ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Could the European Court of Justice be a Decisive Player in Climate Justice?

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ABSTRACT

The article aims to assess to which extent the European Court of Justice (ECJ) is able to play an effective role in climate change justice. While some national courts are trying to respond to one of the greatest challenges of our time, which is requiring them to reinvent their role, the ECJ is maintaining a very formalistic approach that raises questions about its capacity to respond to these new challenges. The key question is whether, although the ECJ faces both procedural and substantive limitations, it has legal instruments available to overcome them as well as the legitimacy. To that end, the article analyses the limits of individual access in environmental disputes in front of ECJ and tests the justifications advanced. On the one hand, the European judge would appear to be best placed to take action on such an issue, in accordance with functionalist theories of integration: a transnational problem (climate change) must be resolved at the transnational level. Notably, in the past, when the will of Member States has been defective, the ECJ could be relied upon to advance action on a Europe-wide scale. Therefore, when it comes to climate change, its authority could be undermined if it maintains a formalistic approach to such a major societal issue. On the other hand, a less formalistic approach would require the European judge to accept, more broadly, private, and even transgenerational, claimants into its courtroom, so that it can become a new space for activist dialogue. Should, and can it be the guardian of agonistic democracy without doing judicial activism? As a result, the article suggests that by applying a climate justice lens, European judges could push the boundaries of existing law to address climate change more comprehensively, by exploring the potential of the European values, enshrined in Article 2 of TEU which could give substance to a subjective right of a clean, healthy, and sustainable environment.

Keywords: climate justice, EU Litigation, european values, right to a 'can, healthy, and sustainable environment'

ATHENA
Volume 3.2/2023, pp. 157-186
Conference Papers
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17929

1. Introduction

The paradigm of sustainable development is over. Supposed to "transcend the tensions between the economy and ecology, the local and the global" (Fievet, 2001)[1] this economic mechanism aimed primarily at reconciling the interests of countries along the North/South axis has demonstrated its limitations in that it prioritises economic development over environmental sustainability.

Nearly forty years after the first "World Commission on Environment and Development" supported by the 1987 *Brundtland Report*,[2] resolutions, declarations, reports, conferences, binding and non-binding standards stemming from international, European, and domestic law have proliferated in an attempt to address the greatest challenge of the century. Despite some progress, this normative proliferation has not guaranteed success. We must come to terms with the observation of a steadily worsening state of the global environment, accompanied by a decline in citizens' trust in the ability of policies to address climate and environmental issues. This distrust towards policies and their relative inadequacy in the face of a now-vital emergency, however, has led to a "judicial revolution" (Huglo, 2018) on a global scale.

Concisely, the new approach could be described as such: if ecological protection cannot be adequately ensured from the top, and within political institutions, the response to the climate emergency has to be triggered from the bottom, through citizen actions and before the courts.

We are witnessing, indeed, an unprecedented surge in climate litigation,[3] brought forth at times by namely: the youth, highlighting the cost of climate

[1] Translated by the author.
[2] *Report* of the World Commission on Environment and Development (1987). *Our common future* [*Brundtland report*], (UN, New York).
[3] For an exhaustive overview of these litigations, see: Global Climate litigation Report of 2023, it highlights also: "As of December 2022, there have been 2,180 climate-related cases filed in 65 jurisdictions, including international and regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, such as Special Procedures at the United Nations and arbitration tribunals. This represents a steady increase from 884 cases in 2017 and 1,550 cases in 2020",

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17929

change borne by future generations; by the elderly (Swiss Senior Association), citing the vulnerability of their group in relation to air pollution; by a mayor grappling with rising waters in their municipality;[4] mostly by individuals united in environmental defence associations; and sometimes even by trees.[5] Three main petitions have been lodged also with the European Court of Human Rights.[6]

'Climate justice' encompasses actually two meanings untimely related. First of all, climate justice calls for a holistic approach that acknowledges and addresses the social, economic, and political dimensions of climate change, striving for a more equitable and sustainable future for all. In a narrower sense, it refers also to the way civil society uses law and mobilises it before judicial institutions to the cause of climate change (Torre-Schaub, 2016).

This second facet of climate justice is particularly interesting as it could unveil a new form of direct democratic engagement, wherein certain parts of civil society attempt, through legal arguments, to shift the debate to the courts in order to achieve political changes or outcomes.

At the European Union level, such an issue implies assessing if the European Court of Justice could be a decisive player in climate justice for the purpose of individual claims stemming from civil society. In that respect, it appears necessary to establish if individual or collective societal claims can be raised with success before the European Court of Justice (ECJ), when the claimants fall outside the scope of the Aarhus Convention,[7] and if so, are EU judges able to shape legal responses to their expectations?

