door de overheid, krijgen specifieke belangenorganisaties of categorieën van belangenorganisaties, een autorisatie die met zich kan brengen dat de toegang tot de rechter is gegeven of dat een andere, lichtere toets door de rechter wordt uitgevoerd bij de ontvankelijkheidsbeoordeling. In nagenoeg alle jurisdicties die autorisatiemechanismen hanteren, bestaat voor belangenorganisaties óók de mogelijkheid om op grond van generieke regels ontvankelijk te zijn.

220 Rapport Frankrijk, p. 9.
221 Rapport Frankrijk, p. 10.
222 Rapport Frankrijk, p. 11.

6 Representativiteit bij de ontvankelijkheidsbeoordeling

6.1 Introductie

Bij de ontvankelijkheidsbeoordeling wordt in alle onderzochte jurisdicties gekeken naar de representativiteit van de procederende belangenorganisatie. Daarbij geldt wel dat niet alle jurisdicties expliciet de term representativiteit hanteren. In de onderzochte jurisdicties wordt de representativiteit van de belangenorganisatie die een PIL-zaak aanbrengt op verschillende manieren meegewogen bij de ontvankelijkheidsbeoordeling. Hierna maken wij, tegen de achtergrond van hetgeen is besproken in paragraaf 2.5, een onderscheid tussen twee typen representativiteitseisen Eerst behandelen we criteria die betrekking hebben op de vraag of de belangenorganisatie *geschikt is om op te komen voor de belangen die onderwerp zijn van de procedure* (par. 6.2). Denk hierbij aan criteria die betrekking hebben op de kennis en ervaring van de belangenorganisatie en eerdere activiteiten van de organisatie ten behoeve van bescherming van het belang waarvoor het in rechte opkomt. Vervolgens behandelen we criteria waarbij het gaat om de *relatie van de belangenorganisatie tot de achterban*, en in het bijzonder het mandaat van de belangenorganisatie om namens de achterban op te treden (par. 6.3). Denk hierbij aan criteria gerelateerd aan het aantal leden of steun van de achterban voor de belangenorganisatie. We sluiten af met een duiding van de rechtsvergelijkende inzichten ten aanzien van representativiteit (par. 6.4).

6.2 Representativiteit: geschiktheid van de belangenorganisatie

In België zien we primair criteria die verbandhouden met de geschiktheid van de belangenorganisatie om voor de (litigieuze) belangen op te komen. Daar wordt in civielrechtelijke context onder meer beoordeeld of de organisatie haar statutaire doel op een duurzame en effectieve wijze nastreeft,[223] waarbij op grond van de wet géén minimum geldt wat betreft het aantal jaren dat de organisatie actief moet zijn. De organisatie mag bovendien enkel opkomen voor een collectief belang, d.w.z. zij mag niet opkomen voor de individuele belangen van een of een aantal van de leden. [224] In het consumentenrecht geldt onder meer als voorwaarde voor autorisatie (zie par. 5.3) dat de organisatie ten minste 12 maanden actief moet zijn geweest in het behartigen van het desbetreffende consumentenbelang, geen winstoogmerk heeft, niet onderwerp is van een faillissementsprocedure of insolvent is verklaard, onafhankelijk is en procedures heeft die deze onafhankelijkheid waarborgen, en informatie over - het voldoen aan deze - criteria publiekelijk beschikbaar heeft gemaakt.[225] In bestuursrechtelijke en staatsrechtelijke context geldt als uitgangspunt dat verenigingen zonder winstoogmerk brede toegang genieten. Qua representativiteit geldt een negatief vereiste: niet moet komen vaststaan dat de organisatie het belang niet meer (effectief) behartigt, ofwel zij mag niet puur een papieren bestaan leiden.[226]

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223 De Belgische rapporteurs duiden dit ook als een representativiteitscriterium, zie Rapport België, p. 11.
224 Rapport België, p. 9.
225 Rapport België, p. 13.
226 Rapport België, p. 10.

In Duitsland geldt in het milieurechtelijke domein dat de belangenorganisatie het belang waarvoor zij opkomt niet-tijdelijk moet behartigen, minstens drie jaar dient te bestaan, en tijdens dat bestaan actief is geweest in het behartigen van de statutaire doelen, of op andere wijze voldoende garantie biedt voor een adequate uitvoering van de belangenbehartiging, waarbij onder meer wordt gekeken naar activiteiten in het verleden, de mogelijkheden om lid te worden (zie par. 6.3) en de algemene bekwaamheid van de organisatie. Voorts moet de organisatie een (in belastingrechtelijke zin) goed doel nastreven.[227]

Zoals gezegd vindt de ontvankelijkheidsbeoordeling in Engeland & Wales plaats op basis van uiteenlopende gezichtspunten en op holistische wijze (zie par. 5.2). Daarbij kan representativiteit een gezichtspunt zijn, maar van een vereiste waaraan altijd moet worden voldaan is op dit punt geen sprake. De nadere invulling van het begrip representativiteit is tamelijk diffuus en erg afhankelijk van de voorliggende feiten. Noties van representativiteit fungeren met name als steunargument om toegang te verlenen.[228] Een voorbeeld van een gezichtspunt dat is gerelateerd aan de geschiktheid van de belangenorganisatie om voor de (litigieuze) belangen op te komen, is dat in sommige zaken is gekeken naar expertise en ervaring van de belangenorganisatie.[229]

In Frankrijk geldt ten aanzien van de *habilitation van* organisaties (zie par. 5.3) in het milieurecht dat zij ten minste vijf jaar geregistreerd dienen te zijn ten tijde van het intreden van de litigieuze feiten.[230] In het kader van het consumentenrecht wordt bij de autorisatiebeslissing beoordeeld of de belangenorganisatie al meer dan een jaar bestaat op het moment van de aanvraag en activiteiten uitvoert ter bescherming van het belang waarvoor de organisatie opkomt. In zowel het consumenten- als milieurecht wordt ook gekeken naar het aantal leden (zie hieronder, par. 6.3).[231] In het strafrecht geldt bijvoorbeeld als representativiteitseis dat de organisatie ten minste vijf jaar ten tijde van het (gestelde) delict is geregistreerd.[232] Wij roepen hierbij overigens wel in herinnering dat in Frankrijk ook de rechter, op andere gronden, een belangenorganisatie ontvankelijk kan verklaren (zie par. 6.3).

In Noorwegen wordt bij de ontvankelijkheidsbeoordeling onder meer betrokken of de organisatie een permanente organisatiestructuur heeft, extern wordt vertegenwoordigd, regelingen voor lidmaatschap heeft en eigen financiële middelen heeft.[233] Vermeldenswaardig is dat gerenommeerde organisaties verondersteld worden om de bevoegdheid te hebben om te procederen, aangezien wordt aangenomen dat zij beschikken over de juiste organisatiestructuur, leden en, tot op bepaalde hoogte, de benodigde financiële middelen.[234]

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227 Rapport Duitsland, p. 8.
228 Rapport Engeland & Wales, p. 28-29.
229 Rapport Engeland & Wales, p. 23-25.
230 Rapport Frankrijk, p. 9.
231 Rapport Frankrijk, p. 16.
232 Rapport Frankrijk, p. 18.
233 Rapport Noorwegen, p. 4-5.
234 Rapport Noorwegen, p. 4-5.

Zweden hanteert zowel in milieurechtelijke zaken als in discriminatiezaken, onder meer als vereiste dat de organisatie een ngo moet zijn.[235] In het milieurecht geldt dat de organisatie ten minste drie jaren actief moet zijn, en er geldt een vereiste ten aanzien van het aantal leden (zie hieronder par. 6.3). In discriminatiezaken wordt daarnaast onder meer beoordeeld of de organisatie geschikt is om de actie aan te brengen, waarbij onder meer haar activiteiten en economische en financiële slagkracht van belang zijn.[236]

6.3 Representativiteit: relatie tot de achterban

In Duitsland, Engeland & Wales, Frankrijk, Noorwegen en Zweden worden ook criteria gehanteerd die specifiek zien op de *relatie van de organisatie met de achterban*.

In Duitsland wordt, in aanvulling op de hiervoor genoemde criteria (par. 6.2), in milieurechtelijke context in het kader van de autorisatie van een organisatie, onder meer bekeken of de belangenorganisatie mogelijk maakt dat personen die de doelen van de organisatie ondersteunen lid te worden.[237] Er geldt geen vereiste ten aanzien van het aantal leden.

In Engeland & Wales vindt men in de rechtspraak voorbeelden waarin onder meer het ledenaantal van de organisatie, het feit dat een identificeerbare groep individuen door het onrechtmatige beleid wordt geraakt en de organisatie opkomt voor die groep, is meegewogen door rechters in de ontvankelijkheidsbeoordeling. In sommige gevallen wijzen rechters ter onderbouwing van hun flexibele en genereuze houding bij de ontvankelijkheidsbeoordeling (zie par. 4.2 en 5.2), in hun motivering er expliciet op dat belangenorganisaties opkomen voor gemarginaliseerde personen die eigenstandig niet of minder gemakkelijk zich tot de rechter (kunnen) wenden.[238]

In Frankrijk geldt allereerst dat de habilitation van een belangenorganisatie (zie hiervoor par. 5.2) mede kan zijn ingegeven door de *veronderstelde* representativiteit van de organisatie .[239] Voorts vindt men binnen het consument- en milieurecht elementen van representativiteit terugkomen die betrekking hebben op de relatie van de belangenorganisatie tot de achterban. In het kader van het consumentenrecht geldt voor een landelijk opererende organisatie bijvoorbeeld als eis dat zij ten minste 10.000 betalende leden heeft. Voor niet-landelijk opererende organisaties geldt dat een voldoende representatief aantal leden is vereist.[240] In het kader van het milieurecht moet de organisatie eveneens een voldoende aantal leden hebben.[241] Echter, het is veeleer de activiteit van de belangenorganisatie waarnaar gekeken wordt dan het aantal leden. In de context van milieuverenigingen hangen de ledencijfers af van de demografische kenmerken van het betreffende gebied en de algemeenheid van het

235 Rapport Zweden, p. 7-8.
236 Rapport Zweden, p. 7-8.
237 Rapport Duitsland, p. 8.
238 Rapport Engeland & Wales, p. 23-25.
239 Rapport Frankrijk, p. 4.
240 Rapport Frankrijk, p. 16.
241 Rapport Frankrijk, p. 16.

statutaire doel. Bovendien moeten milieuorganisaties, om gecertificeerd te worden, activiteiten ontplooien die ook hun niet-leden ten goede komen.

De verdere invulling van de notie van representativiteit in Noorwegen is diffuus. Op basis van rechtspraak lijkt in ieder geval te gelden dat een organisatie met ongeveer 20.000 leden voldoende connectie heeft met de vordering (zie over die eis par. 6.2).[242] Het is echter niet zo dat, *a contrario,* geldt dat een organisatie met minder leden niet-ontvankelijk is. In een zaak oordeelde het Noorse Hooggerechtshof bijvoorbeeld dat een belangenorganisatie bestaande uit 20 leden het recht had om een rechtszaak aan te spannen, omdat zij over enige financiële middelen beschikte en een voldoende stabiele organisatievorm had.[243] Het Noorse Hooggerechtshof heeft zich zelden uitgesproken over de kwestie van het minimumaantal leden, aangezien de representativiteit niet alleen afhangt van het absolute aantal leden, maar ook van het potentiële aantal leden.

Ten slotte stelt men in Zweden in het kader van het milieurecht onder meer als eis dat de organisatie meer dan 100 leden heeft *of* op een andere manier laat zien dat zij publiekelijke steun heeft. Het gaat daarbij om steun voor de organisatie, *niet* voor de specifieke vordering of rechtszaak. Rechters zouden het criterium flexibel interpreteren. Ter illustratie wordt in het jurisdictierapport erop gewezen dat een organisatie die vijf jaar actief was, onder meer in bestuursrechtelijke procedures, met tien leden, voldeed aan het ledenvereiste.[244]

6.4 Overeenkomsten en verschillen

Alle onderzochte jurisdicties betrekken de representativiteit van de procederende belangenorganisatie in de ontvankelijkheidsbeoordeling. Soms wordt representativiteit expliciet als term vermeld, maar soms worden ook aspecten van representativiteit betrokken in de ontvankelijkheidsbeoordeling zonder dat daarbij deze term expliciet wordt gehanteerd. Dat doen zij op verschillende en uiteenlopende manieren. Daarbij geldt dat de invulling van het begrip representativiteit vaak diffuus is. Bovendien is het de rechter die, in alle jurisdicties, nadere uitwerking geeft aan representativiteit en de criteria die worden gehanteerd ter vaststelling daarvan. In paragraaf 2.5 is onderscheid gemaakt tussen twee typen representativiteitseisen: criteria die zien op de geschiktheid van de belangenorganisatie om op te komen voor de belangen die onderwerp zijn van de procedure en criteria die zien op de relatie van de belangenorganisatie tot de achterban. Alle jurisdicties hanteren criteria die zien op de geschiktheid van de belangenorganisatie om voor de (litigieuze) belangen op te komen. Er wordt onder meer gekeken naar het aantal jaren dat de organisatie bestaat en/of actief is, de expertise en ervaring van de organisatie en de eerdere activiteiten die het heeft ontplooid ter bescherming van de belangen waarvoor het opkomt. Sommige jurisdicties hanteren ook criteria die betrekking hebben op de relatie van de organisatie tot de achterban, bijvoorbeeld

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242 Rapport Noorwegen, p. 9.

243 In de desbetreffende zaak vertegenwoordigde de organisatie eigenaars van vakantiehuizen die gezamenlijk gebruikmaakten van water- en rioleringsinfrastructuur.

244 Rapport Zweden, p. 9.

door te kijken naar het aantal leden. Echter, ook in deze jurisdicties geldt dat deze criteria ruimhartig en flexibel worden toegepast. Bovendien geldt ook in die jurisdicties uiteindelijk dat het meeste gewicht toekomt aan criteria die betrekking hebben op de geschiktheid van de belangenorganisaties om op te komen voor het (litigieuze) belang.

7 Conclusie

7.1 Introductie

Hierna behandelen we de kernbevindingen van dit onderzoek. Daarbij richten we ons op de bevindingen die relevant zijn voor de ontvankelijkheidsbeoordeling in een (ideële) algemeenbelangactie, en in het bijzonder het representativiteitsvereiste. We bespreken de bevindingen ten aanzien van de bevoegdheden die belangenorganisaties hebben om PIL-zaken aanhangig te maken (par. 7.2),[245] de systematiek van de ontvankelijkheidsbeoordeling (par. 7.3) en het hanteren en de uitwerking van een representativiteitsvereiste in die ontvankelijkheidsbeoordeling (par. 7.4). We behandelen in deze paragrafen steeds de relevante overeenkomsten en verschillen tussen de onderzochte buitenlandse jurisdicties (België, Duitsland, Engeland & Wales, Frankrijk, Noorwegen en Zweden) en relateren deze aan de Nederlandse context.

7.2 Bevoegdheden van belangenorganisaties in de onderzochte jurisdicties

Alle onderzochte rechtssystemen geven belangenorganisaties de bevoegdheid om voor de bescherming van belangen en rechten van anderen rechtszaken aanhangig te maken. Die bevoegdheid kennen zij toe op basis van generieke wettelijke regelingen en/of specifieke wettelijke regelingen. Ook kennen zij die bevoegdheid toe op uiteenlopende terreinen, waarbij er verschillen bestaan ten aanzien van de (rechts- en beleids)domeinen waarvoor specifieke regelingen bestaan. In de onderzochte jurisdicties vinden we een variëteit aan belangen waarvoor belangenorganisaties kunnen opkomen. Te denken valt aan mogelijkheden op het terrein van arbeid, asiel & migratie, belastingen, constitutionele bevoegdheden van de overheid, consumentenbescherming, corruptie, dierenwelzijn, discriminatie, fundamentele rechten, gegevensbescherming, milieubescherming, klimaatverandering, kinderbescherming, oorlogsmisdaden, verkeersveiligheid en verzekering. Ook verschillen de jurisdicties in bij welke rechter PIL-zaken aanhangig kunnen worden gemaakt (bestuursrechter, civiele rechter, constitutionele rechter of strafrechter). In België, Engeland & Wales, Frankrijk, Nederland en Noorwegen kent men ruimere mogelijkheden toe aan belangenorganisaties dan in Duitsland en Zweden. In Engeland & Wales zijn PIL-zaken enkel mogelijk tegen de overheid, maar bestaat die mogelijkheid wel ten aanzien van uiteenlopende rechten en belangen. Duitsland valt op vanwege de, in vergelijking met de andere jurisdicties, beperktere bevoegdheden voor belangenorganisaties (die hen op basis van enkele specifieke wetten zijn toegekend). Tegelijkertijd valt op dat in die gevallen waar in Duitsland wel zo'n bevoegdheid bestaat, de ontvankelijkheidsbeoordeling licht van aard is. De generieke bevoegdheid die artikel 3:305a BW verschaft aan belangenorganisaties is soortgelijk aan de bevoegdheid die belangenorganisaties hebben in België, Frankrijk, Engeland & Wales, Noorwegen en Zweden. Hoewel de jurisdicties uiteenlopen in de mogelijkheden die zij aan belangenorganisaties bieden om PIL-zaken aanhangig te maken, is een gemeenschappelijke deler dat in alle

[245] Zie voor een uitleg van de term public interest litigation (PIL), par. 1.4.

jurisdicties belangenorganisaties PIL-zaken ter bescherming van milieu-, klimaat- en consumentenbelangen aanhangig kunnen maken.

Ten slotte blijkt dat in alle onderzochte (buitenlandse) jurisdicties belangenorganisaties via de juridische mobilisatie van individuele eisers, bijvoorbeeld door deze eisers te ondersteunen in hun procedure, trachten te komen tot de bescherming van maatschappelijke belangen. Met name de Duitse context verdient hierbij vermelding: juridische mobilisatie wordt daar ingezet om de beperktere mogelijkheden tot het aanbrengen van PIL-zaken te ondervangen, en om zodoende (alsnog) via de rechter te komen tot bescherming van maatschappelijke belangen. Mobilisatie vindt in het bijzonder plaats wanneer de mogelijkheden tot het aanhangig maken van PIL-zaken beperkt(er) zijn.

7.3 Ontvankelijkheidsbeoordeling

Voor de ontvankelijkheidsbeoordeling geldt dat alle onderzochte jurisdicties werken met generieke open bepalingen op basis waarvan de rechter de ontvankelijkheid beoordeelt. Dit is ook in Nederland het geval (artikel 3:305a BW). Voor de toepasselijke criteria maakt het daarbij in géén van de jurisdicties verschil uit of de gedaagde de overheid of een private actor is.[246] Ook dit is in Nederland het geval. Sommige systemen kennen daarnaast autorisatiemechanismen.[247] Op grond van de wet, eventueel in combinatie met een daarop gebaseerd besluit door de overheid, krijgen specifieke belangenorganisaties of categorieën van belangenorganisaties een autorisatie die met zich kan brengen dat de toegang tot de rechter is gegeven of dat een lichtere toets door de rechter wordt uitgevoerd bij de ontvankelijkheidsbeoordeling. In nagenoeg alle jurisdicties die autorisatiemechanismen hanteren, bestaat voor belangenorganisaties óók de mogelijkheid om via een generieke en open bepaling ontvankelijk te zijn.

7.4 Representativiteit

Bij de ontvankelijkheidsbeoordeling wordt in alle onderzochte jurisdicties gekeken naar de representativiteit van de procederende belangenorganisatie. Daarbij geldt wel dat niet alle jurisdicties expliciet de term representativiteit hanteren. Echter, ook wanneer de term representativiteit niet expliciet wordt gebezigd, ziet men elementen daarvan terugkomen in de ontvankelijkheidsbeoordeling. In de onderzochte jurisdicties wordt de representativiteit van de belangenorganisatie bovendien op verschillende manieren meegewogen bij de ontvankelijkheidsbeoordeling.

Op basis van de bevindingen uit het onderzoek, kan onderscheid worden gemaakt tussen twee typen representativiteitseisen die gehanteerd kunnen worden bij de

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246 Met dien verstande dat in sommige jurisdicties enkel PIL-zaken tegen de overheid mogelijk zijn (zie bijvoorbeeld England & Wales).

247 Ook in Nederland kennen we zo'n mechanisme in het kader van de implementatie van de Richtlijn representatieve vorderingen, zie par. 1.5.

ontvankelijkheidsbeoordeling. Dit onderscheid gebruiken we hierna bij de verdere bespreking van de conclusies uit dit rapport.

Het eerste type heeft betrekking op de vraag of de desbetreffende belangenorganisatie *geschikt is om op te komen voor de belangen die onderwerp zijn van de procedure*. Criteria die gehanteerd worden bij de beantwoording van deze vraag zijn gericht op de belangenorganisatie, en de wijze waarop zij de door haar beoogde belangenbescherming nastreeft en heeft nagestreefd. Daarbij kan worden gekeken naar de staat van dienst van de desbetreffende belangenorganisatie in het nastreven van (onder meer) de belangen die onderwerp zijn van de procedure, het feit dat de organisatie zich eerder al heeft ingezet voor de bescherming van deze of soortgelijke belangen, de verschillende activiteiten die hiertoe zijn ontplooid (media-optredens, protesten etc.), of al eerder door de organisatie collectieve acties zijn gevoerd, alsmede naar hoelang de belangenorganisatie bestaat en de specifieke kennis en ervaring van de organisatie ten aanzien van de belangen waarvoor zij opkomt. Het tweede type criteria heeft betrekking op de *relatie van de belangenorganisatie met de achterban waarvoor de organisatie opkomt*. Hierbij kan het gaan om het aantal leden bij een vereniging, aangeslotenen bij een stichting, steun van de achterban, bijvoorbeeld blijkend uit het aantal steunbetuigingen, en de omvang van de achterban.

De uitwerking van het representativiteitsvereiste in Nederland is onduidelijk, mede door een gebrek aan duidelijkheid in de wet en wetsgeschiedenis. In de Nederlandse rechtspraak zien we wel dat de afgelopen tijd met name criteria (lijken te) worden gehanteerd die zien op de geschiktheid van de belangenorganisatie om voor de belangen op te komen die onderwerp zijn van de procedure. Te wijzen valt op uitspraken waarin onder meer is gekeken naar de (lange) staat van dienst van de desbetreffende belangenorganisatie in het nastreven van (onder meer) de litigieuze belangen, het feit dat de organisatie zich eerder al heeft ingezet voor de bescherming van de (litigieuze of soortgelijke) belangen, de verschillende activiteiten die hiertoe zijn ontplooid (media-optredens, protesten etc.), naar de vraag of al eerder door de organisatie collectieve acties zijn gevoerd, alsmede naar de omstandigheid dat de belangenorganisatie al geruime tijd bestaat en specifieke kennis en ervaring heeft ten aanzien van de belangen waarvoor zij in rechte opkomt.

In de Nederlandse literatuur – en in een enkel geval ook rechtspraak – is gewezen op de beperkte hanteerbaarheid van het representativiteitsvereiste. Ook is erop gewezen dat het vereiste, en een eventuele aanscherping daarvan, in strijd kan zijn met het bestaansrecht van de algemeenbelangactie en de rechtsbescherming van in het bijzonder stemloze en kwetsbare belangen en fundamentele rechten op oneigenlijke wijze kan ondermijnen. Dat is met name het geval wanneer criteria worden gehanteerd die betrekking hebben op de relatie van de belangenorganisatie tot de achterban. Het hanteren van een representativiteitsvereiste dat zich richt op de relatie van de belangenorganisatie tot de achterban kan in sommige gevallen haaks staan op de ratio van de algemeenbelangactie: het beschermen van stemloze en kwetsbare belangen waarvoor individuen niet of niet snel een rechtszaak aanhangig maken. Dat is het

geval omdat in dit soort kwesties de achterban vaak te diffuus, onbepaalbaar of onbereikbaar is.

De huidige uitwerking van het representativiteitsvereiste in Nederland staat op gespannen voet met het Verdrag van Aarhus. Dat geldt met name wanneer criteria worden gehanteerd die zien op de relatie van de belangenorganisatie tot de achterban, aangezien bij milieubelangen de achterban vaak diffuus en onbepaalbaar is, waardoor deze criteria moeilijk tot niet toe te passen zijn. Het uitgangspunt van het Verdrag van Aarhus is dat milieuorganisaties een ruime toegang tot de rechter toekomt. In de onderzochte buitenlandse jurisdicties wordt dit uitgangspunt gehanteerd en heeft dit geleid tot een verlaging van drempels tot de rechter en lichtere ontvankelijkheidsregimes bij algemeenbelangacties voor milieubelangen.

Bij de ontvankelijkheidsbeoordeling wordt in alle onderzochte jurisdicties gekeken naar de representativiteit van de procederende belangenorganisatie. In de onderzochte jurisdicties geldt ook dat het begrip representativiteit en de verdere uitwerking daarvan diffuus is. Bovendien geven de onderzochte jurisdicties op uiteenlopende wijze invulling aan de notie van representativiteit. Wel geldt dat in alle onderzochte jurisdicties criteria worden gehanteerd die zien op de geschiktheid van de procederende belangenorganisatie om op te komen voor de (litigieuze) belangen. Criteria die zien op de relatie van de belangenorganisatie tot de achterban worden in de meeste jurisdicties gehanteerd. In de jurisdicties waar dit soort criteria worden gehanteerd, worden deze veelal ruimhartig en flexibel toegepast. In die jurisdicties komt echter uiteindelijk het meeste gewicht toe aan criteria die betrekking hebben op de geschiktheid van de belangenorganisatie om op te komen voor het (litigieuze) belang.

Het overkoepelende beeld dat uit deze studie naar voren komt is dat in alle onderzochte jurisdicties (België, Duitsland, Engeland & Wales, Frankrijk, Nederland, Noorwegen en Zweden) representativiteit een rol speelt bij de ontvankelijkheidsbeoordeling, maar dat de nadere uitwerking daarvan diffuus is. Het is bovendien vaak de rechter die nadere uitwerking geeft aan de representativiteitseisen. Voor alle onderzochte jurisdicties geldt verder dat de rechter in zijn beoordeling met name kijkt naar criteria die zien op de geschiktheid van de belangenorganisatie om op te komen voor de belangen die onderwerp zijn van de procedure. In sommige jurisdicties worden daarnaast ook criteria gehanteerd die zien op de relatie van de belangenorganisatie tot de achterban, maar daarbij geldt wel dat het meeste gewicht toekomt aan criteria die betrekking hebben op de geschiktheid van de belangenorganisatie om op te komen voor de belangen die onderwerp zijn van de procedure.

Colofon

Het onderzoek is begeleid door de volgende begeleidingscommissie:

Prof. mr. T. Hartlief, advocaat-generaal bij de Hoge Raad der Nederlanden en hoogleraar Privaatrecht aan Maastricht University (voorzitter).

Dr. T. Geurts, onderzoeker, WODC.

Mr. E.C. van Ginkel, projectbegeleider, WODC.

Mr. P.M.M. van der Grinten, senior wetgevingsjurist, Ministerie van Justitie en Veiligheid.

Dr. mr. R. Stolk, universitair docent staats- en bestuursrecht, Universiteit Leiden.

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Bijlage 1
Questionnaire
Comparative legal research on access to justice in public interest litigation

Explanatory note to the questionnaire

In the Netherlands, public interest litigation (hereafter: PIL) initiated by interest groups against the government and corporations is in the spotlight. Well-known examples include the climate cases of Urgenda against the Dutch State and Milieudefensie against Shell. This kind of litigation is, however, not limited to the environmental policy domain. For example, currently a case initiated by Oxfam Novib, Pax Netherlands and The Rights Forum against the Dutch State to stop the delivery of components of F-35 fighter jets to Israel is pending before the Dutch Supreme Court. Other examples include litigation about noise nuisance caused by airplanes, access to drinking water of minors and equal treatment cases. Characteristic for this type of cases is that the actions and/or policies(hereafter: policies) of the government or corporations are subjected to judicial review by civil courts in order to protect collective and/or public interests. Also typical is the requested remedy: the litigating interest groups seek declaratory relief and/or injunctive relief to stop alleged norm violations and/or prevent alleged impending norm violations, instead of compensation for damages.

These developments give reason to study the possibilities for interest groups to subject governmental and corporate policies to judicial review in several European legal systems. With this questionnaire we primarily aim to obtain a better understanding of the current landscape in various legal systems concerning access to justice of interest groups in PIL-cases. The questionnaire, however, also includes questions that relate to the possibilities of individual litigants or public actors to challenge governmental and/or corporate policies before courts. After all, the research is not solely about interest groups access to justice, but also about the possibilities of subjecting governmental and corporate policies to judicial scrutiny for the purpose of protecting collective and/or public interests. It is quite conceivable that in some legal systems access to justice for interest groups is more limited compared to others, while the opportunities for individuals to start litigation(e.g., by constitutional review, which is absent in the Netherlands) might be broader instead. Moreover, interest groups can mobilize individual litigants, for instance in test case procedures, for the purpose of enhancing legal protection of collective and/or public interests. Also, while many of the Dutch PIL-cases are litigated before civil courts, in other legal systems there may well be the option to litigate before other courts than civil courts. For this reason, the questionnaire is not limited to PIL before civil courts.

PIL is notoriously difficult to define. Moreover, different legal systems employ their own terminology, and apply different emphases. Core to the Dutch situation is that interest groups can litigate for the protection of supra-individual (i.e., collective and/or public interests) and are typically demanding non-monetary remedies. In answering the questions below, we ask you to take the definitions and concepts that are used in your legal system as a starting point. However, we also ask you to consider the possibilities in your legal system for the type of cases we have in the Netherlands (as briefly described above).

Instructions for answering the questionnaire

When answering the questions, we kindly ask you to include the relevant legislative provisions and/or case law. Concise references to literature can be included but are not required. The answers

to the questions should address the current legal status quo (unless we have indicated otherwise) and can be brief and concise.

Context and output of the research

The Dutch Parliament requested a comparative legal research into the possibilities and rules of procedure for interest groups to initiate public interest litigation against corporations and government. The research is commissioned by the Dutch Research and Data Centre of the Ministry of Justice and Security. We have rapporteurs for Belgium, France, Germany, the United Kingdom, Norway and Sweden. On the basis of the country reports, we will write an overarching analysis report in Dutch. The country reports will be attached to this report and will be made publicly available. Please include your name, affiliation and title(s) in the report. Please answer the questions in English.

Questions

A. Context

Note: the answers to these context questions can be brief. The purpose of this section is to get insight into the context and relevant developments in your legal system. Section B-D will address specific legal issues in more detail.

1. What is the common terminology used for defining 'public interest litigation' in your legal system?
    - Is this terminology defined in legislation, case law and/or literature?
2. What are the main legislative provisions and/or leading cases regarding PIL?
3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?
4. To what extent do interest groups(have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?
5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system including:
    - To which policy areas do these cases relate?
    - Whom are the defendants in these cases: government and/or corporations?
6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?
    - Are these interest groups, public authorities and/or individuals?
8. Against whom can PIL be initiated (government/corporations)?
9. Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?
    - If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?

10. What are the relevant admissibility rules?
    - What are the standing requirements?
    - Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc. of the represented constituency members, for establishing standing? If yes, how is it assessed?
    - Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?
    - For determining admissibility: does it make a difference which legal norms are invoked?
    - For determining admissibility: does it make a difference which remedy is requested?
    - Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?
    - If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?
    - If there are several competent courts: are there any differences in the rules on admissibility?
11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?
    - What are the rules on admissibility in that respect?
12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?
13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?
    - What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in European Court of Human Rights, 9 April 2024, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20 (KlimaSeniorinnen)?
14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?
15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?
    - Are there special rules on the legal provisions that can/can't be invoked in PIl-cases?
    - Under which conditions can constitutional rights and/or international treaties be invoked?
    - To what extent can private law provisions be invoked?

17. Which remedies can be invoked in PIL-cases?

    - Are there special rules on remedies in PIl-cases?

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?
20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

Bijlage 2 - Questionnaire
Comparative legal research on access to justice in public interest litigation
Belgium

Wannes Vandenbussche & Toon Moonen[1]

A. Context

Note: the answers to these context questions can be brief. The purpose of this section is to get insight into the context and relevant developments in your legal system. Section B-D will address specific legal issues in more detail.

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

- **Is this terminology defined in legislation, case law and/or literature?**

The notion of public interest litigation is neither defined in legislation nor recognized as such in case law. As a result, reference is made to definitions found in legal literature. Below, we present three such definitions, which all essentially converge on the idea that a party initiates legal proceedings to defend an interest beyond a purely personal one:

1. Citizens, groups, or legal entities turn to the courts to defend an interest that exceeds the purely individual, often with forward-looking and value-driven objectives.[2]
2. It is litigation for the protection of the public interest, aimed at safeguarding or enforcing rights enjoyed by the public or significant segments thereof, on a not-for-profit basis.[3]
3. It is a legal action seeking a ruling that protects a general (and thus collective) interest. Such claims aim to secure measures that safeguard a common resource relevant to shared interests. These actions may be brought against private (legal) persons or public authorities.[4]

2. What are the main legislative provisions and/or leading cases regarding PIL?

In civil cases, articles 17 and 18 of the Judicial Code are the main PIL provisions, which contain two admissibility requirements:

- the party initiating a claim must have legal capacity (*qualité – hoedanigheid*)

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2 P GILLAERTS, 'De afdwinging van duurzaamheid als collectief belang. Hoe kunnen ngo's via de burgerlijke rechter wegen op (duurzaamheids)beleid?' in A VAN HOE en G CROISANT (eds), Recht en duurzaamheid (Larcier 2022) 61, 77-79.

3 L LAVRYSEN, 'Public interest litigation for the protection of the environment in Belgium' 2014; lib.ugent.be/catalog/pug01:5716862.

4 M KRUITHOF, 'Privaatrechtelijke facetten van algemeenbelangacties bij de justitiële rechter' (2022) 1-2 Tijdschrift voor Privaatrecht 21, 44, para. 33

- the party must demonstrate a legitimate, personal and direct interest in bringing the case before the court (*intérêt – belang*).

It is not uncommon in Belgium for private individuals or associations to bring a PIL action before the criminal courts. The legal basis for this is article 4 of the Preliminary Title of the Code of Criminal Procedure, which allows civil claims related to criminal offenses to be pursued either separately or in conjunction with criminal prosecutions. As regards the admissibility of such civil claims, the requirements are largely aligned with those set out in Articles 17 and 18 of the Judicial Code, as mentioned above.

In addition, various parliamentary statutes (some of which transpose EU directives) allow certain legal entities to bring an admissible claim based on specific collective interests, which are discussed in Part B.

The leading case in Belgium on PIL in civil courts[5] is the so-called *Eikendael* judgment of 1982. In this case, the Court of Cassation ruled that an action brought by an association to stop the conversion of a nature park into a residential area was inadmissible for lack of personal interest.[6]

A considerable number of cases directed against the government, however, are not brought before the civil courts. Those are adjudicated by the Council of State (if decisions of the executive branch are concerned) or by the Constitutional Court (which holds exclusive jurisdiction for constitutional review of acts of Parliament). For those jurisdictions, procedural law separate from the code used in the civil courts applies. To introduce an action for annulment in the Constitutional Court, a natural or legal person requires "a justifiable interest" (article 2 of the Special Act of 6 January 1989 on the Constitutional Court). An interest is also required to introduce a case in the Council of State (article 19 of the Coordinated Laws of 12 Januari 1973 on the Council of State). In order to meet the interest requirement, generally, a party needs to show a direct, personal, and certain disadvantage.[7] For individual applicants, this limits the possibilities for PIL, but as we will show below, the interest requirement is interpreted rather favourably for associations defending a collective interest.

Note that other, specialised administrative courts competent for the adjudication of individual government decisions (in relation to whom the Council of State sits as apex jurisdiction), too, can be confronted with PIL. The Flemish Council for Permit Disputes, a regional court whose jurisdiction includes environmental issues, or the federal Council for Alien Law Litigation, which adjudicates migration cases, appear the most relevant in that respect. Different procedural requirements are applicable in those courts. For example, in the Council for Permit Disputes, the law determines that a permit decision can be appealed by "the public concerned". This is defined as "any natural or legal person as well as any association, organization or group with legal personality that is affected or likely to be affected by or is an interested party in the

5 In this questionnaire, 'civil courts' is used as a generic term for the ordinary court system, which, pursuant to articles 144-145 of the Constitution, adjudicates violations of 'subjective' rights (see question 9).

6 Cass. 19 November 1982, ECLI:BE:CASS:1982:ARR.19821119.11.

7 The Council of State adjudicates cases relating to individual government decisions as well as regulations. In the latter case, the interest requirement is interpreted more leniently (e.g. Council of State 26 January 2016, n° 233.610, Bogaerts and others, ECLI:BE:RVSCE:2016:ARR.233.610).

decision-making process regarding the issuance or adjustment of an integrated environmental permit or of permit conditions, in which non-governmental organizations committed to environmental protection are deemed to be interested parties" (article 105 of the Decree of 25 April 2014 concerning the integrated environmental permit). The latter means that an environmental association is not required to demonstrate or make plausible any nuisance or disadvantages in order to be deemed to be an interested party. It is sufficient that it proves that it is an environmental association.[8] In what follows, we will for practical purposes limit our discussion of the administrative courts' approach to the Council of State.

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

These are a number of commonly expected areas of law:

- environmental law
- fundamental rights and criminal justice
- anti-racism, -xenophobia or -discrimination law
- migration law
- animal rights law
- consumer protection law (including financial services)
- data protection law

4. To what extent do interest groups (have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?

In civil cases interest groups are legally not required to do so, although they often face limitations to bring a case themselves. An individual acting on behalf of something other than his own personal interest faces the same obstacles as an interest group. However, individuals are sometimes mobilised, as it is clear that depending on the facts of the case their individual situation may be more favourable to demonstrate capacity and/or interest.