[4] French Conseil d'État, C.E. (2020), *Commune de Grande-Synthe et Damien Carême*, no 427301; C.E., (2021), *Commune de Grande-Synthe*, no 428177 and Trib. Adm. de Paris (2021), *Association Oxfam France et a*., req. n 1904967, 1904968, 1904974/4-1.

[5] Trib. Bruxelles (2021), *Klimaatzaak c/ Belgique*, http://climatecasechart.com/climate-change-litigation/.

[6] *Carême v. France*, req.no 7189/21, 2022 ; *Verein KlimaSeniorinnen Schweiz v. Switzerland*, req. no 53600/20, 2021 ; *Duarte Agostinho v. Portugal* and 32 other States, req. no 39371/20, 2020(Duarte Agostinho).

[7] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in
Environmental Matters, (Aarhus, 25 June 1998, in force 30 October 2001) *UNTS* n° 2161, 447.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17929

It corresponds, eventually, to the first three questions a judge should resolve when a case comes before its court, namely: the standing and interest of the applicant to bring proceedings, the justiciability and enforceability of the provision of reference, and it involves, at last, the question for the judge of its own jurisdiction.

An overview of the cases law of the last two years, brought to the ECJ by individuals challenging the EU and Member States directly on climate change, highlights the actual limits of the EU judges' reasoning in relation to three questions of admissibility.

However, the approach of the ECJ, when placed in a broader context, reveals a certain potential. In this regard, the values of solidarity and dignity that are turning into hard law hold promise.

2. The Current Legal Context: The Limits of Individual Access in Environmental Disputes in Front of ECJ

The limitations of access to justice for individual petitions can be grouped into two aspects. Firstly, there are rational limitations, which are primarily procedural and textual constraints. Secondly, there are axiological limitations tied to the Court's fear of falling into judicial activism.

2.1 Rational Limitations

To date, The ECJ considers environmental protection as a mere “general objective” possibly imposing obligations on Member States and EU institutions but not conferring any rights on individuals. Consequently, in the cases where the Court had the opportunity to deal directly with individual climate claims directed against a measure of general application, the Court dismissed their actions. Two cases are particularly relevant to summarise the approach defended by the Court of Justice.

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https://doi.org/10.6092/issn.2724-6299/17929

Thereby, in the *Carvalho* case,[8] the action was first brought to the General Court by thirty-six families from different Member States together with a Swedish association representing young indigenous people. They claimed that the measures to reduce greenhouse gas emissions that had been laid down by the European legislative package were not far-reaching enough. They demanded the annulment of the legislation and the adoption of stricter measures to reduce greenhouse gas emissions by 2030.

The General Court, confirmed by the ECJ,[9] declared the action inadmissible because the claimants did not satisfy the *locus standi criteria* under its strict '*Plaumann* test'. According to this criterion, the admissibility of individual applicants, who seek the annulment of a European act, requires them to be individually affected to the same extent as if they were the addressees of the acts at issue.[10] This condition is, with rare exceptions, hardly ever met when a measure of general application is at stake, especially when it concerns a legislative act, such as in the present case.

The applicants had tried to bypass this issue by arguing that they were individually concerned due to the violation of their fundamental rights. They pointed out that an insufficient reduction in greenhouse gas emissions infringed their fundamental rights as enshrined in the Charter of the European Union: the right to life (Art. 2), the right to the integrity of the person (Article 3), the rights of the child (Art. 24), the right to property (Art. 17), the right to equal treatment (Art. 21) and the rights of the child (Art. 24).

But, under a formalist approach, the Court emphasised that

> the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the

[8] GC (2019), *Carvalho v. Parliament and Council*, case T-330/18, EU:T:2019:324.
[9] ECJ (2021), *Carvalho v. Parliament and Council*, case C-565/19 P, EU:C:2021:252.
[10] ECJ (1963), *Plaumann & Co v Commission of the European Economic Community*, case 25/62, EU:C:1963:17; such approach has been maintain even after Lisbon Treaty: See ECJ (2013) *Inuit Tapiriit Kanatami v European Parliament,* case C-583/11 P, EU:C:2013:625; [2014] 1 *C.M.L.R*. 54.

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https://doi.org/10.6092/issn.2724-6299/17929

> requirements of the fourth paragraph of Article 263 TFEU meaningless" (para. 48).

In other words, in the presence of a general EU act, like a regulation, the potential violation of their fundamental rights by a general measure could not be taken into account unless the claimants succeed in demonstrating, first of all, that they are individually affected by the act. These two issues (admissibility and substance), according to the Court of Justice, must remain distinct.

The Court concluded by noting that:

> Since, (…), the appellants merely invoked, before the General Court, an infringement of their fundamental rights, inferring individual concern from that infringement, on the ground that the effects of climate change and, accordingly, the infringement of fundamental rights are unique to and different for each individual, it cannot be held that the acts at issue affect the appellants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguish them individually just as in the case of the person addressed"(para.49).

In this respect, it is important to bear in mind, with regard to an action for annulment, the unvarying position of the ECJ not to open its court hearing to natural persons when a measure of general application that does not entail implementing measures is at issue.[11]

The Court justifies this finding on the ground of Article 263, para. 4 TFEU stating that:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act

[11] For examples: ECJ (2021), *Sabo and Others* v *Parliament and Council*, case C-297/20 P, EU:C:2021:24, par. 29; ECJ (2020), *Sarantos and Others* v *Parliament and Council*, case C-84/20 P, EU:C:2020:871, par. 34.

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https://doi.org/10.6092/issn.2724-6299/17929

> addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

This procedural reason could be seen and is presented by the Court as an unsurpassable limit fixed by the treaty, but we all know that, in other contexts, the ECJ did not hesitate, through its interpretative power, to go beyond the words of the treaty.[12] Nevertheless, despite the claims formulated by individuals and even its Advocate General in favour of opening wider the action of annulment to private claimants,[13] The ECJ constantly maintains a restrictive interpretation of Article 263 TFEU,[14] even after the relative opening window introduced by the Lisbon Treaty in paragraph 4 of this provision (Bergstrom, 2014; Bouveresse, 2015).[15]

The Court's apprehension about having its courtroom congested is certainly not unrelated to its stringent positioning. Eventually, although disappointed, *Carvalho*'s ruling was not surprising, contrary to the second case.

In *Ministre de la Transition écologique and Premier ministre* case law,[16] the context was different as the claim was made in the form of an action for damages in front of the French Court. France had been condemned several times due to exceeding the limits for ambient air quality set by European legislation. In that context, the applicant considers that the deterioration of

[12] See, for topic examples, when the Court enshrined the capacity of the European Parliament to be an applicant in actions before the Court of Justice (*legitimation active*) and its capacity to be a defendant for the action of annulment (*legitimation passive*): ECJ (1986), *Parti écologiste 'Les Verts' v. Parliament*, case 294/83, EU:C:1986:166.

[13] Opinion of Advocate general Jacobs (2003), *Commission v Jégo-Quéré*, case C-263/02 P, EU:C:2003:410, "a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests' (point 60).

[14] ECJ (2002), *Unión de Pequeños Agricultores* v *Council,* case C-50/00 P, EU:C:2002:462 ; ECJ (2004), *Commission v Jégo-Quéré*, case C-263/02 P, EU:C:2004:210.

[15] ECJ (2013), *Inuit Tapiriit Kanatami and Others v Parliament and Council*, case C-583/11 P, EU:C:2013:625; ECJ (2021), *Peter Sabo e.a. v. Parliament and Council,* case C-297/20 P, EU:C:2021:24.

[16] ECJ (2022), *Ministre de la Transition écologique and Premier ministre*, case C-61/21, EU:C:2022:1015.

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https://doi.org/10.6092/issn.2724-6299/17929

the ambient air quality was the result of a breach by the French authorities of their obligations under EU law and was seeking therefore compensation arguing his health problems were directly linked to air pollution exceedances in his residential area. However, the French judge hesitated to hold France liable for loss and damage caused to the applicant as a result of breaches of EU law for which the State can be held responsible and opted to refer a preliminary question to the Court in order to determine whether the conditions for holding such liability were met.

It should be noted that, unlike the action for annulment, the action for liability is broadly accessible to natural persons. According to settled case-law, for establishing such liability, the Court held that individuals who have been harmed have a right to compensation where three conditions are met: the disposition of EU law infringed must be intended to confer rights on them; the infringement of that rule must be sufficiently serious; and there must be a direct causal link between that infringement and the loss or damage sustained by those individuals. The most challenging demonstration to provide within the framework of this widely accessible legal ground remains that of proving the existence of a fault, as a sufficiently serious breach of Union is required.

However, in the present circumstances, legitimate hopes could be held for the Court's recognition of the possibility of invoking France's liability due to its shortcomings in implementing action plans in a manner that ensures compliance with limit values and prevents persistent and systematic exceedances.[17]

Furthermore, in a judgment concerning a similar breach but attributable to Germany, while the Court had not imposed coercive detention being ordered to ensure compliance with the limit values by the relevant Länder, it nevertheless recalled

[17] See : ECJ (2019), *Commission v. France* (*Exceedance of limit values for nitrogen dioxide)*, case C-636/18, EU:C:2019:900 and ECJ, (2022), *Commission v. France*, case C-286/21, EU:C:2022:319, in which the Court refers to “persistent and systematic exceedances” (para. 45 and 70), as well as to the demonstration led by Advocate General Kokott, resulting in the conclusion of a sufficiently established violation in the submissions made in this case: Opinion (2022), case C-61/21, EU:C:2022:359, para. 106 to 125.