A case filed in 2024 illustrates this. A farmer is suing the oil and gas giant Total Energies before the Tournai Enterprise Court. The Belgian farmer claims that Total Energies' activities contribute to global warming, which in turn disrupts the climate and affects his farm's operations (such as reduced yields, extra labour, a smaller cattle herd, and increased stress).[9] In this case, three NGOs immediately intervened and appear to be the driving forces behind the lawsuit. The individual farmer is highlighted as a representative figure to make the issue more tangible for the general public.

Additionally, individuals are sometimes involved to demonstrate the broader support for the case. The prime example is the climate change case against the federal and regional

8 See e.g. CPD 10 October 2024, n° RvVb-A-2425-0115.

9 See www.thefarmercase.be.

governments, where 8,422 individuals initially joined the lawsuit filed by the non-profit organization, followed by a further 50,164 individuals who voluntarily intervened.[10]

Before the Constitutional Court and the Council of State, multiple parties can initiate an action together. Interest groups often mobilize persons that are individually affected by the object of the action for annulment to litigate together (same attorneys, same briefs), but formally they appear as separate parties. This way, the remedy claimed by all parties being the same (annulment), in many cases a disagreement as to the admissibility of the association's case becomes largely moot.

5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system including: To which policy areas do these cases relate? Whom are the defendants in these cases: government and/or corporations?

Before civil courts:

- Based on publicly available information, three climate change cases have been filed in Belgium so far:
    - The case brought by the non-profit organization 'Klimaatzaak' against the federal and regional governments, seeking a reduction in greenhouse gas emissions, which is currently pending (in part) before the Belgian Court of Cassation.[11]
    - The case filed by ClientEarth against the National Bank of Belgium concerning the implementation of the Corporate Sector Purchase Programme of the European Central Bank, which was discontinued in 2022.[12]
    - The farmer case against Total Energies mentioned above, where trial briefs are currently being exchanged before the Tournai Enterprise Court.
- Other environmental cases target both companies and governments, with lawsuits concerning air pollution [13] and pollution caused by PFAS (the so-called 'forever chemicals')[14] receiving the most attention.
- Logically, human rights cases are mostly brought against governments. Often, they involve summary proceedings, where NGOs have initiated lawsuits, for example:
    - against freedom-restricting COVID-19 safety measures (such as the curfew).[15]
    - against the Belgian government's failure to comply with international legal obligations regarding the reception of asylum seekers.[16]

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10 Court of Appeal of Brussels 30 November 2023, prismic-io.s3.amazonaws.com/affaireclimat/aff2e124-f79d-4d5a-916a-e7919342f880_SP52019923113012320+en.pdf.

11 www.klimaatzaak.eu/en.

12 www.clientearth.org/latest/news/we-re-withdrawing-our-lawsuit-against-the-belgian-national-bank/.

13 E.g.,https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates-annual-newsletters/belgian-court-provides-opportunity-to-set-binding-precedent-on-the-right-of-the-public-to-enforce-air-quality-monitoring-rules/

14 Court of First Instance Brussels of 19 September 2024, AR 22/335/A, https://advocaten-leuven.be/wp-content/uploads/Vonnis-NREA-19.09.2024-GP-e.a.-Vlaamse-overheid-PFOS-en-actieve-openbaarheid.pdf.

15 Court of Appeal of Brussel 7 June 2021,*JLMB* 2021, 1209. .

16 President of the Court of First Instance of Brussel of 19 January 2022, JLMB 2022, 1512..

    - against a prisoner exchange involving a convicted terrorist.[17]
- Finally, consumer protection cases primarily target companies. For example, a consumer organization has brought a case against insurance companies for allegedly requiring excessively detailed medical questionnaires from prospective policyholders.[18]

Before the Constitutional Court and Council of State, the opposing party is by definition the government. Those courts also hold the monopoly of the adjudication of abstract (legislative, respectively executive) legal norms. Numerous cases on a multitude of topics can be considered PIL. Currently pending in the Constitutional Court are, for example, applications for annulment against environmental[19], animal protection[20], social security[21], criminal justice[22], data protection[23], and migration[24] law reforms, all introduced by advocacy groups (including farmers' rights, environmental, animal rights, religious rights, anti-poverty, human rights and refugee rights organisations).

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

N/A

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?
    - **Are these interest groups, public authorities and/or individuals?**

In civil matters, the admissibility requirements set out in articles 17 and 18 of the Judicial Code, which apply to any claim brought before the civil courts, generally prevent interest groups from initiating admissible PIL claims. This was first established in the aforementioned *Eikendael* judgment and reaffirmed in 2024 in the *Animal Rights* judgment. In that case, the Court of Cassation ruled that an association advocating for the promotion or protection of animal welfare does not have the required interest to bring an admissible legal action. The mere fact that the association pursues animal welfare as its statutory objective is insufficient to establish a personal interest in initiating proceedings.[25]

However, there are a number of exceptions in which *interest groups* have been granted the ability to initiate PIL cases.

17 www.vrt.be/vrtnws/nl/2022/07/22/assadi-beschikking/.
18 www.test-aankoop.be/geld/hypotheekleningen/nieuws/illegale-medische-vragenlijsten-van-verzekeraars.
19 App n°s 8299-8300, 8305-8308, 8357, 8415, 8419, 8428 (see: https://www.const-court.be/en/judgments/pending-cases).
20 App n°s 8323, 8405, 8407.
21 App n° 8359.
22 App n°s 8289, 8328, 8339, 8341, 8343, 8370.
23 App n°s 7930-7931, 8317.
24 App n°s 8411-8412.
25 Cass. 11 June 2024, ECLI:BE:CASS:2024:ARR.20240611.2N.21.

- A first (judge-made) exception concerns the right of action for environmental associations. In 2013, the Court of Cassation set aside the doctrine established in the *Eikendael* judgment for this type of association, taking into account the Aarhus Convention, which guarantees, among other things, the right of access to justice in environmental matters. In the *Huldenberg* judgment, the Court of Cassation confirmed that an environmental association acting in pursuit of its statutory objectives meets the required interest for admissibility. If a legal action is brought by a legal entity whose statutes explicitly aim to promote environmental protection and the action seeks to challenge acts or omissions by private individuals or public authorities that are deemed to violate environmental law, that entity meets the requirement of having an interest to bring an action.[26]
- For legal entities whose statutory purpose is the protection of human rights and fundamental freedoms, the Belgian legislator intervened in 2018, following a ruling by the Constitutional Court[27], by adding a second paragraph to article 17 of the Judicial Code[28], which sets out the general admissibility requirements for initiating a civil action (see above). Since then, such entities can bring an admissible claim for the protection of human rights and fundamental freedoms, provided they meet certain conditions.
- Thirdly, there are several specific areas in which interest groups, provided they meet certain conditions, are empowered by parliamentary statute to take legal action to defend the collective interests they represent. These actions often originate from EU law and typically take the form of actions for cease-and-desist orders (*stakingsvorderingen – actions en cessation*), hereinafter often referred to as injunctions or actions for injunctive relief, such as:
    - Consumer associations, which may seek injunctive relief to protect the collective interests of consumers (Art. XVII.1/4, paragraph 2 of the Code of Economic Law) and to enforce compliance with financial sector and financial services legislation (Art. 125 of the law of 2 August 2002 on the supervision of the financial sector and financial services).
    - Accredited health insurance funds, which may initiate claims on behalf of the collective rights of their members (Art. 39, second paragraph of the law of 6 August 1990 on health insurance funds and national associations of health insurance funds). In this case, the action is not a bundling of individual rights, nor does it amount to acting in a purely collective interest. Rather, it is something in between: the representation of the collective interests of the association's members and those under their care.
    - Interest groups, trade unions, employers' organizations, and self-employed associations, which may act against violations of anti-racism and anti-

[26] Cass. 11 June 2013, ECLI:BE:CASS:2013:ARR.20130611.12.

[27] Constitutional Court, 10 October 2013, App. no. 133/2013, ECLI:BE:GHCC:2013:ARR.133.

[28] The law of 21 December 2018 containing various provisions relating to justice, *Belgian Official Gazette* 31 December 2018.

discrimination laws (Art. 30 of the law of 10 May 2007 to combat certain forms of discrimination, Art. 35 of the law of 10 May 2007 to combat discrimination between women and men, Art. 32 of the law of 30 July 1981 punishing certain acts motivated by racism and xenophobia).

- Environmental groups, which can seek injunctions to stop clear breaches or serious threats of breaches of certain environmental laws (Art. 1 of the law of 12 January 1993 on a right of action on environmental protection).
- Interest groups representing deportees initiating legal proceedings in any disputes arising from the application of the anti-negationism law, which bans public denial of nazi genocide war crimes (Art. 4 of the Law of 23 March 1995 on punishment of denying, minimising, justifying or approving the genocide committed by the German National Socialist regime during World War II).

Exceptions for *individuals* are rare. Article 2 of the law of 12 August 1911 on the preservation of the beauty of the countryside gives any citizen the right to take legal action against a mine operator who fails to restore the original appearance of the land, reforest it or provide vegetation as far as possible. It would appear that this provision today is obsolete. More relevant, particularly in environmental matters, is article 194 of the Flemish Municipality Decree of 15 July 2005, which allows one or more residents to take legal action on behalf of their municipality. Conditions apply, of course, including the failure of the municipal authorities to take legal action themselves.

Finally, although less common, *public authorities* are sometimes granted the power to initiate PIL-proceedings before civil courts, such as:

- Under the laws against racism, xenophobia, and discrimination, two equality bodies (Unia and the Institute for the Equality of Women and Men) have been granted the authority to bring legal actions (Art. 29 of the law of 10 May 2007 to combat certain forms of discrimination, Art. 34 of the law of 10 May 2007 to combat discrimination between women and men, Art. 31 of the law of 30 July 1981 punishing certain acts motivated by racism and xenophobia).
- In the event of breaches of consumer law, the Minister of Economy and the Director General of the General Directorate for Economic Inspection of the FPS Economy have the authority to initiate actions for injunctive relief for the protection of the collective interests of consumers (Art. XVII.7, para 1, 2° Code of Economic Law).
- For violations of certain financial regulations, the same applies to the Financial Services and Markets Authority, the Minister responsible for Finance, the Minister responsible for Economy, the Minister responsible for Pensions, and the Minister responsible for Consumer Protection (Art. 125 of the law of 2 August 2002 on the supervision of the financial sector and financial services).

As there is no specific procedural arrangement for PIL, in the administrative courts and in the Constitutional Court, any party that meets the requirements to initiate a case is able to do so.

Those actors are often *interest groups*, as the requirements are more accommodating for them, but it can also concern *individual initiatives*. Given that the opposing party in those courts is by definition a government entity itself, instances of PIL where the applicant is a public authority are less likely. However, as said, certain public authorities, like human rights bodies, have a particular legal mandate, which can make them more prone to start a case[29] or to intervene in pending cases.[30]

8. **Against whom can PIL be initiated (government/corporations)?**

PIL can be initiated against corporations and governments alike. Depending on the type of case, different courts may be competent, applying different procedural standards and granting different remedies.

9. **Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?**
    - **If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?**

There are no courts specifically competent for PIL, so those cases can be heard in all of them, from a justice of the peace[31] up until the Court of Cassation (which sits as the apex court in the civil court system), and in the administrative courts and the Constitutional Court. The forum depends on the general rules of jurisdiction.

The distribution of jurisdiction between courts is – theoretically – straightforward.

- The civil courts, in application of the articles 144-145 of the Constitution, deal with violations of 'subjective' rights (which exist when a norm or decision entitles a person to a specific behaviour or performance by someone else). Subjective rights can be enforced against the government, but of course also against private parties: contracts, for example, create subjective rights.
- The administrative courts on the other hand are, generally speaking, competent for 'objective' questions of law related to the legality of individual government decisions or executive legal norms, irrespective of whether anyone's subjective right was

[29] See, in the Constitutional Court, e.g. case 2/2016 (ECLI:BE:GHCC:2016:ARR.002), in which the Institute for the Equality of Women and Men initiated a case concerning the naming rules for children. See also e.g. the pending application n° 8293, in which the Federal Institute for the protection and promotion of Human Rights initiated a case concerning law enforcement powers of municipalities.

[30] See, in the Constitutional Court, e.g. recently case 85/2023 (ECLI:BE:GHCC:2023:ARR.085), in which the intervention of Unia in a case concerning rights of people with a disability was accepted as the norms under scrutiny "can affect the mission of UNIA and the collective interest it defends" (B.11.2).

[31] See e.g. for a case concerning environmental protection and public health recently decided by the justice of the peace in Zwijndrecht, near Antwerp: https://www.vrt.be/vrtnws/nl/2023/05/15/chemiebedrijf-3m-moet-gezin-uit-zwijndrecht-schadevergoeding-bet/.

violated.[32] Many legal norms provide the government with policy discretion, so no subjective right follows from them, but that does not mean the government would be absolved from respecting them (for example when deciding whether a permit will be awarded or not). As a result, in the administrative courts, the opposing party is always a government entity.

10. **What are the relevant admissibility rules?**
    - **What are the standing requirements?**

As mentioned above, in civil cases, the standing requirements are set out in articles 17 and 18 of the Judicial Code:

- The party initiating a claim must have legal capacity (*qualité – hoedanigheid*), meaning the authority to act in court to defend the right asserted in the claim.
- The party must demonstrate a legitimate, personal, and direct interest in bringing the case before the court (*intérêt – belang*).

As noted above, with the exception of environmental associations, for which these requirements have been relaxed due to the Aarhus Convention, these standing requirements prevent interest groups from bringing PIL cases. They can only bring an admissible action if their claim is aimed at protecting their own subjective rights. This is the case when the association seeks to protect matters that affect "its existence or its material and moral assets, in particular its property, honour, and reputation".[33] There is some academic disagreement as to whether this inability of interest groups to bring admissible PIL actions (in the absence of a specific legal framework) is a matter of interest or legal capacity. While the Court of Cassation appears to consider it a lack of personal interest, several authors argue that it is a lack of legal capacity.

Importantly, as mentioned above, in 2018 the legislator added a second paragraph to article 17 of the Judicial Code, allowing legal entities with a statutory purpose of protecting human rights and fundamental freedoms to bring admissible claims even when no subjective right of their own is at stake, provided they meet four conditions:

1. The legal entity must have a statutory purpose of a particular nature, distinct from the pursuit of the general interest.
2. The legal entity must pursue this statutory purpose in a sustainable and effective manner. The court must make a concrete assessment whether this condition is met, and

[32] As said, the Constitutional Court is (exclusively, and only) competent to assess the constitutionality of acts of parliament. Any doubt in that regard raised in a civil or administrative court is to be referred to this Court by way of a preliminary question procedure. It can also be seized directly, under certain conditions, by way of an application for annulment.

[33] Cass. 19 November 1982, ECLI:BE:CASS:1982:ARR.19821119.11.

its assessment must not reveal that the entity does not genuinely pursue its purpose. The law does not set a minimum number of years of activity for this requirement.
3. The legal person must bring the action within the framework of this statutory purpose and in defence of an interest connected with that purpose.
4. The legal entity must pursue only a collective interest with its legal action, meaning it does not act for the individual interests of all or some of its members, whether directly or indirectly.

Interestingly, many of the special legislative frameworks that grant legal standing to interest groups for specific collective interests now also refer to these four conditions (such as Art. 1 of the law of 12 January 1993 on a right of action on environmental protection), or at least to the first three (such as Art. 30 of the law of 10 May 2007 to combat certain forms of discrimination, Art. 35 of the law of 10 May 2007 to combat discrimination between women and men, Art. 32 of the law of 30 July 1981 punishing certain acts motivated by racism and xenophobia and Art. 4 of the Law of 23 March 1995 on punishment of denying, minimising, justifying or approving the genocide committed by the German National Socialist regime during World War II).

Over the past decades, the Council of State and the Constitutional Court have developed consistent and similar case law concerning the admissibility of cases in their forum, including the interpretation of the "interest" requirement (article 2 of the Special Act of 6 January 1989 on the Constitutional Court; article 19 of the Coordinated Laws of 12 Januari 1973 on the Council of State). Individuals forming an interest group organised under the legal form of a non-profit association (typically so-called *verenigingen zonder winstoogmerk – associations sans but lucratif*), have wide access to defend the statutory collective (group or ideal) interest, apart from the particular (material or moral) interests of the association strictly speaking. Associations are frequent initiators of proceedings. Generally, in order to bring an admissible case in defence of a statutory collective interest, an association must show that the interest:

1) Is specific, and therefore distinguishable from the general interest, so as to exclude an *actio popularis*. Even if the collective interest can be formulated in broad terms, there are some limits to what the Council of State is willing to accept (for example with regard to environmental associations) as distinct enough form the general interest.
2) Is truly collective, and not, in reality, the individual interest of some of its members;
3) Can be affected by the object of the litigation (which is a requirement for any applicant, including individuals); and
4) Does not appear to be not or no longer effectively advocated, meaning that the association cannot have a purely formal existence. This requirement is not interpreted strictly.

This case law is relatively welcoming towards cases aimed at defending a collective interest, avoiding an all too restrictive or formalistic approach. It means that the interest of an association before the Constitutional Court or the Council of State is not under dispute very often, but rather implicitly accepted. Clearly, those conditions resemble (and were in fact used

as a model for) the conditions under article 17, para 2 of the Judicial Code, mentioned above, allowing legal entities with a statutory purpose of protecting human rights and fundamental freedoms to bring admissible claims in the civil courts.

- **Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc. of the represented constituency members, for establishing standing? If yes, how is it assessed?**

No, that is not the case in the Council of State and the Constitutional Court. Representativeness is not required, nor is it for example excluded that an association was founded very recently (even if, as said, it is a requirement for associations that the collective interest cannot appear to be not or no longer effectively advocated). In the civil courts, there is no requirement of representativeness either. However, the second condition of article 17, para 2 of the Judicial Code requires that the legal entity pursues its statutory purpose in a sustainable and effective manner. This begs the question if an association can be set up for the sole purpose of initiating a particular PIL case. However, at this stage, there is no known case law that sets out what this requirement actually entails.

- **Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?**

In the Council of State and the Constitutional Court, the absence of legal personhood (i.e. regarding *de facto* associations) bars associations in principle from initiating litigation in defence of a collective interest because they lack standing. This is different for some of types of *de facto* associations, namely when their legal prerogatives – if any – are affected (e.g. trade unions or political parties in certain cases).

Before civil courts, more or less the same rules apply. Whether or not the case is a PIL action, a party to the proceedings must have legal personhood. However, specific exceptions exist as well (such as for trade unions). Furthermore, in 2018, the Belgian legislator made it possible for groups without legal personhood to initiate proceedings, provided they comply with certain formalities, such as registration with the Crossroads Bank for Enterprises (article 703, § 2 of the Judicial Code). Nevertheless, it is important to note that the exception to the standing requirements under article 17, second paragraph of the Judicial Code is limited to legal entities. This means that an interest group must, among other things, draft articles of association, register with the Crossroads Bank for Enterprises, and publish notices in the Belgian Official Gazette, to bring an admissible action for the protection of human rights and fundamental freedoms.

Save for a few very limited circumstances which do not appear relevant here, the Council of State nor the Constitutional Court have developed a political question doctrine.

- **For determining admissibility: does it make a difference which legal norms are invoked?**

In principle, to determine admissibility, it does not matter which legal norms govern the merits of the case. That said, in certain areas, an applicable body of (international) law impacting the merits may also impact admissibility requirements. This is the case for environmental law: the Aarhus Convention has led to a softening of the *Eikendael* doctrine in the civil courts (see the *Huldenberg* case law developed by the Court of Cassation as referred to in question 9). To an extent, the interest requirement before the Council of State has also been relaxed in this type of cases. In some of its more recent case law, for example, the Council no longer requires a sufficient material and territorial connection to accept the specificity of the collective interest pursued by an association.[34]

- **For determining admissibility: does it make a difference which remedy is requested?**

As explained above, the remedy asked for determines to an important extent the forum (civil courts or administrative/constitutional court). In each of those courts, different admissibility criteria apply. In practice, there is a grey zone in which disputes arise about whether the civil courts or the administrative courts, like the Council of State, are competent to adjudicate a case. The answer to the question may even depend on the precise way in which the applicants frame their claim. For example, during the covid pandemic, applicants disputing government restrictions of private life argued their cases both before the civil courts (requesting injunctions to halt the violation of their fundamental rights) and before the Council of State (requesting the annulment of the restrictive regulations as such). Ultimately, in application of article 158 of the Constitution, the Court of Cassation decides in which forum a case should be decided.

- **Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?**

See above with regard to environmental associations, trade unions and political parties.

For recognised private professional organisations (*beroepsverenigingen – unions professionnelles*), who in principle take the legal form of a non-profit association (*vereniging*

[34] See e.g. Council of State 20 March 2018, n° 241.048, vzw Bond Beter Leefmilieu Vlaanderen and others, ECLI:BE:RVSCE:2018:ARR.241.048.

zonder winstoogmerk – association sans but lucratif), specific rules apply given their particular legal position. In application of article 9:25 of the Companies and Associations Code, they can litigate in defence of the personal rights to which their members may be entitled in that capacity (without prejudice to the right of those members to act directly, to join the proceedings or to intervene in the course of the proceedings), particularly in legal proceedings for the execution of agreements concluded by the association for its members, and for compensation for damage caused by their non-execution. Public professional organisations (such as bar associations), the goals of which are defined by law, can engage in litigation within the limits of that speciality. Bar associations, for example, often engage in PIL before the Constitutional Court in the area of criminal justice.

For consumer organizations seeking to bring actions for injunctive relief for the protection of the collective interests of consumers before the civil courts, the Belgian legislator in 2024 amended the legal standing requirements.[35] Since then, purely domestic claims have been subject to the same requirements as those imposed on cross-border claims by the Representative Actions Directive. To initiate such an action, they must be recognized by the Minister of Economic Affairs as a qualified entity 'Consumer.' To obtain this recognition, the organization must demonstrate that it meets the set of criteria prescribed in article XVII.1, § 1 of the Code of Economic Law:

- at least 12 months of actual public activity in the protection of consumer interests;
- legitimate interest in protecting consumer interests as enshrined in statutory purpose;
- a non-profit-making character;
- not the subject of insolvency proceedings and not declared insolvent;
- independent, not influenced by persons having an economic interest in the action, with procedures in place to prevent undue influence and conflicts of interest;
- publicly available information on compliance with the above criteria, as well as about sources of funding in general, organisation, management, membership structure, statutory purpose, and activities.

If a legal entity has not (yet) been recognized by the Minister, it can still be recognised as a qualified entity 'Consumer' for a particular action for injunctive relief. In this case, the president of the court hearing the action will check that the criteria for recognition are met, taking into account the specific nature of the claim (article XVII.1/1, § 3 of the Code of Economic Law).

- **If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?**

[35] The Law 21 April 2024 amending Books I, XV and XVII of the Economic Code and transposing 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, *Belgian Official Gazette* 31 May 2024.

As long as applicable procedural rules are observed, interest groups and citizens can litigate together. Also, both in the civil courts, the Council of State and the Constitutional Court, options exist to merge cases.

- **If there are several competent courts: are there any differences in the rules on admissibility?**

Yes, those are explained above.

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?

- **What are the rules on admissibility in that respect?**

In both the civil courts, the Council of State and the Constitutional Court, NGOs can intervene under the conditions applicable for any intervening party. For that they must demonstrate an interest (article 16 j° 17 of the Judicial Code; article 21*bis* of the Coordinated Laws of 12 Januari 1973 on the Council of State; article 87 of the Special Act of 6 January 1989 on the Constitutional Court;). This requirement is interpreted in the same way as it is for applicants. In the Council of State and the Constitutional Court, term limits apply if the case was notified to potential intervening parties or if the case was made public. Note that in the Constitutional Court, parties can also intervene in cases brought by way of a preliminary referral.

Apart from the rules for intervention as a party properly speaking (*vrijwillige tussenkomst - intervention volontaire*), the status of *amicus curiae* does not exist in Belgian procedural law, except in one very specific case that does not bear on PIL.[36]

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?

As mentioned above, the legislation giving interest groups the right to bring actions in the civil courts for specific collective interests often originates in EU law. This applies in particular to consumer organisations, organisations or non-profit associations acting in the context of data protection, and interest groups active in the fight against discrimination, racism and xenophobia.

[36] In competition proceedings before the Market Court, the Belgian Competition Authority may submit written observations as amicus curiae regarding the application of competition law (article IV.88 Code of Economic Law).

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?

- **What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in European Court of Human Rights, 9 April 2024, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20 (KlimaSeniorinnen)?**

Whereas the case law of the European Court of Human Rights under article 6 of the Convention has influenced the general interpretation of the required "interest" to access the Council of State (to the effect of making that requirement less rigid), its case law does not seem to have had a particular significance for PIL cases before this court. The same applies to the Constitutional Court. Given these courts' jurisdiction and their existing case law vis-à-vis associations, it appears that the article 6 considerations in the *KlimaSeniorinnen* judgment do not in and of themselves entail a particular impact on that case law.

The same applies to the civil courts. As in the *KlimaSeniorinnen* judgment, in the *Klimaatzaak* against the Belgian governments (see question 5), the link between the interest requirement and the Aarhus Convention was established and the climate association's claim was declared admissible. Interestingly, the Flemish Government argued as one of the defendants before the Brussels Court of Appeal that the admissibility of the action should have been assessed in the light of article 34 ECHR (and related case law), which at the time made it difficult to bring a public interest action. The Brussels Court of Appeal, however, rejected arguments in this regard.[37] The ECtHR later adjusted its case law on this article in the context of climate cases in *KlimaSeniorinnen*.

That said, although article 34 ECHR does not in itself determine the admissibility of claims of individuals before the national courts, in *KlimaSeniorinnen* the ECtHR applied a high admissibility threshold for natural persons (para. 488). Even as scientific evidence shows that the health of older women is particularly threatened by climate change, the ECtHR ruled that they were not sufficiently specifically and seriously affected to be considered victims. In contrast, in the Belgian *Klimaatzaak*, both the first-instance court and the court of appeal adopted a more flexible approach to the claims of individuals. It was, for instance, accepted that the potential impact of global warming on the life and private and family life of every individual on this planet was sufficiently demonstrated, and that there will be direct and specific consequences of global warming in Belgium by 2100.[38] As noted, the question remains whether

[37] Court of Appeal of Brussels 30 November 2023, *TMR* 2024, 54, prismic-io.s3.amazonaws.com/affaireclimat/aff2e124-f79d-4d5a-916a-e7919342f880_SP52019923113012320+en.pdf, 64, para 118.

[38] Court of Appeal of Brussels 30 November 2023, *TMR* 2024, 54, prismic-io.s3.amazonaws.com/affaireclimat/aff2e124-f79d-4d5a-916a-e7919342f880_SP52019923113012320+en.pdf, 69, para 130 ff.

article 34 ECHR is relevant at all in determining the admissibility of a case before a national court and whether this stricter stance on victim status before the ECtHR for individuals in climate cases has any implications for proceedings before national courts.

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

As explained above (see question 7), in the *Huldenberg* judgment, the Court of Cassation set aside the strict personal interest requirements of the *Eikendael* doctrine for environmental groups, taking into account the Aarhus Convention. Also, the Aarhus Convention has to a certain extent softened the interpretation of the conditions under which an association can defend a collective interest before the Council of State in environmental cases (see question 10).[39]

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

N/A

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?

- **Are there special rules on the legal provisions that can/can't be invoked in PIL-cases?**

No. Since PIL cases are not explicitly recognised as a specific category of actions before the civil courts, there are no special rules on the legal provisions that can or cannot be invoked. The same goes for the Council of State and the Constitutional Court. Any limits with regard to the legal provisions that can be invoked there relate to the procedural rules of the forum, not the character of the case as PIL.

- **Under which conditions can constitutional rights and/or international treaties be invoked?**

[39] It is noteworthy that the Aarhus Convention is regularly invoked in the Constitutional Court, including in cases disputing attempts by the regional legislator to restrict access to the Council for Permit Disputes. See e.g. (successfully) Constitutional Court 11 April 2023, n° 59/2023 (ECLI:BE:GHCC:2023:ARR.059).

In Belgium, constitutional rights and international treaties can be invoked before the civil courts.[40] For international treaty norms to be invoked, it is required that they have direct effect in the domestic legal order. The direct effect of international treaties refers to the ability of individuals to derive subjective rights from these provisions and enforce them before the courts. The conditions for direct effect require, by and large, that the provisions be clear, complete, and unconditional, allowing them to be applied in the national legal order without further implementation.

In the Council of State and the Constitutional Court, as well, constitutional rights can be invoked. The same goes for international treaties. The Council of State requires international law provisions to have direct effect for that to be possible. In the Constitutional Court, the situation is different. Applicants cannot invoke international law directly; an argument to that effect needs to be brought in conjunction with a constitutional right (usually the equality and non-discrimination clause or an human right analogous to the one invoked under international law). As a result, the Court has abandoned the requirement that those norms of international law need to be directly applicable.

- **To what extent can private law provisions be invoked?**

Private law provisions, which by definition grant subjective rights to legal subjects, can always be invoked before the civil courts. Because of the nature of litigation before the administrative courts and the Constitutional Court, it is less likely that private law norms are relevant.

17. Which remedies can be invoked in PIL-cases?

- **Are there special rules on remedies in PIL-cases?**

With regard to the civil courts, there are several specific legal frameworks that allow interest groups defending particular collective interests to seek actions for injunctive relief, such as in the field of consumer law, anti-discrimination law and environmental law (see question 7).

Apart from these specific frameworks, the principle of the *Eikendael* doctrine applies, which implies that claims brought by interest groups are only admissible if they have a personal interest. As mentioned above, this means that they must act in defense of its existence or its material and moral assets, in particular its property, honour, and reputation. Consequently, compensation must be linked to the individual interest of the association rather than the collective interest it seeks to protect, meaning such cases do not truly qualify as PIL.

[40] The socioeconomic constitutional rights, however, do not provide citizens with a classic subjective right, but are formulated as an obligation for the legislator, who is required to realize those rights through specific legislation (e.g. social security, housing, environmental protection …). This does not mean those rights lack all enforceability in court: a *standstill* applies, meaning that once a certain level of protection is provided for, the legislator cannot substantially lower it without a reasonable justification.

Nevertheless, in the past, a number of lower courts have awarded moral damages to interest groups as compensation for the harm done to the collective interest that they represent. By doing so, they had found a 'creative' way to get around the *Eikendael* doctrine. In the *Animal Rights* judgment, the Court of Cassation seems to have put an end to this case law (see question 7). An exception is made for environmental groups, for which the Court of Cassation itself has relaxed the *Eikendael* doctrine on the basis of the Aarhus Convention. Hence, environmental groups can claim moral damages for harm to the environment. The Constitutional Court has even ruled that, when assessing non-pecuniary damage, a court cannot automatically limit compensation to a symbolic sum of one euro.[41] Furthermore, and crucially for environmental groups, some courts have imposed injunctions on public authorities as a form of reparation in kind for their moral damage. For example, the Dutch-speaking Court of First Instance of Brussels ordered the government in 2021 to install sampling points in accordance with the Air Quality Directive.[42]

Apart from the specific legal frameworks providing for actions for injunctive relief (see first paragraph), the imposition of an order or prohibition by the civil courts remains controversial in Belgium. Until recently, there was no general legal basis for granting preventive claims under the Belgian rules on extra-contractual liability. This, combined with concerns about the separation of powers, led the court of first instance in the Belgian climate case to refrain from ordering the Belgian authorities to reduce greenhouse gas emissions.[43] However, the appellate court considered such a remedy permissible, provided that it did not specify the concrete measures the authorities must take.[44]

Since the entry into force of the new rules on extra-contractual liability on 1 January 2025, there is now a general legal basis for injunctions in Belgian law. Under article 6.40 of the Belgian Civil Code, a court may issue an order or prohibition (*bevel of verbod - ordre ou interdiction)* in cases of a proven or seriously imminent violation of a statutory provision that prescribes specific conduct, with the aim of ensuring compliance with that provision. This remedy is available at the request of a party demonstrating that such a violation would harm its property or physical integrity. This development is likely to expand the possibility of imposing injunctions in PIL cases beyond environmental law or areas where actions for cease-and-desist orders are explicitly provided for. However, the provision is subject to strict conditions. For instance, there

41 Constitutional Court, 21 January 2016, no. 7/2016, ECLI:BE:GHCC:2016:ARR.007.

42 Court of First Instance Brussels, 29 January 2021, *TMR* 2021/3, 258.

43 Court of First Instance Brussels, 17 June 2021, TMR 2021, 387, https://affaireclimat.cdn.prismic.io/affaireclimat/1c8f52f2-0eb7-4aec-b38e-a3f2c6d63318_%5BENG%5D+2021+Belgian+Climat+Case+Verdict+MACHINE+TRANSLATION+%28OCR%29.docx, p. 80 ff.

44 Court of Appeal of Brussels 30 November 2023, prismic-io.s3.amazonaws.com/affaireclimat/aff2e124-f79d-4d5a-916a-e7919342f880_SP520199231130123 20+en.pdf, 141 ff, para 271 ff.

must be a violation of a statutory rule prescribing specific conduct, meaning that a mere breach of the general duty of care is insufficient.

In the Council of State and the Constitutional Court, the remedy is, in principle, the annulment of the decision, regulation or law being adjudicated. The Council of State can also award pecuniary damages, the modalities of which are, however, not entirely the same as under general tort law. In exceptional circumstances, the Council of State can substitute the decision of the executive body with its own. It does not often make use of this option.

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

No, under the Belgian rules on extra-contractual liability, public authorities are subject to the same civil liability rules as private parties, such as corporations. With regard to the imposition of certain remedies, the separation of powers may create a certain caution; however, as said, this field remains under evolution.

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?

In the summer of 2024, the *Animal Rights* judgment of the Court of Cassation caused considerable controversy. The case concerned an interest group for animal welfare, Animal Rights, which had exposed animal abuse in a slaughterhouse and subsequently filed a claim for civil damages before the criminal court. As mentioned above, this claim was declared inadmissible due to a lack of personal interest. The mere fact that the association pursues animal welfare as its statutory objective was deemed insufficient to establish a personal interest in initiating proceedings.[45] As the case concerned domesticated animals (such as cattle), the Aarhus Convention did not provide a way of overriding this personal interest requirement. This would have been different for wild animals, which would fall within the scope of that convention.[46] Moreover, since the Court of Cassation ruled that animal rights do not fall under human rights and fundamental freedoms, article 17, para 2 of the Judicial Code could not apply either. The fact that this type of association fell through the cracks was seen by some as problematic.[47] In response, a bill was introduced in Parliament to ensure that claims for animal welfare could be brought under the same conditions as those set out in article 17, para 2 of

45 Cass. 11 June 2024, ECLI:BE:CASS:2024:ARR.20240611.2N.21.

46 As observed, amongst other, by P. Herbots and M. Driessen, "Het lot van dieren ligt in handen van het Europees Hof van Justitie", NjW 2024/508, 779-780.

47 See amongst others, www.standaard.be/cnt/dmf20240714_96281148, www.vrt.be/vrtmax/luister/radio/d/de-ochtend~11-19/de-ochtend~11-28138-0/fragment~bddf3582-06fa-4834-84e1-d266deafd94a/.

the Judicial Code. Shortly thereafter, an amendment was submitted that would even establish a full-fledged action for a cease-and-desist order for animal rights organizations.[48] However, both the bill and the amendments were rejected by the Justice Committee of the Belgian Parliament and will therefore not become law.

Unsurprisingly, in a number of areas, PIL initiatives have caused backlash. In the field of environmental law, for example, responsible government actors have recently aired dissatisfaction with an association applying for government subsidies, all the while making it central to its activities to take the same government (and others) to court.[49] In the field of migration law, in which PIL also relies on individual applicants, political discontent is sometimes aired with regard to the fact that applicants are represented by attorneys with, allegedly, 'political' or 'activist' goals.[50]

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

N/A

48 www.dekamer.be/FLWB/PDF/56/0226/56K0226004.pdf.

49 See e.g. https://www.standaard.be/cnt/dmf20240201_97625940.

50 See e.g. https://www.standaard.be/cnt/dmf20180528_03534236.

Bijlage 3 - Questionnaire
Comparative legal research on access to justice in public interest litigation
Germany

Christine Heidbrink[1]

A. Context

Note: the answers to these context questions can be brief. The purpose of this section is to get insight into the context and relevant developments in your legal system. Section B-D will address specific legal issues in more detail.

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

- **Is this terminology defined in legislation, case law and/or literature?**

Public interest litigation is also referred to as "public interest litigation" (in English) in the German literature. The term is not defined in legislation or case law. In the literature, public interest litigation is used to mean litigation, frequently primarily driven or supported by NGOs, that seeks to extend or intensify the protection of common and public rights or individual rights for more people. However, this phrase is not used very frequently. The term "strategic litigation" is more common to describe comparable cases. Although the two terms can overlap, there are some important differences. "Public interest litigation" typically refers to administrative or constitutional law, whereas "strategic litigation" equally includes private law. "Strategic litigation" can more strongly than "public interest litigation" imply an innovative and therefore risky approach. "Strategic litigation" also implies an equal or stronger emphasis on garnering attention for the underlying cause than on actually winning the case, whereas public interest litigation does not necessarily have that connotation in Germany.

"Public interest litigation" and "strategic litigation" describe a phenomenon, in particular the goals and motivations of a claim, not a specific type of claim. Individual claims can be public interest litigation if raised with an extrajudicial goal of protecting public interests; these claims are typically supported by NGOs.

2. What are the main legislative provisions and/or leading cases regarding PIL?

There are no legislative provisions specifically pertaining to public interest litigation. For the *Verbandsklagen*, available in specific exceptions as civil law claims primarily for consumer protection and as administrative law claims in environmental law, their conditions are regulated by the corresponding law which allows the particular claim (see *infra*). The Environmental

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Appeals Act determines the requirements for an association to be qualified and is particularly relevant.

With regard to case lase, the climate decision of the Federal Constitutional Court from 24 March 2021, 1 BvR 2656/18, BVerfGE 157, 30 (available in English under https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html) is the most important (successful) public interest litigation case of the last years and was celebrated as a milestone for climate change. By individual constitutional complaints, the complainants – some of whom live in Bangladesh and Nepal – claimed that the state had failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, basing their claim primarily on constitutional duties of protection of health arising from Article 2(2) Basic Law (*Grundgesetz, GG*) and property arising from Article 14(1) GG. As "advocates of nature", two environmental associations claimed, on the basis of Art. 2(1) GG in conjunction with Art. 19(3) GG and Art. 20a GG in the light of Art. 47 of the EU Charter of Fundamental Rights, that the legislator had failed to take suitable measures to limit climate change. These claims were dismissed for lack of standing.

The decision held that the provisions of the Federal Climate Change Act of 12 December 2019 (*Bundesklimaschutzgesetz – KSG*) governing national climate change targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards, thus offloading major emission reduction burdens onto periods after 2030. Since virtually all aspects of human life still involve the emission of greenhouse gases, practically every type of freedom would be threatened by the drastic restrictions after 2030 which would then be necessary to still reach the constitutional climate goal. As intertemporal guarantees of freedom – an effect first applied in this case – fundamental rights were found to afford the complainants protection against comprehensive threats to freedom caused by mandatory emission reductions being offloaded into the future. The challenged provisions were found to have an advance interference-like effect (*eingriffsähnliche Vorwirkung*, first applied in this case) on the freedom protected by the Basic Law.

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

It must be emphasized that the German legal system is primarily intended to protect individuals and individual rights. Although interest groups and associations can access the legal system in all areas of law by claiming injury of their own rights, such as property rights if they own land, these claims are more rare and rarely successful. Due to their nature, the rights of the associations are less frequently affected. In particular, they cannot claim injury to health as a right particular to natural persons, which is commonly invoked in public interest litigation and especially climate change litigation. Additionally, purchasing land for the sole purpose of bringing a claim based on these property rights is considered an abuse of rights and not permissible. For this reason, most individual claims are (also) brought by individual claimants

who are supported by interest groups without them being a party to the proceeding. Sometimes it is the directors of relevant NGOs who raise the claim as claimants, such as in the cases of civil law climate change litigation against carbon majors. In this constellation, interest groups are not claimants, but support the cases without a formal legal role. By mobilizing individuals to litigate or having their directors raise the claim as individual claimants, interest groups can indirectly access the legal system in all areas of law. This happens in all areas of law – administrative, constitutional and civil law.

In civil law, collective action known as *Verbandsklagen* is available as collective consumer protection. Qualified consumer and business associations can bring claims in particular for injunctive relief and removal against companies for use of invalid terms and conditions and breaches of other consumer protection laws under the Act on Injunctive Relief (*Unterlassungsklagengesetz, UKlaG*) as well as breaches of the Law Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb, UWG,* Sec. 8 para. 3 no. 2-4; Sec. 10 provides a claim for recovery of illegal profits) and claims for damages based on the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*, Sec. 34 para. 1, 4, Sec. 34a). These are not considered to be public interest litigation since they do not review larger policies but rather individual instances of illegal conduct. Claims typically made by consumer protection organizations under the UWG have become more widespread and successful in recent years to prevent greenwashing. However, these only affect companies' marketing strategy and not their actual sustainability policy.

In administrative law, *Verbandsklagen* are available under the Environmental Appeals Act (*Umweltrechtsbehelfsgesetz, UmwRG*) and under the Federal Act for the Protection of Nature (*Bundesnaturschutzgesetz, BNatSchG*) for environmental associations. Under these acts, qualified associations can challenge certain approval decisions for projects with high environmental relevance for the violation of public law standards, even if these standards do not provide third-party protection. This claim is a means of objective legal control and allows associations to challenge violations of environmental law standards that only seek to protect or promote public interests. It does not enforce individual rights, but serves the objective control of environmental authorities.

4. To what extent do interest groups (have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?

The German legal system primarily serves the legal protection of individuals and individual rights. Interest groups therefore frequently rely on individual claimants in proceedings for the protection of collective and/or public interests. These individuals can be the directors of the interest group, as in most of the climate change litigation cases. In other cases, interest groups work together with individual claimants.

The *actio popularis* (*Popularklage*), that is, a claim that can be raised by anyone regardless of whether or not they are directly affected, is generally not allowed within the German legal system. The German legal system primarily protects individuals and individual rights; individual

claims are the norm and any exception must have a legitimate, specific purpose to be convincing enough to adopt. Article 19 (4) Basic Law (*Grundgesetz, GG*) guarantees legal remedies against public authorities for the violation of an individual's own rights; there is no general right pertaining to the execution of the objective law at large. In civil law, individuals must prove their private law claims (*Prozessführungsbefugnis*, not explicitly regulated in the ZPO, see *infra*); in public law, individuals can make claims based only on a norm providing subjective rights (*Schutznorm*; this is the requirement of *Klagebefugnis* according to Sec. 42 para. 2 Rules of the Administrative Courts (*Verwaltungsgerichtsordnung, VwGO*, see *infra*). In certain cases, collective actions (*Verbandsklagen*) allow an association to raise claims based on the rights of their members or public rights. However, these only apply to very specific areas of law and remain the exception.

5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system including:

- **To which policy areas do these cases relate?**

Public interest litigation currently frequently relates to environmental protection with climate change litigation being the most widespread form of public interest litigation at the moment and receiving the most attention. Human rights litigation, also in the context of corporate social responsibility, has also increased in the last years and affects areas such as the protection of human rights and fundamental rights – including freedom of the press, of expression, and of assembly; strengthening democracy; limitation of (digital) surveillance and right to privacy; equal rights and social participation; asylum law and protection of asylum seekers. Obligations for companies relating to human rights and sustainability along the supply chain have increased due to the Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz, LkSG*) and are still evolving with EU law such as the Corporate Sustainability Reporting Directive (which has not yet been implemented in Germany) and Corporate Sustainability Due Diligence Directive. The LkSG primarily provides for public enforcement, although it provides the possibility for action to be taken upon application in Sec. 14 LkSG. It remains to be seen how litigation under these new laws will develop.

- **Who are the defendants in these cases: government and/or corporations?**

Public interest litigation can and does affect both government at the federal and state level and corporations. In climate change litigation, both government and corporations are defendants. Human rights litigation has more often addressed the state, especially via individual constitutional complaints, but also addressed corporations.

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

"Public interest litigation" describes a phenomenon, not a specific type of claim; it addresses the goals and motivations of a claim much in the same way that "strategic litigation" does. Public interest litigation is not, however, a formal category of its own with specific requirements

and consequences. Some individual claims can be considered public interest litigation. The same rules apply to all individual litigation, regardless of whether it is a typical case focused solely on the individual claimant or whether the claim is supported by an NGO and aims to achieve supra-individual protection. Public interest litigation is often regarded with skepticism in the literature. However, public interest litigation in the shape of an individual claim can be successful and is not *per se* prohibited.

In the German legal system, the legal norms invoked, the addressee of the claim (public or private), the competent courts (administrative or civil) and the possible remedies are all related and determined by one another. These elements are not up to the claimants but are set by law. Questions pertaining to different possible bases for a claim, addressees of a claim and remedies are therefore not intuitive to German law.

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?

- **Are these interest groups, public authorities and/or individuals?**

Public interest litigation describes an approach, a phenomenon, and not a type of claim. Individuals can initiate strategic claims to protect their individual rights under civil, administrative and constitutional law, which can be framed as public interest litigation. Although associations can raise claims if they are affected in their own rights, these cases are rare and less frequently successful due to the nature of the rights inherent to associations. Only in certain specific cases can associations raise claims without any claiming a infringement of individual right. This applies in particular under environmental protection law. Federal states, cities and municipalities are able to bring claims; however, this possibility has not been relevant.

8. Against whom can PIL be initiated (government/corporations)?

Public interest litigation can be initiated against both the government and corporations. Litigation in the public or common interest is more common and historically has had a higher rate of success against the government. In particular, the necessary breach of a duty of care is more difficult to reason in cases against corporations, which are not bound by the fundamental rights of the Basic Law (*Grundgesetz, GG*).

9. Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?

- **If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?**

The competent court depends on the legal grounds for and the addressee of the specific claim. Public interest litigation is possible and does occur in all courts. Competency depends primarily on whether the claim is addressed to the government or a private company and therefore which rules apply. The Federal Constitutional Court is competent for claims of injury to fundamental rights in the form of the individual constitutional complaint (Article 93 (1) No. 4a

GG, Sec. 90 (1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz, BVerfGG*)); administrative courts are competent for cases against the executive; private courts are competent for claims against corporations. Since different courts are competent for different claims, concurrence is not an issue: for any one claim, only one kind of court (civil, administrative, constitutional) will be competent. The general rules apply, this division is not specific to public interest litigation.

10. What are the relevant admissibility rules?

- **What are the standing requirements?**

Standing is typically translated into German as *Rechsschutzinteresse*, which is the admissibility requirement that the claimant must have a legitimate interest in a decision by the courts. This interest is usually given as soon as an injury is claimed but can be missing if there is an easier way to achieve legal protection.

Other elements of standing are considered as independent admissibility requirements: In accordance with the fundamental orientation on protecting individual rights, claimants must base their claim on (an injury of) their own individual right (*Prozessführungsbefugnis* in civil proceedings, not explicitly regulated by law in the ZPO, *Klagebefugnis* in administrative proceedings according to Sec. 42 para. 2 VwGO or *Beschwerdebefugnis* in constitutional proceedings according to Art. 93 para. 1 no. 4a GG). In order for the action to be admissible, the plaintiff must only claim an individual injury; the evidence is examined in the merits of the case. Admissibility in this point does not require the claimant to have a special right or stronger interest distinguishable, that is individualized from that of the general public in the sense of the *Plaumann* requirement of EU procedural law.

In civil law proceedings, the figure of *Prozessstandschaft* allows a third party without relevant rights to bring claims in its own name on behalf of another (injured) party under narrow conditions in very few statutory and voluntary cases. One such voluntary case is provided in Sec. 11 LkSG. Parties claiming injury to an exceedingly important legal position under Sec. 2(1) LkSG may authorize a domestic trade union or non-governmental organization to conduct legal proceedings in order to assert their rights in court. An entity may only be authorized if it maintains a permanent presence of its own and is not commercially and not only temporarily committed to realizing human rights or corresponding national rights according to its own statutes.

In administrative law, individual injury – *Klagebefugnis* – is required by Sec. 42 para. 2 VwGO – unless otherwise provided by law. Two such provisions are relevant to public interest litigation: Sec. 64 BNatSchG allows qualified environmental organizations to raise claims against specific environmental law decisions, while Sec. 2 UmwRG allows qualified associations to raise claims against decisions of public law authorities specified in Sec. 1 para. 1 UmwRG. These include decisions in environmental impact assessments and plant licensing under the Federal Emissions Control Regulation (*Bundesimmissionsschutzverordnung, BImSchV*). Unlike individual claimants,

environmental associations can bring a claim in both cases without having to show that they are affected in their own rights; they must only state why the decision in question contradicts environmental legislation. Additionally, environmental associations can always bring an individual claim if they are affected in their own rights, notably participation rights in administrative decision procedures. *Klagebefugnis* requires a potential injury to a subjective public right, as opposed to objective law. The claimant must base their claim on injury of not just any law, but a *Schutznorm*, that is a law which provides individual rights in case of injury. The *Schutznorm* requirement has been a hurdle in particular to administrative law climate change litigation in the past, as climate protection law in Germany generally does not provide individual rights.

With a view to actions before the German Federal Consitutional Court, the *Beschwerdebefugnis* for an individual constitutional complaint requires the claimant to be themselves – that is personally –, currently and directly affected in their fundamental rights. In the climate decision of 24 March 2021, the Federal Constitutional Court stated succinctly that the current affectedness is fulfilled if a later constitutional complaint would be too late to guarantee effective legal protection.

Other aspects such as traceability of the injury to an action of the defendant and further questions of causality and attribution as well as redressability (with the narrow exception of obviously entirely unsuitable cases) are considered in the merits of the claim.

- **Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc. of the represented constituency members, for establishing standing? If yes, how is it assessed?**

Individual claims and claims by interest groups based on their own rights have no such requirement. Support of these claims by NGOs which are not party to the proceedings is not controlled. In order to raise an administrative law *Verbandsklage*, associations must be recognized under Sec. 3 UmwRG (see *infra*).

- **Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?**

The capacity to sue (*Parteifähigkeit*) is determined by legal capacity (*Rechtsfähigkeit*), Sec. 50 (1) German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) and therefore includes natural and legal persons, the latter of which must be properly represented. *Rechtsschutzinteresse*, that is sufficient interest in a judicial decision, is required but is typically given if current or future injury is asserted; it therefore poses a very low hurdle (see *supra*). "Victim status" as required by the ECHR can be equated to the principle of the protection of individual rights fundamental to the German legal system; in principle, admissibility requires the claimant to be directly affected in his or her own rights, although exceptions are possible (see *supra*). There are no

admissibility rules specifically governing justiciability and there is no political question doctrine in the German legal system. However, the underlying separation of powers concerns often become relevant incidentally in the merits.

- **For determining admissibility: does it make a difference which legal norms are invoked?**

Claims before different courts have differing admissibility requirements, although the principles are the same; these are dependent on the competent court, which is in turn dependent on the legal norms invoked and the addressee of the claim. The exemptions from the requirement of an individual injury listed above are only available if the corresponding legal norms are invoked by a qualified association.

- **For determining admissibility: does it make a difference which remedy is requested?**

Claims for declaratory judgment (*Feststellungsklagen*) require a qualified interest in the declaration; however, a declaratory claim is not typically invoked for public interest litigation as the remedy is not very strong and does not directly lead to action or change. Otherwise, the remedy – which is predetermined by the grounds for the claim and the legal norms invoked – makes no difference.

- **Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?**

With the exception of *Verbandsklagen*, interest groups can only litigate as a party if they are raising a claim based on their own rights as an association. In this case, the group must be a legal person with legal capacity and be properly represented. These general rules apply to all litigation and are not specific to public interest litigation.

In order to raise an administrative law *Verbandsklage*, associations must be recognized under Sec. 3 UmwRG, under which recognition is to be granted if the association:

1. According to its statutes primarily, ideally (that is, non-materially) and not only temporarily promotes the objectives of environmental protection;
2. Has been in existence for at least three years at the time of recognition and has been active within the meaning of number 1 during this period;
3. Offers the guarantee of an appropriate fulfillment of tasks, in particular for an appropriate participation in administrative decision-making procedures; the type and scope of its previous activities, its members and the capabilities of the association must be taken into account;
4. Pursues charitable purposes within the meaning of Sec. 52 of the German Fiscal Code (*Abgabenordnung, AO*) and
5. Allows any person who supports the objectives of the association to join as a member; members are persons who receive full voting rights in the association's general meeting

upon joining; in the case of associations whose membership consists at least three-quarters of legal entities, the requirement under the first half-sentence may be waived if the majority of these legal entities meet this requirement.

According to Sec. 3 (2) UmwRG, "For a foreign association and for an association with a field of activity that extends beyond the territory of a state (*Bundesland*), recognition shall be granted by the Federal Environment Agency. In the case of recognition of an association in accordance with sentence 1 which primarily promotes the objectives of nature conservation and landscape management, this recognition shall be granted in agreement with the Federal Agency for Nature Conservation. No fees or expenses shall be charged for recognition."

For a domestic association with a field of activity that does not extend beyond the territory of one state, recognition is granted by the competent authority of the state, Sec. 3 (3) UmwRG. This is usually the state ministry of the environment.

A list of all currently recognized associations is available under https://www.umweltbundesamt.de/dokument/vom-bund-anerkannte-umwelt-naturschutzvereinigungen-0.

- **If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?**

There are no specific rules on concurrence of plaintiffs in PIL cases or in cases brought by NGOs. Under the general rules of German civil procedural laws, several claimants may jointly sue or several pending cases may be joined in one proceeding (*aktive Streitgenossenschaft*) "if they form a community of interest with regard to the disputed right, or if they are entitled for the same factual and legal cause" (Sec. 59 ZPO) or "if similar claims or obligations form the subject matter in dispute and such claims are based on an essentially similar factual and legal cause" (Sec. 60 ZPO). In essence, a joint action is permissible if a joint hearing and decision is expedient. Additionally, since a joint action means that several claims are being consolidated – at least one by each party – the claims must permissibly be dealt with in the same type of proceedings (Sec. 260 ZPO).

Streitgenossenschaft is simply the external consolidation of several actions in one proceeding; each party remains independent and is not represented by the other parties; each claim must be individually admissible, the judgment can differ between the claims. However, the individual cases are uniformly treated concerning evidence, which is the main benefit of a *Streitgenossenschaft*. In the case of a "necessary" *Streitgenossenschaft* according to Sec. 62 ZPO, procedural actions must be taken by or are attributed to all parties; however, this case is not typically relevant for public interest litigation claimants. These civil procedure rules also apply to administrative proceedings, Sec. 64 VwGO.

Thus, interest groups can litigate with individual citizens if they can bring a claim themselves and if the above criteria are met. Typically, individual claims are supported by NGOs –

financially, in terms of legal support, and by raising public awareness for the claim and the underlying goals – without becoming a formal party to the proceeding.

- **If there are several competent courts: are there any differences in the rules on admissibility?**

For any one claim, only one kind of court (civil, administrative or constitutional) can be competent. The rules on admissibility differ in detail from court type to court type and even depending on the type of claim, although the basic conditions of admissibility are the same for all courts. In particular, all require the claimant to be affected in their individual rights, although there are some differences on how that requirement is formulated depending on the area of law (see *supra*).

For a constitutional complaint (*Verfassungsbeschwerde*) pursuant to Art. 94 Basic Law, the claimant must have exhausted all other legal remedies.

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?

- **What are the rules on admissibility in that respect?**

There is no *amicus curiae* in the German legal system. NGOs commonly support individual public interest litigation without being party to the proceedings. There are no rules on admissibility for this approach. In administrative law procedures, according to Sec. 65 VwGO, the court can – of its own volition or on application – summon a third party (*Beigeladener*) whose legal interests are also affected by the decision. An NGO can have relevant legal interests based on qualified procedural rights; furthermore, a relevant interest can be based on its specific expertise which would aid the clarification of the facts of the case. The closest equivalent is available in cases before the Federal Constitutional Court, where the Court may give expert third parties (who do not have to have a particular interest in the proceedings) the opportunity to comment according to Sec. 27a BVerfGG and may take these comments into consideration. This does not grant them any procedural status. Third parties cannot demand to be heard with a declaration; they do not have to submit a declaration if asked.

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?

The necessary implementation of EU directives has prompted the introduction of the UmwRG and the creation of its *Verbandsklagen*. The German legislator is frequently cautious when implementing EU directives which require changes to the previous system, such as the introduction of *Verbandsklagen* without the requirement of an individual injury of the claimant. In these cases, clarifying decisions of the CJEU are frequently cause for further changes. EU law and case law continues to be one of the main drivers of change in environmental law as an area highly relevant to public interest litigation and in access to justice for interest groups in general. For the example of the *Verbandsklagen*, the German legislator only did away with the requirement that the provision whose infringement is asserted protects (any) subjective rights after the Trianel decision (C-115/09, ECLI:EU:C:2011:289) of the CJEU.

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?

- **What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in European Court of Human Rights, 9 April 2024, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20 (KlimaSeniorinnen)?**

The interpretation of the Basic Law and particularly the fundamental rights must take the ECHR and its case law into account, which can influence their scope and application. This also applies to the decision in the KlimaSeniorinnen case, although Germany was not a party.

Victim status required by the ECHR can be equated to the requirement of an individual injury fundamental to the German legal system which is required for admissibility for all kinds of courts (see *supra*). The German legal system does not however currently provide standing for associations for human rights-based litigation in the way reasoned by the ECHR in the KlimaSeniorinnen case. The introduction of standing for associations without individual injury in human rights-based litigation congruent to the KlimaSeniorinnen reasoning has been discussed in the literature but was so far rejected. The literature currently appears to predominantly agree that representative actions by certain interest groups in climate cases must be allowed in Germany following the ECHR decision; however, in order to establish this standing, legislative clarification is necessary.[2] The current German regulations restricting *Verbandsklagen* contradict the standing for associations and cannot be overcome by way of legal interpretation by the courts.

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

The UmwRG was created to implement the parts of the European Public Participation Directive 2993/35/EC of 26 May 2003 dealing with access to justice and therefore to allow ratification of the Aarhus Convention, which the directive goes back to. This substantially increased access to the courts for environmental associations and the possibility of judicial review in environmental law. The Aarhus Convention had no effect on civil law claims, however, as it only applies to compliance with national laws concerning environmental matters, which is regulated by public law in Germany.

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[2] Calliess/Täuber, NVwZ 2024, 945 criticize the methodical construction undertaken by the ECHR; they find that an adoption of the resulting standing for interest groups is necessary, but highlight the inconsistencies with current German law and gather that a legislative clarification in the sense of allowing such representative actions in the field of climate litigation is the obvious solution. Breuer, NVwZ 2024, 1631 examines the effect on standing for interest groups in administrative law proceedings in detail, also highlighting the inconsistencies with German law which make a legislative clarification necessary. Although the article does not completely rule out the possibility of a differing assessment, it shows how different approaches to a legal interpretation which would overcome these hurdles appear promising but ultimately fail.

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

The obligations of the government and of corporations are governed by different laws, so different claims are brought against each before different courts (constitutional, administrative, or civil). These differences are not specific to private interest litigation.

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?

- **Are there special rules on the legal provisions that can/can't be invoked in PIL-cases?**

From the perspective of German law, public interest litigation describes an approach, a phenomenon, and not a type of claim. There are no special rules on legal provisions that can or cannot be invoked in public interest litigation cases. As with any other case, claimants must generally base their claim on an injury of their own rights. Legal provisions can therefore only be invoked if they confer subjective rights and the claimant falls under the scope of the provision. The fundamental rights of the Basic Law are typically invoked in relevant individual claims. Typically these are the basic rights to human integrity (Article 1(1)), life and physical integrity (Article 2 (1)), property (Article 14) and the freedom of profession (Article 12). Recent attempts in climate change litigation to create the fundamental right to preserve greenhouse gas-related freedom (*Recht auf Erhalt treibhausgasbezogener Freiheit*) based on the general right of personality (*allgemeines Persönlichkeitsrecht*, Article 2(1) in combination with Article 1(1)) have failed.

Monetary damages and injunctions can be invoked based on tort law against corporations for damages and to prevent impending injury, although the material law hurdles are high. Fundamental rights have indirect effects on these cases when interpreting general clauses and "open" legal terms, in particular in determining duties of care.

An obligation for the legislature to impose stricter regulations can be invoked by an individual constitutional complaint as in the climate decision of the Federal Constitutional Court from 24 March 2021. Here, too, the hurdles are very high: the claimant must show that the legislature is violating the duty to protect an individual basic right by insufficient legislation. However, the state has a wide margin of discretion in determining how to fulfill its obligations to protect basic rights. In order to be successful, claims must show that the state has manifestly failed to fulfil its duty to protect, which is the case if measures have not been taken at all, if the measures taken are manifestly unsuitable or completely inadequate or if they fall considerably short of the protection objective. An exception to these general principles are the *Verbandsklagen*. These allow qualified associations to invoke certain legal provisions of administrative law and

environmental law in particular which are intended to protect the environment or public interests, but which do not confer individual rights onto third parties. In so doing they can submit specific administrative decisions which must consider environmental aspects to judicial review.

- **Under which conditions can constitutional rights and/or international treaties be invoked***?*

Fundamental rights guaranteed by the Basic Law can be invoked before the Federal Constitutional Court by claimants who assert their individual basic rights have been or will foreseeably be injured by action or inaction of the state – contrary to duty to protect. They have indirect effects on private law litigation (see *supra*).

International treaties have the rank of a federal law and can be invoked if they provide an individual right, which is rare, and are not precluded by a later or more specific federal law (*lex posterior* or *lex specialis*). Additionally, lower-ranking law must be interpreted in the light of constitutional law and the interpretation of the Basic Law and particularly the fundamental rights must take the ECHR and its case law into account.

- **To what extent can private law provisions be invoked?**

Private law provisions can be invoked by individuals against corporations in particular for violations of a duty of care. The claimant must show an injury of an individual right. So far, this strategy has not been successful, due to a number of hurdles such as an individual injury, determination of a relevant duty of care, and causality issues.

17. Which remedies can be invoked in PIL-cases?

- **Are there special rules on remedies in PIL-cases?**

Each cause of action has a specific remedy. Depending on the claim raised, different remedies can be invoked in public interest litigation cases (see *supra*). There are no rules on remedies specific to public interest litigation. Typical remedies include monetary damages and injunctions against corporations and obligations to impose stricter regulations against the state.

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

The obligations of the government and of corporations are governed by different laws, so different claims with different remedies and different admissibility requirements are brought against each before different courts (constitutional, administrative, or private). These differences are not specific to public interest litigation.

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?

Public interest litigation, strategic litigation, climate change litigation and collective action in general are frequently criticized in the literature. Debate on the value, effects and possible restrictions of these forms of litigation resurfaces whenever new claims are raised, decided, or the relevant laws are changed. In general, politics and the literature are hesitant to change the current status quo on public interest litigation – especially by NGOs – as the protection of individual interests is the core purpose of the German legal system.

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

No.

Bijlage 4 - Questionnaire
Comparative legal research on access to justice in public interest litigation
England & Wales

Dr Emily Barritt[1]

Jurisdictional Note

This research focuses on the jurisdictions of England and Wales. Whilst there are similarities and links between the four jurisdictions of the United Kingdom, the devolution of powers means that there are differences in the conduct and organisation of PIL in Scotland and Northern Ireland, differences I am not qualified to address. However, given that the UK Supreme Court (UKSC) acts as the final court of appeal for all four kingdoms of the UK, cases will be cited from all four jurisdictions.

A. Context

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

- Public interest litigation
- Pressure through law
- Lawyering for change
- Impact lawyering
- Strategic litigation
- Legal mobilisation
- Campaign litigation
- Group litigation

- **Is this terminology defined in legislation, case law and/or literature?**

There is no legal definition of PIL in statute or case law. However, there is jurisprudence which elaborates the nature and purpose of this type of litigation:

- *Re v Somerset County Council., ex p Dixon* [1988] ENV LR 111, 117 as per Sedley J:

> There will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court.
>
> …

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> Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs — that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court`s only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief.

Thus, the idea of a litigation motivated by the public interests is well embedded in the jurisprudence of the British courts.

In academic literature there has been some discussion of definitions, although there is not much,[2] and it is generally not recent.[3] In the broader context of the common law, there is a significant body of legal scholarship focused on PIL based on jurisprudence from the US and India, but PIL does not have the same legal cultural significance in the UK.[4] Instead, there is a more measured discussion of using law for social change. Early work by Carol Harrow and Richard Rawlings, for example, focused on the idea of 'pressure through law', tracing the lineage of public interest groups using the courts to achieve social change back to 1749 when abolitionists used the courts to test views on slavery in common law. However, the authors of this work do not frame it in terms of public interest litigation.[5]

In more recent scholarship the nomenclature has switched to 'strategic litigation'.[6] Thus, the focus is not so much on public interests but on influencing policy and social outcomes.[7] Michael Ramsden defines strategic litigation as follows:

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2 Common law legal scholarship concerning PIL is mostly focused on the US and India, where the terminology is far more developed. In the UK, whilst there is a long lineage of public interest type litigation, there is not the same terminological fluency in the use of PIL is scholarship.

3 For example: John Griffith, 'Public Interest Litigation and JR' (1997) 2 Judicial Review 195; Peter Cane, 'Standing up for the Public' [1995] PL 276

4 Michale Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 4 Civil Justice Quarterly 407.

5 Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992)

6 Michael Ramsden, 'Strategic Litigation in English Judicial Review' (2023) 28 Judicial Review 261.

7 Although see Griffith's definition of PIL from 1997: 'public interest litigation is an exercise in politics. It tries to change the policy or the administrative practices of public authorities.' Griffiths (n 3) 202.

> a strategic challenge will involve the applicant in using the court as an instrument to achieve reform at a structural level, in challenging the distribution of legal, political, social or economic goods in society.[8]

Whilst this definition echoes the description of PIL outlined in the explanatory note for this questionnaire, the critical difference, as Ramsden highlights, is that 'strategic litigations might even be anathema to the public interest'[9] where the strategy pursued does not represent a public interest, for example SLAPPS are a form of strategic litigation which is typically used against the interests of the public.[10]

Another notable definitional difference between public interest and strategic litigation, is that PIL is specifically 'concerned with assisting marginalised and underrepresented communities', thus there is a particular kind of public in mind for PIL.[11] Thus there are a number of prisoner rights cases that are detailed below, which would be considered PIL because they about upholding the rights of marginalised claimants, although the arguments concerning the public interest are raised by the government defending the claim rather than by the claimant.

PIL is therefore not a particularly common term of art in the UK, particularly when compared to the common law jurisdictions of the US and India. Ramsden and Gedhill suggest that the contrast between the common usage of PIL in these jurisdictions relates to the comparatively weak legal tools available to litigants in the UK (principally judicial review) as compared to the US and India, jurisdictions where constitutional and public interests claims are possible.[12]

Although there is no formal definition of PIL, in the UK, PIL is frequently understood to be synonymous with **judicial review**, the limited process by which the legality (but not the merits) of a decision by a public body can be reviewed by a senior court. In addition to brining a judicial review, it is also possible for victims of a human rights abuse to bring a claim under s 7 of the Human Rights Act 1998, and to include a human rights claim as part of a judicial review.

Judicial review, and to a more limited extent human rights claims, are the main legal route to pursue PIL in the UK. There are however some other causes of actions that can have public interest potential in the UK. I will briefly introduce them in this opening section but

8 Ramsden (n 6) 262.
9 ibid.
10 ibid.
11 ibid; this understanding is influenced in part by the PIL of India which is very much focused on marginalised communities.
12 Ramsden and Gledhill (n 4) 7.

will not elaborate on them much more in the rest of the questionnaire, unless the question raises a directly relevant point.

Firstly, it is possible to **appeal administrative decision on a point of law** (error of law, unfair process, unfair exercise of discussion) however, as this is more focused on individual decisions, they are less relevant for public interest purposes.[13] Similarly, it is possible to bring an 'ordinary case' to contest the legality of decision by a public authority, however these claims generally need to engage some private law right (*O'Reilly v Mackman* [1983] 2 AC 237) and thus there is a preference for judicial review to address decisions of a purely public nature.[14] Similarly, it is also possible to bring a **statutory right of appeal**, for example for planning decision, but again standing for these types of appeals tend to be more personal. For example, the test for whether a person can appeal a planning decision is that they must be a person 'aggrieved' (Town and Country Planning Act 1990 s 288)

Private law also has some, limited, possibilities for PIL, for example through private nuisance (*Bar v Biffa Waste* [2012] EWCA Civ 312; *Manchester Ship Canal Ltd v United Utilities Water Ltd* [2024] UKSC 22), Group Litigation Orders (CPR 19)[15] and through Third Party Interventions into private legal claims that may have consequences for the public or policy (see answer to Q 11). However, these claims require interference with a legal right (a tort, a breach of contract or property right) and so the public interest possibilities of these claims are more limited. Further, as these claims involve private rights, often the public interest balancing exercise that the courts undertake is in favour of the defendant rather than the claimant (*Coventry v Lawrence (No 2)* [2014] UKSC 46).

There are also a small number of high profile private law claims against corporations made in the UK courts in respect of harms that have occurred in other jurisdictions, where the parent company is based in the UK: *Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC); *AAA and others v Unilever plc and another* [2017] EWHC 371 (QB); *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20. This is a potentially powerful avenue for global public interest type claims, but this jurisprudence is still developing.

Finally, if PIL is understood expansively, it might also be possible to view certain **enforcement actions** as a form of public interest litigation. Enforcement actions that may have public interest implications can be brought by:

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[13] Timothy Endicott, *Administrative Law* (5th ed, OUP 2021), 386.

[14] ibid, 386-95.

[15] Group Litigation Orders ('GLO') (the UK version of a class action) is a court order that allows related issues to be managed collectively. Common issues for GLO include private nuisance and products liability. The rules governing the establishment and management of GLO are found at CPR Part 19. GLOs have some possibilities in terms of public interest claims but are more limited in relation to strategic litigation. For a list of current GLOs see: https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders accessed (13 February 2025)

- the Environment Agency ('EA'). The EA can bring enforcement actions for the failure to respect environmental permits and regulations against anyone required to respect environmental regulations or bound by an environmental permit.[16] Action can therefore be brought against both public and private actors. Enforcement powers are granted by the Regulatory Sanctions and Enforcement Act 2004. EA policy guidance for whether enforcement action is taken indicates that enforcement action is more likely to be brought where there is serious harm or environmental health and where it is in the public interest.[17]
- the Environmental Protection Office ('EPO'). The EPO was legally constituted in November 2021 under the Environment Act 2021, and has the power to bring enforcement actions for failures to respect environmental law by government and any 'person [or organisation] carrying out any function of a public nature' (s 31). Critically, for present purposes, the OEP can receive complaints about potential failures from members of the public, which they then may investigate.[18] However, there is no obligation to investigate complaints, thus the OEP has a significant discretion as to whether they investigate or bring enforcement actions (s 32). In 'urgent' cases the OEP may also bring a judicial, or statutory review, in relation to the conduct of a public authority (s 39).

However, given that these legal actions can only be brought by the relevant statutory body (EA or OEP) I will not consider these routes further. I simply note them here, to show that there are alternative ways to achieve public interest type outcomes through litigation in the UK.

Answers to the following questions will focus on judicial review, as this is the main legal route for public interest litigation.

2. What are the main legislative provisions and/or leading cases regarding PIL?

Legislation

There are no legislative provisions explicitly related to PIL. However, there a several statutes that provide an important background to understanding the landscape of PIL in the UK:

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[16] For a recent example of what this might look like from a public interest perspective see: Sandra Lavile, 'East Anglian farms breach environment regulations 700 times in seven years' (*The Guardian*, 5 February 2025) https://www.theguardian.com/environment/2025/feb/05/east-anglian-farms-breach-environment-regulations-700-times-in-seven-years (accessed 7 February 2025)

[17] Environment Agency Enforcement and Sanctions Policy https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy (accessed 7 February 2025).

[18] See for example a recent success with referring an issue to OEP by ClientEarth in respect to the use of pesticides: https://www.clientearth.org/latest/news/the-uk-government-has-approved-a-bee-threatening-pesticide-in-a-potential-breach-of-environmental-law/ (accessed 17 February 2025).

- Senior Courts Act 1981 governs the administration of senior courts in the UK, for example, it includes provisions on permission, standing (s 31(3)) and remedies in judicial review claims (ss 29, 29A and 30).
- Access to Justice Act 1999 relates to costs and improving the accessibility of the courts system, although the rationale of this act has been superseded by a preference to limit the availability of judicial review in later acts:

In *Callery v Gray* [2002] UKHL 28 Lord Bingham said the purpose of the Act was as follows:

1. To contain the rising cost of legal aid.
2. To improve access to the courts of claimants with meritorious claims.
3. To discourage weak claims.

- Human Rights Act 1999 was enacted to incorporate the provisions of the ECHR into the UK legal system and allows a person to bring an action where they say that they are the victim of an unlawful act under section 6.

> **7. Proceedings.**
>
> (1)A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a)bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b)rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.

- Criminal Justice and Courts Act 2015 introduced to reduce the number of judicial review claims and speed up the process of judicial review.
- Judicial Review and Courts Act 2022: introduction of new forms of quashing orders and the removal of the possibility to request a judicial review of the Upper Tribunal's refusal to grant permission to appeal a decision of the First Tribunal.

Civil Procedural Rules

The running of litigation in the UK is governed by rules of procedure. These rules are important to understanding the operation of PIL. In the High Court and the County Court, the Civil Procedure Rules ('CPR' also known as 'the White Book'). This book is updated yearly and is the authority on the rules and sources of law in relation to the practices and procerus of the High Court and the County Court for the handling of civil litigation. The Court of Appeal and the Supreme Court have their own rules and procedures and they will be cited where relevant. These procedural rules are also embellished with Practice Directions (PD).

The CPR 1.1 (1) states as follows:

1.1—(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

i. to the amount of money involved;

ii. to the importance of the case;

iii. to the complexity of the issues; and

iv. the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Case law

There are many examples from case law, some of the leading cases are as follows:

- *R v IRC, ex p National Federation of Self-Employed* [1982] AC 617 ('*Fleet Street Casuals*'): judicial review by an interest group representing the self-employed of a decision on the part of the Inland Revenue to reach an agreement with a group of causal Fleet Street workers who had been cheating on their income taxes.
- *R v Social Security Secretary, ex p Child Poverty Action Group* [1990] 2 QB 540: judicial review about the duties of the Secretary State in respect of social security payments, the claim was brought on behalf of those claimants by the Child Poverty Action Group and the Local Authority.
- *R v Inspectorate of Pollution, ex p Greenpeace (No 2)* [1994] 2 CMLR 548: judicial review of government's decision to authorise the discharge of nuclear waste at British Nuclear Fuels Plc's Sellafield site.
- *R v Foreign Secretary, ex p World Development Movement* [1996] 1 WLR 386: judicial review of decision to use foreign aid budget to fund the Pergau hydroelectric dam in Malaysia.
- *R v Somerset County Council, ex p Dixon* [1998] Env LR 111: a public interest challenge to the decision of Somerset County Council to grant planning permission to the extension of a limestone mining operation.