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https://doi.org/10.6092/issn.2724-6299/17929

> that the full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based.[18]

This suggested at least an 'implicit' recognition, as noted by Advocate General Kokott, of the admissibility of the claim for compensation. However, the Court of Justice ruled that the Air Quality Directive does not confer individuals harmed by air pollution rights to demand compensation when Member States breach EU air quality rules.

This is a condition that tends to be overlooked, as it is extremely rare for the Court to be picky on this point. This requirement has led to the rejection of liability in the only instances where no connection, however remote, to individual rights could be established.[19] Even the case law had, until then, demonstrated a favourable and even expansive interpretation towards the recognition of this status.[20]

Laconically, the Court nonetheless judges that, although this Directive establishes clear and precise obligations with regard to the result that Member States must achieve, "those obligations pursue (…) a general objective of protecting human health and the environment as a whole" (para. 55).

It concluded to dismiss the liability of the State on the basis of EU law:

> Thus, besides the fact that the provisions concerned of Directive 2008/50 and the directives which preceded it do not contain any

[18] ECJ (2019), *Deutsche Umwelthilfe eV v Freistaat Bayern*, Case C-752/18, EU:C:2019:1114, para. 54.
[19] ECJ (2004), *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*, case C-222/02, EU:C:2004:606.
[20] GC (2020), *Industrial Química del Nalón*, SA v European Commission, case T-635/18, EU:T:2020:624 where the General Court considers that it is "not necessarily exclude the possibility that the European Union may incur non-contractual liability as a result of the infringement of a rule of law which is not intended *stricto sensu* to confer rights on individuals, but rather is likely to lead to the imposition or strengthening of obligations on individuals pursuant to other rules of EU law", para. 70.

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https://doi.org/10.6092/issn.2724-6299/17929

> express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals. (para. 56)

According to the Court, compliance with air pollutant limit values does not lead to any explicit attribution of rights on individuals whose violation would make a Member State responsible for damages caused to them. Thus, the main and even sole argument for dismissing the compensation claim lies in the (overly) general nature of the health and environmental protection objectives.

The only determining factor seems to be the general interest objective of protecting health and the environment. In other words, the right to environmental health is not, in the Court's view, a subjective right. However, this is nothing but an assumption, given how carefully the Court avoids providing justification. If we delve more deeply into the case law, a rule grants rights to individuals in four main instances: a rule of law is intended to confer rights on individuals where the infringement concerns a provision that gives rise to rights for individuals which the national courts must protect, so that it has direct effect,[21] which creates an advantage that could be defined as a vested right,[22] which is intended to protect the interests of individuals[23] or which entails the grant of rights to individuals and the content of those rights are sufficiently identifiable.[24] While the first two hypotheses could be dismissed, the latter two, on the other hand, deserved to be, at the very least, elaborated upon. Art. 1(1) of Directive 2008/50 at stake. This article states

[21] ECJ. (1996), *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport*, cases C-46/93 and C-48/93, EU:C:1996:79, para. 54.
[22] GC. (1998), *Edouard Dubois et Fils SA v Council and Commission*, case T-113/96, EU:T:1998:11, para. 63-65.
[23] ECJ. (1978), *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission*, cases 83 and 94/76, 4, 15 and 40/77, EU:C:1978:113 para. 5.
[24] GC. (2014), *Evropaïki Dynamiki* v *Commission*, case T-297/12, EU:T:2014:888, para. 76.

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https://doi.org/10.6092/issn.2724-6299/17929

that the Directive lays down measures aimed at “defining and establishing objectives for ambient air quality designed *to avoid, prevent or reduce harmful effects on human health* and the environment as a whole”.[25] It appears to us that the objective 'to prevent or reduce harmful effects on human health and the environment,' within which lies the obligation, particularly not to exceed pollutant limit values, possibly read in conjunction with Art. 3 (right to the integrity of the person), Art. 35 (health care), and Art. 37 (environmental protection) of the Charter of Fundamental Rights of the European Union (the charter), lead to the recognition of a subjective right for the benefit of victims of air pollution. In other words, it bestows an individual right to environmental health, allowing for redress when these obligations (establishing a plan/observing limit values) are distinctly violated.