- *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481: judicial review of a fast-track scheme to deal with asylum claims.
- *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011: judicial review of a decision to assign a school over to academy school status.
- *AXA General Insurance v HM Advocate* [2011] UKSC 46: judicial review brought by insurance companies about the lawfulness of an Act of the Scottish Parliament that deemed pleural plaques as an actionable damage for the purposes of a tort claim.
- *Walton v The Scottish Ministers* [2012] UKSC 44: challenge to the validity of decision by Scottish government to allow the construction of a new road network. Claim brought by Mr. Walton on behalf of a local group – Road Sense.
- *R (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2015] UKSC 28: judicial review in respect of failure to respect air quality limits.
- *R (on the application of Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52: judicial review of policy in favour of the construction of a third runway at Heathrow airport on the basis it failed to take account of the Paris Agreement. Court of Appeal found the policy to be unlawful, but Heathrow Airport (but not the Secretary of State) appealed the decision. UKSC found in favour of the airport.

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

As explained above at Q 1, these answers will focus on judicial review which is the primary route by which interest groups have access to the courts.

The CPR 54.1(1)(2)(a) defines judicial review as follows:

> A claim to review the lawfulness of-
>
> (i) an enactment; or
> (ii) a decision, action or failure to act in relation to the exercise of a public function.

Judicial review is thus the supervisory jurisdiction of courts over public bodies. Two important considerations about judicial review for the purposes of understanding its potential for public interest litigation:

1. It is only possible to bring a judicial review against a public actor, judicial review is not available for acts and decision of private actors.
2. Judicial review does not give courts an unlimited power to remake decisions of public authorities. Whilst courts have a wide discretion as to how judicial review operates (as

will be clear from the extensive case law cited) they must do so within the limits of the separation of powers and Parliamentary Sovereignty. This careful balancing act is reflected in the limited grounds for judicial review and the remedies available.

4. To what extent do interest groups (have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?

The broad rules of standing for judicial review mean that anyone with a 'sufficient interest' in the claim can initiate a judicial review, therefore it is not generally necessary for public interest organisations to mobilise a particular claimant. (For an elaboration of the meaning of 'sufficient interest' see answer to Q 10.)

There may however be strategic reasons for mobilizing certain individuals, particularly in relation to the cost of litigation, although the courts are alive to these kinds of schemes. In R(*Edwards) v Environment Agency* [2013] UKSC 78] and [2010] UKSC 57 the 'real' claimant (Mrs. Pallikaropolous) was too wealthy for legal aid and so Mr. Edwards brought the claim on the basis of his eligibility for legal aid to bring the claim. However, he withdrew his instructions to bring the case and Mrs. Pallikaropolous joined as an appellant. The case was ultimately about costs and access to justice in environmental claims, for further discussion of the significance of costs of understanding public interest litigation in the UK see Q 20.

Critically, the court will only hear claims brought by public interest claimants if there is no one else, more directly affected who can bring the claim:

- *R v Home Secretary, ex p Ruddock* [1987] 1 WLR 1482: in a judicial review about illegal phone tapping, only the person whose phone had been tapped had standing to bring the claim.
- *Re Conway & Hutchinson* [2011] NIQB 68 and *R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 7111: prisoners tried to challenge the rates paid to their legal representatives.
- *R v Birmingham City Council, ex p Connolly* (1994) 26 HLR 551: social housing landlords could not challenge a decision about the amount of housing benefit paid to their tenants.
- *Coedbach Action Team v Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin): judicial review of a planning permission granted to a biomass fuel plant in Avonmouth (South West England) could not be challenged by a group based in Coedbach (South Wales).
- *R (D) v Parole Board* [2018] EWHC 694 (Admin): the Mayor of London was not deemed to have a sufficient interest in a parole board decision to release a former cab driver convicted of multiple rapes and sexual assaults because there were 'obviously better-placed challengers' e.g. Attorney General, Secretary of State for Justice or the victims themselves.
- *R (on the application of Zafar) v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2154 (Admin): the son of a sick woman sought to challenge a

planning enforcement notice on her behalf, but the court said: 'the interest in the enforcement notice [was] that of his mother ... The claimant ha[d] no interest in the property and no direct interest that is not that of his mother'

- *R (on the application of AB) v A County Council* [2022] EWHC 2707 (Admin): a teacher wanted to challenge her employer's treatment of a transitioning pupil was barred from bringing the claim on the basis that the student who had the relevant sufficient interest.

Therefore, if there is someone more directly affected by the decision complained of, the public interest group would either have to support the claimant in bringing the litigation or they could intervene in the claim (see answer to Q 11).

5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system including:

There is a rich and varied tradition of public interest type litigation claims in the UK, some recent examples include:

Judicial Review

- *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43: judicial review of the government's decision to approve a natural gas plant. Claim unsuccessful on basis decision was within the discretion of the government.
- *R (on the application of Good Law Project & Runnymede Trust) v Prime Minister* [2022] EWHC 298 (Admin) ('*GLP & Runnymede*'): judicial review of the failure to have an open competition for the appointment to high level leadership positions as part of the governments Covid-19 response. Claim unsuccessful on standing grounds.
- *R (Finch on the application of Finch on behalf of Weald Action Group) v Surrey County Council* [2024] UKSC 20: a judicial review concerning whether Environmental Impact Assessment ('EIA') should include consideration of Scope 3/downstream emissions. Claim successful as court found that these emissions should have been considered in the EIA.
- *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) ('*FoE No. 1*') ; *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2024] EWHC 995 ('*FoE No. 2*'); *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2024] EWHC 2707 ('*FoE No. 3*'): a series of cases challenging various aspects of the government's policies and programmes in relation to climate change. The first two claims were successful, the third was resolved in favour of the government.
- *The King v National Crime Agency* [2024] EWCA Civ 715: judicial review of the National Crime Agency's failure to investigate the importation of cotton produced in the Uyghur

Region. Claim successful as the failure to investigate origins of cotton was found to be unlawful.

Illustrations of the types of claims currently in process are all being brought by the Good Law Project:

- Kids Company: judicial review of a Charity Commission report that condemned the charity Kids Company, an active and vocal advocate of children's rights in the UK, and critic of government policy at the time.
- Puberty blockers: judicial review challenging decision to ban the use of puberty blockers.
- Coal mining: joint judicial review with Coal Action Network about failure of local council to address mining at site that had continued past the date set out in planning permission.

Private law

- *Manchester Ship Canal Ltd v United Utilities Water Ltd* [2024] UKSC 22: a successful claim in private nuisance and trespass in respect of sewage discharges that were not caused negligently.
- *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20: a tort claim brough by 1,826 Zambian citizens concerning toxic emission from a mine in Zambia against the UK based parent company. The UKSC explained why it was the proper forum for the case at [88] and [89]:

> [88] In conclusion, it is sensible to stand back and look at the matter in the round. This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice.
>
> [89] …Rather, it derived essentially from two factors: first, the practicable impossibility of funding such group claims where the claimants were all in

> extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant (KCM) with a track record which suggested that it would prove an obdurate opponent. The judge acknowledged that in the large amount of evidence and lengthy argument presented on this issue there was material going both ways, giving rise to factual issues some of which he had to resolve, but others of which he could not resolve without a full trial. Nonetheless he concluded not merely that there was a real risk but a probability that the claimants would not obtain access to justice so that, in his view, and notwithstanding the need for caution and cogent evidence, this reason for preferring the English to the Zambian jurisdiction was established by a substantial margin beyond the real risk which the law requires.

- *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3: a permission question as to whether UK courts had jurisdiction to hear a tort claim brought against the UK based parent company of a Nigerian subsidiary for oil spills in the Ogoniland, as per Lord Hamblen at [22]:

> Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.

The preliminary issues hearing of this claim is currently underway in the High Court to decide two question: (1)'(w)hether oil pollution by a private company can be a violation of a community's fundamental human rights under the Nigerian Constitution and African Charter on Human and People's Rights'; and (2) '(w)hether Shell can be held liable for damage to its pipelines due to oil theft, known as "bunkering," or for the waste produced as a result of illegal refining of spilled or stolen oil'.[19]

[19] Leigh Day, 'Shell trial over oil pollution which has devastated two Nigerian communities begins at the High Court in London', 13 February 2025 < https://www.leighday.co.uk/news/news/2025-news/shell-trial-over-oil-

- **To which policy areas do these cases relate?**

An illustrative, non-exhaustive list:

- Environment
- Climate change
- Planning
- Housing
- Gypsy and Travel rights
- Refugee and immigration rights
- Prisoners' rights
- Military spending
- Medical rights (euthanasia, puberty blockers)
- Public protest
- Journalistic freedom
- Education
- Modern slavery
- Covid-19
- Brexit

- **Whom are the defendants in these cases: government and/or corporations?**

Judicial Review

Judicial review is only available against decisions made by those who 'exercise a public function' (CPR 54.1). However, they have been willing to interpret the idea of a 'public function' generously. In *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 185 (CA): the Court of Appeal extended its jurisdiction to include a body that was not a government agency, or even a legal person, the Panel on Take-overs and Mergers. The panel organised by investment banks in the City of London as a form of self-regulation of company take-overs was effectively performing a public function (regulating commercial trading), and so the court decide it was in the public interest that it be amenable to judicial review.

Courts will use various considerations to assess whether a potential defendant is exercising a public function for the purposes of judicial review:

- A 'but-for' test: whether the state would need to perform the functions if the private body in question was not performing them: *R v Panel on Take-overs and Mergers, ex p Datafin plc*; *R v Advertising Standards Agency, ex p Insurance Service*.
- Statutory "underpinning: where the state has provided a statutory underpinning to the activities of the private body in question, or the body was established by statute.

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pollution-which-has-devastated-two-nigerian-communities-begins-at-the-high-court-in-london/> (accessed 14 February 2025).

However, creation by statute does not automatically mean the body is providing a public function: *R v Football Association Ltd ex p Football League* [1992] 2 All 833.

- Monopolistic powers: *R v Panel on Take-overs and Mergers, ex p Datafin plc*. However, this will also depend on the number of people impacted and the seriousness of the decision: *R v Football Association Ltd ex p Football League*.
- Public interest: *R v Panel on Take-overs and Mergers, ex p Datafin plc*

Examples of where the court has interpreted 'public function' expansively include:

- *Pharmaceutical Industry, ex pe Professional Counselling Aids* (1990) 3 Admin LR 697
- Law Society: *Swain v Law Society* [1983] 1 AC 598 (HL)
- Advertising Standards Agency: *R v Advertising Standards Agency, ex p Insurance Service* (1989) 2 Admin LR 77 (DC)
- A self-organised pharmaceuticals industry committee: *R v Code of Practice Committee of the British*
- Bar Council: *R c General Council of the Bar, ex p Percival* [1991] 1 QB 212 (DC)
- nndent school providing and assisted school place: *R v Cobham Hall School, ex p* [1998] ELR 39
- Privatised water company exercising statutory powers: *R v Northumbrian Water Ltd, ex p Newcastle and Tyneside Health Authority* [1999] Env LR 715
- Airport operator in relation to noise pollution and vibrations: *R v Fairoaks Airport Ltd, ex p Roads* [1999] COD 168
- Managers of a private psychiatric hospital: *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin)
- A registered social landlord: *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin.

Although it is not possible to use judicial review for the court to supervise the decision-making powers of a private authority that cannot be said to be performing a public function, there is a limited legal route to review private decision-making via CPR Part 8. CPR 8.1(2) permits a claimant to 'seek the court's decision on a question which is unlikely to involve a substantial dispute of fact.' For example, in *Mullins v McFarlane* [2006] EWHC 986 the Standley Bunrton J transferred a failed judicial review of a Jockey Club doping decision to the CPR Part 8 procedure to review the Jockey Club's decision. These claims are heard in the Queen's Bench Division of the High Court rather than the Administrative Court. However, the use of this procedures will be very limited to cases where the private decision-making body has a monopoly, and there is no other private law right engaged.[20] CPR Part 8 does not provide a hook for public interest claims.

[20] Endicott (n 13) 629.

Human Rights Act

The Human Rights Act 1998 applies to acts of public authorities (s 6(1)), which are defined in s 6(3) as follows:

> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature,
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

This definition becomes complicated when private companies carry out public functions. In *Poplar Housing v Donoghue* [2001[EWCA Civ 595 where the role of the private entity is 'enmeshed' with the activities of the local authority it will be viewed as a 'functional public authority'. However, where the local authority clearly contracts out their responsibilities, the private law operator will not be considered as a public authority: (*R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366). Criteria for assessing what a functional public authority is were set out in *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37 at [12]:

> '…the extent to which in carrying out the relevant functions the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'

Unfortunately, however where a public authority contracts out a public function (like providing care home services) to a private provider who is paid for their services. the commercial nature of the arrangement means that although they are serving a public function, the court will not regard the private entity as carrying out a public function for the purposes of s 6(1)(3). See for example: *YL v Birmingham City Council* [2007] UKHL 27 as per Lord Scott at [26]:

> Southern Cross is a company carrying on a socially useful business for profit…. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business.

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

Two key aspects of the legal culture in the UK are important to understanding the way that judicial review works:

1. The adversarial system means that much of the way a case is run depends on the arguments that the parties bring before the courts, for example, if the defendant doesn't challenge the standing of the claimant, then the court will not consider whether a public interest group is given standing, and it will be assumed. For example, in *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department,* Sedley J at [5] remarked: 'Rightly, no objection has been taken by the Home Office to the standing of the RLC in these proceedings.'
2. Courts have a great deal of discretion in terms of the functioning of judicial review, and therefore it is not enough to understand what the formal legal test are, because the courts have wide discretion to interpret these requirements on a case-by-case basis, as they see fit. The extensive case law cited below therefore demonstrates how context heavy judicial review is, particularly in relation standing and permission to pursue the claim.

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?

There are three key hurdles to the availability of judicial review proceedings:

a. Permission must be granted by the court: 'The court's permission to proceed is required in a claim for judicial review' (CPR 54.4).
b. The request must be submitted within the relevant time limits: 'promptly' and in any event within three months of the relevant decision (CPR Practice 54).
c. The claimant must have standing (see answer to Q 4).

Permission

A claimant must seek the courts permission before they can pursue a claim for judicial review (CPR Practice 548.4). This is initially done on the bases of written submissions (on the papers), and the judge has a discretion to order an oral hearing (CPR 54.12). Claimants who are refused permission on the papers can request reconsiderations in an oral hearing (CPR 54.12(3)).

However, if the case is 'totally without merit' (CPR 54.12.(7)) then the court must refuse permission for an oral hearing. The claimant can appeal this decision to the Court of Appeal, but this will only be on the papers. 'Totally without merit' has been interpreted as 'bound to fail' (as per Kay LJ in *R (Grace) v Home Sectary* [2014] EWCA Civ 1901 at [15].

R v IRC, ex p Federation of Sel-Employed and Small Business Ltd [1982] AC 617, 643 as per Lord Diplock, the permission stage: 'is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error'.

R v Home Secretary, ex p Sati [1986] 1 QLR 477, 485 sets out general test for permission:

> an applicant must show more than that it is not impossible that grounds for judicial review exist… he must at least show that it is a real, as opposed to a theoretical, possibility. In other words, he must have an **arguable case**.

as per Sir John Donaldson MR.

Further, the court must deny permission in the following circumstances:

- Submitted outside of time limit.
- No sufficient interest (standing) (Senior Courts Act 1981 s 31(3)
- Alternative remedy available
- Question is 'academic' namely a case where 'either passage of time or changing circumstances have rendered the grounds of challenge redundant' as per Singh LJ and Swift J *GLP & Runnymede* [8]
- Highly likely outcome would not have been substantially different if the conduct complained of had not occurred' (Criminal Justice and Courts Act 2015 s 8)

The permission stage of judicial review is both a limit on the potential of judicial review for PIL, and an avenue to have a court hearing, through a permission hearing, on a legally hopeless, but nevertheless important public interest case.[21] Some examples where the permission hearing was an opportunity to air matters of public interest for a claim that would not succeed:

- *R (Gulf Centre for Human Rights) v The Prime Minister* [2018] EWCA Civ 1855: concerning changes to the Ministerial Code that removed the words 'including international law and treaty obligations;' in relation to a minster's duty to respect the law.
- *McClear v First Secretary of State* [2017] EWHC 3174: concerning a 'confidence and supply' agreement between the Conservative party (who had lost their majority) and the Democratic Unionist Party (a Norther Irish party DUP).
- *R (Wilson) v Prime Minister* [2019] EWCA Civ 304: permission to quash Prime Ministers' notification to withdraw from EU based on election fraud on the part of the leave campaign.

[21] Ibid 404.

- *R (Webster) v Secretary of State for Exiting the European Union* [2018] EWCH 1543: request for court to mandate the halting of Brexit negotiations on the basis the UK and not taken the decision to withdraw from EU.

Courts may also grant permission for legally hopeless cases based on their public interest value. Thus, there is a public airing of the relevant issues in court (and consequent media attention), even if the court regards the case to be non-justiciable/unarguable:[22]

- *Blackburn v Attorney-General* [1971] 1 WLR 1037: declaration that signing of Treaty of Rome was unlawful.
- *R v Foreign Secretary, ex p Reese-Mogg* [1994] QB 522: concerning the signing of the Maastricht Treaty.
- *R (Abassi) v Foreign Secretary* [2002] EWCA Civ 1598: claim to require Foreign Secretary to take steps to secure the release of Mr. Abassi who was detained in Guantánamo Bay.
- *CND v Prime Minister* [2002] EWHC 277: claim that invasion of Iraq was contrary to international war.
- *R (Gentle) v Prime Minister* [2006] EWCA Civ 1078: judicial review of governments decision not to hold a public inquiry into the Iraq war: 'the importance of the issues and the uncertainty of the present position there is a compelling reason' to grant permission [22].

One further note about the court allowing these types of case through to the hearing stage relates to costs (see further below at Q 20), because if the court grants permission to a case that seems unlikely to succeed and the case fails, the claimant will be liable to pay the legal costs of the defendant. Indeed, the courts may use costs to 'punish' claimants for bringing 'unnecessary actions' as per Farwell LJ in *Dyson v Attorney-General* [1911] 1 KB 210, 423.

- **Are these interest groups, public authorities and or individuals?**

Judicial reviews can be brought by individuals, public interest groups, the Office of Environmental Protection in 'urgent cases' (see answer to Q 1), the Attorney General via 'realtor' proceedings where it is in the public interest to do so, and by local authorities when they are representing the interests of those living in their area.

8. Against whom can PIL be initiated (government/corporations)?

Judicial review is only available against decisions made by those who 'exercise a public function' (CPR 54.1). See answer to Q 4.

[22] Ibid.

9. Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?

The structure of the UK courts system is such that many types of court may be capable of hearing a public interest type case. Where PIL is heard will therefore depend on the type of action:

- A judicial review will normally be heard in the Administrative Court a specialist court within the King's Bench Division of the High Court of Justice (green in figure 1). The Administrative Court also contains a specialist Planning Court, which hears judicial reviews of planning decisions. However, some judicial reviews will be heard by specialist tribunals, for example, judicial reviews of immigration decisions will be heard by Immigration and Asylum Chamber of the Tribunal system (purple in image below).
- Civil human rights claims brought under s 7(1)(a) of the Human Rights Act 1998 (i.e. one that is not also part of a judicial review) must be heard by the High Court (CPR 7.11(1)) in the King's Bench Division.[23]
- Private law claims can be heard either in the County Court or in the King's Bench Division of the High Court (green in image below), and the rules for initiating these claims are set by CPR Part 7. However, Practice Direction 7A, which supplements CPR Part 7 states that the where the outcome of the claim is of interest to the public in general, the claim ought to be dealt with by a High Court judge.[24] Therefore the types of private law case which are likely to have public interest implications, will be heard by the High Court King's Bench Division.[25]

See figure 1. below for a detailed diagram of the structure of the UK courts and tribunal system. The most important court for the purposed of PIL is the High Court as this is where judicial reviews are initiated.

Historical note: the UK Supreme Court (UKSC) was created 2009, when the Constitutional Reform Act 2005 abolished the Appellate Committee of The House of Lords which was until that point the UK's apex court. Thus, references to pre-2005 cases are indicated by the acronym UKHL and post-2005 are UKSC.

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[23] Courts and Tribunals Judiciary, King's Bench Guide, March 2024 < https://www.judiciary.uk/wp-content/uploads/2023/06/14.457_JO_Kings_Bench_Division_Guide_2024_WEB.pdf > (accessed 18 February 2025), 17.

[24] Practice Direction 7A – How to Start Proceedings – the Claim Form: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part07/pd_part07a (accessed 7 February 2025)

[25] Ibid 17.

Figure 1. Structure of the UK courts and tribunal system, taken from judiciary.co.uk.

- **If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?**

N/A

10. What are the relevant admissibility rules?

- **What are the standing requirements?**

Individuals and public interest groups

Standing for judicial review is governed by the deceptively simple requirement of 'sufficient interest' (*Ex p Tott* [1961] 1 KB 7, 9). There is no requirement to show that there has been an infringement of a legal right. The 'sufficient interest' test is set out in the Senior Courts Act 1981 s 31(3):

> No application for judicial review shall be made unless the leave [permission] of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

What constitutes 'sufficient interest' is 'acutely case-sensitive' (*R (on the application of the Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [526]). This has been made clear in the UKSC as per Lord Reed in *AXA General Insurance v HM Advocate* [2011] UKSC 46 at [170]:

> what is to be regarded as [a] sufficient interest ... depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

As a result of this context sensitivity, courts take a flexible approach to interpreting the meaning of sufficient interest because the test does not 'lend itself to exhaustive definition' it is regarded as being inherently elastic depending on the particular context as per *R (on the application of O) v Secretary of State for International Development* [2015] EWHC 2371 (Admin) at [27] and in *R (D) v Parole Board* [2018] EWHC 694 (Admin) at paras [105]-[111]. As the Divisional Court (Sir Brian Leveson P, Jay and Garnham JJ) noted in that case, at paragraph 111:

> The test for standing is discretionary and not hard-edged.

The courts have tended to generous in interpreting what constitutes a sufficient interest, particularly in relation to public interest groups and individuals acting in the public interest. For example, as per Lord Hope at [63] of *AXA*:

> A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

In *R v Secretary of State for Trade, ex p. World Development Movement* [1994] EWHC Admin 1 a challenge to the government's decision to use its aid budget to fund the Pergau dam in Malaysia, the court expanded on what is required for public interest claimants to have standing, 395 as per Rose LJ (emphasis added):

> Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the **importance of vindicating the rule of law**, as Lord Diplock emphasised at 644E; **the importance of the issue raised**, as in *ex parte Child Poverty Action Group and Others*; the **likely absence of any other responsible challenger**, as in *ex parte Child Poverty Action Group and Others* and *ex parte Greenpeace Ltd*; the **nature of the breach of duty against which relief is sought** (See per Lord Wilberforce at 630D in *ex parte National Federation of the Self Employed and Small Businesses Ltd*); and **the prominent role of these Applicants in giving advice, guidance and assistance with regard to aid** (See *ex parte Child Poverty Action Group and Others* at 1048J). All, in my judgment, point, in the present case, to the conclusion that the Applicants here do have a sufficient interest in the matter to which the application relates within section 31(3) of the Supreme Court Act and Ord. 53 r.3(7).

More recently courts have been revisiting the question of standing for public interest groups, largely as a result of the campaigning efforts of the Good Law Project ('GLP').[26] In two judicial reviews of public procurement[27] arrangements for medical supplies during Covid-19 the High Court dealt with the question of standing of the GLP.

[26] Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313, 317.

[27] Public procurement/public contract cases are particularly tricky standing cases because the natural challenger for such claims would be a failed bidder rather than a public interest organisation, and the types of cases that have arisen do not meet the 'gravity' threshold for the conduct complained of in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011.

In *R (on the application of Good Law Project) v Minister for the Cabinet Office* [2021] EWHC 1569 (Admin) Farrel J at [178]-[181] highlighted three factors in favour of finding standing:

1. Expertise and experience of the non-governmental organisation and its lack of an 'ulterior motive in pursuing the challenge';
2. The absence of an alternative claimant (in this case a 'disgruntled bidder' willing to risk the costs of litigation);
3. Gravity of the issue, which the court explained as follows:

> the gravity of the issues raised, concerning the Defendant's public law obligations against the background of an unprecedented public health crisis, justify the scrutiny of the court and, where appropriate, the grant of a public law remedy.

These ideas were further developed in *R (on the application of the Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) as per Waksman J at [501]:

> Having regard to the relevant case-law, it seems clear to me that the question of sufficient interest, which of course goes to the court's jurisdiction, is a multifaceted one. It involves (at least) consideration of the following factors:
>
> (1) The merits of the underlying claims;
> (2) The particular legislative or other context of the claim being made;
> (3) How, if at all, the claimant might be affected by the unlawfulness alleged;
> (4) The gravity of the allegations or findings made;
> (5) Other possible claimants; and
> (6) The position of the actual claimant.

Although standing is an admissibility requirement that can be assessed at the permission stage, courts tend to assess standing at a later stage of proceedings. For example, *R (on the application of the Good Law Project) v Secretary of State for Health and Social Care* [2021] at [17]

> Although on its face that provision might suggest that the question of standing is to be determined at the permission stage only, it is well established that it may also have to be considered at the substantive stage,

since sometimes it will be closely linked to the legal and factual merits of the claim

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The context sensitive nature of the standing rules mean that it is sometimes necessary for the court to make an assessment about the merits and the nature of the claim in order to decide if the claimant has standing (*Fleet Street Casuals*). In *World Development Movement* Rose LJ stated that 'the merits of the challenge are an important, if not dominant, factor when considering standing' (pg 395).

The CPR makes clear that claims (judicial review as well as ordinary claims) which lack merit because the claimant 'has no real prospect of succeeding on the claim' (CPR 24.2(a)(i)) must be dismissed at whatever stage this becomes apparent, including at the permission stage. Thus, this initial evaluation of the merits of the claim is wrapped up in the assessment of whether the claimant has standing.[28]

Further, there is an assessment as to the nature of the claim i.e. how serious is the breach that is the subject of the judicial review. This is important in relation to judicial reviews that are brought by a public interest groups or individuals in the public interest, because the courts will usually only grant standing to such a public interest group where the decision or conduct complained of amounts to a very serious breach of the law or abuse of power, as per Arden LJ at [77] in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011 a sufficient interest for public interest claimants will be found 'where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event'.

This was made clear in the case of the *Fleet Street Causals*, a case that was bought by a national federation representing small business owners and the self-employed about a tax repayment arrangement that had been made by casual newspaper workers who had been cheating on their taxes. In their decision the law lords made the following statements:

- Lord Fraser at 447: 'some exceptionally grave or widespread illegality'
- Lord Wilberforce 633: 'a case of sufficient gravity'
- Lord Roskill, 622: 'some grossly improper pressure or motive
- Lord Diplock, 644: 'flagrant and serious breach of the law'

In this case, the court decided that the arrangement the Inland Revenue came to with the Fleet Street casuals was within the normal purview of ensuring efficient tax collection. However, had the conduct complained of been of a more serious nature, then the Federation would have been more likely to have the relevant standing to bring their claim.

This sentiment is echoed in *R v Somerset County Council, ex p Dixon* [1998] ENV LR 111, 117 as per Sedley J:

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[28] A summary decision to strike out a claim is appealable.

> There will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court.

Cases where the conduct complained of was not considered grave enough:

- *R v Secretary of State, ex p Rose Theatre Trust* [1990] 1 QB 504: objection to minister's failure to list a former Shakespearean theatre as a monument, the claimants formed a company for this very purpose, as per Schiemann J, 522:

> …the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated.

- *R (UNISON) v NHS Wiltshire Primary Care Trust* [2010] EWHC 642: a decision about outsourcing in breach of public contracts regulations was not considered serious enough.
- *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011: objection to academy school designation on the basis of public contract regulations, as per Arden LJ at [78] 'it would, in our judgement, be outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim.'

However, in *R (Plantagenet Alliance Ltd) v Justice Sectary* [2014] EWHC 1662 the claimants who were descendants of Richard III brought a judicial about the City of Leicestershire's failure to hold a public inquiry about where his remains should be re-buried were granted standing on the basis that 'the points raised have a boarder public interest sufficient for the Claimant to have standing in this case as a public interest litigant' at [82].

In addition to assessing the gravity of the claim, courts will assess the sincerity and expertise of the claimant in bringing a public interest claim. For example:

- *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 522, 562: 'we accept without question that Lord Rees-Mogg brings the proceedings because of his sincere concern for constitutional issues.'
- *R (on the application of Good Law Project) v Minister for the Cabinet Office* [2021] at [176]:

> the Claimant is a non-governmental organisation with expertise and experience in holding the Government to account in respect of its public procurement decisions. It has a sincere interest in promoting good public

administration, including compliance with the PCR 2015 and lawful conduct of the public procurement regime. It has no ulterior motive in pursuing the challenge.

- *R (on the application of Motherhood Plan) v HM Treasury* [2021] EWCA Civ 1703: this applies even to 'newly established campaigning organisations'

Another concept that courts use to assess whether the claimant has a sufficient interest, is the 'mere busy body' test (as per Lord Fraser in *Fleet Street Casuals*, 646). Someone the courts regard has being a 'busy body' will not be regarded as having a sufficient interest. In *R (Walton) v The Scottish Ministers* [2012] UKSC 44 at [92] Lord Reed defined a busybody as 'someone who interferes in something with which he has no legitimate concern'.

Further, standing to bring a judicial review claim is not necessarily restricted to citizens of the UK. In *R (Hasan) v Trade and Industry Secretary* [2007] EW HC 2630 Palestinian claimants were given standing in a judicial review of the decision to grant export licences of military equipment to Israel on the basis that they were 'indirectly affected by any trade in military equipment to Israel' as per Collins J at [8]. However, in *Al-Haq v Foreign Secretary* [2009] EWHC 1910 an NGO based in the Israel-occupied territory of Ramallah was not given standing in a judicial review of the British government's support of Israel on the basis that there was no public interest in allowing the British courts to become a forum for the discussion of international politics.

As a final point on standing for public interest claims, given the adversarial nature of British justice, there are many cases where standing is not raised as an issue by the defendant and the court of its own volition does not challenge the standing of the claimant. However, an Independent Review of Administrative Law suggests that defendants in judicial review proceedings should 'do more to challenge the standing of claimants ... than they perhaps do at the moment'.[29]

Further, with the increased activity of organisations like the Good Law Project, standing has been described as having a 'resurgence' in judicial review cases.[30] Indeed, this is reflected in the 2022 decision *GLP & Runnymede*, involving a challenge to government's failure to use an open competition to make leadership appointments for critical Covid-19 response bodies, where Singh LJ and Swift J seem to be drawing some limits on who can claim standing in the public interest, indeed introducing a 'representivity' requirement not generally required in previous cases:

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[29] Lord Edward Faulks and others, The Independent Review of Administrative Law, March 2021 https://assets.publishing.service.gov.uk/media/6053383dd3bf7f0454647fc4/IRAL-report.pdf (accessed 18 February 2025), 137.

[30] Bell (n 26).

> [21] What is of importance is that in all such cases of which we are aware the NGO concerned did have a particular interest and in a sense was representative of an identifiable group in society which was affected by the decision or policy in question.
>
> …
>
> [26] We also note that not everyone who has a strong and sincere interest in an issue will necessarily have standing

Further the court was not willing to simply take at face value the stated objectives of the GLP in order to assess whether they have a sufficient interest:

> [56] No individual, even with a sincere interest in public law issues, would be regarded as having standing in all cases. We do not consider that the position differs simply because there is a limited company which brings the claim. It also cannot be right as a matter of principle that an organisation could in effect confer standing upon itself by drafting its objects clause so widely that just about any conceivable public law error by any public authority falls within its remit.
>
> [57] In all the circumstances of this case, we are not persuaded that such a general statement of objects as is now set out in the GLP's Articles of Association can confer standing on an organisation. That would be tantamount to saying that the GLP has standing to bring judicial review proceedings in any public law case. This can be contrasted with the approach which was taken by the Divisional Court in the case of *D*, where even a statutory authority (the Mayor of London) was not regarded as having a sufficient interest in the matter in issue in that case. It cannot be supposed that the GLP now has *carte blanche* to bring any claim for judicial review no matter what the issues and no matter what the circumstances.

What this is likely to mean is that courts scrutiny of a public interest groups sufficient interest will go beyond simply considering their objectives but will also view their objectives in light of the merits and nature of the claim.

Public Authorities

The Attorney General has standing on behalf of the Crown to bring a judicial review where he/she perceives to do so is required by the public interest via 'realtor' proceedings. This is effectively open standing because the decision of the A-G to bring these proceedings is pretty much unreviewable (*Gouriet v Union of Post Office Workers* [1978] AC 435).

Local Authorities also have a statutory standing to bring judicial review (and other civil) proceedings by virtue of s 222 of the Local Government Act 1972 which states that standing 'is for the promotion or protection of the interests of the inhabitants of their area'. This statutory right amounts to an assumption of a 'sufficient interest' for the purposes of s 31(1) of the Senior Courts Act 1981.

Human Rights Claims

Section 7(1) of the Human Rights Act 1998 states that a claimant can only bring a claim 'if he is (or would be) a victim of the unlawful act.' Similarly, if the claimant is raising a human rights issue in a claim they will 'to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act' (s 7(3)).

- **Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc. of the represented constituency members, for establishing standing? If yes, how is it assessed?**

Not formally, for example in *World Development Movement* they were deemed to have standing not because the decision effected its members but because it was the most effective body to bring such a claim.

However, there are some cases where the issue of representation is raised as a relevant consideration:

- *R v Inspector of Pollution, ex pa Greenpeace (No 2)* [1994] CMLR 538 at [81] as per Otton J there was a suggestion that standing was given to Greenpeace since 2,500 members based in Cumbria were 'inevitably concerned about…. A danger to their health and safety from any additional discharge of radioactive waste even from testing.' However, this is something of a 'redherring' because Greenpeace was also given standing on the basis that they were 'campaigning organisation which has as its prime object the protection of the natural environment' at [70].
- *Re JR216's Application for Judicial Review* [2022] NIKB 28: the Northern Ireland Retired Police Officers' Association (NIRPOA) was held to have standing as a 'representative organisation' that had a sufficient interest in 'in ensuring that the statutory scheme is properly applied ... since that will or may affect a wide range of their members'
- *R (on the application of Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin) at [136]: a trade union was deemed to have standing in a challenge that argued that

Coronavirus Job Retention Scheme discriminated against women on the basis that it had '5,000 members, and it [was] safe to assume that, amongst them, there will be women who are in employment'.

- *R (Independent Workers Union of Great Britain) v Mayor of London* [2020] EWCA Civ 1046: challenge directed to changes made in the London congestion charge scheme brought by a trade union, the court in *GLP & Runnymede* regarded this as a form of representative standing because the union was 'seeking to vindicate the interests of its members, who were individually affected'.
- *GLP & Runnymede*: 'What is of importance is that in all such cases of which we are aware the NGO concerned did have a particular interest and in a sense was representative of an identifiable group in society'.

See also above at Q 4, where there is a potential claimant who is more clearly affected by the decision complained of, the court will not allow standing on the part of a public interest group.

- **Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?**

See answer with regards to standing, where 'sufficient interest' is the test for whether a claim can go ahead.

There are multiple opportunities for courts to assess whether the issues raised is a legal rather than a political question and therefore whether a claim will proceed to a full hearing:

- *R v Home Secretary, ex p Sati* [1986] 1 QLR 477, 485: at the permission stage for a judicial review the claimant must present an 'arguable case'.
- *Al-Haq v Foreign Secretary* [2009] EWHC 1910 when assessing standing and the nature of the claim, courts will not grant standing if the claimant is trying to use the courts to air a political issue.

There are different principles and tests used by courts to assess whether the decision they are being asked to review is one that is suitable for a court to interfere with.

Principle of Comity

The principle of comity says that judges should not interfere with the decision of another public authority unless they can do so effectively and without damaging that other public authorities' capacity to do their own job.

Deference

Courts will defer to the original decision maker where issues raised require the special expertise and information of that decision-maker:

- *Home Secretary v Rehman* [2001] UKHL 47: court concluded that only the government had 'access to special information and expertise' in the matter of a deportation of a terror subject.
- *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61: court would not interfere (3:2 majority) in a decision to prevent Chagos Islanders returning to their ancestral lands on the basis that the Foreign Secretary was best placed to manage military cooperation with the US.
- *R (on the application of Friends of the Earth)v Heathrow Airport Ltd*: the Secretary of State had a wide discretion in terms of how relevant the Paris Agreement was for assessing whether there was a need for airport expansion.
- *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43: courts will not interfere with the discretion of government to make decisions of a policy nature at [67]:

> There is, in my view, no justification for reading such a requirement into the policy. The way in which a decision-maker's task is to be carried out in a particular case is for him to resolve. The policy leaves him with an ample discretion to decide how best to go about making the evaluative judgment required.

Although deference is very cautiously exercised:

- *A and X v Home Secretary* [2004] UKHL 56: in a case concerning the indefinite detention of foreign nationals without trail under terrorism law, the court issued a declaration of incompatibility with s 6 of the ECHR, despite claims that this was a matter of public safety. As per Lord Bingham at [29]:

> As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater

> the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.

Justiciability

Some issues will also be considered non-justiciable, for example:

- *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('*GCHQ case*'): a decision to ban, without consultation, the union for members of the government's intelligence service. The court found the decision to be non-justiciable, as per Lord Diplock, pg 413 'the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is'
- *R (Jackson) v Attorney General* [2005] UKHL 56: judicial review of an Act of Parliament is non-justiciable.
- *R (Khan) v Foreign Secretary* [2014] EWCA Civ 24: court will refuse permission for a judicial review involving consideration of another country's adherence to international criminal law.

- **For determining admissibility: does it make a difference which legal norms are invoked?**

See answer to standing above, in brief, it is not a question of the legal norm invoked but the merits and nature of the claim. Generally, for a public interest claim to proceed to a full hearing, the claimant must be raising an issue of 'sufficient gravity' (*Fleet Street Casuals*).

- **For determining admissibility: does it make a difference which remedy is requested?**

No. Historically it did matter, but now courts have a wide discretion as to the remedy that they can use in response to judicial review. This includes the discretion to give no remedy, even in a case where the claimant's legal claim has succeeded (*R (Hurley) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201).

- **Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?**

No, see the general discussion of standing.

- **If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?**

No, if there is a citizen directly effected by the decision complained of, they must bring the claim, (*R v Home Secretary, ex p Ruddock)* public interest groups can only bring the claim when there is no other suitable claimant (*R v Secretary of State for Trade, ex p. World*

Development Movement). A public interest group however may support a claimant (*R (Edwards)*) or they can join the proceedings as a third party intervener.

- **If there are several competent courts: are there any differences in the rules on admissibility?**

For purely domestic claims this is not an issue because there is only one route for judicial review. However, where private law claims are brought by non-UK nationals against UK based parent companies the courts have said that there cannot be parallel proceedings in the jurisdiction where the harms originated as per Lord Briggs at [79] *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc*):

> At the heart of it lies the proposition that, because a claimant has a right to sue the anchor defendant in England, there is "no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings". In my judgment, there is good reason why the claimants in the present case should have to make that choice, always assuming that substantial justice is available in Zambia (which is a necessary but hypothetical predicate for the whole of the analysis of this issue).

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?

Standing for NGOs and other public interest groups to intervene is fairly open. This is true both for judicial reviews claims, and for private law ones. Some important examples of public interest interventions in private law cases include:

Torts

- *Michael v The Chief Constable of South Wales Policy* [2015] UKSC 2: negligence claim against the police for failure to respond to an urgent 999 call by a victim of domestic violence, who as a result of a delayed police response was killed by her former partner. Interventions by Liberty and Refuge (jointly) and Cymorth I Ferched Cymru (Welsh Women's Aid) a domestic violence charity all argued that the police ought to have a special duty of care to victims of domestic violence.
- *GN v Poole Borough Council* [2019] UKSC 25: a negligence claim against the local authority in respect of their failure to take adequate measures to protect children from continued and very serious harassment by a neighbouring family. The AIRE Centre, Article 39, Care Leavers Association, Coram Children's Legal Centre and the Equality and Human Rights Commission all intervened in the case.

Employment rights

- *Hounga v Allen* [2015] UKSC 47: employment case examining the illegality defence, a victim of trafficking made a claim against former employers for unpaid wages, Court of

Appeal found that her claim was barred based on the common law defence of illegality (she was in the country illegally). The case was appealed to the UK Supreme Court with intervention by Anti-Slavery International to change the common law defence of illegality to ensure that victims of trafficking could bring a claim against traffickers, irrespective of immigration status.

- **What are the rules on admissibility in that respect?**

Third Party Interventions

In judicial review proceedings, courts may allow applications on the part of third parties to file evidence or make representations at the hearing.[31] Interventions can be made in the public interest by NGOs, but they can also be brought by public bodies or those with private interests in the outcome of the claim, e.g. trade organisations or developers.

The rules for interventions are set out at CPR Part 54. First of all, when preparing their judicial review claim form, a claimant 'must state the name and address of any person he considers to be an interested parry' (CPR 54.6(1)). Second, 'any person' can apply for permission to intervene as a third party in judicial review proceedings (CPR 54.17).

Court's powers to hear any person

54.17

(1) Any person may apply for permission –

(a) to file evidence; or

(b) make representations at the hearing of the judicial review.

(2) An application under paragraph (1) should be made promptly.

Courts have interpreted this wide discretion by stating that interveners must raise matters 'of some general importance' and there must be a 'real possibility that the court would be assisted by its intervention' (*R (MH) v Healthy Secretary (Application for Permission to Intervene)* [2004] EWCA Civ 1321 a case where mental health charity Mind intervened in a claim that the Mental Health Act 1983 was not compliant with the ECHR).

The rules of procedure of the Supreme Court also set out generous rules for interventions, paying particular attention to the value of submissions made in the public interest:

Interventions in applications

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[31] CPR 54.17; see also: JUSTICE and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court Third Party Intervention in the Public Interest' (2016) https://files.justice.org.uk/wp-content/uploads/2016/06/06170721/To-Assist-the-Court-Web.pdf (accessed 7 February 2025).

16.—(1) Any person and in particular—
(a)any official body or non-governmental organization seeking to make submissions in the public interest; or
(b)any person with an interest in proceedings by way of judicial review,
may file submissions asking the Court to grant or dismiss an application for permission to appeal which has been issued by the Court (including for lack of jurisdiction) and request that the Court takes them into account.
(2) Once the submissions are filed, they must be served by the person on—
(a)the appellant;
(b)every respondent; and
(c)any person who was an intervener in the court below.
(3) Any submissions which are filed and served shall be referred to the panel of Justices which considers the application for permission to appeal.

The Court of Appeal and Supreme Court are particularly open to interventions in human rights cases. *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 as per Lord Slynn:

Whether as amicus curiae, keeping within the limits of a non-partisan view of the particular case, or advocating as intervener where there is a danger that an important principle of law favouring one party or the other has not been brought to the attention of the court, the [Commission] would have the possibility of promoting understanding by the courts of human rights law. Courts can gain much from such interventions.

Public authorities are also entitled to intervene: *R v Pretty v DPP* [2001] UKHL 61, the Home Secretary intervened a claim that the Director of Public Prosecutions was required to offer clear guidance on when people would be prosecuted for the offence of assisting a suicide; and *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 the Secretary of State for Health (and the Royal College of Nursing) made submissions in a judicial review about the legitimate expectations of someone under the care of the health authority.

Whilst standing for these interventions is expansive there are some limitations. Critically, to make an intervention the relevant public interest organisation needs to know about the legal action in question, which they may not if the claim is launched privately. Second, it is possible for the court to set limitations on how intervenors may engage with the case (Practice Direction 54A–Judicial Review, para 13.6). Third, a court can make a costs order against a third party to require them to pay the defendants costs (Criminal Justice and Courts Act 2015 s 87(3)).

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?

One of the rationales for introducing the Office for Environmental Protection was that it would replace the supervisory function for the enforcement of environmental law and environmental standards that had previously been provided by the European legal system. Indeed, EU law and the preliminary reference system served a significant access to environmental justice function for public interest groups, see for example the *Client Earth* litigation around air quality limits.

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?

The ECHR has been enacted into domestic legislation in the Human Rights Act 1998. As per the answer to Q 10 above, standing under the Act is only granted to 'victims' of human rights abuses. However, the Equality and Human Rights Commission under the Equality Act 2006 s 30 has special standing to bring Human Rights Act proceedings:

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(1) The Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.

(2) The Commission shall be taken to have title and interest in relation to the subject matter of any legal proceedings in Scotland which it has capacity to institute, or in which it has capacity to intervene, by virtue of subsection (1).

(3) The Commission may, in the course of legal proceedings for judicial review which it institutes (or in which it intervenes), rely on section 7(1)(b) of the Human Rights Act 1998 (c. 42) (breach of Convention rights); and for that purpose—

(a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,

(b) the Commission may act only if there is or would be one or more victims of the unlawful act,

(c) section 7(3) and (4) of that Act shall not apply, and

> (d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies);

The Equality and Human Rights Commission is an independent equality and human rights regulatory, accredited 'A status' National Human Rights Institution by the United Nations. Human rights cases support by the EHRC include:

- *R (on the application of Muriel Maguire) v HM Senior Coroner for Blackpool & Fylde* [2023] UKSC 20: intervention in a case about Article 2 rights of people subject to deprivation of liberty safeguards under the Mental Capacity Act 2005.
- *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust and the Secretary of State for Health* [2014] EWCA Civ 822: intervention in a case engaging Article 8 right when a patient was issued with a Do Not Attempt Cardio Pulmonary Resuscitation notice in her medical notes without their knowledge.
- Launched judicial review against the Scottish governments based on the inadequacy of their guidance on the use of restraint by schools. Launching the proceedings was enough to establish a forum for discussion with ministers to improve guidance.

- **What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in?**

The English courts are required to 'take into account' decision of the ECrtHR (Human Rights Atc 1998 s 2(1)(a)) and whilst they are not formally bound by decisions of ECrtHR, courts in the UK have tended to follow their reasoning. In *R (Alconbury) v Environment Secretary* [2001] UKHL 23 as per Lord Slynn at [26]:

> In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.

In *R (Ullah) v Special Adjudicator* [2004] UKHL 26 Lord Bingham developed the 'mirror principle':

> …the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court…. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolved over time: no more, but certainly no less.

In line with this approach, jurisprudence on standing and victim status follows the reasoning of the ECrtHR (that the victim requirement 'does not permit individuals to complain against a law in abstract simply because they feel that it contravenes the convention' (*Klass v Germany* (1978) 2 EHRR 214 at [33]). The UK courts have made clear that they follow the approach of the ECrtHR. In *Lancashire County Councill v Taylor* [2005] EWCA Civ 284 at [37] as per Lord Woolf:

> 'The primary objective of the Convention is to secure for individuals the rights and freedoms set out in the Convention.'

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

As the standing rules in the UK are already fairly generous for public interest groups, and the standing of environmental interest groups is rarely if ever challenged, the changes have mostly been in relation to costs rules see answer to Q 20. Costs rather than standing are the real barrier to access to justice in the UK.

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

N/A judicial review can only be brought against a body exercising a public function and not a private actor acting in a private capacity.

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?

Judicial review permits courts a carefully balanced jurisdiction to review the decision of public bodies on three grounds: illegality; procedural fairness; and irrationality. Courts are *not* entitled to review the general fairness or proportionality of a decision. This is to ensure a proper respect for the balance of powers and Parliamentary Sovereignty. The case law in respect of the three grounds of judicial review is dense, I will therefore focus on a few key cases to explain each of these grounds.

Illegality

Public authorities are not entitled to act outside of their legal powers (*ultra vires*). There are various examples of conduct by public authorities that constitute illegality:

- Inconsistency of subordinate legislation and/or decision with a superior source of law (primary legislation): *R (RWE Npower Renewables Ltd) v Milton Keynes Council* [2013] EWHC 751: a new planning document about the distance between wind turbines and residential homes was in conflict with the existing local plan and national legislation on wind energy.

- Abdicating powers: *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598: claim by British citizen detained in Guantanamo Bay.
- Discretion exercised for an improper purpose: *R (on the application of Trafford) v Blackpool BC* [2014] PTSR 989: the refusal of the council to renew the lease of a solicitor's office in order to 'punish' her for bringing claims against them was unlawful.
- Fettering discretion: *British Oxygen Co Ltd v Board of Trade* [1971 AC 610: blanket policy by the Board of Trade not to award statutory grants for units less that £20, rather than considering the merits of the claim, was unlawful.
- Unlawful delegation of a decision-making power: *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54: decision to keep prisoners in solitary confinement for long periods of time was improperly delegated to the prisoner governor by the Secretary of State; and *R v Adams* [202] UKSC 19: orders detaining Gerry Adams (former leader of Sinn Féin) after his escape from prison were improperly made by a Minister of State on behalf of the Home Secretary.
- Acting in a way that exceeds the purpose of a statute: *R v Foreign Secretary ex p. World Development Movement* pg 401:

> Whatever the Secretary of State's intention or purpose may have been, it is, as it seems to me, a matter for the courts and not for the Secretary of State to determine whether on the evidence before the court, the particular conduct was, or was not, within the statutory purpose.

- Irrelevant considerations: *Tesco Stores v Environment Secretary* [1995] 1 WLR 759: the Secretary of Sate was entitled to discount the offer by Tesco to fund the building of a new road when considering their planning application, as per Lord Keith pg 764:

> It is for the courts… to decide what is a relevant consideration…. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably.

Procedural fairness

Decision making must abide by minimum standards of fairness:

- Rule against bias, including apparent bias: *Magill v Porter* [2001] UKHL 67 (a Conservative council decided to sell council homes to those living in areas more likely to vote conservative), as per Lord Bingham at [103] the question was:

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

- Right to be heard: *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2013] EWHC 481: case brought by HS2 Alliance (interest group against planned high speed railway) that consultation period for a compensation scheme for property owners impacted by the development was flawed. Court found consultation to be so unfair it was unlawful.
- Duty to be given reasons where the claimant needs those reasons to be able to have a fair judicial review of the decision: *R v Home Secretary, ex p Doody* [1994] 1 AC 531: reasons were required to enable a judicial review decision to use a tariff to decide whether a prisoner would be eligible for parole; and *R (Help Refugees Ltd) v Home Secretary* [2018] EWCA Civ 209: the Secretary if State was required to give reasons about which un-accompanied asylum seeking children were relocated from France to the UK.
- Legitimate expectation that a public body will act in a particular way and the claimant has thus acted in reliance on that expectation and have suffered a detriment as a result:
    - *R (Bibi) v Newham LBC* [2001] EWCA Civ 607: claimants promised long term housing by the local authority on the basis of a mistaken belief by the local authority that they had a legal duty to do so, when the realised that there was no such duty they revoked the decision. However, they had created a legitimate expectation by their conduct.
    - *R v North and East Devon Health Authority, ex p Coughlan*: a claim by severely disabled woman who had been promised a home for life in a care home, which the local authority later closed down on the basis of costs.
    - *Luton Borough Council and others v Secretary of State for Education* [2011] EWHC 217: judicial review of decision to halt certain building projects without consultation.

Irrationality

The test of irrationality sets a very high bar for whether a court finds that a decision was irrational or *Wednesbury* unreasonable. This is a very difficult ground to establish because judicial review is not about remaking decisions on their merits, only on their legality. Courts will therefore pay deference to the decision-maker in reviewing the irrationality of their decision.

- *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223: a judicial review of licensing decision for a cinema which said that unaccompanied children under the age of 15 were not allowed to go to the cinema on a Sunday. The fact that the decision was 'unreasonable' was not enough for the court to interfere with the decision

- *GCHQ*: to be considered irrational for the purposes of judicial review, the decision complained of must be:

> so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

- *R (Johnson and others) v Secretary of State for Work and Pensions* [2020] PTSR 1872: the Secretary of State's refusal to put in place a solution to a specific issue affecting claimants' universal credit awards following an amendment to the Universal Credit Regulations 2013 was deemed:

> …so irrational that no reasonable Secretary of State for Work and Pensions would have struck the balance in that way.

- *R (on the application of Friends of the Earth)v Heathrow Airport Ltd*: the extent to which the Paris Agreement was relevant for setting policy re: airport construction was within the Secretary of States discretion and it was not possible to say that they had acted irrationally in deciding in favour of airport expansion.

Proportionality

Proportionality is generally a test adopted for the consideration of human rights claims (for example the police's decision to cancel a vigil after the murder of Sarah Everard on the basis of Covid regulations was deemed incompatible with Art 11 of the ECHR on the basis of proportionality *Leigh v Commissioner of Police of the Metropolis* [2022] 1 WLR 3141), and previously EU law. However, there are some limited examples of the courts using a proportionality test in relation to domestic judicial review claims:

- *R (Daly) v Home Secretary* [2001] UKHL 26: a judicial review of the a decision to require prisoners to leave their cell when searches were conducted, creating the risk that prison employers would read confidential legal correspondence.
- R (Unison) v Lord Chancellor [2015] UKSC 51: UKSC struck down the Employment Tribunals scheme of fees on the basis that they amounted to an unlawful limitation on access to justice.
- *R (Miller) v Prime Minister* [2019] UKSC 41: PMs decision to prorogue parliament (close it to avoid discussion of Brexit) was considered 'sufficiently serious to find the conduct unlawful'.

- **Are there special rules on the legal provisions that can/can't be invoked in PIL-cases?**

No.

- **Under which conditions can constitutional rights and/or international treaties be invoked?**

The uncodified nature of the UK constitution means that there are no separate constitutional rights, other than the judge made writ of *habeas corpus*. The writ requires those who are detained are done so lawfully and that the decision-maker detaining them demonstrate that the detention is not arbitrary. Some illustrations of the writ:

- *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598: Court of Appeal found that the detention of British citizen, Mr Abbasi, in Guantánamo Bay was arbitrary. However, they would not tell the Foreign Secretary how to conduct diplomatic relations with the US in relation to Mr. Abassi as this was beyond what a court could assess.
- *Rahmatullah v Foreign Secretary* [2012] UKSC 48: Mr Ramatullah was a Pakistani citizen detained in Iraq by British forces. He was later handed over to US forces who detained him Afghanistan. The Court of Appeal issued the writ of *habeas corpus* but the US gave an inconclusive response to the request. However, the UKSC would not make a further order to require the Foreign Secretary to demand a further response from the US. (Although the two dissenting judges Lady Hale and Lord Carnwarth believed that they could issue such an order).

The UK is a dualist system. International treaties are not legally binding, unless they have been enacted in domestic legislation (for example the Human Rights Act 1998 enacts the ECHR). Instead, courts can take into account international law, although they will not be bound by it. Claimants/interveners may therefore rely on international law to help persuade a court of the merits of their case, although the courts are open to discount international law obligations. See for example, the employment law case *Hounga v Allen* where the third-party intervenors included submissions concerning international law obligations on modern slavery, or the *R (on the application of Friends of the Earth) v Heathrow Airport Ltd* concerning the relevance of the Paris Agreement.

- **To what extent can private law provisions be invoked?**

See discussion at Q. 1 about the limited possibilities for private law to facilitate public interest-type litigation in the UK.

17. Which remedies can be invoked in PIL-cases?

- **Are there special rules on remedies in PIL-cases?**

There are no special PIL remedies, instead the remedies will depend on the type of claim that is being brought.

Judicial Review

- **Prerogative remedies**:
  a. Quashing order: to nullify a decision (formerly '*certiorari*'). Under s 1 of the Judicial Review and Courts Act 2022 quashing orders have been developed to include the possibility of:
     i. Suspending a quashing order until a specific date (s 1(1)(a));
     ii. Removing the retrospective effect of a quashing order (s 1(1)(b)).
  b. Mandatory order: to require an official action (formerly '*mandamus*)
  c. Prohibiting order: to ban an official action (formerly 'prohibition')
- **Declaration**: authoritative statement of the law. (Technically a 'relief' rather than remedy.) Examples: *R v Home Secretary ex p Khawaja* [1984] AC 74 (HL); *R v Home Secretary, ex p Doody* [1994] 1 AC 531 (HL); *R v Foreign Secretary, ex p World Development* Movement [1995] 1 WLR 386; R *v Javed) v Home Secretary* [2001] EWCA Civ 789; *R (Begum) v Denbigh High School* [2005] EWCA Civ 199.
- **Injunction**: requirement to do or refrain from doing something. It is also possible to get an interim injunction whilst the dispute is ongoing: *R v Transport Secretary* ex p Factortame *(No 2)* [1991] 1 AC 603; *M v Home Office* [1994] 1 AC 377.
- **Damages**: the court can award damages, restitution or the recovery of a sum if 'the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application' (Senior Courts Act 1981 s 31(4)). The claimant must show 'a cause of action sounding in damages' (as per *R v Deputy Governor of Parkhurst Prison, ex p Hauge* [1992] 1 AC 58, 155.Damages can only be awarded if one of the other remedies is also sought (CPR 54.3(2))
- **Substitute remedies**: in the name of efficiency courts may remake the public authority decision subject to judicial review 'if there is no purpose to be served in remitting the matter to the decision-maker' (CPR 54.19(3)).
- **Contempt of court**: if there has been a failure to abide by a court order or injunction on the part of the defendant the court may issue a contempt of court ruling, which opens up the possibility of criminal law sanctions. In *R v Poplar Borough Council, ex pa London County Council (No 1)* [1922] 1 KB 72 councillors in a poor district (Poplar) refused to pay London County Council rates on the basis of structural injustice despite being imprisoned for contempt of court. However, government backed down and reformed the contributions required. It is even possible to hold a Minister in contempt of court, although they cannot face a prison sentence for contempt: *M v Home Office* [1994] 1 AC 377 (deportation of asylum seeker against injunction to keep M in the country until is asylum appeal had been heard).

These remedies are discretionary, so a court may refuse to grant remedies in a judicial review claim: *R (Hurley) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201: a challenge to increase in university tuition fees amounted to failure in respect of equality law, but no remedy was granted on the basis that quashing the decision would amount to 'administrative chaos' at [19] as per Elias LJ.

Further, Lord Reed in *Walton* made clear that the question of the standing will be revisited in reference to the remedies available.

Human Rights claim

Section 8(1) of the Human Rights Act 1998 states that the court can award 'such relief or remedy… within its powers as it considers just an appropriate.' This may include damages 'if it necessary to afford just satisfaction' (s 8(3)(b)). If a human rights claim is raised as part of a judicial review, the normal remedies for judicial (above) are also available. If the breach of the Human Rights Act 1998 is as the result of primary legislation, under s 4 of the Act the court are able to make a declaration of incompatibility with the ECHR. However, courts have no powers to strike down the legislation and the breach will not be unlawful in relation to s 6. A declaration of incompatibility is discretionary remedy (*Lancashire County Council v Taylor* [2005] EWCA Civ 284 at [42]).

Private Law

Remedies available in private law cases are either damages (money) or an injunction (a court order to halt, limit or require an activity). There is case law to suggest that damages are preferable to injunctions where there might a public interest (such as local employment opportunities) in allowing the nuisance to continue: *Coventry v Lawrence* [2014] UKSC 13.

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

Yes, and no. Remedies and injunctions are available in both private law cases and judicial reviews. However, courts in judicial review claims have a wider range of remedies available to them, but these remedies are also discretionary, whereas remedies in a private law case are not discretionary.

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?

Frequently. Judicial review is a hotly contested legal tool. For example, the conservative government of David Cameron were very concerned about what they perceived as an

excessive number of judicial reviews of government decisions.[32] The provision on judicial review Criminal Justice and Courts Act 2015 were intended to reduce the availability of judicial review, for example by reducing time limits from 6 months to 3 months.

In the wake of this political ambition to limit the availability of judicial review, the Judicial Powers Project, funded by right wing think tank Policy Exchange, developed a long running academic project to ensure the 'proper scope of the judicial power within the constitution'. The project is run by academics but with clear policy links.

During the conservative administrations of the previous 10 years, and particularly in light of perceived government corruption with the handling of Covid-19, there has been a renewed focus on public interest litigation, through the consciously marketed efforts of the Good Law Project. Their work has sparked significant media attention, particularly of its founder and director Jolyon Maugham KC.[33] It has also prompted the creation of the Bad Law Project. A project developed with the same aim of using courts to achieve sociopolitical goals, but with a more clearly right wing focus to those goals.

In an Independent Review of Administrative Law a number of recommendations were put forward in relation to judicial review that are relevant for public interest litigation, although this was not the explicit focus of the report.[34] For example, they cautioned against legislative intervention in relation the test for standing, instead encouraging defendants in judicial review claims to raise the issue of standing. They also recommended the removal of the tight time limits for judicial review in a reversal of earlier reforms.

Under the current Labour government there is a focus ensuring economic growth, which includes forcing through the long contested third runway at Heathrow airport. Underlying this push for growth is a criticism of the slowing down of infrastructure projects through objections (over 'bats and newts).[35] It is therefore possible that in pursuit of economic growth, there will be moves to reduce the ability of public interest groups to challenge these kinds of infrastructure projects.

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[32] Adam Wagner, 'A war on Judicial Review?' UK Human Rights Blog, 12 November 2012 http://ukhumanrightsblog.com/2012/11/19/a-war-on-judicial-review/ (accessed 13 February 2025); Patrick Wintour and Owen Bowcott, 'David Cameron plans broad clamp down on judicial Review Rights' *The Guardian* 19 November 2012 < https://www.theguardian.com/politics/2012/nov/19/david-cameron-clampdown-judicial-review> (accessed 13 February 2025).

[33] See for example the saga of an ill-advised tweet and the killing of a troublesome fox: Damien Gayle, Prominent lawyer Jolyon Maugham tweets about clubbing a fox to death, *The Guardian* (26 December 2019). https://www.theguardian.com/uk-news/2019/dec/26/prominent-lawyer-jolyon-maugham-tweets-about-clubbing-a-fox-to-death

[34] Independent Review of Administrative Law (n 29).

[35] Brian Wheeler, 'Reeves backs third Heathrow runway in growth push' *BBC*, 29 January 2025 https://www.bbc.com/news/articles/cvg4d97wxgdo (accessed 13 February 2025).

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

Costs

The counterpart to the wide access to justice and standing rules is the high cost of proceedings. There are two aspects to these high costs: 1) the actual costs of paying for lawyers and accessing the courts; and 2) the cost risk of litigation. This costs risk is the more significant barrier to access to justice in public interest cases, because although it may be possible to find lawyers willing to work pro-bono, unsuccessful claims will still be required to pay the costs of the defendant. The cost rules say that the costs follow the looser CPR 44.2(2)(a):

> The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.[36]

What this means is that a claimant in a public interest case must assess whether they are willing and able to support the costs of the defendant in their case before they can bring an action. This operates as an effective bar to access to justice in public interest cases, especially where the claimant is not represented by a large, well-funded organisation (see for example *Coedbach Action Team v Secretary of State)*.

R (Burkett) v Hammersmith and Fulham LBC (Costs) [2004] EWCA Civ 1342 at [80]:

> …an unprotected claimant… if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant and this… may be a potent factor in deterring litigation directed towards protecting the environment from harm.

There are however some ways in which the chilling effect of a costs orders is mitigated in relation to public interest cases.

First, although the court can make an order of security of costs before litigation begins in a case that looks unlikely to succeed and the claimant is unlikely to be able to afford costs, this is not the case for claims that advance the public interest (*R (Plantagenet Alliance) v Secretary of State for Justice* [2013] EWHC 3164).

Second, the court may make a Costs Protection Order which will limit the costs exposure that the claimant will be expected to pay if their claim is successful. The first

[36] Although CPR 44.2(2)(b) goes on to say that 'the court may make a different order'.

reported case of such an order is *R v The Prime Minister, ex p Campaign for Nuclear Disarmament* [2002] EWHC 2712 where the costs were capped to £25,000.

There are two mechanisms by which a costs protection order can be made, which depend on the type of claim being made:

1. Normal rules (for non-environmental cases)

   The Criminal Justice and Courts Act 2015 ('CJCA 2015') ss 88-89[37] set out the conditions under which a costs caping order can be made:

   > (6) The court may make a costs capping order only if it is satisfied that—
   >
   > (a) the proceedings are public interest proceedings,
   > (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and
   > (c) it would be reasonable for the applicant for judicial review to do so.
   >
   > (7) The proceedings are "public interest proceedings" only if—
   >
   > (a) an issue that is the subject of the proceedings is of general public importance,
   > (b) the public interest requires the issue to be resolved, and
   > (c) the proceedings are likely to provide an appropriate means of resolving it.
   >
   > (8) The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—
   >
   > (a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
   > (b)how significant the effect on those people is likely to be, and
   > (c) whether the proceedings involve consideration of a point of law of general public importance.

   The legislation included provisions designed to limit the availability of costs order (in an effort to reduce the number of judicial reviews, which were perceived by the government of the time as being excessive):

[37] These provisions codified the provisions set out in *R (Corner House Research) v Trade and Industry Secretary* [2005] EWCA Civ 192 at [74].

- the order will only be granted after permission s 88(3);
- the claimant must disclose their financial resources s 88(5) and the resources of anyone supporting them;
- there will also need to be a reciprocal costs cap, so that the defendant is not liable to pay the claimants costs if the claimant us successful s 89(2).

2. Special cases (Aarhus cases)

   In response to litigation and complaints to the Aarhus Compliance Committee, special costs capping orders were introduced for Aarhus Convention claims into the CPR, initially in 2013 and then amended in 2017. These rules are currently contained in CPR 46.24. Costs for individual claimants are capped at £5,000 (CPR 46.24(2)(a)) and for NGOs (or other legal persons) are capped at £10,000 (CPR 46.24(2)(b)). The rules are currently the subject of a Ministry of Justice review of compliance with the Aarhus Convention.

Alongside these requirements, other provisions were included in the CJCA 2015 to reduce the number of judicial reviews being brought. First, claimants are required to provide information about their financial resources and the resources of those supporting them, to demonstrate that they are able to pay a costs order (ss 85-86). Second, intervenors are also liable pay costs: s 87(5) 'the court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings'.

Crowd Funding

The increase in the crowdfunding available for public interest claims opens the possibility for more public interest cases, which creates risks around the availability of standing, which is historically quite liberal, because if the courts perceive that they are overburdened with public interest judicial reviews they may seek to limit the availability of judicial review.[38]

Further Reading

Strategic Litigation

- Michael Ramsden, 'Strategic Litigation in English Judicial Review' (2023) 28 Judicial Review 261
- Michale Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 4 Civil Justice Quarterly 407.
- Carol Harlow, 'Public Law and Popular Justice' (2002) Modern Law Review 1
- John Griffith, 'Public Interest Litigation and JR' (1997) Judicial Review 195

[38] Bell (n 26) 317; see also: Joe Tomlinson, 'Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform' [2019] PL 166; Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2022) 86(2) MLR 331.

- Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992)

Standing

- Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313
- Peter Cane, 'Standing up for the Public' [1995] PL 276

Third Party Interventions

- Nathalie Lieven, 'Interventions in Judicial Review Proceedings' in Andrew Higgins (ed) *The Civil Procedure Rules at 20* (OUP 2020)
- JUSTICE and Freshfields Bruckhaus Deringer LLP, 'To Assist the Court Third Party Intervention in the Public Interest' (2016) https://files.justice.org.uk/wp-content/uploads/2016/06/06170721/To-Assist-the-Court-Web.pdf

International Law in the UK

- Lord Mance, International Law in the UK Supreme Court, 13 February 2017

Crowd funding

- Joe Tomlinson, 'Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform' [2019] PL 166
- Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2022) 86(2) MLR 331.

UK Administrative Law

- Timothy Endicott, *Administrative Law* (5th ed, OUP 2021)
- Paul Craig, *Administrative Law* (9th ed, Sweet & Maxwell 2021)

Bijlage 5 - Questionnaire
Comparative legal research on access to justice in public interest litigation
France

Mathilde Hautereau-Boutonnet & Pauline Abadie[1]

A. Context

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

The common terminology to refer to PIL is "collective defense lawsuits". Although such denomination gathers a variety of legal proceedings, collective defense lawsuits broadly designate lawsuits initiated by an organization whose claim is based on the violation of a right that does not exclusively harm its own personal interests and whose outcome does not solely serve its own personal benefit. All collective defense lawsuits have in common to be an exception to the general prohibition of claims brought on behalf of third parties.

Collective defense lawsuits include a variety of claims which can be classified according to their object, ranging from organizations defending a collection of personal interests to organizations defending more collective ones, and even large societal causes which blur the distinction with the "general interest".

The first type of collective defense lawsuits, although collectively brought (by an organization), intends to protect a collection of *personal* interests of individuals members of the organization. Here, the organization does what each of its members could individually do but because "strength lies in number", efficiency commands to create a dedicated organization. Either the organization has received a written proxy from individual members to bring the proceedings (conventional *ad agendum* representation) and therefore acts on their behalf. Or, the organization, although furthering the personal interests of the group's members, acts without proxy and in its own name. This last instance is generally known in French civil procedure as "defense leagues" and has been used by local residents grouped in neighborhood committees to combat identified sources of nuisance. These lawsuits constitute a judge-made exception to the general prohibition of claims brought on behalf of third parties. Still in this first category, although slightly different, stand "class action lawsuits" which were first introduced by legislation in the field of consumer protection law in 2014. Alike conventional *ad agendum* representation and "defense leagues" lawsuits, class action lawsuits are brought by an organization whose claim is based on similar personal harms caused to a plurality of victims who suffer from the same defendant's breach and who could theoretically act individually. Unlike conventional *ad agendum* representation and "defense leagues" lawsuits, individual victims which personal interests the organization defends are not determined on the day the action is introduced in court nor on the day the liability judgment is rendered. They will actively make themselves known (*opt-in*) for the compensation judgement.

The second type of collective defense lawsuits, while still collectively brought (by an organization),

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intends to further the collective interests of the organization as defined by its statutory objects clause. Among this second type, in one class of lawsuits, the collective interests defended by the organization are those of a *category* of actors, i.e. one profession (lawyers, nurses, etc.), a community of consumers, etc. Here, a particular lawyer, a particular nurse, or a particular consumer, etc., cannot individually bring the action because the injury is not sufficiently particularized. Indeed, it is the collective interests of a specific profession in its globality or of a specific community of actors in its globality, etc., that is being harmed. French law allows such collective defense lawsuits for organizations or entities that are representative of this profession/collectivity/community, etc., either because a specific legislation has empowered the organization to protect the interests of a defined category of actors, or more occasionally when a court found admissible the action brought by a town to protect its residents' collective right of use of a forest (see. civ. 2e, 14 déc. 1992, n° 91-14.453). Still among this second type of lawsuit, in a second class, the collective interests defended by the organization are those of a larger societal cause (the environment, peace, family values, equality, children's protection, secularity, etc.). These lawsuits are the closest form to "PIL". Here, organizations are generally habilitated by statutes to bring claims in defense of such collective values, but even absent any such habilitation, courts have recognized the organizations' standing to sue pursuant to procedural common law rules provided their statutory objects clauses specify the defense of such broad collective interests.

A third type of collective defense lawsuits is illustrated by organizations with large societal causes incorporated in their statutory objects clauses, which bring claims to enforce the proper application of the law, such as cessation of unlawful conducts, rescission of illegal juridical acts, and even punishment of criminal offenders. Close or synonymous with *actio popularis*, these lawsuits are prohibited under French law. The reason lies in the fact that such private prosecutor lawsuits intend to enforce "the general interest", and that France espouses a political State-centered conception of the general interest (see *infra* A.6). In France, the general interest is embodied in the laws voted by the Parliament. They are the expression of national sovereignty, which is vested in the People (art. 3, § 1 of the French Constitution). However, "No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof" (art. 3, § 2 of the French Constitution). Despite such explicit prohibition, some innovative court decisions (Cass. crim., 11/9/2010, n° 09-88.272, *Bien Mal Acquis* prior to Act n° 2013-1117 of 12/6/2013 creating art. 2-23) and more confidently the legislator by a plurality of statutes (art. 2-1 et seq. of the criminal procedure code) have recognized that certain organizations can bring civil actions within criminal proceedings to enforce the proper application of some criminal laws. In one isolated case, the Cour de cassation even granted compensatory damages for the risk of harm caused to the organization by the simple fact the defendant had temporally violated its environmental permit (Cass. 3e civ., 06/08/2011, n° 10-15.500).

While there is no commonly agreed definition of "PIL" in French law, academic literature generally refers to "legal actions beyond personal interests" ("I. Omarjee and L. Sinopoli (dir.) *Les actions au-delà de l'intérêt personnel*, ed. Dalloz 2014), while some have gone further exploring the question of defense, by associations, of the general interest (B. Parance, "The defense by associations of the general interest: general interest v. collective interests", ed. LGDJ 2015).

2. What are the main legislative provisions and/or leading cases regarding PIL?

PIL may be brought before judiciary courts or before administrative courts.

Before judiciary courts, the rules governing civil legal actions are particularly scattered. However, most authors believe that the common statutory provisions, applicable as default rules, are found under article 2 of the criminal procedure code and articles 30, 31 and 32 of the civil procedure Code. Such articles constitute the core provisions dealing with admissibility in civil justice. Article 2 deals with civil actions *within* criminal proceedings. It gives victims a say in lawsuits traditionally occupied by the State and the criminal offender. Thanks to a broad interpretation of the words "civil action" and "victims" contained in article 2, criminal courts have opened their doors to civil actions brought by indirect victims, including groups, and notably groups defending collective interests hurt by a criminal offense. Articles 30, 31 and 32 set the common law rules for civil actions before civil courts. Article 31 is particularly relevant to PIL. It provides that: "*Any legal action is open to those who bear a legitimate interest in the success or the dismissal of a claim, except where a specific legislation empowers with the right to sue the litigants it deems may bring or oppose a claim or may defend a specific interest*". The second prong of the article, written as an exception to the general rule that access to justice is limited to those who can demonstrate a "legitimate interest" (defined by courts and academics as 1/direct & personal, 2/ born and current and 3/ serious and licit) has opened the way to claims brought by litigants who lack a personal interest, and which are nonetheless found admissible by empowering statutes.