This approach can be supported by the opinion of Advocate General Kokott presented in this case. Contrary to the EU judges, she had stressed that “the interest in health is highly personal and thus individual in nature and forms”.[26] Recalling Article 3 of the Charter, she noted that the failure of a Member State to ensure compliance with limit values “infringes a legal interest which is much more important than the abovementioned asset-related interests. This is because everyone has the right to respect for his or her physical and mental integrity, which is laid down in Article 3 of the Charter of Fundamental Rights and is ranked in first position in relation to the other legal interests”.[27] Emphasising,

> Exceedance of the limit values burdens, above all, certain groups who live or work in particularly polluted areas (…) it is incorrect to assume, (…) that the rules on ambient air quality serve exclusively to protect the general public. Although ambient air quality must be

[25] Our enphasis.
[26] Opinion (2022), case C-61/21, para. 77.
[27] *Ibidem*, para. 91.

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https://doi.org/10.6092/issn.2724-6299/17929

> protected in general, the specific problems arise in specific places and affect specific, identifiable groups of people (…).[28]

Thus, the Advocate General arrived at the conclusion that the relevant provisions recognised rights for individuals directly affected by an exceeding of limit values and urged the national judge to acknowledge, on the basis of EU law, a right to compensation for victims of environmental harm linked to degraded air quality.

Eventually, the reasoning developed by Advocate General Kokott demonstrates that procedural and textual limitations could easily be surpassed by a more constructive and progressive interpretation of the law.

Therefore, if the ECJ hesitates to follow this path, its reluctance is due to other reasons that appear in the background of these judgments. The fear of judicial activism might be one of them, but it does not withstand pragmatism and the traditionally assumed role of the ECJ as a driving force of integration.

2.2 Axiological Limitations

In a legal context, the axiological limitation faced by the Court of Justice could manifest as a concern to maintain a balance between judicial and legislative powers, to preserve the separation of powers, or to prevent an excessive intervention by the Court in sensitive political or social matters.
Critics of judicial activism have marked the Court's jurisprudential developments since its inception and the debate on this subject is far from exhausted (Scalia, 1983; Weiler, 991; Mangiameli, 1992; Alter, 2001; Adams and de Witte, 2005; Dougan, 2012; Micklitz and Taupitz, 2018). Proponents may allege that judges should strictly adhere to established legal doctrines and defer to legislative bodies when it comes to addressing complex policy issues like climate change. In that respect, ECJ could not hold governments and corporations accountable for their actions or inaction.

In that sense, in *Carvalho's* case the Court highlights that

[28] *Ibidem*, para. 100 and 101.

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> the Courts of the European Union may not, without going beyond their jurisdiction, interpret the conditions under which an individual may institute proceedings against an act of the Union in a way which has the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty, even in the light of the principle of effective judicial protection. (para.69)

The same idea was developed in *Unión de Pequeños Agricultores* where it notes

> While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.[29]

However, would it really go beyond its jurisdiction by granting full access to individuals in environmental litigations? It appears to us that judicial activism would be an unfair accusation against the Court. While some plaintiffs may identify as climate activists, they do not necessarily make the Court one of their own (Eckes, 2021; Viera, 2019; Huglo, 2018). Actually, the background and the stakes make the Court's reasoning difficult to justify. It has to be recalled at first that a Court should not decline to hear a case just because its political dimensions could be more effectively addressed by another branch of government. Judges have a responsibility to interpret and apply the law in a way that reflects the evolving understanding of the problem and the need for effective solutions.

Climate change intersects with various human rights, such as the right to life, health, and a healthy environment. European judges have a crucial role in protecting fundamental rights and upholding the rule of law. In the same

[29] ECJ (2002), *Unión de Pequeños Agricultores* v *Council,* case C-50/00 P, para. 45.

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https://doi.org/10.6092/issn.2724-6299/17929

way, Climate change often exposes gaps and shortcomings in governance structures. European judges, through their interpretation and application of EU law, can fill these governance gaps by providing guidance and remedies when national governments fail to take sufficient action or violate their obligations.

This problem was directly pointed out in the *Urgenda* case law[30] when the State asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of greenhouse gas emissions. On this issue, the Dutch Court answered that if

> decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. (…) It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.[31]

It pursues the reasoning by noting that

> the Netherlands is bound by the ECHR [European Convention on Human Rights] and the Dutch courts are obliged under (…) Dutch Constitution to apply its provisions in accordance with the interpretation of the ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law.[32]

Similarly, the EU institutions, like the Member States falling within the scope of Union law, are bound to respect fundamental rights as enshrined in the Charter and the ECHR.[33] The Court therefore has jurisdiction to ensure that they remain within these limits. Acting such, the European Court of

[30] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands*, NL:HR:2019:2008.
[31] *Ibidem* para. 8.3.2.
[32] *Ibidem* para. 8.3.3.
[33] Although the Union has not acceded to the ECHR, the rights enshrined in the latter have the status of general principles of law and are binding as such on the EU institutions.