As an exception to the general rule requiring the demonstration of a legitimate interest in order to access a court of law, a plurality of specific legislations, known as "habilitation statutes", have empowered entities or organizations to sue on behalf of others. Despite the blurry landscape that results from such case-by-case legislative interventions, some academics have proposed classifying habilitation statutes into two categories based on their underlying rationales (N. Cayrol, "L'action en justice", Répertoire Dalloz, § 473 et. seq. and § 490 et. seq.). While PIL mostly concerns the second type, one legal action in the first category can be coined PIL. The first category of habilitation statutes is premised on the confidence placed in the empowered organization who allegedly is the best qualified agent to act on behalf of a particular individual or group. In such instance, the legislator has made the empowered organization the agent of a principal who is tangible or individually identifiable and who can be considered somehow vulnerable. For example, the Public Minister (prosecutor) is habilitated to sue on behalf of absentees (C. civ. art. 117) and individuals lacking legal capacity (C. civ., art. 375 et. seq. for minors, C. civ., art. 430 et. seq. for insane people, etc.). Court-appointed trustees in bankruptcy are habilitated to bring claims on behalf of companies undergoing a bankruptcy process (various habilitation texts). The household debt commission is habilitated to refer to one judge on behalf of individual insolvents (C. consum, art. L. 723-3 and L. 723-4). Trade unions are habilitated to sue on behalf of employees who are victims of employment law violations (various texts but for equality claims, see C. emp, art. L. 1144-2). Associations are habilitated to bring the six class actions that exist under French law on behalf of groups of individual victims (for ex. C. consum., art. L. 623-1). Although, in all these lawsuits, the empowered organizations defend the individual interests of private victims, in one of them where art. L. 442-6 III. of the commercial code empowers the Ministry of the Economy to sue to combat restrictive trade practices, the Cour de cassation ruled that the real victims need not approve the action nor even be present (Com. 07/08/2008, no 07-16.761), provided they are notified (Const. conc. 05/13/2011, n° 2011-126 QPC). For the Cour de cassation, the reason lies in the fact that such an action is autonomous and aimed at the proper functioning of the market. By ruling so, the Court endorses the disconnection between the empowered entity (agent) and the victim (principal) and hence transforms this

habilitated action (here a substitution action) into a public interest action, although the public interest at stake has an economic dimension. The second category of habilitation statutes is premised on the representativity of certain organizations. Here, the agency relation between the habilitated organization and the victim is far more remote. The habilitated organization is less "acting on behalf of" than "furthering the interests of". The particularity of these legal actions is to be collective and preventive, and to be subject to specific admissibility conditions. Unlike the previous category of habilitation statutes, the "victim" can be deemed vulnerable to the extent its interests are intangible, diffuse, and it is less easily identifiable. That is the case of one specific profession in its globality, one community of actors in its globality, or of one great cause, etc. Such habilitation statutes aimed at defending the collective interests of a *category* of actors or of a great cause are, for example, codified under art. L. 4161-4 of the public health code (empowering the National medical association), art. L 2132-3 of the labor code (empowering trade unions even below a certain voting rate), art. L. 621-1 of the consumption code (empowering consumers organizations), art. L. 142-1 and L. 142-2 of the environmental code (empowering environmental organizations), art. 1248 of the civil code (empowering a variety of actors including environmental organizations), art. 2-1 to 2-25 of the criminal procedure code empowering a plurality of associations defending great causes, etc. For each habilitation, the statute specifies the nature of the legal action (directly civil or civil within criminal proceedings), the object of the claim, the court before which the claim is brought, and the conditions (if any) of representativity the organization must meet. Beside statutory habilitations, there are court-based or judge-made habilitations. Still grounded on the representativity of the organization, courts welcome – pursuant to general procedural common law rules – the action brought by associations, whether certified or simply registered, to defend the collective interests specified in their statutory objects clause. As a reminder, both statutory and judge-made habilitations loosen the required demonstration of a personal interest.

Whether based on the common law requirements of the criminal and civil procedure codes, sometimes loosen by judges, or on the various habilitation statutes, the history of civil legal actions brought in defense of collective interests is illustrated by a few landmark court rulings. Some of them have received large media coverage and are known, beyond the legal community, by the general public. They all exemplify the legal battles fought by associations, either defending a collection of individual victims against high-profile politicians and financial institutions, or defending collective interests, or greater causes. In all instances, the admissibility of the claims was fiercely opposed by the defendants. Such cases include: the foreign corruption and money laundering case *Biens Mal Acquis*. The political, financial and health scandals *Sang Contaminé*, *Growth Hormones*, *Asbestos* or *Mediator drug* Affairs. And on the strict civil front, the *Our Body Affair* related to the exhibition showcasing actual dead human body parts, organs and skin.

Other less high-profile case law also composes the law of legal actions related to the defense of collective interests in civil justice. They will be mentioned, where appropriate, throughout the following developments of the questionnaire.

Before administrative courts, where litigation is traditionally divided into two types of claims, i.e. claims for rescission of an administrative act (individual or general) and claims for compensatory damages, common law admissibility rules have first been crafted by case law (and later by "habilitation statutes": see *infra* art. L. 142-1 of the environmental code). In rescissory actions, standing is premised, inter alia, on demonstrating a direct interest, that is a direct relation between the object of the contested act and the interest of the claimant. Ordinary standing rules

for groups have been affirmed by the landmark case: *Syndicat des patrons coiffeurs de Limoges* (CE, 12/28/1906: Lebon, p. 977). Since then, groups' standing is governed by the requirement of a concordance between the group's statutory objects clause and the object of the contested administrative act, and more contentiously, the act's territorial scope. In one important decision, the Conseil d'Etat admitted, as an exception to this rule, that an NGO which object is to defend human rights nationally has standing to sue to challenge the legality of a municipal decree, provided other municipalities nationwide may adopt the same type of decrees (likely to impact specific foreign populations) (CE, 11/04/2015 n° 375178, *Assoc. Ligue des Droits de l'Homme*, Lebon, p. 375)

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

With respect to civil actions either directly brought before civil courts or within a criminal proceeding, the areas of law where organizations defending collective interests regularly use their right to sue are primarily determined by the habilitation statutes. Such habilitation provisions are particularly widespread in the aera of labor law and consumer protection law where trade unions and consumers associations defend a specific profession or a well-defined category of actors; environmental law and more recently climate change law, where the inherently collective nature of the protected interests, as well as Nature's lack of legal personality, requires to be defended by a representative group. More specifically, such environmental organizations may bring a purely civil action seeking compensation for ecological damages under tort law (art. 1248 of the civil code), or within criminal proceedings where the defendant's breach may constitute criminal offenses (art. L. 142-2 of the environmental code for general environmental offenses, and for specific offenses, see art. L. 437-18 for fisheries and water resources crimes, art. L. 480-1 and L. 610-1 of the land use code for land use and forest loggings crimes). This is also true before administrative courts were environmental organizations benefit from a general habilitation to sue (art. L. 142-1 of the environmental code). In the latter cases, they may bring rescissory actions to challenge the legality of an administrative act removing a species from a protected list, or to contest the violation of an individual permit (to build or to operate a facility), or to oppose a ministerial decree shortening public debate consultation for new nuclear projects, etc. In one famous climate change case ("*Affaire du Siècle*"), environmental associations sought compensatory damages from the French State for violating its own climate policy by relying on the habilitation provision of art. 1248 of the civil code. Additionally, the habilitation provisions of art. 2-1 et seq. of the criminal procedure code grant the right to sue to enforce criminal laws to a variety of associations defending broader causes. Here, the causes defended by the habilitated organizations range from combatting racism, sexual violence, child abuse, crime against humanity and war crimes, discriminations based on sex, age, handicap, social exclusion, poverty, sub-standard housing conditions, the honor of veterans, road safety crimes, drug traffic and addiction, slavery, torture and other degrading treatments, students hazing, corruption, violence against civil servants, etc. Some NGOs in the field of anti-corruption are very active.

4. To what extent do interest groups (have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?

Aside from actions initiated by organizations to defend a collection of personal interests (see the first type of collective defense lawsuits presented in A.1 *supra* such as "defense leagues" or class actions), groups defending collective interests do not need to mobilize individual victims since they generally benefit from legislative habilitations (see the second category of habilitation statutes presented in A.2, *supra*), or, in the absence of such habilitation statutes, because the protection of collective interests is enshrined in their statutory objects clauses, which satisfies courts' scrutiny under common law civil and criminal procedure rules.

5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system including:

- ***To which policy areas do these cases relate?***

The answer to this question relates to the "areas of law where interest groups have access to courts" (see developments in A.3 *supra*).

- ***Whom are the defendants in these cases: government and/or corporations?***

In PIL, the defendants may either be governmental entities, corporations or individuals.

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

In French law, the development of PIL is quite schizophrenic and requires to briefly discuss the concept of "general interest". On the one hand, France has historically espoused a contractualist, state-centered, political conception of the general interest. In French legal and political thought, the general interest is embodied in the laws voted by the Parliament. It stands as the compass of State action and a measurement standard used by administrative courts to review its legality. In such conception, there is no room for private groups to further the general interest. Every French secondary school student knows the words of the rapporteur of the *Le Chapelier Act* of 1791 which abolished guilds and other intermediate bodies: "From now on, nothing else exists but particular interests and the general interest", hence banning the possibility of defending more collective special interests. This very conception has long explained the reluctance to see the general interest (or broad collective interests) be defended by private groups, especially in the courtroom. Indeed, in France, statutory law (*la loi*) is supreme, and courts are traditionally not conceived as social engineers. Montesquieu famously said: "judges are no more than the mouth that pronounces the words of the law", making courts the legislator's subordinates. In this context, discussing "public interest litigation" in France could be brief! However, a closer look at positive law proves the opposite. Since the past 50 years or so, French law, on the contrary, has largely welcomed legal actions brought in defense of collective interests (sometimes bordering the general interest). While some legal scholars have regretted seeing NGOs becoming "private prosecutors" (S. Guinchard) supplanting the Public Minister through civil actions within criminal proceedings, all today, even lately some congressmen (see B. Questel and C. Untermaier, *Mission « flash » sur la capacité des associations à agir en justice*, Dec. 8th, 2021), complain about the unreadable state of the law caused by the multiplicity of habilitation statutes.

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?

- ***To whom is the ability to initiate PIL cases granted?***

The defense of collective interests is granted to certain legal persons under public or private law.

Concerning legal persons under private law (we leave aside the unions, which defend more the interests of a member or a profession than collective interests oriented towards a greater cause), these are generally associations or foundations. It should be noted that, under French law, the Act of July 1st, 1901 grants an association the right to take legal action: "Any duly registered association may take legal action without any special habilitation". However, this legal provision does not specify whether it can defend collective interests, beyond its individual interests. As a result, to correct this shortcoming, the legislator and the judge have come to provide special habilitation (empowerment).

Concerning legal persons under public law, these are, for example, public establishments and certain local authorities, municipalities, but also the State itself. It can also be the Ministry of Economy. According to Article L. 442-6, III, of the Commercial Code, legal action by the Minister of the Economy in matters of practices restricting competition. This is an action aimed at protecting the functioning of the market and competition.

Please note: 1) These legal entities cannot simply defend any collective interests. 2) Either they have been habilitated by the legislator to defend specific collective interests; or they have been granted this right by the judge, but in this case, they must demonstrate a personal interest in taking action.

- The defense of the environment perfectly demonstrates the diversity of legal persons, under private or public law, who have the right to defend the collective interests of environmental protection "Any person with standing and an interest in taking action, such as the State, the French Office for Biodiversity, local authorities and their groupings whose territory is concerned, as well as public establishments and certified associations or associations created at least five years prior to the date of the institution of proceedings whose purpose is the protection of nature and the defense of the environment, shall have standing to bring an action for compensation for ecological damage."

- Article L142-4 of the Environment Code: "The local authorities and their groupings may exercise the rights granted to civil parties with regard to acts causing direct or indirect damage to the territory in which they exercise their powers, and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment and the texts adopted for their application".

- Article L. 142-1 of the environmental Code: "Any association whose statutory objects clause is the protection of nature and the environment may initiate proceedings before the administrative courts for any grievance relating thereto. Any environmental protection association certified pursuant to article L. 141-1, as well as certified departmental federations of fishing and aquatic environment protection associations and certified professional fishing associations, have standing to bring proceedings against any administrative decision directly related to their statutory objects

clause which causes harmful effects on the environment in all or part of the territory for which they are certified, provided that the decision was made after the date of their certification.

- Article L. 132-1 of the environmental code: " The Environment and Energy Management Agency, the National Forestry Office, the Coastal and Lakeshore Area Conservation Agency, the French Biodiversity Agency, the national parks, the water agencies, the National Monuments Center and the National Agency for Radioactive Waste Management may exercise the rights granted to civil parties with regard to acts directly or indirectly prejudicial to the interests they are intended to defend and which constitute an offense against the legislative provisions relating to the protection of nature and the environment, the improvement of the living environment, the protection of water, air, soil, sites and landscapes, urban planning or which are intended to combat pollution and nuisances, as well as the texts implementing them".

- ***Are these interest groups, public authorities and/or individuals?***

Individuals and legal persons do not have the right to defend collective interests. They can only defend their own interests.

Three examples of the rejection of an action brought by an individual:

- Before the administrative judge, the judge dismisses actions brought by individuals when the contested act has no consequences for the interests of the claimant. For example, in the climate trial, in the "*Commune de Grande Synthe*" ruling, which led to the French State being forced to review its climate policy, the legal action was brought by two people: the municipality and the mayor.

The action brought by the municipality to defend its interests was declared admissible. The judge stated: "The municipality of Grande-Synthe, in view of its level of exposure to the risks arising from the phenomenon of climate change and their direct and certain impact on its situation and the specific interests for which it is responsible, has a vested interest entitling it to seek the annulment of the contested implicit decisions". It is clear that, through its personal interest, the municipality is defending the collective interests of the inhabitants of the municipality.

On the other hand, the action brought by the mayor was declared inadmissible. In its ruling of November 19, 2020, the Council of State held: "Mr. A... who merely claims that his current residence is in an area likely to be subject to flooding by 2040, and also claims to be a citizen, does not demonstrate such an interest". This decision is a reminder that an individual must always demonstrate sufficient interest before the judge in order to be heard.

- Another example: the Council of State ("Conseil d'État") declares the action of a petitioner challenging an administrative act organizing the right of worship (defense of secularism as a general interest). This petitioner considered that he had an interest in acting solely because he was a French citizen living in a secular Republic (Council of State, May 17, 2002, Mr. and Mrs. Hoffman)

- The Court of Cassation also rejects the *actio popularis*. In a ruling handed down by the second civil chamber on November 18, 2008 (No. 08-60.503), it rejects the action brought by a voter who intended to challenge the registration of a citizen on an electoral roll. The judge ruled that the elector was not acting under private law and for personal gain, but was bringing a class action on

behalf of all electors with a view to ensuring the accuracy of the electoral rolls: it was therefore inadmissible, in the absence of personal interest.

- ***On what legal grounds is the ability to initiate PIL cases granted***

A distinction must be made between the empowerment (or "habilitation") granted by the legislature and by the judiciary.

a) First, it is the legislator who grants certain organizations the right to sue for a specific purpose. The habilitation statute specifies the purpose and the conditions that the organization must satisfy in order for the action to be admissible before the judge.

It should be noted that: 1) The interests that they are empowered to defend are determined by law. 2) The expression "collective interests" does not always appear, but the idea is the same: to defend the interests of a category of persons (for example, all consumers) or more altruistic interests, a "cause", such as the defense of the environment, the fight against racism and anti-Semitism, the fight against violence against women, the defense of child victims of abuse, the defense of the French language, the fight against road crime, the fight against poverty, the protection of animals, the fight against drug addiction, the fight against alcoholism, etc. 3) The habilitation rules can be found in the codes governing the various matters of collective interest (for example, the environmental code, the town planning code and the consumer code), or more generally in the penal code (which contains 25 empowering provisions).

Examples of legal bases that grant legislative habilitation to certain organizations: the environment, consumer affairs or the fight against drug addiction and trafficking:

- Article L142-2 of the environmental Code:

"Certified associations mentioned in Article L. 141-2 may exercise the rights recognized to the civil party with regard to facts directly or indirectly prejudicial to the collective interests that they have as their object to defend and constituting an offense to the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soil, sites and landscapes, urban planning, sea fishing or whose purpose is to combat pollution and nuisances, nuclear safety and radiation protection, commercial practices and advertisements that are misleading or likely to be misleading when these practices and advertisements include environmental information, as well as the texts adopted for their application.

This right is also recognized, under the same conditions, to associations that have been regularly registered for at least five years at the time of the facts and whose statutes include the safeguarding of all or part of the interests referred to in Article L. 211-1, with regard to acts constituting an infringement of the provisions relating to water, or of the interests referred to in Article L. 511-1, with regard to acts constituting an infringement of the provisions relating to classified installations".

- Article L621-1 of the Consumer Code:

"Associations that are duly registered and whose statutory object clause explicitly furthers the defense of consumer interests may, if they have been certified pursuant to article L. 811-1,

exercise the rights granted to civil parties in relation to acts that directly or indirectly harm the collective interests of consumers.

The organizations defined in Article L. 211-2 of the Social Action and Families Code are exempted from approval to take legal action under the conditions provided for in this article.

- Article 2-16 of the criminal procedure code:

"Any association that has been duly registered for at least five years at the time of the offense and whose articles of incorporation offer to fight against drug addiction or drug trafficking may exercise the rights granted to the civil party with regard to the offenses provided for in articles 222-34 to 222-40 and article 227-18-1 of the Penal Code when the public action has been initiated by the public prosecutor or the injured party.

b) Second, it is the judge who grants certain organizations the right to defend collective interests. These are judge-made habilitations. They are provided for by the civil judge and by the administrative judge in the course of actions brought before their courts. Judicial grants by the criminal judge are more exceptional.

- The civil judge may sometimes find actions brought by certain associations admissible even though they do not fulfill the conditions set by the legislator. That is especially the case when the organization is not certified by the State (see infra.) provided it can demonstrate that the collective interests defended fall within its statutory objects clause: the infringement of such clause results in personal injury. The Court of Cassation has established a "case law" in this regard. Legal doctrine refers to this as "judge-made habilitations".

The evolution of case law is as follows:

Firstly, in a judgment of May 2, 2001 (no. 99-10.709), the 1st Civil Chamber of the Court of Cassation stated: "Without legislative habilitation, an association may only take legal action on behalf of collective interests insofar as these fall within its statutory objects clause". Then, on May 27, 2004 (no. 02-15.700), it ruled: "It follows from Article 31 of the civil procedure code and Article 1 of the Law of July 1, 1901, that, without legislative habilitation an association may act in the name of collective interests only insofar as these fall within its statutory objects clause." Finally, on September 26, 2007 (No. 04-20.636), the 3rd Civil Chamber of the Court of Cassation ruled that an association may take legal action on behalf of collective interests, provided they fall within its statutory objects clause. Above all, in this decision, the Court takes care to specify that the association suffers personal injury. In other words, since the collective interests that the association intends to defend through legal channels are part of its statutory objects clause, the infringement of these collective interests causes personal injury to the association. It is, in a way, through its personal interest that the association defends the collective interests.

On this point, a ruling handed down by the Court of Cassation on March 30, 2022 (No. 21-13.970) is even clearer. It concerned a lawsuit brought by a consumer protection association against a construction company. On the one hand, the Court declared the lawsuit brought on the basis of a legislative habilitation inadmissible. Admittedly, an association that has been certified may act on the basis of Articles L. 621-1, L. 621-2 and L. 621-7 of the Consumer Code in order to defend the collective interest of consumers. However, it must meet the required conditions. In this case, one condition was missing (the offense). On the other hand, it declares the action admissible on

the basis of common law rules of standing. It points out that it is possible to act on the basis of common law and "when no stipulation in the statutes provides for a restriction of the geographical scope of action of the association, the action brought by it may be brought before any court with territorial jurisdiction".

It follows that there are two ways of defending collective interests before the civil judge: either through legislative habilitation on the basis of specific statutory provisions; or through common law civil and criminal procedure rules, that is to say, by demonstrating a specific interest in acting on the part of the plaintiff (demonstrated by the consistency between the interests defended in the statutory objects clause and the interests affected in case at hand, as well as the judge checks with regard to legislative habilitation).

- The administrative judge also allows certain NGO's to defend collective interests, even if they are not authorized by the legislator. On the one hand, the administrative judge presumes the existence of a legal interest when the association is authorized by the legislator (for example, environmental protection associations, under Article L. 141-1 of the Environment Code). It only verifies that the statutory objects clause is related to the contested administrative act and that the conditions required by the legislator are met. On the other hand, it has long been accepted that, regardless of any legislative habilitation, certain applicants may have a legal interest in acting to defend collective interests. Here it applies its famous case law resulting from a judgment of December 28, 1906 (*Syndicat des patrons coiffeurs de Limoge*, no. 25521). In this case, the judge recognized that unions, groups and other associations are admissible to challenge non -individual regulatory acts that would undermine the collective interests and the interests of the legal person itself. But beware: the Council of State regulates this defense of collective interests. It should be remembered that the administrative judge is competent to assess the illegality of administrative acts by means of the "remedy for abuse of power". The purpose of this remedy is to challenge regulatory acts that affect society as a whole and not just one person. To avoid overcrowding the courts, it is necessary to prevent anyone from challenging non -individual regulatory acts that do not concern them. The case law of the Council of State has resolved this difficulty. It is complex and subtle. But we can retain the following elements: when the association is not authorized by the legislator, the administrative judge requires not only that the collective interests affected fall within its statutory objects clause, but also that the association itself has an interest in acting. In this case, it must be demonstrated that the challenge to the administrative act has consequences for the person and that he or she therefore has an interest in challenging the act. In other words, the interest to sue must always be personal to the author of the appeal who defends collective interests. The case law applies to any group. For example, in a ruling handed down on May 22, 2012 ("*Les Hautes des Épinettes*" case), the Council of State reiterated that to prove its interest to sue, a local authority cannot simply refer to the sole interest of its residents. It must demonstrate its own interest. On this point, case law shows that there is a direct link between the alleged interest and the contested administrative act. The judge proceeds on a case-by-case basis...

- The criminal judge is stricter: on the one hand, when the civil action is brought before the criminal judge on the basis of the provisions specially granting the right to certain associations to bring their civil action before the criminal judge ("constitution de partie civile"), the criminal judge strictly verifies the presence of the conditions required by the legislator. On the other hand, when the association acts outside the scope of legislative habilitations, it verifies that the common law conditions provided for in Article 2 of the criminal procedure code ("Civil action for compensation for damage caused by a crime, an offense or a contravention belongs to all those

who have personally suffered damage directly caused by the offense") are met. In this case, as the Criminal Chamber of the Court of Cassation pointed out in a ruling of September 7, 2021 (No. 19-87.031), the associations must demonstrate that they have suffered a direct and personal injury, other than the harm to the collective interests that they are tasked with defending. The Court of Cassation points out that "bringing a civil action before the criminal courts is an exceptional right which, by its very nature, must be strictly confined within the limits set by the criminal procedure code".

To summarize: 1) Habilitation (empowerment) may be granted by the legislator (in which case it designates the collective interests that can be defended by certain legal entities provided certain conditions are met). 2) However, the judge may also admit the admissibility of certain associations in the course of legal proceedings. This is the case when they demonstrate that: a) they have a statutory objects clause that targets the collective interests affected b) they have a personal interest in acting according to the requirements set out by the various judges (civil, administrative and criminal). In other words, while legislative habilitation (empowered NGOs) waives the requirement to prove a personal interest, judge-made habilitation does not eliminate the condition. The petitioner must then comply with the general law of standing.

8. Against whom can PIL be initiated (government/corporations)?

Actions in defense of collective interests are brought against the government and against companies.

In the first case, the aim is to challenge an act or behavior of a public person (state, prefect, municipality, etc.) that is contrary to the law.

Example:

In terms of climate litigation, in the case of the century (the one that led to the recognition of the French State's responsibility for its contribution to climate change), the Administrative Court of Paris recognized on February 4, 2021, the interest of several associations to bring a claim on two grounds 1) Article L. 142-1 of the Environment Code, which states that "Any association whose purpose is the protection of nature and the environment may bring proceedings before the administrative courts for any grievance relating thereto. (...)"; 2) Article 1248 of the Civil Code: "Action for compensation for ecological damage is open to any person having the capacity and interest to sue, such as the State, the French Office of Biodiversity, local authorities and their groupings whose territory is concerned, as well as public establishments, certified associations or associations created for at least five years on the date of introduction of the proceedings whose purpose is the protection of nature and the defense of the environment."

In the second case, it is often a question of requesting the cessation of unlawful behavior by a natural or legal person or compensation for damages, before the civil or criminal court.

Examples:

- In a decision (ruling) dated February 23, 2000, the Court of Cassation (criminal division, no. 99-84.448) reiterated that an association whose statutory objects clause is the fight against terrorism may exercise the rights of the civil party before the criminal judge to obtain compensation for

damage caused to the collective interests it defends by individuals on trial for preparing acts of terrorism.

In its ruling of September 25, 2012, the Court of Cassation (criminal division) condemned the oil company Total following legal action taken by environmental protection associations declared admissible to bring a claim in defense of the collective interests referred to in their statutory objects clause.

9. Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?

Reminder: in France, there is a jurisdictional order composed of two courts: the administrative courts (Administrative Court, Administrative Court of Appeal and Council of State) and the judicial courts (civil courts and criminal courts: Judicial Court, Court of Appeal and Court of Cassation).

Please note: the Constitutional Council ("Conseil Constitutionnel") is not a real court. It is a body that verifies the conformity of laws with the Constitution. It does not settle disputes.

The defense of collective interests can take place before both types of courts: the administrative judge and the judicial judge.

- **If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?**

The rules of jurisdiction depend on the objective/goal of the appeal.

- The administrative judge has jurisdiction to judge public persons (the State). There are two possible appeals: the appeal for abuse of power (to verify the legality of administrative acts) and the "full litigation" appeal (the appeal for liability). Consequently, plaintiffs who bring their action before the administrative judge must use one of these two remedies. Legal persons who intend to defend collective interests will do so by demonstrating that the act adopted by the State is contrary to a law or that the State's behavior is wrongful. In the first case (action for misuse of power), it must be demonstrated that the illegality of the contested act has consequences for the legal person: it affects the collective interests defended in its statutory objects clause. In the second case, it must be demonstrated that the fault committed by the State affects the collective interests referred to in the statutory objects clause.

- The civil courts has jurisdiction to judge private individuals. There are various remedies. In the case of the defense of collective interests, the aim is often to ask the court to recognize the civil liability of a company and to obtain damages and the cessation of an unlawful act regarding the infringement of the collective interests defended by the association in its statutory objects clause.

- The criminal courts have the power to impose criminal sanctions (fines and prison sentences) provided that an offense has been committed. In this case, the victims can ask the criminal court to deal with the civil consequences of the case (damages or cessation of the unlawful act). In France, it is said that "the civil action is joined to the criminal action". Action before the criminal court is quantitatively the most important way of defending collective interests in the judicial system. The reason is as follows: the legislator grants a large number of associations the right to

exercise the rights of the "civil party" or to "become a civil party" in order to defend the collective interests referred to in the statutory objects clause. This means that they can seek compensation for damages in a trial before the criminal court. The court will hand down a criminal decision (fine or prison sentence) and a civil decision (damages and cessation of an unlawful act).

10. What are the relevant admissibility rules?

- **What are the standing requirements?**

To fully understand the eligibility rules for actions aimed at defending collective interests, it should be remembered that, under French law, the principle is as follows: any person who stands before the judge must demonstrate their capacity (being a subject of law), their interest to sue and their quality to sue (the title allowing them to bring a claim with regard to the status of the person).

- Concerning the standing, this means that the dispute must affect the claimant's own interests and that the result of the action must personally benefit the claimant (remedy to his problem). An old legal adage expresses it in these terms: "no interest, no action".

Before the civil judge, the conditions for standing to sue are as follows: the interest must exist (be real), be direct, personal, arising and current, and legitimate. When it comes to defending collective interests, it is the proof of the personal nature that poses a problem in French law because it implies that the plaintiff must demonstrate that his own interests are harmed and that the legal action will benefit him personally.

Before the criminal court, only the direct victim of the offense can bring a claim: we find the problem raised by the personal nature of the interest when it comes to defending non -personal interests (article 2 of the criminal procedure code: "Civil action for compensation for damage caused by a crime, an offense or a contravention belongs to all those who have personally suffered damage directly caused by the offense.").

Before the administrative judge, the conditions of standing are as follows: the interest must be present and current; certain, legitimate and direct; material or moral; it is also assessed in terms of the quality (status) of the person and the subject of the request. The idea of the personal nature (although the administrative judge does not use this expression) of the interest to sue is found in the requirements of a material and moral interest (that of the person acting) and in the direct nature (for example: the contested act directly affects the material interest of the applicant).

- Regarding the capacity to bring the claim, i.e. the title in the name of which the applicant has the capacity to sue, there are two solutions: either the capacity results from standing (the applicant has an interest, therefore he has the capacity to sue); or the capacity to sue alone allows him to stand (whereas for the administrative judge, the capacity will presume the interest, for the civil judge, the capacity will make it possible to set aside the requirement of standing).

Legal basis to be used: Article 31 of the civil procedure code, "*Any legal action is open to those who bear a legitimate interest in the success or the dismissal of a claim, except where a specific legislation empowers with the right to sue the litigants it deems may bring or oppose a claim or may defend a specific interest***"**.

This provision means that, exceptionally (subject to the cases in which), the legislator grants a right to sue to certain persons whom it "qualifies" to defend a "specific interest". This "specific interest" may be the defense of certain collective interests covered by the law. It therefore concerns the empowerment given by the legislator. In other words: in principle, everyone must demonstrate a legitimate interest in suing except when the legislator has granted them legal standing. In this case, their title (legal standing as a legal entity authorized to defend collective interests) is sufficient

Beware: 1) We have seen that this empowerment to stand is not only granted by the legislator. In practice, the judge plays an important role and complements the action of the legislator. 2) Article 31 of the civil procedure code only concerns civil procedural law. In criminal law, there is no rule enshrining the possibility for the legislator to grant a "qualified" person the right to bring a claim to defend collective interests. However, the legislator grants these habilitations on a case-by-case basis (art. 2-1 to 2-25 of the criminal procedure code). 3) Administrative law stays silent: there is no rule provided for in the texts governing the interest to sue. The way in which the interest is governed can only be understood through case law. In summary: the principle is the need to demonstrate an interest in bringing the claim. But because the administrative judge has a liberal conception of standing, he includes the defense of collective interests in the interest to sue as long as the latter is provided for in the statutory objects clause of the organization. In this case, the administrative judge considers that there is nevertheless one legal interest. And, when a legal person has been habilitated by the legislator, the judge considers that there is a presumption of legitimate interest. There is a meeting of personal interests and collective interests.

- **Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc. of the represented constituency members, for establishing standing? If yes, how is it assessed?**

Whether the habilitation is granted by the legislator or by the judge, the general rule is that the interests defended in the statutory objects clause of the association must be identical to the interests affected by the facts that justify the legal action. There are then specific requirements.

- With respect to habilitation statutes, the conditions are set out by the legislator on a case-by-case basis. Here, a distinction must be made between two types of associations: registered associations and certified associations. Under French law, certified associations enjoy additional advantages: in addition to being able to apply for funding, they are consulted by the public authorities. In both cases, they can take legal action. In principle, registered associations have the right to take legal action to defend only their own interests (the declaration allows them to obtain legal capacity), while certified associations can defend collective interests. This distinction is clear in the action taken by environmental protection associations before the administrative judge.

Indeed, according to Article L 142-1 of the Environment Code:

"Any association whose purpose is the protection of nature and the environment may bring proceedings before the administrative courts for any grievance relating thereto.

Any environmental protection association certified under Article L. 141-1, as well as certified departmental federations of fishing and aquatic environment protection associations and certified professional fishing associations, have standing to bring proceedings against any

administrative decision directly related to their statutory object clause which causes harmful effects on the environment in all or part of the territory for which they are certified, provided that the decision was made after the date of their certification".

However, the distinction between the two types of associations must be specified: the legislator sometimes also expressly or incidentally allows registered associations to defend collective interests. In this case, the association must have been registered for some time. The registration procedure is provided by law and is carried out at the prefecture. For example, in the fight against racism, Article 2-1 of the criminal procedure code requires that the association has been regularly registered for at least five years at the time of the events. As for certified associations, they can take legal action to defend collective interests. Certification is sought from the competent minister under certain conditions. Certain conditions must be met. These are again determined by specific legislative provisions. In general, it should be remembered that to be certified, an association must demonstrate that it has a purpose of general interest (non-profit, open without discrimination, selfless management), that it operates democratically (in particular proof of the existence of an annual general meeting) and that it respects financial transparency (it keeps regular accounts and has an annual budget). In addition, there are specific conditions for the various habilitations provided for by the legislator.

Two examples:

- Consumption (article R 811-1 of the Consumer code)

Associations can only obtain certification if they can prove that they have been in existence for one year on the date of the request, real advocacy activity (meetings, publications, etc.) and have at least 10,000 dues-paying members if it is a national association or a sufficiently representative number of members if it is a local association (art. . 2).

In terms of environmental protection:

Certification is governed by article L. 141-1 and R. 141-2 of the Environment Code. Art. R. 141-2 provides:

"An association may be certified if, at the date of application for certification, it has been in existence for at least three years from the date of its registration:

1° A statutory purpose relating to one or more of the fields mentioned in Article L. 141-1, and the exercise of effective and public activities in these fields, or publications and works whose nature and importance show that it works primarily for the protection of the environment;

2° A sufficient number of natural person members, either individually or through federated associations, in view of the territorial scope of its activities;

3° A non-profit-making activity and disinterested management;

4° Operating in accordance with its bylaws, with guarantees that its members are kept informed and participate effectively in its management;

5° Guaranteed financial and accounting regularity.

The granting of certifications to environmental associations has been specified by a circular from the Ministry of the Environment[2] instructing regional and departmental prefects what to consider for each required item of art. R. 141-2. With respect to the activities of an association applicant, the circular first generally notes that a certification is neither a brand nor a reward for an occasional commitment to the protection of the environment. It is the State's formal recognition of a long-lasting and effective involvement in this domain. Second, it more specifically requires the environmental activity not to be incidental but primary (timewise). Not simply based on a statement of intent but real and substantiated by an activity report that includes actions, publications, organizations of debates, events, etc., serving, not only the interests of its members, but of the general public. The reputation of the association is illustrated by membership rate. Depending on the demography of each district and the more or less broadly defined statutory object clause, it is up to the Prefect to determine what is a "sufficient" number of members (by number of membership fee payers). With respect to the functioning of the applicant association, the circular remands the assessment of "non-profit" to tax regulation. It adds that the strategy of the applicant shall be the result of an open governance, and not of a single or narrow group members. That directors shall be duly elected and their management controlled by the members. The association must keep accurate books and records, and above 153 000€ of public subsidies be assisted by external auditor.

It should be added that the legislator sometimes authorizes both types of associations to defend the same collective interests in court: the judge is therefore required to verify the admissibility of the action brought by both a certified association and an association that has been declared for at least 5 years.

With respect to article L. 142-2 of the Environment Code:

"Certified associations mentioned in article L. 141-2 may exercise the rights recognized to the civil party with regard to facts directly or indirectly prejudicial to the collective interests that they have as their object to defend and constituting an offense to the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soil, sites and landscapes, urban planning, sea fishing or whose purpose is to combat pollution and nuisances, nuclear safety and radiation protection, commercial practices and advertisements that are misleading or likely to be misleading when these practices and advertisements include environmental information, as well as the texts adopted for their application.

This right is also recognized, under the same conditions, to associations that have been legally registered for at least five years at the time of the events and whose statutes include the safeguarding of all or part of the interests referred to in Article L. 211-1, with regard to events constituting an infringement of the provisions relating to water, or of the interests referred to in Article L. 511-1, with regard to acts constituting an offense under the provisions relating to classified installations".

In summary: 1) The distinction between certified associations and registered associations is important but not always relevant 2) In both cases, no financial conditions are stipulated by the legislator.

[2] Circular of May 14th 2012, BO du MEDDE n° 10 of June 10th 2012 - NOR : DEVD1223201C

- *Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?*

Five points should be remembered: 1) Legal personality is obtained by the "declaration" of the association or is given by law (other legal persons under public and private law). 2) The only certification required is that of the declaration or accreditation. 3) The theory of political doctrine has no influence at the stage of standing to sue to defend collective interests. 4) Yes, the idea of sufficient interest to sue can be found in cases of judge-made habilitations (when the conditions of legislative habilitation are not met): in this case, the judge verifies that the association also has its own interest to sue. 5) There are other additional conditions:

- When the action is brought before the criminal court, it is a matter of exercising the rights of the civil party: the legislator therefore requires the presence of an offense or crime. The offense is determined by the legal provision itself.

Examples:

- Article 2-4 of the criminal procedure code: "Any association that has been duly registered for at least five years and whose statutes include the aim of fighting crimes against humanity or war crimes or defending the moral interests and honor of the Resistance or deportees may exercise the rights granted to the civil party with regard to war crimes and crimes against humanity".

- Article 2-5 of the criminal procedure code : "Any association that has been duly registered for at least five years at the time of the events and whose statutes state that it aims to defend the moral interests and honor of the Resistance or deportees may exercise the rights granted to the civil party with regard to either the glorification of war crimes or crimes or offences of collaboration with the enemy, or the destruction or defacement of monuments or the desecration of graves, or the offenses of defamation or insults, which have caused direct or indirect harm to the mission it fulfills"

- For certain actions brought before criminal courts, sometimes (but not always), the legislator requires that the association be authorized by the victim affected by the offense.

Example:

Article 2-6 of the criminal procedure code: "Any association that has been duly registered for at least five years at the time of the offense and whose statutory object includes the aim of combating discrimination based on gender, morals, sexual orientation or gender identity may exercise the rights granted to the civil party with regard to the discrimination penalized by articles 225-2 and 432-7 of the Penal Code and articles L. 1146-1 and L. 1155-2 of the Labor Code, when they are committed because of the victim's sex, family situation, morals, sexual orientation or gender identity or as a result of sexual harassment.