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Justice would gain legitimacy by assuming the "role of guardian of agonistic democracy" (Grandjean, 2022). This concept highlighted in the 1930s (Honig, 1993) gained particular significance in environmental disputes (Connolly, 2002).

The latter advocates for multiple centres of power and decision-making, enabling diverse voices and perspectives to participate in the democratic process. This includes promoting the participation of marginalised and disadvantaged groups and fostering deliberative spaces where different viewpoints might be expressed. In this context, the judge as a guardian of agonistic democracy might contribute to preserving democratic values.

Moreover, the European Court is undoubtedly the best-placed institution to address such transnational issues as climate change or environmental protection, which requests to articulate the local and global dimensions that underpin these disputes. In that sense, it may be argued that addressing climate change's magnitude and urgency plea in favour of judicial creativity to fill legal gaps and promote climate justice.

3. Exploring the Potential of European Values

The idea is that by applying a climate justice lens, European judges could push the boundaries of existing law to address climate change more comprehensively. They can interpret legal principles and constitutional provisions in innovative ways to respond effectively to climate-related challenges without overreaching their powers. From this perspective, the ECJ could draw inspiration from the solutions developed by national judges, who are responsible for applying Union law. Not only do national solutions provide insights to the European judge, but their adoption, even partially, might reinforce the authority of the Court's rulings (taking into account the dynamic interaction of their system and law: Saiger, 2019; Roberts, 2011).

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3.1 National Contexts

Since 2015, European national judges have taken up climate litigations. In particular, Dutch courts (*Urgenda*[34]; in legal literature: Besselink, 2022; Maxwell, 2020; Antonopoulos, 2020; De Schutter, 2020) and German courts (*Neubauer*[35]; in legal literature: Hong, 2023; Torre-Schaub and Missonne, 2023; Humphreys, 2022; Romainville, 2022) have not hesitated to adopt innovative solutions and provide citizens with a forum for dialogue and protection of their rights. Moreover, they have initiated the transformation of environmental protection, initially perceived as a general objective, into a genuine individual right by the conjunction of the principle of duty to care. In both cases, associations of environmental protection were holding the States directly responsible for climate change.

We will focus on these two cases, particularly salient, as they took place in front of European national courts, linked as such to ECJ and because the success of these actions was a decisive step in climate litigations in Europe.

The *Urgenda* case law revolves around several key points. The Dutch Court ruled that the government has a legal duty to care in order to protect its citizens from harm caused by climate change, based on its obligations under Art. 2 (Right of life) and Art. 8 (Right to respect for private and family life) of the ECHR. It found that the Dutch government's efforts to mitigate greenhouse gas emissions were insufficient to meet its duty to prevent harm, as they were not in line with the necessary emission reduction targets. In this respect, it held that a more substantial reduction of at least 25 per cent was required to fulfil the government's duty to protect citizens' rights. One of the most interesting points of the reasoning is that the case established a precedent for positive obligations, wherein governments can be legally compelled to take action to prevent harm, rather than merely refraining from causing harm. This includes taking adequate measures to mitigate climate change.

[34] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands*, NL:HR:2019:2008.
[35] German Federal Constitutional Court (2021), *Neubauer v. Germany*, 1 BvR 2656/18, 78/20, 96/20, 288/20.

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Such findings stem from the combination established between the duty of care and human rights, emphasizing that failure to address climate change adequately could infringe upon citizens' right to life and a safe environment.

According to the Dutch Court, indeed, Art. 2 & 8 ECHR oblige the State to take measures. Relying on the ECtHR (European Court of Human Rights) case-law, the national judge holds that Art. 2 "encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (…) [and] was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster".[36] In the same manner, it confirms that "Art. 8 ECHR encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment".[37] It considers therefore, that "In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region".[38] Finally, the Dutch Court refers to Art.13 ECHR according to which national states are required to provide remedies that can effectively prevent more serious violations[39] to reassert its jurisdiction (in an over-abundant manner) or more likely to justify the substance of its ruling.

However, it is worthwhile to mention that the parties do not dispute that *Urgenda* has standing to pursue its claim because Dutch law provides for class actions brought by interest groups. Nevertheless, the *Urgenda* case remains a landmark decision, establishing the legal precedent that governments have a responsibility to take robust action to mitigate climate change and protect their citizens' rights which subtly reveals the recognition of an individual right to a safe environment.

[36] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands,* para. 5.2.2.
[37] *Ibidem* para. 5.2.3.
[38] *Ibidem* para. 5.3.1.
[39] *Ibidem* para. 5.5.

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In *Neubauer*'s judgment,[40] a group of German youth filed a legal challenge to Germany's Federal Climate Protection Act in the Federal Constitutional Court, stressing that the legislation's target of reducing greenhouse gas emissions by 55 per cent until 2030 from 1990 levels was insufficient. The complainants argued to defend their standing of interest that the German legislation violated their human rights as protected by Germany's constitution. Concerning the standing of interest, the Court held that

> Insofar as the complainants are natural persons, their constitutional complaints are admissible. This applies insofar as they claim that duties of protection arising from fundamental rights have been violated. The complainants can in some cases claim a violation of their fundamental right to life and physical integrity (…) and some of them can claim a violation of their fundamental right to property (…) because it is possible that the state, in adopting the Federal Climate Protection Act, might have taken only insufficient measures to reduce greenhouse gas emissions and to limit global warming.[41]

If the German Court notes that the challenged act "does not presently or directly affect the complainants since it merely contains an authorisation to enact ordinances"[42] and that Article 20a of the Basic Law which obliges the State to take climate action "cannot be directly relied upon to establish standing to lodge a constitutional complaint (…) [and] does not entail any subjective rights",[43] it considers nevertheless that "alongside the duties of protection arising from Art. 2(2) first sentence with regard to physical and mental well-being and from Art. 14(1) GG, a mechanism for safeguarding the ecological minimum standard could indeed acquire its own independent validity".[44] By this conjunction, it stresses that "The fundamental right to the

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[40] German Federal Constitutional Court (2021), *Neubauer v. Germany*, 1 BvR 2656/18, 78/20, 96/20, 288/20.
[41] *Ibidem*, para. 90.
[42] *Ibidem*, para. 111
[43] *Ibidem*, para. 112.
[44] *Ibidem*, para. 114.

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protection of life and health (…) obliges the State to afford protection against the risks of climate change”.[45]

Thereby:

> Apart from providing the individual with a defensive right against state interference, this fundamental right also encompasses the state’s duty to protect and promote the legal interests of life and physical integrity and to safeguard these interests against unlawful interference by others (…). The duties of protection derived from the objective dimension of this fundamental right are, in principle, part of the subjective enjoyment of this fundamental right. *Thus, if duties of protection are violated, the fundamental right enshrined in Art. 2(2) first sentence GG is also violated*,[46] and affected individuals can oppose such a violation by lodging a constitutional complaint. (para. 145)

The German Court, in this case, strikes down parts of the Federal Climate Protection Act as incompatible with fundamental rights for failing to set sufficient provisions for emission cuts beyond 2030. Moreover, if the Court does not enshrine expressly a subjective right to future generations to live in a safe environment, it stresses however that the state’s duty of protection is “also oriented towards the future (…). The duty to afford protection against risks to life and health can also establish a duty to protect future generations”.[47] In this respect, it “encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence”.[48] It rules: “Accordingly, the legislator may be obliged to act in a forward-looking manner by taking

[45] *Ibidem*, para. 144.
[46] Our enphasis.
[47] *Ibidem*, para. 146.
[48] *Ibidem*, para. 193.

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precautionary measures in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights".[49]

These approaches effectively elevated climate change from a purely environmental concern to a legal obligation tied to the well-being and rights of individuals and communities. Both rulings highlighted the role that non-state actors, such as NGOs, can play in advocating for climate action through legal means.

3.2 The Potential Mutation of Environmental Protection as a Mere Objective to a Subjective Right Through the Values of the EU

It appears to us that the solutions that need to be formulated before the ECJ to enhance individuals' access to European justice must primarily stem from the needs private prosecutors express through the concept of 'climate justice'.

Climate justice postulates the recognition of the intergenerational nature of climate change and advocates for the rights and interests of both present and future generations to be considered in decision-making processes. In other words, it emphasises the responsibility to preserve a liveable planet for future generations and ensure they have access to the same opportunities and resources as present generations.

Put differently, opening the admissibility of the action for annulment to individuals against acts of a general nature is not necessarily the anticipated response. In a certain way, it matters little whether the claims are scrutinised within the framework of an action for annulment, omission, or liability. What matters is that the legitimacy of those who feel they have been harmed by a flawed environmental policy be recognised as deserving of expression, which should be reflected, in terms of litigation, by the admissibility of their arguments before the ECJ. More precisely, while it can be accepted that the admissibility of individual actions may be denied within the scope of the action for annulment, on the other hand, such a refusal, within the framework

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[49] *Ibidem*, para. 195.

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of an action for liability, amounts to endorsing a form of irresponsibility of public decision-makers in environmental matters, or at least a lack of accountability of the governing bodies to the primary stakeholders. Certainly, the effectiveness of environmental policies involves moving beyond a solely anthropocentric perspective. However, these policies cannot be pursued by entirely excluding individuals, meaning without considering them, at the very least, as potentially affected and impacted by these standards. It seems difficult to admit that environmental harm would be fully distinguishable from harm to persons (Müllerová, 2023, pointed out the necessity to examine the two branches separately).