However, regarding discrimination committed as a result of sexual harassment, the association is only admissible if it can prove that it has received the written consent of the person concerned, or, if the latter is a minor and after the latter's opinion, that of the holder of parental authority or legal representative".

- **For determining admissibility: does it make a difference which legal norms are invoked?**

No. It does not matter.

- **For determining admissibility: does it make a difference which remedy is requested?**

Yes, but this is mainly due to the competence of the judge. The defense of collective interests may consist of obtaining compensation or the cessation of unlawful behavior or the annulment of an administrative act.

If the claimant invokes the liability of a company to obtain compensation or the cessation of unlawful conduct, then the civil judge will verify the presence of the conditions of the standing required before the civil judge (legislative or judge-made habilitations).

If the claimant invokes the criminal sanction of a person who has committed an offense and the compensation resulting from the offense, they must meet the conditions required to take legal action before the criminal court (in particular the existence of an offense).

If the claimant invokes the illegality of an administrative act or the liability of a public person, the claimant must respect the conditions required by the administrative procedure (the contested act must be directly related to the collective interests defended by the association).

- **Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?**

On the one hand, there is a general rule. Article 31 of the civil procedure code provides that the legislator may qualify certain persons to defend a specific interest. However, on the other hand, the rules are special: some concern consumer associations, other rules govern environmental protection associations, etc. But let's not forget that the judge has established rules that are applicable to all situations. Thus, with regard to action brought before the civil court, in a ruling dated September 26, 2007 (no. 04-20.636), the 3rd Civil Chamber of the Court of Cassation decided "that an association may take legal action in the name of collective interests, provided that these fall within its statutory ojects clause". This is a principle applicable to all associations.

- *If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?*

No, there is no rule that organizes competition issues. If there are three associations defending the same collective interests, each will receive damages.

Yes, in the same lawsuit, we can find: the individual who is claiming damages for personal injury and the association that is seeking compensation for the infringement of collective interests (see the *Erika case* mentioned above).

- **If there are several competent courts: are there any differences in the rules on admissibility?**

Yes, under French law, there are rules of civil procedure, criminal procedure and administrative procedure. On the one hand, we find the same idea concerning the conditions related to standing (capacity/interest/quality to sue and legislative /judge-made habilitation). On the other hand, there are specific rules regarding the competence of the judge, the power of the judge and the limitation period.

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?

The conditions for intervention are set out in the various codes according to the subject matter (art. 66 of the civil procedure code and article R. 632-1 of the administrative justice code).

Before all judges, intervention allows a third party to become a party during the initial proceedings. The intervention may be voluntary (at the initiative of the third party) or forced (incidental claim brought against the third party who becomes a new defendant). Intervention is defined by Article 66 of the civil procedure code: "an intervention is a claim whose purpose is to make a third party a party to the proceedings initiated between the original parties". Before the administrative judge, intervention is subject to several conditions: the intervener must be a third party to the proceedings, have capacity and a distinct interest. Before the civil judge, intervention is only admissible if it is sufficiently linked to the claims of the parties. The intervener, like the main party, must have an interest in acting. But his interest in acting must be distinct from that of the parties already involved: if the intervener does not show that he has an interest in making a claim or in supporting the claim of one of the parties, then his intervention is inadmissible.

- As for the amicus curiae, although it has existed in practice for a long time, it is little used and has only very recently been regulated by law. It is the law The law on the modernization of the 21st century justice of November 18, 2016 (L. no. 2016-1547 of Nov. 18, 2016) that established the amicus curiae before the judicial courts. Then, a few months later, the legislator recognized the possibility of calling on the amicus curiae before the administrative judge. But in both cases, there is no condition relating to the interest in acting or to the conditions affecting the status of friend of the Court. Its function is solely to enlighten the Court.

According to article L. 431-3-1 of the judicial organization code: "When examining the appeal, the Court of Cassation may invite any person whose competence or knowledge is likely to enlighten it on the solution to a dispute to produce general observations on the points it determines".

According to Article R. 625-3 of the administrative justice code: "The panel responsible for the investigation may invite any person whose competence or knowledge would be useful in clarifying the solution to a dispute to submit general observations on the points it determines.

The opinion is recorded in writing. It is communicated to the parties.

Under the same conditions, any person may be invited to present oral observations before the panel responsible for the investigation or the panel of judges, the parties having been duly summoned".

- **What are the rules on admissibility in that respect?**

There are no rule on this point.

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?

As a reminder, Article 47 of the Charter of the European Union guarantees the right to an effective remedy before a tribunal. This effectiveness is ensured by the national judge. We know that the case law of European Union law requires France, as well as the other Member States, to ensure that access to the national judge is accompanied by rules that effectively guarantee the rights of litigants guaranteed by European Union law and the right to the recognition of provisional legal protection. In other words, as the national judge is the judge of the application of European Union law, litigants must have access to the judge that is sufficiently open to allow this application. However, until now, contrary to other Member States, the French rules of access to the judge, including those concerning PIL cases, have not been challenged by the judge of the European Union.

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?

As a reminder, the European Court of Human Rights protects the right of access to the courts on the basis of a fair trial (article 6-1 of the European Convention on Human Rights). While it allows States to choose the means of access to the courts, it verifies that the limitations imposed by the legislator have a legitimate purpose and are proportionate to the reasons for which they were provided.

Note: cases raising the question of the validity of French rules on access to the national judge before the European Court of Human Rights are rare. The European Court of Human Rights has mainly had the opportunity to consider the conditions to be met in order to qualify as a victim before its own judge.

Three points should be noted:

1) In a 2009 ruling, France was found to be in breach of its own rules before the national courts. The European Court of Human Rights has led to the termination of a case law of the Court of Cassation which, in interpreting the law on associations of 1901, required foreign associations with no establishment in France to carry out the "declaration" procedure on French territory (with the prefecture) prior to taking legal action. For the Court (ECHR, January 15, 2009, *Ligue du monde islamique et Organisation mondiale du secours islamique v. France,* No. 36497/05 37172/05, pt 58), the prior declaration imposed by Article 5 of the 1901 law on any foreign association wishing to bring legal action in France undermines the very substance of the right of access to a court, and violates Article 6 of the Convention for the Protection of Human Rights. Since this decision, the Court of Cassation has recognized that any legal person that is the victim of an offense has the right to take legal action even if it does not have an establishment in France and has not made a prior declaration to the prefecture (Cass. Crim. December 8, 2009, No. 09-81.607). To do so, it must have legal capacity (legal person) and its representative must have the power to sue on its behalf in accordance with the national law to which it is subject (Cass. Crim. December 1, 2015, No. 14-80.394). It should be noted, then, that the case law of the European Court of Human Rights has had a positive influence on French law by giving foreign associations access to the national judge.

2) Concerning access to the European Court of Human Rights, the latter has handed down several decisions concerning France.

It is important to remember the important decision handed down by the European Court of Human Rights in the case "*Association Burestop 55 v. France*", July 1, 2021.

In this case, the French National Agency for Radioactive Waste Management (ANDRA) had approved a radioactive waste landfill site. An environmental protection association argued that, in order to make this decision, ANDRA had provided the public with incomplete information. The NGO asked the Judiciary judge compensation for the damage resulting from the infringement of the collective interests referred to in its statutory object clause, on the basis of Article L. 142-2 of the Environmental Code. The court ruled that the legal action was inadmissible because the statutory object clause concerned the protection of the environment and not, in particular, the risks associated with the burial of radioactive waste. In other words, the French judge had ruled that the association's statutory object clause was not related to the defense of the collective interests claimed. The European Court of Human Rights condemns France. For the Court, protection against nuclear risks is "fully connected" to the protection of the environment referred to in the association's statutory object clause (§71 of the Court's judgment). Furthermore, the action of the association also tended to defend the association's own interests (the protection of "its" rights to information and participation in environmental matters) and not only collective interests. It concluded that: "no evidence has been provided to justify that the refusal to consider such an action pursued a legitimate aim and was proportionate to that aim". This decision is important because it shows that French law cannot adopt an overly strict interpretation of the requirement of consistency between the statutory object clause of the plaintiff-association and the collective interests actually affected. Furthermore, it reiterates that an association can also always act to defend its own interests.

In the 2006 judgment *Collectif Stop Melox et Mox v/ France*, an environmental protection association challenged a decree authorizing COGEMA to proceed with the extension of a plutonium recycling plant. The European Court of Human Rights granted it the status of victim with regard to the disregard of the right to information and participation. Then, in the *Greenpeace France v. France* judgment of December 13, 2011, the European Court affirmed that the status of victim cannot be inferred from the violation of the right to live in a healthy environment because the legal person (the environmental protection association) does not hold the right to live in a healthy environment. Finally, let us recall the recent *Damien Carême v. France* case (2024). As mayor and resident of the Municipality of Grande Synthe, was at the origin of the legal action "Commune de Grande Synthe" which led to the condemnation of the French State by the Council of State in 2021. The Council of State had admitted the admissibility of the action brought by the Municipality of Grande Synthe but had declared that Damien Carême had no legal standing. He took action before the European Court of Human Rights on the basis of Article 8 of the European Convention on Human Rights to argue that he was directly affected by the inadequacy of the government's action in the fight against climate change. The European Court of Human Rights rejected the application. It dismissed the application because the applicant had no legal standing. He did not demonstrate the existence of a direct link between the State's climate inaction and the violation of individual rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, *Carême v. France*, April 9, 2024, req. no. 7189/21). We will note that these decisions ultimately arrive at the same result as that handed down by the French judges: 1) Associations that do not have a certification must demonstrate a

legal interest and this involves demonstrating the direct and personal nature of the infringement (the infringement of the collective interests defended by the association in its statutory objects clause). 2) Individuals cannot defend collective interests. They must demonstrate their personal interest.

3) As for the national judge, he too is confronted, on the occasion of certain legal actions, with the applicability of the European Convention on Human Rights. In a judgment already cited, the criminal chamber of the Court of Cassation declared the action brought by an association inadmissible because this association had not demonstrated its interest in acting (on the basis of Article 2 of the criminal procedure code). The Court of Cassation asserts that "the exercise of civil action before the criminal courts is an exceptional right which, by its very nature, must be strictly contained within the limits set by the criminal procedure code". And it adds "Such a solution cannot be regarded as irreconcilable with Article 6, § 1, of the European Convention on Human Rights, as the European Court of Human Rights does not in itself recognize the right to prosecute or impose criminal penalties on third parties, and having specified, as a consequence, that the Convention guarantees neither the right to "private vengeance" nor actio popularis."

In other words, Article 6,§ 1, of the European Convention on Human Rights can also allow the national judge to justify the governing of actions to defend collective interests.

- **What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in European Court of Human Rights, 9 April 2024, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20 (KlimaSeniorinnen)?**

The decision handed down on April 9, 2024, in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* confirms the distinction to be made between associations (legal persons) and individuals (natural persons) in lawsuits intended to defend collective interests: first and foremost, let us remember that the European Court of Human Rights reiterates that it does not recognize *actio popularis*. However, it granted victim status to the association because it "defended the rights and interests of individuals facing the threats of climate change in the defendant state", including those of its members who were natural persons. The Court then specified the conditions under which an association may have standing to bring proceedings before the European Court: "a) it must have been legally constituted in the country concerned or have standing to bring proceedings in that country, b) be able to demonstrate that it pursues a statutory aim corresponding to the defense of the fundamental rights of its members or other individuals, and c) be able to demonstrate that it can be considered truly representative and empowered to act on behalf of members or other affected individuals in the country concerned who are exposed to specific threats or adverse consequences related to climate change. "(§ 502). Above all, it specifies that the association does not need to prove that the in dividuals it represents are themselves victims. On the other hand, individuals who act (§ 502). Above all, it specifies that the association does not need to prove that the individuals that the association represents have themselves the status of victim. On the other hand, individuals acting on their own behalf must provide proof of their interest in taking action, i.e. their status as a victim. To do so, they must demonstrate that they are personally and directly affected. In this case, the judge ruled tha t the Swiss seniors had failed to demonstrate their status as victims. However, the Court specified that

certain private individuals could, in certain circumstances, succeed in doing so by invoking the violation of their right to life (art. 8 of the European Convention on Human Rights).

To a certain extent, the same reasoning can be found in French law:

The *actio popularis* does not exist, but it is possible for an association to defend collective interests if certain conditions are met. French law appears even more flexible with regard to the admissibility of action by associations. While in French law, the importance of being legally constituted (registered or certified associations) and the need to demonstrate the link between the statutory purpose and the issue in dispute are important, on the other hand: 1) the fundamental rights of members and victims are not taken into consideration 2) the association is not required to demonstrate that it is truly representative and certified to act on behalf of members or other affected individuals in the country. The defense of collective interests is detached from the fundamental rights of members or individuals.

The reasoning is similar when it comes to individuals: the individual must demonstrate that they have a real, direct, innate and personal interest. Similarly, ignorance of a fundamental right can make it easier to prove an interest in acting. But beware: it remains necessary to demonstrate that there has been ignorance of a fundamental right and that this violation harms the interests of the individual. In a recent judgment, the Council of State stated that the judge does not have to investigate "whether the applicants' interest in bringing the claim did not result from the fact that the authorization granted by the contested decision would have infringed on their right to live in a healthy and balanced environment". In other words, the fact that the right to live in a healthy environment is at stake in this case does not mean that the individual has an interest to sue. Similarly, the Council of State ruled that *"Article 2 of the Environmental Charter, which states that 'every person has a duty to take part in the preservation and improvement of the environment', does not in itself confer on any person who invokes it an interest to bring an action for misuse of power against any administrative decision that they intend to challenge"* (CE, August 3, 2011, *Ms. Buguet*).

Note that there has been an important development in French law that allows for a comparison with the ruling of the European Court of Human Rights. In French law, there is an emergency relief procedure: "le référé-liberté". This procedure allows anyone to go before a judge, under certain conditions, to request the restoration of a fundamental freedom that has been violated by a public person. In a decision handed down on September 20, 2022 (No. 451129), the Council of State recognized that the right to live in a healthy environment, as derived from the Constitutional Charter for the Environment of 2005 (Article 1st), is a fundamental freedom. It concluded that ignorance of this right allows individuals to demand its restoration through a "liberties application" procedure. Then, on October 18, 2024 (No. 498433), the Council of State recognized that the action brought by an environmental protection association was well founded after finding "a serious and manifestly illegal infringement of the right to live in a balanced and healthy environment, with regard to the interests that the association *Comité Ariège écologie* claims to defend". Although the decision only concerns the emergency procedure of "référé-liberté" (summary proceedings to protect civil liberties), it may have consequences for the way of reasoning to prove standing before the courts in the future: the right to live in a healthy environment could be part of the interests to be defended. But beware: unlike the ruling of the European Court of Human Rights, the Council of State does not mention the right of members or individuals to live in a healthy environment.

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

As France is a member of the Aarhus Convention, it must respect it. The Convention has been invoked several times by applicants before French judges to claim a legal interest. This is the case of individuals who, on the basis of Article 9 of the Aarhus Convention, wish to benefit from a legal interest to claim collective interests. But the French judge remains firm: individuals must demonstrate a legal interest (damage to their own interests) and Article 9 of the Aarhus Convention has no influence because it has no direct effect.

- In a ruling of April 5, 2006 (No. 275742), the Council of State then reiterated that:

"Without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions of public authorities which contravene provisions of its national law relating to the environment" and that under paragraph 5 of the same article: "In order to make the provisions of this article even more effective, each Party shall ensure that the public is informed of the possibility of initiating administrative or judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

The judge ruled that "the aforementioned stipulations only create obligations between the States party to the convention and do not have any direct effect in the internal legal system; they cannot therefore, and in any case, be usefully invoked by the plaintiffs".

Then, in a judgment of October 23, 2015 (No. 392550), the Council of State declared inadmissible an action brought by an individual who intended to defend environmental protection on the basis of his expertise in the field. The Council asserts that this does not give him a direct and certain personal interest in requesting the annulment of the contested order. The judge adds that "the stipulations of Article 9 of the Aarhus Convention have, in any case, neither the object nor the effect of giving any person a right to appeal against any decision having an impact on the environment".

The position of the administrative judge is therefore clear: it is impossible to rely on the Aarhus Convention to circumvent the requirement of the applicant's interest to sue. And if this were the case, let us not forget that the Aarhus Convention in no way imposes an *actio popularis*.

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

Yes, it is important to distinguish between actions brought against the government and against companies because they are brought before two different judges: the administrative judge and the judicial judge (civil and criminal).

The proceedings are subject to different procedural conditions (administrative justice code, civil procedure code, criminal procedure code). Regarding access to the judge, before the three judges, it will be necessary to demonstrate the link between the association's statutory objects clause and the collective interests affected. However, each judge assesses the interest to sue differently (see above).

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?

All rules can be invoked. There is no distinction to be made with other areas of law.

- **Are there special rules on the legal provisions that can/can't be invoked in PIl- cases?**

No. Before the administrative judge, if the PIL-case consists in contesting an administrative act, the petitioner can invoke (according to certain conditions), the regulations (rules created by the executive power), the laws, the constitution, the international conventions, the law of the European Union...; The same is true before the judicial judge. Everything will depend on the type of collective interests defended**.**

- **Under which conditions can constitutional rights and/or international treaties be invoked?**

Concerning the rights recognized in the Constitution: the rights included in the "Constitutional Block" are at the top of the hierarchy of standards and can in principle be invoked by any citizen before a judge since they create individual rights for citizens (it should also be noted that the judicial judge is the judge of the protection of individual freedoms). These include the rights and freedoms enshrined in the constitutional bloc, those enshrined in the Constitution of October 4, 1958 itself, such as individual freedom, but also those enshrined in the Declaration of the Rights of Man of 1789 (such as the presumption of innocence) and those arising from the Environmental Charter of 2005 (right to live in a healthy environment). They can be invoked against the State only if they are "opposable" to it: in this case, the judge decides whether the citizen is entitled to a right with regard to the State. The State must implement it and take steps to ensure its effectiveness. The opposability is assessed by the judges.

But beware: sometimes certain rights depend on the action of the legislator. This is the case in the Environment Charter: for example, Articles 3 and 4 of the Constitutional Environment Charter (Article 3, "Everyone must, under the conditions defined by law, prevent the damage they are likely to cause to the environment or, failing that, limit the consequences"; Article 4: "Everyone must contribute to repairing the damage they cause to the environment, under the conditions defined by law").

With regard to international law, treaties may also be invoked before all national judges (administrative and judicial judges). French law is a monist law. But beware: Only provisions that have direct effect may be applied by the judge. According to the Council of State, since a decision of 2012, it is possible to invoke a provision of a treaty "when it creates rights that individuals can directly invoke" (Council of State, *Gisti case*, April 11, 2012). However, the judge may nevertheless rely on a provision of a treaty that does not have direct effect to interpret another standard.

Thus, in its decision "*Commune de Grande Synthe*" which led to the conviction of the State on November 18, 2020, the Council of State reiterated that the UNFCCC (United Nations Framework Convention on Climate Change) and the Paris Agreement do not have direct effect, but that these

treaties the objectives that France has set itself in terms of climate change must be read in the light of these agreements in order to give them full effect under French law.

- **To what extent can private law provisions be invoked?**

Provisions of private law may be invoked before all judges as long as they are applicable to the dispute. Sometimes, the rules of administrative law and private law are applicable in the same dispute. For example, in French law, the rules governing the liability of the State are provided by principles derived from administrative case law. But in the case of the century (the case that led to the recognition of the State's responsibility in climate matters), the Paris Administrative Court (February 3, 2021 and October 14, 2021) applied the rules of the Civil Code governing compensation for ecological damage.

17. Which remedies can be invoked in PIL-cases?

- Before the administrative judge, claimants may request the annulment of an administrative act (remedy for ultra vires) and the recognition of the liability of the State or any other public entity. The administrative judge has the power to issue injunctions. He may order the public body to take measures to restore the legality of an act, to pay damages or to take measures to put an end to the illegality (remedial and preventive measures).

All these remedies are applicable in disputes concerning the defense of collective interests.

Climate cases are a perfect illustration of the possible remedies: on the one hand, in the Commune de Grande Synthe case, the judge annulled the contested administrative act for non-compliance with the greenhouse gas emission reduction targets set by higher standards of domestic law and European Union law. On the other hand, in the case of the century, the judge ordered the State not only to pay damages to the associations that defend the collective interests affected (compensation for the moral damage resulting from the infringement of the collective interests they defend), but also to put an end to and repair the ecological damage caused by its contribution to climate change.

- Before the civil judge, it is possible to obtain various measures: on the one hand, compensation for damages. Compensation can consist of obtaining damages. This is the case when the legal entity demonstrates that the infringement of the collective interests it defends causes it harm. This harm is qualified as moral or social or collective harm (sometimes the judge remains silent on the nature of the harm). The compensation may also be compensation in kind. This is the case where the action is aimed at compensating for ecological damage (article 1249 of the Civil Code). Furthermore, when it comes to defending collective interests, associations often ask the judge to impose an injunction. For example, in consumer matters, Article L. 621-7 of the Consumer Code states that the associations mentioned in Article L. 621-1 and organizations providing proof of their inclusion on the list published in the Official Journal of the European Union pursuant to Article 4 of Directive 2009/22/EC of the European Parliament and of the Council of April 23, 2009, as amended, on injunctions for the protection of consumers' interests, may bring an action before the civil courts to stop or prohibit any unlawful act in accordance with the provisions transposing the directives mentioned in Article 1 of the aforementioned directive". According to Article L. 621-9, associations may also ask the judge to "remove an unlawful or unfair clause from any contract or type of contract proposed or intended for the consumer or from any contract in progress".

- Before the criminal court, the plaintiffs bring a civil action. They seek compensation for the damage caused by the offense. They will then obtain damages in a trial whose main purpose is above all to impose a criminal penalty on the offender (fine or prison sentence).

To conclude, there is nothing specific about actions aimed at defending collective interests. The remedies imposed by the judge are the same as those provided for in ordinary law. It should be noted that the legislator may specify the type of remedies in the special provision that grants certain persons the right to sue. We have seen this in consumer matters. But this is also the case, incidentally, in the field of environmental protection. Article L. 142-2 of the Environment Code allows certified associations to "exercise the rights recognized to civil parties with regard to acts that directly or indirectly harm the collective interests that they aim to defend". It follows that it will be possible to obtain compensation for the damage and its cessation.

- **Are there special rules on remedies in PIl-cases?**

No, but beware: under French law, because of the separation of the judicial and administrative systems, the civil judge cannot encroach on the powers of the administrative judge. In concrete terms, he cannot order the defendant to cease his activity when it has been authorized by the State and is operating legally. It is up to the administrative judge to rule on the legality of the authorization and, if necessary, to cancel it.

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

Yes: when the defendant is a company that has received authorization from the State to carry out its activity. In this case, if the association for the defense of collective interests wants to obtain the cessation of the activity that it considers illegal, it must turn to the administrative judge. It is up to the administrative judge to assess the legality of administrative acts. If the association brings a civil liability action against a company whose activity is causing harm to collective interests (health and the environment, for example), the civil judge may award it damages. He may also order the defendant to take measures to reinforce damage prevention. But he may not declare the operating license granted to the company to be illegal.

This limitation of the judge's powers results from a ruling of the Tribunal des conflits (Court of Jurisdictional Conflict) of May 23, 1927: "The courts of law have the authority to rule both on the damages to be awarded to injured third parties and on the measures to be taken to prevent the harm that this establishment could cause in the future, provided that these measures do not contravene the regulations enacted by the administration."

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?

Yes, associations' access to court in order to defend collective interests is often debated. It is the subject of significant doctrinal work (books, symposia, articles and columns), notably in the field of the environment.

See in French (non exhaustive) :

L. Boré, *La défense des intérêts collectifs par les associations devant les juridictions administratives et judiciaires*, LGDJ, 1998

J. Bétaille (dir.) *Le droit à l'accès à la justice en matière d'environnement*, LGDJ Lextenso Presses de l'Université de Toulouse 1 Capitole, 2016

V Donier et B. ApéRou-scheneideR (dir.), *L'accès au juge, recherche sur l'effectivité d'un droit*, Bruylant 2013

M. Hautereau-Boutonnet et E. Truilhé, *Le procès environnemental*: https://ierdj.fra1.digitaloceanspaces.com/media_library/2022/10/Rapport-GIP-Decembre-2019-LE-PROCES-ENVIRONNEMENTAL-pour-mise-en-ligne-29112019.pdf

M. Hautereau-Boutonnet et E ? Truilhé (dir.), Le procès environnemental, Du procès sur l'environnement au procès pour l'environnement, éd. dalloz 2022

I. Omarjee and L. Sinopoli (dir.) *Les actions au-delà de l'intérêt personnel*, ed. Dalloz 2014

B. Parance, *La defense de l'intérêt general par les associations*, éd. LGDJ 2015).

Although French law is fairly liberal on this issue, some authors point to the existence of certain rules that are still too restrictive. This is the case in urban planning. To prevent anyone from challenging building permits, the legislator has strictly regulated the interest of associations in taking action. According to article L. 600-1 of the Town Planning Code, an association may only take action against a decision relating to land use or occupation "if the association's articles of association have been filed at the prefecture at least one year before the petitioner's request is posted at the town hall". Furthermore, the appeal may only be lodged within a period of 2 months from the 1st day of the authorization being displayed on the land.

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

Remember that we have only dealt here with actions in defense of collective interests as a "cause to defend", such as consumer protection, environmental protection, the fight against racism, the fight against violence against women, the fight against smoking, etc.

However:

1) There are other "collective" actions: but they do not defend collective interests. They defend the multiplicity of individual interests. This is particularly the case with group action, which is provided for in various matters, including consumption and environmental protection. For the environment, the standing is given to NGOs.

Nevertheless, it should be noted that group action can incidentally contribute to the defense of collective interests when the remedy sought is the cessation of the wrongful act. This cessation will benefit society as a whole and not just the group of people.

2) Of course, the individual cannot take action before the judge to defend collective interests. But he can request measures to stop the unlawful act (based on the theory of abnormal neighborhood disturbance (article 1253 of the Civil Code). In this case, the cessation of the unlawful act can also contribute to the common good and therefore incidentally to the defense of collective interests.

Example of legal based for group action

Article L. 142-3-1 Environmental Code:

"I. - Subject to this article, Chapter I of Title V of Law No. 2016-1547 of November 18, 2016 on the modernization of justice for the 21st century and Chapter X of Title VII of Book VII of the administrative justice code apply to the action initiated on the basis of this article.

II. - When several people placed in a similar situation suffer harm resulting from damage in the areas mentioned in Article L. 142-2 of this code, caused by the same person, having as common cause a failure of the same nature to fulfill their legal or contractual obligations, a collective action may be brought before a civil or administrative court.

III. - This action may aim at stopping the breach, at repairing physical and material damage resulting from the harm caused to the environment or for both purposes.

IV. - Only the following can perform this action:

1° Associations, certified under the conditions defined by decree of the Council of State, whose statutory object includes the defense of victims of physical injury or the defense of the economic interests of their members.

2° Certified environmental protection associations pursuant to article L. 141-1".

Bijlage 6 - Questionnaire
Comparative legal research on access to justice in public interest litigation
Norway

Anna Nylund[1]

A. Context

Note: the answers to these context questions can be brief. The purpose of this section is to get insight into the context and relevant developments in your legal system. Section B-D will address specific legal issues in more detail.

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

Public interest litigation is referred to as *representative søksmål,* representative actions. The Act relating to mediation and procedure in civil disputes (The Dispute Act, DA) of 2005, in force 1 January 2008, does not specifically define representative actions. However, s. 1-4 indirectly gives a definition. The unofficial English translation reads:

Section 1-4 *Right of action for organisations etc.*

(1) If the conditions in Section 1-3 are otherwise satisfied, an organisation or foundation may bring an action in its own name in relation to matters that fall within its purpose and normal scope.
(2) Public bodies charged with promoting specific interests may, in the same manner, bring an action in order to safeguard such interests.

The key part of this definition is 'in matters that fall within its purpose and normal scope', which indirectly states that organisations may bring not only when they themselves are the rights holder but also claims of public interests if and when the interest falls within the scope of the organisation's domain.

2. What are the main legislative provisions and/or leading cases regarding PIL?

The DA s. 1-4 is the core legislative provision. The Norwegian Supreme Court has handed down several landmark rulings, including the plenary rulings HR-2021-417-P[2] (Acer) and HR-2020-2472-P (Klimasøksmålet/The Norwegian Climate Case). There are also quite a few other recent cases, including HR-2024-837-U (Redd Ullevål Sykehus); HR-2023-1901-A (hundeavl/Norsk Kennel Klub / the dog breeding); and HR-2021-662-A (Ulvefelling I / Wolf hunting I).

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[2] The numbering system for Supreme Court rulings has changed. Therefore, the old cases have a different numbering system than newer cases. Older cases have Rt (Rettstidende) the official journal in which they were published followed by year and page number. Newer cases have HR for Høyesterett (Supreme Court) and then the year of the ruling, number of ruling and a letter signaling the composition of the court.

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

There are no restrictions on the areas in which interest groups may intervene. Many cases relate to environmental law in the broad sense, e.g., climate emissions, wolf hunting, zoning/building preservation, and building or upgrading waterpower and wind power plants. Other cases relate to the powers of the government to transform decision-making powers to EU bodies, dog breeding, local taxes, human rights violations in child welfare cases, employment law, insurance law, dog breeding, and so forth.

4. To what extent do interest groups (have to) mobilize individuals to litigate individual proceedings for the protection of collective and/or public interests?

Organisations do not have to involve individuals, as in most of the Supreme Court rulings mentioned above. Whether individuals must be involved in the case depends on the interest at stake. If it is an interest that belongs primarily to an individual or a small group of individuals (e.g., a family or siblings), as is the case with non-discrimination and the right to family life, the individual(s) concerned must sue, and the interest group may intervene on behalf of an individual. Examples of such cases are found in immigration and labour law.

When the interest at stake is collective, i.e., it belongs primarily to a group of individuals as a collective, no individual needs to, and often no individual can be, the claimant. Therefore, the typical constellation in PIL is that the interest group acts as a third-party intervener under the DA s.15-7 (see below question 11). Examples of recent Supreme Court rulings concerning the right to act as an intervener are HR-2024-99-U, HR-2023-2468-U, HR-2023-2299-U, HR-2023-292-U, HR-2022-1552-U, HR-2022-1161-U, HR-2020-438-U and HR-2020-46-U.

5. Could you provide an overview of the current status and developments of the type of PIL cases in your legal system

PIL cases relate to many different policy areas, ranging from environmental and climate cases to child welfare, public procurement, and insurance law, to mention a few. Typically, the government is the defendant, but there are plenty of examples of two private parties being the disputants. Often, corporative organisations (e.g., workers' unions and trade organisations) appear as third-party intervenors. The party constellation could also be a municipality against the state government.

See also below, questions 6 and 11.

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

A few other aspects are also important to understanding PIL in Norway.

One aspect is the court structure and procedural rules that follow from it. There is only one branch of courts, general courts and no administrative courts. Therefore, general courts hear administrative cases under civil procedure law rules. The combination of general cost-shifting rules (the loser pays), parties having to produce the evidence they invoke (and bearing the cost of the production of evidence unless they prevail and, if they do not pay, have to pay the costs of the opposite party), a tradition of large – even excessive – amount of evidence and very thorough examination of the evidence, result in a very high threshold for bringing an action in administrative law cases. Recourse against administrative decisions normally takes place by bringing the decision to an administrative complaints board for review. Many of the complaints boards are quasi-courts. In these bodies, the rules of administrative law apply, e.g., no cost-shifting, less evidence, and the government body must present documents without or with low charges. Constitutional review takes place in general courts *ex-post*.

The second aspect is that NGOs and associations do not have legal personhood in Norwegian law. There is no register of associations or clubs. Therefore, unlike limited liability companies, general partnerships, and registered foundations, which have legal personhood under relevant acts and under DA s. 2-1 subs. 1, associations have limited legal capabilities, including a limited capability to be a party to court proceedings (regulated in DA s. 2-1 subs. 2). The capacity depends partly on how established the association is and the extent to which the dispute and the claims are connected to it.

The third aspect is that although Norwegian law does not have *actio popularis*, it has a long tradition of allowing public interest litigation. One of the earliest examples is from 1914, Rt. 1914 s. 419, on the right to call oneself a craftsperson. The guild had a wider interest in litigating the issue than its members because the harm unskilled craftspersons inflicted on the guild far exceeded the minor harm inflicted on each member. This case served as the foundation for later rulings. The Alta case Rt. 1980 s. 569 marked a leap forward in environmental cases. The most recent development was taken in the plenary ruling in the Acer case (HR-2021-417-P), which further enlarged the scope for such actions. Thus, access to PIL has grown organically over more than a century.

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL cases granted?

Both private and public bodies (municipalities and counties) may bring PIL cases. Most of the cases are brought by private bodies. The legal ground is DA s. 1-4 (cited above, question 1) in combination with DA s. 1-3, which contains the general requirements for legal standing.

8. Against whom can PIL be initiated (government/corporations)?

A PIL case can be initiated against anyone: a private individual, corporation or government body. It depends on the issue and dispute at hand against whom the case can be brought.

The seminal Cage Hen II case (Burhøns, Rt. 1987 s. 538) illustrates this. The Norwegian Animal Protection Association brought a case against a hen farmer claiming that he kept his hens in unlawful conditions. The conditions the hens were kept in were lawful according to the Decree on Laying Hens, but the association claimed the way the farmer kept his hens was in breach of the Animal Welfare Act (dyrevernlov) and, therefore, unlawful. The hen farmer against whom the action was brought was, of course, not the only one who kept hens in such conditions. Still, the Supreme Court found the case could be brought against a single farmer.

(A few years earlier, the Animal Protection Association had brought an action against the government Burhøns I (Rt. 1984 s. 1488).) The Supreme Court dismissed a similar action brought against the Government in which the association claimed the decree was unlawful. The Court opined that the case amounted to an *actio popularis*, because it concerned the validity and lawfulness of the decree in general and could thus not be heard.

9. Which courts are competent in PIL cases (e.g., civil courts, administrative courts or constitutional courts)?

General civil courts hear the cases since no administrative or constitutional courts exist.

10. What are the relevant admissibility rules?

The relevant admissibility rules are the capacity to sue and a legal interest in suing (legal standing). The legal interest/standing consists of three subelements: the legal nature of the claim, currentness and connection to the defendant and the issue at stake.

Capacity to sue

The regular standing requirements apply. The parties must have the capacity to sue. This is regulated in DA section 2-1.

Section 2-1 *Capacity to sue and be sued*

(1) The following have the capacity to sue and be sued:

a. any physical person,

b. the State, municipalities, county authorities and intermunicipal cooperations,

c. companies, including limited liability companies, general partnerships and limited partnerships,

d. cooperative societies, savings banks and foundations,

e. estates in bankruptcy and estates of deceased persons under public administration,

f. other organisations and independent public enterprises if specifically provided by statute.

(2) Other organisations than those mentioned in subsection (1) have the capacity to sue and be sued to the extent justified by an overall assessment, whereby the court shall place particular emphasis on:

- whether the organisation has a permanent organisational structure,
- whether the organisation is represented externally by an executive committee or other body,
- whether the organisation has a formalised membership arrangement,
- whether the organisation has funds of its own, and
- the purpose of the organisation and the subject matter of the action.

The second subsection regulates most NGOs and associations' capacity to sue because they are not companies. In general, well-established associations and NGOs are presumed to have the capacity to sue because they have an established organisation and membership and, thus, at least some funds of their own (albeit not necessarily enough to cover high litigation costs). The final point, the purpose of the organisation and the subject matter of the action, overlaps with the requirements on standing in sections 1-3 and 1-4.

Ad hoc organisations were originally not considered to have the capacity to sue. But after the Stopp Regionfelt Østlandet (SRØ) case (HR-2003-372-A), the rules became more liberal. The issue was whether the permission to establish a shooting range was valid. The court found that the capacity to sue must depend on an overall assessment of the organisation (the dissenting opinion did not concern the capacity to sue). In this case, the organisation had been formally founded nine years earlier; it had by-laws, a board of five members, and more than 1,000 members across Norway, all of which pay membership fees. It could not be regarded as an ephemeral phenomenon or organisation. The majority then discussed whether this organisation was entitled to bring the action.

Ephemeral associations that are not well-established lack the capacity to sue. This was the case in Rt. 2012 s. 901, in which the Supreme Court held that two Facebook groups lacked a permanent organisational structure, including by-laws and an executive committee or board or similar representative body.

Organisations fulfilling the four first criteria have the capacity to sue in cases that are closely connected to their interests.

Legal standing

Legal standing consists, as mentioned, of three interrelated criteria: legal nature, currentness and connection. The main legal ground is DA s. 1-3.

Section 1-3 *The subject matter in dispute, the parties' connection to the dispute and the dispute situation*

(1) An action may be brought before the courts for legal claims.

(2) The claimant must demonstrate a genuine need to have the claim decided against the defendant. This shall be determined based on an overall assessment of the relevance of the claim and the parties' connection to the claim.

The requirement of a legal nature is clearly stated in subsection 1. Currentness is not explicitly mentioned but included in the genuine need, and connection refers to the connection between the claimant and defendant in the legal issue. The connection between the claim and the claimant (and defendant) is mentioned in the second sentence of subsection 2.

Legal standing: legal nature

First, the subject matter must be a legal claim, not a dispute concerning mainly non-legal issues. This is rarely a problem for PIL, unless the claim could be characterised as an abstract claim (*action popularis),* which would be inadmissible.

The rules regarding abstract claims have become more lenient. In the Cage Hens/Burhøns cases discussed above represent the starting point of how an inadmissible abstract claim is defined. However, in the recent plenary ruling in the Acer case (HR-2021-417-P)[3], the Supreme Court lowered the admissibility criteria regarding the definiteness of the litigated issue because the outcome of the case would not directly influence anyone's legal rights and obligations.

In 2018, the Norwegian Parliament decided by a simple majority vote to incorporate EU law, commonly referred to as the third energy market package, as part of the EEA agreement into Norwegian law. The organisation No to the EU (Nei til EU) brought an action against the Norwegian Government, claiming that the State had a duty to refrain from incorporating the energy market package into Norwegian law because it constituted a transfer of sovereignty, which requires a three-fourths majority pursuant to the Norwegian Constitution. The lower courts had ruled the action inadmissible because the claim did not constitute a legal claim but an abstract legal issue. The government also claimed that No to the EU lacked a sufficient connection to the issue.

The Supreme Court majority of 12 justices found that the action was admissible. Relying on the preparatory works for the Dispute Act (preparatory works, *travaux preparatoire* are an important source of law in Norway), the majority held that clarification of the law was key. The preparatory works gave "a basis for placing considerable emphasis on overall societal aspects and needs when assessing whether an action of a more general scope is admissible." (para. 140). The court cited the preparatory works (NOU 2001: 32 page 191):

[3] An unofficial English translation is available here: https://lovdata.no/pro/#document/HRENG/avgjorelse/hr-2021-417-p-eng. All passages cited in this text are from the unofficial English translation.

> *When it comes to the possibility to obtain a judgment on abstract legal issues, the Committee believes that one should keep the rule that currently forms the starting point, namely that one cannot have a judgment on abstract legal issues. The courts' task must be to resolve individual, actual disputes. Here, the Committee notes that as long as there is a relevant need for clarification, actions may be brought although the case still has the characteristics of a future case, see for instance Rt-1998-300. Admittedly, there is a context between the relevance requirement and the need for clarification of the law. The Committee points out that there has been a significant development in this area.*

It held that the Committee had stated on the next page (p. 192) that «legal issues of a more abstract nature» according to applicable law may be reviewed «to a certain extent». The Supreme Court acknowledged and acquiesced to this view (para 144). It also emphasised that the Department of Justice had argued in the bill on the Dispute Act that the threshold for bringing an action should not be too high and even suggested that the Supreme Court had been too strict. The Court cited the Parliamentary Proposition on the bill for the Dispute Act (Ot.prp. nr. 110 (2004-2005) p. 31):

> *«The [Parliamentary Justice Affairs] Committee finds that the threshold for legal action under applicable law should mainly be continued. But the Committee deems it important that a lower threshold nonetheless may be applied in certain cases, particularly those dealing with issues of principle, including actions brought against the State challenging the validity of regulations, and when general norms in legislation are applied to individual facts.»*

Hence, the Supreme Court majority found that two conditions must be met for "a more abstract" issue to be admissible. "Will a broader form of constitutional review result in the court losing «nuances and illustrative materials», and is it possible to concretise the dispute?" (para 145). These criteria must be assessed individually in each case. The majority held that the claims in the Acer case "stem from a specific and limited fact" (para. 178). Given that the majority of Supreme Court justices considered it better to examine concrete issues rather than general issues, they found the case admissible. They held that the legal issues were "suited for clarification in more general terms on the legal and factual basis we presently have." (para 183.) The Court has later reiterated this stance in, e.g., HR-2023-1044-A para 56 et seq.

The Supreme Court also discussed whether the issue at hand would provide guidance for future cases and thus amount to legal clarification. Although it was not obvious that there would be future cases, the majority held that

> *there is a particular need for clarification of the issue of principle in the case in the form it is raised. Transfer of sovereignty to international organisations, mostly in connection with the EEA cooperation, is a topical and recurring issue of controversy. This is amplified by a constant development, where – according to the No to the EU – sovereignty is transferred «bit by bit» and becomes increasingly difficult to reverse. (para 180)*

The minority of five justices argued that this was an instance of constitutional review and that, following previous case law, courts should be reluctant to do so, particularly in

economic matters, such as the case at hand. Therefore, the issue is primarily political, not legal, and is therefore inadmissible.

Legal standing: currentness

Second, the issue must be timely: an action may not be brought too early or late. However, there are exceptions to this. An example is HR-2021-662-A, on wolf hunting. When the case was ripe for a decision, the permit to hunt three wolves had already been killed. Often, it takes only a few weeks from when the permission is issued until the hunting period starts, and most animals are killed on the first days. Therefore, it is impossible to bring an action, let alone for a court to render a ruling after the permit was granted but before the wolves were killed. Therefore, an exception exists from the requirement of currentness/topicality (*aktualitet*).

Legal standing: connection

Third, there must be a sufficient, tangible connection between the claimant, the defendant and the disputed issues part of the action. Normally, claimants may only bring an action on rights they are the beholder of themselves. However, as mentioned above, there is a long-standing tradition that NGOs and associations may bring an action on collective rights when their members hold those rights collectively, or the NGO/association is a "natural" representative of those rights. For NGOs/associations, the main rule in DA s. 1-3 must be read in conjunction with s. 1-4 specifying the connection when an organisation/association brings an action. In essence, the interests underpinning the claims and grounds for the claims brought must be well aligned with the interests the legal rules invoked protect and the interests the organisation promotes. These interests do not need to be identical, only closely connected. For instance, the Norwegian Trekking Association (DNT), an association promoting outdoor activities, could bring claims invoking nature protection because nature protection and wildlife are intimately connected with outdoor activities.

In this regard, too, the Acer case (HR-2021-417-P) serves as an illustration. The Supreme Court opined on the right of No to the EU to bring an action. The majority held that

> *It is not decisive whether the organisation's or the foundation's members could have brought the case in its own name. The provision is therefore particularly significant where an individual member does not meet the requirements for bringing an action. The Dispute Act Committee also emphasises that the development of the law has been guided by «a need to have a claim decided that the courts have come to recognise». (para 127).*

It continued to state (paras 131-133):

> *The preparatory works [NOU 2001: 32] also state that «the key criterion» for organisations' right to bring an action must be the organisation's objective. On page 367, it is set out that «[t]he decisive factor must be the effects of the disputed issue when it comes to the organisation's objective»*

> *For actions brought by organisations, it is not a condition that the result determines the claimant's rights or duties. Such actions are merely to safeguard the idealist and general public interests within the organisation's objective. But also organisations are precluded from bringing an action challenging the validity of a statutory provision or a Storting decision in general, as also emphasised by the Storting in 2015 and 2020 when expressly continuing applicable law on constitutional review.*
>
> *I note that No to the EU with its approximately 20 000 members has sufficient connection to the legal claim made. According to its objective, No to the EU is to work «to prevent that Norwegian statutory provisions and rules – through our EEA membership and otherwise – are adjusted to the EU's internal market in violation of the majority's basic views in connection with the referendums in 1972 and 1994». Values such as national self-government and respect for the Constitution are emphasised as key. As I have accounted for, the action from No to the EU is brought as an attempt to prevent the adjustment of Norwegian law to the EU's internal market for energy supply, where the Constitution's provisions on transfer of sovereignty are essential. No to the EU is clearly a natural representative for an action of this kind.*

This illustrates how the court argues. The decisive issue is whether the organisation/association represents interests tangibly at stake in the current action. Sometimes, several organisations could be allowed, and are allowed to bring an action. This was the case in the Norwegian Climate case (HR-2020-2472-P),[4] in which Natur og Ungdom (Nature and Youth Norway) and Greenpeace Nordic brought an action against the government. Naturvernforbundet (The Friends of the Earth Norway) and Besteforeldrenes klimaaksjon (The Grandparents Climate Campaign), which was a new association partly founded to support the action but had established a relatively broad membership, were interveners.

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL cases?

Under DA s. 15-3, an NGO may join the case if it submits an independent claim, which could be identical to the original claim, and the claim is closely connected to the original claim. To do so, it must meet the requirements in DA s. 1-3 and 1-4. Joinder could take place already when the case is filed, in which case this is regulated in DA s. 15-2, or later.

NGOs often act as third-party intervenors under DA s. 15-7 subs. 1 litra b. It states that intervention shall be permitted when

> associations, foundations and public bodies charged with promoting specific interests in cases that fall within the purpose and normal scope of the organisation pursuant to Section 1-4.

The direct reference to s. 1-4 indicates that the interests the NGO invokes must be aligned with the interests underpinning the legal norms invoked and the purpose of the NGO. This

[4] An unofficial English translation is available at https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2020-2472-p?searchResultContext=14047&rowNumber=1&totalHits=42.

type of intervention is relatively common. However, special limitations apply to NGOs as interveners for public interests. Pursuant to DA s. 15-7 subs. 4, "the procedural rights of the intervener shall be limited to safeguarding the interests of the organisation…" The NGO has no right to appeal. Intervention is common in cases regarding collective interests, such as trading standards, labour agreements (both individual and collective agreements), asylum and immigration cases, tax and so forth. Recent examples include (HR-2025-215-U and HR-2025-79-U (trading rules), HR-2024-2368-A labour law, HR-2024-2346-A asylum, HR-2024-2345-A real estate tax).

Finally, NGOs relatively often use the opportunity to act as an *amicus curie* by submitting written submissions to shed light on the public interests at stake. This right is reserved exclusively for NGOs whenever the public interests are "within the purpose and normal scope of the organisation" and public bodies within their area of competence. Although the provision mentions the same limitations as are found in s. 1-4, it makes no direct reference to the provision. The Facebook group case (Rt. 2012 s. 901) mentioned above was on the right to file an amicus brief. However, there are numerous examples of amicus curie submissions. One of the most recent examples is HR-2025-261-A, an asylum case.

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL cases in your legal system?

Thus far, the significance has been limited. The rules are very broad already. The requirements of EU law (as they apply through the EEA Agreement in Norway) could influence the admissibility of PIL cases, but considering the broad access to PIL, this is not very likely to happen.

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL cases in your legal system?

Considering the broad access to courts for NGOs in PIL cases in Norway, the KlimaSeniorinnen case has limited, if any, impact on the Norwegian rules regarding PIL and access to justice for organisations and associations.

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

The Supreme Court made reference to the Aarhus Convention already in the SRØ case (HR-2003-372-A). The claimants argued that they had legal standing under the Convention. The majority of the Supreme Court held that under the Aarhus Convention article 9 no 3, the legal standing for NGOs is a matter left to national law, which the Convention itself does not regulate. However, the majority noted the importance of allowing NGOs to bring an action in environmental law cases to ensure real access to justice and the goals of the Convention (para 42).

The Supreme Court did not refer to the Aarhus Convention in the Climate case, which reflects that there is no need to do so beyond what was already done in the SRØ case.

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

No, it does not.

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL cases?

Any legal provision, whether public or private law, can be invoked to protect a public interest directly or indirectly. All international treaties incorporated into Norwegian law may also be invoked.

17. Which remedies can be invoked in PIL cases?

Theoretically, any remedy could be invoked. In pure PIL cases (i.e., those which concern primarily a public interest, not an individual interest with PIL as an additional interest), parties usually invoke that something is unlawful or disallowed, while monetary compensation is exceptional. The court will hand down a declaratory judgment declaring a decision or an act (or omission) to be lawful or unlawful.

18. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

No, it does not.

D. Conclusion

19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL cases?

Not beyond the extension to abstract issues in the Acer case. Even then, some lawyers wrote a few critical blog entries and op-eds, but there were no serious discussions.

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

The issue of (excessively) high litigation costs is often discussed in Norway. One reason for the high costs is that all cases are under civil procedure rules, including administrative cases. Therefore, normal cost-shifting rules apply, and the parties must pay for the evidence. The Attorney General for Civil Affairs (*Regjeringsadvokaten*) claims costs in the same manner and follows the approximate same cost rates as other lawyers. The main hearing is often very

long, particularly compared to many other countries, and often lasts at least a few days in PIL cases. Hearings are also very long in appellate proceedings. For instance, the costs in the Norwegian climate case were about 50.000 euros per party in the District Court and increased to almost 200.000 euros per party after the appellate and Supreme Courts had heard the case. This is an important deterring factor in PIL cases and a reason why associations tend to support individuals by intervening and thus lowering the risk of costs for individuals.

Bijlage 7 - Questionnaire

Comparative legal research on access to justice in public interest litigation

Sweden

Agnes Hellner[1]

A. Context

Note: the answers to these context questions can be brief. The purpose of this section is to get insight into the context and relevant developments in your legal system. Section B-D will address specific legal issues in more detail.

1. What is the common terminology used for defining 'public interest litigation' in your legal system?

There is no common terminology or even word for 'public interest litigation' in Swedish.

• Is this terminology defined in legislation, case law and/or literature?

No.

2. What are the main legislative provisions and/or leading cases regarding PIL[2]?

16:12 Environmental Code [Miljöbalken 1998:808] establishes that concerned individuals or local or trade unions organizing workers in a work place may bring an action against a permit decision under the Environmental Code.

16:13 Environmental Code [Miljöbalken 1998:808] establishes that not-for-profit environmental associations may bring action against certain judgments and decisions that come within the scope of the Environmental Code. Case law from the Supreme Administrative Court extends this right to areas of law that do not come within the scope of the Environmental Code, but nevertheless have been considered environmental law.

Section 2 [Lag (2006:304) om rättsprövning av vissa regeringsbeslut]. Not-for-profit environmental associations that fulfil the criteria in 16:13 Environmental Code may bring an action against permit decisions taken by Government that come within the scope of article 9.2 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

Section 4, Group Proceedings Act [Lag (2002:599) om grupprättegång]. A private group action may be instituted by a natural person who, or legal entity that, himself, herself or itself has a claim that is subject to the action. The group action allows individuals with legal standing to bundle their claims in a single case.

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[1] Agnes Heller is lecturer in procedural law at Stockholm University, Sweden.

[2] Since the question concerns PIL in general, provisions relevant to public interest cases brought by public authorities/ombudsmen are included in the answer.

Section 5, Group Proceedings Act [Lag (2002:599) om grupprättegång] A not-for-profit association that, in accordance with its statues, protects consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utility that the business operator offers to consumers, may bring an organization action.

[Lag (2011:1211) om Konsumentombudsmannens medverkan i vissa tvister] The consumer ombudsman may represent/and or assist an individual consumer in a consumer dispute deemed to be of public interest.

6:2 Discrimination Act [Diskrimineringslagen (2008:567)] A not-for-profit association or the ombudsman may bring an action on behalf of an individual plaintiff and act as a party in cases concerning discrimination, if the individual consents to it.

4:5 [lag (1974:371) om rättegång i arbetstvister]: a collective action on behalf of members of a trade union may be brought by the trade union in a dispute concerning a union agreement.

Selection of leading cases:

NJA 1981 s. 1 Skattefjällsmålet. Several Sami villages filed a lawsuit to claim ownership of lands confiscated by the state in the nineteenth century. NJA 2020 s. 3 Girjasdomen. The question brought before the Supreme Court was whether members of the Girjas Sámi village in northern Sweden or the Swedish state in its capacity as landowner, had the right to decide upon fishing and game hunting in the traditional area of the Sámi village.

Sporrong Lönnroth v. Sweden ECtHR 7151/75, 7152/75. A construction industry interest organization stood behind the case, which was formally brought by individual property owners, arguing that Swedish expropriation legislation was discretionary, discriminatory and infringed their right of property.

There is a rich case law pertaining to the right of appeal of environmental NGOs in environmental cases (before Land and Environment Courts and administrative courts). NJA 2010 s. 419 (and the preliminary reference in C-263/08 DLV) was crucial in that the Supreme Court (Högsta domstolen) set aside the requirement in 16:13 Environmental Code that an environmental NGO had to have at least 2000 members in order to have court access. It opened up for environmental PIL cases in Sweden in a manner that had not previously been possible. Legal standing for environmental NGOs has subsequently been further expanded as a result of developments in the case law. See e.g. HFD 2014 ref. 8, MÖD 2020:45, MÖD 2021:11, NJA 2020 s.190, NJA 2020 s. 641, NJA 2020 s. 845, NJA 2023:65 and the very recent decision by the Supreme Court of 7 April 2025 in case ÖP 4479-23. In recent years, however, a couple of judgments of the Supreme Administrative Court (Högsta förvaltningsdomstolen) reflect a more restrictive approach. See e.g. HFD 2020 ref. 12 where the Supreme Administrative Court held that a guidance provided by the Swedish forest agency to an individual forest owner, that gave recommendations with regard to logging, was not a decision and therefore not challengeable before the courts.

Decision of the Supreme Court of 19 February 2025 in case Ö 7177-23. The case has been considered the first Swedish climate lawsuit. The Supreme Court declared the action

inadmissible, but clarified that a climate lawsuit can be admissible under certain circumstances.

3. Could you provide an overview of the areas of law where interest groups have access to courts in your legal system?

Environmental law
Discrimination/labour law

4. To what extent do interest groups (have to) mobilize individuals to litigate in individual proceedings for the protection of collective and/or public interests?

It has become more common that individuals, supported by public interest law firms, bring lawsuits against the state. The public interest law firm uses the lawsuit strategically in order to develop the case law, in particular insofar as the interpretation of certain rights of the ECHR is concerned (similar cases have been brought in which the plaintiff invokes the UN Convention on the Rights of the Child). Formally, the dispute is then primarily of individual interest to the plaintiff. But there is a clear private enforcement/strategic purpose, directed to developing the case law with regard to certain human rights. The public interest law firms may also direct attention to situations where the state violates human rights of individuals in their communication, in order to engage public debates. This type of litigation has resulted in important developments in the case law of the Supreme Court (and subsequent amendments of legislation). One may note, however, that to the extent that such cases are civil procedural law cases, rules on costs can in practice constitute a barrier to access to justice (see further below).

5. Could you provide an overview of the current status and developments of the type of PILcases in your legal system including:

• To which policy areas do these cases relate?
Environmental law:

- Permit cases
- Species protection
- Forestry
- Climate change

Discrimination
Labour law
Child law
Indigenous rights

• Whom are the defendants in these cases: government and/or corporations?

Environmental NGOs bring legal actions against administrative decisions or judgments in permit cases, cases concerning hunting, logging etc. These cases may be brought against an administrative authority or a corporation.

The discrimination ombudsman/individuals/associations may bring cases against corporations or public authorities in discrimination cases.

Trade unions may bring cases relating e.g. to the freedom of speech of their members, against corporations or public authorities.

The state may be the defendant in a case concerning damages for human rights violations (civil procedural cases).

One climate lawsuit has been brought against the state (declared inadmissible).

6. Are there any other aspects relevant to understanding (the developments regarding) PIL in your legal system?

There is no tradition of public interest lawsuits brought by interest groups in Sweden. Historically, the Swedish welfare state provided citizens with broad entitlements to services and benefits. In the realist tradition, administrative authorities and courts were expected to realize the objectives of legislation, i.e. the rights it conferred on individuals. Rights were not regarded as shields against the state at this point.

This background explains that, if one considers only lawsuits initiated by interest groups, there is not much PIL case law in Sweden (especially outside the domain of environmental law). It can be related first, to the circumstance that administrative authorities rather than interest groups have been charged with enforcing public law. Second, the role of the courts has been understood to be to resolve disputes in individual cases, and to apply the law in such a manner that the objectives of legislation are realized (and thus, to be loyal to the legislature). Furthermore, constitutional judicial review is rare.

Strategic litigation has become more and more common, however, particularly since Sweden incorporated the ECHR and became a member of the EU in 1994. For instance, and as mentioned above, rights-based (administrative or civil law) actions brought against the state have been brought in a number of sectors. But in these cases the plaintiff is an individual (although he or she may receive legal support from an organization of some kind). In environmental law, environmental NGOs have been active following the implementation of article 9 of the Aarhus Convention (and ensuing EU law) but they have not (yet) brought civil law cases (see below). Rules on costs may deter associations from bringing civil law cases.

B. Admissibility and competent courts

7. To whom and on what legal grounds is the ability to initiate PIL-cases granted?

16:12 Environmental Code [Miljöbalken 1998:808] establishes that concerned individuals or local or trade unions organizing workers in a work place may bring an action against a permit decision under the Environmental Code.

16:13 Environmental Code [Miljöbalken 1998:808] establishes that not-for-profit environmental associations may bring action against certain judgments and decisions that

come within the scope of the Environmental Code. Case law from the Supreme Administrative Court extends this right to areas of law that do not come within the scope of the Environmental Code, but nevertheless have been considered environmental law.

Section 2 [Lag (2006:304) om rättsprövning av vissa regeringsbeslut]. Not-for-profit environmental associations that fulfil the criteria in 16:13 Environmental Code may bring an action against permit decisions taken by Government that come within the scope of article 9.2 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

Section 4, Group Proceedings Act [Lag (2002:599) om grupprättegång]. A private group action may be instituted by a natural person who, or legal entity that, himself, herself or itself has a claim that is subject to the action. The group action allows individuals with legal standing to bundle their claims in a single case.

Section 5, Group Proceedings Act [Lag (2002:599) om grupprättegång]. A not-for-profit association that, in accordance with its statues, protects consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utility that the business operator offers to consumers, may bring an organization action.

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6:2 Discrimination Act [Diskrimineringslagen (2008:567)] A not-for-profit association or the ombudsman may bring an action on behalf of an individual plaintiff and act as a party in cases concerning discrimination, if the individual consents to it.

4:5 [lag (1974:371) om rättegång i arbetstvister]: a collective action on behalf of members of a trade union may be brought by the trade union in a dispute concerning a union agreement.

o Are these interest groups, public authorities and/or individuals?
All three.

8. Against whom can PIL be initiated (government/corporations)?
Both. As illustrated by the case law (see p. 2 above), however, a significant part of the PIL brought by NGOs are environmental law cases where claims are brought against administrative action of various kind.

9. Which courts are competent in PIL-cases (e.g., civil courts, administrative courts or constitutional courts)?

Ordinary courts (*allmän domstol*), administrative courts (*allmän förvaltningsdomstol*), Land and Environment Courts (*Mark- och miljödomstolar*). There is no constitutional court. Any court or administrative authority may review the constitutionality of administrative action/legislation in concrete cases, but constitutional judicial review is rarely practiced.

o If there are several competent courts: what are the rules regarding concurrence and jurisdiction/competence?

Sweden has ordinary courts (*allmänna domstolar*) and administrative courts (*allmänna förvaltningsdomstolar*), as well as special courts and courts with exclusive competence.

The central subject-matter forum rule regulating the relationship between competence rules in the Code of Judicial Procedure and competence rules in other laws is 10:17 Code of Judicial Procedure. If a forum is mentioned in 10:17, it excludes the application of other forum rules in the Code of Judicial Procedure. In short, the ordinary court (*allmän domstol*) is competent unless rules in other laws establish that other courts (administrative courts or special courts or courts with exclusive competence), administrative authorities or arbitrators are competent. The court shall check its authority of its own motion, 34:1 Code of Judicial Procedure.

Depending on the substance matter of a case, several courts can in some instances be competent. To a degree the plaintiff may then decide where to bring the case (unless the defendant objects 10:18 Code of Judicial Procedure). But in other cases, only one court is competent (special courts and court with exclusive competence). If, in the latter case, the action is brought before a different court, this court shall reject it as inadmissible (10:17, 34:1 Code of Judicial Procedure) or refer it to the competent court (10:20, 10:20a Code of Judicial Procedure).

Administrative courts are competent where legislation explicitly provides that they are competent. Legal action against administrative (challengeable) decisions can be brought before administrative courts (Section 40, Administrative Act [Förvaltningslagen 2017:900], HFD 2019 ref. 43).

Land and Environment Courts (Mark- och miljödomstol) have exclusive competence (21:1 Environmental Code; 3 § lag om mark- och miljödomstolar (2010:921)) which means that no other court is competent to decide a case that comes within its jurisdiction. It is not possible to join claims that must be brought before ordinary courts with claims that must be brought before Land and Environment Courts. One may also note that the Land and Environment Court is competent with respect to certain environmental subject matters, whereas administrative courts are competent with respect to other environmental subject matters.

In some instances, it may be difficult to determine whether ordinary or administrative courts are competent. This problem is not specifically related to PIL cases, however. To my knowledge, there is no PIL case where the issue of jurisdiction has been problematic. At least in theory, cases may arise where the ECHR requires that a plaintiff has access to a court but where it is not clear under Swedish procedural law if the district court or administrative is competent (cf. HFD 2017 ref. 2).

10. What are the relevant admissibility rules?

To bring a case before the courts presupposes that a right to initiate an action with respect to the disputed subject-matter exists. It must also be possible to initiate the action (the plaintiff

must have capacity as a party, procedural capacity, and legal standing), and it has to be brought before a competent court. In administrative cases, the challenged administrative action must be "challengeable" (*överklagbart*) and the claimant must have a right to challenge it (*klagorätt*).

- **What are the standing requirements?**

There is no general requirement of *locus standi* in civil procedure. The Code of Judicial Procedure does not include rules on legal standing (*talerätt*). In general, anyone who makes a claim has legal standing. Where the principle of party autonomy applies, the court generally does not examine whether the plaintiff has legal standing. Where third parties may be affected by a judgment, however, the court may examine whether the plaintiff has standing to sue. In general, it is not permitted to bring an action concerning the rights and responsibilities of third parties (there are, however, exceptions, see NJA 1984 s. 215. Associations may also initiate actions concerning the rights and interests of their members, see below.). As a point of departure, only public authorities can bring actions relating exclusively to matters of public interests. An individual who has legal standing may however make claims pertaining also to public interests.

In administrative cases, other procedural rules apply (Administrative Act [Förvaltningslagen 2017:900], Administrative Procedure Act [Förvaltningsprocesslag 1971:291]). The right to appeal an administrative decision or judgment (*klagorätt*) is dependent on whether the person has a sufficient interest in the subject matter of the case (Section 42, Administrative Act), or whether the decision or judgment has legal consequences for the person. In general, a public interest is not considered to constitute a sufficient interest.

There are special rules concerning the right of appeal (*klagorätt*) of environmental NGOs (implementing article 9 of the Aarhus Convention and corresponding EU secondary law/CJEU case law). So far, environmental NGOs have not brought civil claims and it is unclear if/how the special environmental NGO standing regime would be applied in the context of civil procedure.

- **Does your legal system include a representativity requirement, e.g., with respect to the interests, size, funding and finance, composition, evidence of support etc.of the represented constituency members, for establishing standing? If yes, how is it assessed?**

Yes such requirements apply to:

Environmental associations: 16:13 Environmental Code establishes the criteria that an environmental association have to fulfil in order to be able to challenge administrative decisions and judgments. These are:

- The association is a non-profit association
- The purpose of the association is to promote nature conservation or environmental protection interests (according to its statutes)
- The association has operated in Sweden for at least three years (ad hoc associations have not been accepted, see e.g. HFD 2018-12-21, case 4840-18)

- The association either has 100 members or more, or otherwise shows that it has public support (It is the association that has to have public support, not the subject matter of the case, NJA 2012 s. 921. The requirement has been interpreted in a flexible manner. For instance, an association with approximately ten members that had been active for fifty years e.g. by participating in administrative proceedings, has been considered to fulfil this requirement, NJA 2020 s. 845).

Associations that act on behalf their members in discrimination cases (6:2 Discrimination Act):
- The association is a non-profit association
- The association promotes the interests of its members according to its statutes
- The association is suitable for bringing the action, taking into consideration its interests, activity, economic capacity, and other relevant circumstances.

- **Are there other rules relevant to admissibility, for example regarding legal personhood, certification, sufficient interest, victim status, justiciability and/or the political question doctrine?**

Physical and legal persons have capacity as a party (*partsbehörighet*) (Code of Judicial Procedure 11:1 1 p.; 11:2 1 p.).

There are rules on procedural capacity (*processbehörighet*) (11:1 2 p.; 11:2 2p.). When a party does not exercise control over the matter at issue, or is incompetent, personally, to enter into the legal relationship in question, the legal representative of the party shall sue or be sued on his behalf. Insofar as legal persons (corporations, partnerships, cooperatives, associations or similar societies, or foundations or similar institutions that can acquire substantive rights and assume legal liabilities) are concerned, the conduct of proceedings is attended to by their legal representative.

To be admissible, the action must also fulfil criteria applicable to the type of action as such: An action for an order obliging the defendant to perform an act may, according to 13:1 Code of Judicial Procedure, be brought

even when the time for performance does not expire prior to the determination by the court, provided that:

1. the claim is for periodic performances, and either does not depend upon the performance of a past or future consideration, or is in the form of a pension or an annuity owed by reason of consideration already given, and that at least one of them is due;
2. the performance obligation matures immediately upon default of another obligation that constitutes a claim in the case;
3. the claim is for interest pending payment of a mature debt or for other obligations auxiliary to the principal obligation;
4. timely performance is important to the plaintiff, and there is special reason to believe that the defendant will avoid performance; or
5. such action as is otherwise authorized by law.

An action for a declaratory judgment may be brought if the criteria established in 13:2 Code of Judicial Procedure are fulfilled. 13:2 an action for a declaratory judgment of whether or not

a certain legal relationship exists may entertained on the merits if an uncertainty exists as to the legal relationship, and the uncertainty exposes the plaintiff to a detriment. If determination of the matter at issue depends upon the existence or non-existence of a certain disputed legal relationship, a request for a declaration thereon may be entertained. Actions for declaratory judgments may be entertained in other cases where legislation so prescribes.

In the Decision of the Supreme Court of 19 February 2025 in case Ö 7177-23 (Aurora, so-called), the Supreme Court referred to the judgment of the ECtHR in Klimasenorinnen, and held that access to court is more strictly limited in climate cases where the lawsuit is brought by individuals, than in cases where the lawsuit is brought by an association (para. 74-75). For this and other reasons, the Aurora case was declared inadmissible (para. 86).

- **For determining admissibility: does it make a difference which legal norms are invoked?**

Not really. Insofar as appeals brought by environmental associations are concerned it does not make a difference at all. Insofar as standing in civil cases are concerned, the plaintiff has to state that he or she has a claim in relation to the defendant. The plaintiff thus cannot bring an action regarding someone else's claim. The claim is usually related to an invoked legal norm (but this is not formally required and jura novit curia applies - the court is not bound by the norms invoked by the parties).

- **For determining admissibility: does it make a difference which remedy is requested?**

In general, it does not make a difference. See however above, in so far as the court is asked to order that the legislature and/or administrative authorities should take a particular action, or declare that the legislature and/or administrative authorities has an obligation to take a particular action.

o Are there special rules on the admissibility of interest groups in general and/or on the admissibility of a specific type of organization (such as environmental interest groups, consumer organizations or trade unions)?

Yes, see above, under 7.

o If different actors can initiate PIL: are there rules on concurrence? For example, can interest groups and citizens litigate together?

In discrimination cases, an association or the ombudsman may not initiate an action if a trade union has already done so with respect to the same subject matter (6:2 3 p. Discrimination Act).

If both an NGO and individuals fulfil admissibility requirements (for instance in an environmental case) they can litigate in the same case.

- **If there are several competent courts: are there any differences in the rules on admissibility?**

Procedural rules on admissibility are different in administrative courts, general courts, and special courts.

11. To what extent can NGOs intervene, join or act as an amicus curiae in PIL-cases?
• What are the rules on admissibility in that respect?

14:9 Code of Judicial Procedure establishes that anyone (who has capacity as a party) not a party to pending proceedings who states that the matter at issue bears on his legal right or obligation, and who shows probable cause for his statement, may appear as an intervenor in the litigation on the side of either the plaintiff or the defendant. To my knowledge, it has not been relied on in PIL-cases, however.

There are no rules on amicus curiae in Swedish law. Amicus submissions have nevertheless been made (and referred to by the court) in cases concerning migration (MIG 2021:14; MIG 218:7). Similarly, an amicus submission was made in a recent Swedish climate lawsuit (amicus curiae by the Swedish institute for human rights (public authority), Supreme Court case Ö 7177-23).

In public law matters, administrative authorities/experts may either of their own motion or upon request give their views. The court is sometimes obligated to request that administrative authorities provide information or give their views and recommendations.

12. What is the significance of primary and secondary EU law for the access to justice of interest groups in PIL-cases in your legal system?

It is highly relevant with respect to environmental NGO standing in environmental administrative cases, especially those that come within the jurisdiction of the Land and environment courts. The CJEU case law on article 9 of the Aarhus Convention (starting with C-263/08) has been extensively cited by the courts, which subsequently has expanded access to court for environmental associations (see the references above, p. 2).

13. What is the significance of the European Convention of Human Rights for the access to justice of interest groups in PIL-cases in your legal system?

The ECHR has had a profound impact on access to justice in general in Swedish law, but less so in relation specifically to PIL cases and cases formally brought by interest groups. The recent climate case (the Aurora case, decision of the Swedish Supreme Court 19 February 2025 in case Ö 7177-23) however opened up for a development in a different direction. In this case, the Supreme court held that the bar for bringing a climate action as an individual is higher than that of an association (para. 75).

• What can be said about the implications for your legal system of the reasoning of the European Court of Human Rights on standing and victim status under the ECHR in European Court of Human Rights, 9 April 2024, Verein KlimaSeniorinnen

Schweiz and Others v. Switzerland, (GC), app. no. 53600/20 (KlimaSeniorinnen)?

See above, p. 10. In the Decision of the Supreme Court of 19 February 2025 in case Ö 7177-23, the Supreme Court furthermore addressed the relationship between the courts and the legislature in relation to climate change, in light of the Klimasenorinnen case. The Supreme Court clarified that courts are competent in relation to certain climate lawsuits, but that constitutional law sets boundaries with respect to the claims that are admissible. First, the Supreme Court held, a court cannot order the state to adopt or amend legislation, or order the state or administrative authorities to commit to objectives (para. 64-65). Second, the Supreme Court held, article 6 ECHR does not require a court to admit a claim whereby the court is asked to declare that the state should take certain measures or set particular objectives with respect to climate change mitigation (para. 78). In light of Klimasenorinnen, the Supreme Court furthermore held that, in a climate case, an action for a declaratory judgment concerning an alleged violation of article 8 ECHR can be admissible, provided that the plaintiff asserts reasonable grounds for the claim (para. 70, 74).

14. What is the significance of the Aarhus Convention regarding access to justice of interest groups in PIL?

The special rules on environmental NGO standing set out above were introduced in the Swedish legal system as part of the implementation of article 9 of the Aarhus Convention and related EU law. The case law of the CJEU has importantly affected the application of these rules. Reference has been made to this case law both by the Supreme Administrative Court, Land and Environment Courts, and the Supreme Court (see above, under 2.).

15. Does it matter to the answers to the above questions whether PIL is brought against the government or corporations? If so, in what way?

Rules on costs are significantly different in Swedish civil procedure than in administrative procedure (including administrative cases that come within the scope of the Environmental Code). Whereas in civil procedure, the losing party shall reimburse the opposing party for litigation costs unless otherwise provided (18:1 Code of Judicial Procedure), each party covers its own costs in administrative procedure. This explains why environmental NGOs have been reluctant to bringing civil law cases and/or intervening in those cases, and it might have indirect consequences in terms of against whom PIL cases are brought.

C. Substantive legal provisions and remedies

16. Which legal provisions can be invoked in PIL-cases?

• Are there special rules on the legal provisions that can/can't be invoked in PIl-cases?

In general, there are no such limitations.

• Under which conditions can constitutional rights and/or international treaties be invoked?

A plaintiff who has legal standing or a right to appeal (*klagorätt*) may invoke any legal provision, including EU and international law. Sweden has incorporated the ECHR.

• To what extent can private law provisions be invoked?

There is no general limit in that regard.

17. Which remedies can be invoked in PIL-cases?
• Are there special rules on remedies in PIL-cases?
No.

18. Does it matter to the answers to the above questions whether PIL is brought against thegovernment or corporations? If so, in what way?

No.

D. Conclusion
19. Is there any debate (in politics, society and academia) on restricting or widening the possibilities of NGOs to start PIL-cases?

There has been a discussion following the Klimasenorinnen case as well as the abovementioned Aurora case, where, in essence, it has been argued that climate change is a matter for the political branch and not for the courts. Moreover, the implementation of article 9 of the Aarhus Convention in Sweden resulted in lengthy discussions, in particular relating to NGO standing/access to justice. There is currently a discussion of whether an administrative fee for appeals before the Land and Environment Court should be introduced, in order to prevent that legal action is taken without proper consideration (See SOU 2024:91 p. 331).

20. Are there any other relevant aspects that have not been addressed in the questions above? If so, which ones?

No.

Bijlage 8

Casus: Toxic smoke 1

Company A emits a vast amount of toxic smoke. Foundation B has, according to its rules of association, as main purpose 'to protect people and the environment against harmful emissions'. B starts proceedings in the appropriate court for a stopping order against A, in order to protect the living environment and people exposed to the emissions.

a. The legal basis for pursuing the stopping order is a general standard of private law, such as nuisance or negligence

b. The legal basis for pursuing the stopping order is the fact that company A is not in compliance with the applicable (e.g., environmental) statutory requirements

When will B be heard by the court (leaving aside the merits) ?

Casus: Toxic smoke 2

Company A emits a vast amount of toxic smoke. Inhabitants of a nearby village suffer considerable health impairment. Foundation B has, according to its rules of association, as main purpose 'to protect people and the environment against harmful emissions'. B starts proceedings in the appropriate court for an order against the appropriate authorities to tighten the emission rules, in order to protect the living environment and people exposed to the emissions.

a. The legal basis for seeking the order is the fact that the existing emission rules are not in compliance with domestic or international human rights requirements (eg, a treaty)

b. The legal basis for seeking the order is the fact that the existing emission rules do not meet the level of protection that a reasonable authority would offer to its citizens

When will B be heard by the court (leaving aside the merits) ?