This imperative implies that environmental standards should no longer be seen solely as goals with general obligations aimed at Member States and/or EU institutions, but rather as embodying the right of every individual to live in a healthy environment. Contentious hurdles are thus merely indicative of the significant problem arising from the lack of acknowledgement of the fundamental right to live in a healthy environment. If such a right could be enshrined by ECJ, instead of considering environmental issues as a mere general objective, then the *locus standi* of individuals becomes attainable.

The hypothesis here formulated is that the reasoning applied by ECJ with regard to the value of the rule of law could be extended to the values of dignity and/or solidarity, which support the right of present and future generations to a healthy environment.

Indeed, the Court has interpreted the values, established in Art. 2 TEU, which states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and

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men prevail.", as reflecting the "very identity"[50] of the EU and becoming such an enforceable set of rules. In that regard, the Court adds

> (…) it must be borne in mind that Art. 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which (…) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States.[51]

In consequence of this finding, the ECJ held that any specific manifestation of these values in the treaty, the Charter or secondary legislation might lead, because of their binding nature, to broader requirements for the Union institutions and its Member States that could such turning into rights for individuals.

The Court applies, in particular, this reasoning, regarding the rule of law value. Considering that 'Effective judicial protection' (established in art. 19 TEU) gives concrete expression to the value of the rule of law,[52] enabled the Court to deduce binding obligations on the Member States to provide effective legal protection to EU citizens including national judges in Poland and Romania.[53] Furthermore, once the Court can rely on a specific provision of the treaty that refers to a value of the European Union, it then becomes

[50] ECJ (2022), *Hungary v. Parliament and Council*, case C-156/21, EU:C:2022:97, para. 127 "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties"; see also: ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, EU:C:2022:98, para. 145.

[51] ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, para. 264.

[52] ECJ (2018), *Associação Sindical dos Juízes Portugueses*, case C-64/16, EU:C:2018:117, para. 32.

[53] See in particular: ECJ (2019), *Commission v Republic of Poland*, case C-619/18, EU:C:2019:6 15; ECJ (2021), *Commission v Republic of Poland*, case C-791/19, EU:C:2021:596; ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, EU:C:2022:98; ECJ (2021), *Euro Box Promotion and Others*, cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

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possible to derive from this specific provision broader obligations towards the Member States in such a manner to grant rights to individuals.

It results from the above that any norm adopted by the institutions of the Union or, within its scope, by the Member States must be interpreted in accordance with these values. Their specific embodiment in the Charter, as well as in derivative law, can lead, due to their binding nature, to broader requirements for the institutions of the Union as well as for the Member States in the implementation of Union policies and actions.

The same reasoning could apply to environmental protection, which emphasises the responsibility to preserve a liveable planet for present and future generations and ensure they have access to the same opportunities and resources as present generations. In that regard, it could be argued that the right to human dignity (Art. 1), the protection of physical integrity (Art. 3), the rights of the child (Art. 24), Health care (Art. 35) and, more broadly, the protection of the environment (Art. 37) enshrined in the Charter and others several dispositions of the treaties, give concrete expression to the value of dignity and solidarity, lay down in Art. 2 TEU. The combination of values with these specific obligations to the EU and its Member States could thus confer substance of the rights on individuals.

As some recent judgments of the Court of Justice prove, such a combination has already been done with the value of solidarity and its (concrete) manifestation as a principle in the treaty as well as in secondary legislation.

For instance, in the case of *Poland v. Commission*,[54] the principle of energy solidarity, deriving content from Art. 194 (1) (b) TFEU,[55] is interpreted as a specific expression of the value of solidarity established in Art. 2 TEU leading to binding obligations.

[54] ECJ (2021), *Germany v. Commission*, case, C-848/19 P, EU:C:2021:598.
[55] Art. 194(1)(b): "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to (b) ensure security of energy supply in the Union".

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ECJ ruled that "(…) the spirit of solidarity between Member States, mentioned in that provision [Art. 194(1)], constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law".[56] Highlighting the several other provisions of the Treaties referring to the principle of solidarity, the Court stressed that

> the principle of solidarity underpins the entire legal system of the European Union (…) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the ECJ has held, inter alia, that the principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States.[57]

Consequently, unlike the Member States, who invoked in defence that the principle of solidarity was merely a general and political objective, and the Commission, which argued that it could not constitute "an autonomous legal criterion that may be invoked in order to assess the legality of an act",[58] the Court considers:

> that the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of

[56] *Ibidem.* para 38.
[57] *Ibidem.* para 41.
[58] *Ibidem.* Para 36.

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https://doi.org/10.6092/issn.2724-6299/17929

> solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[59]

In this perspective, the protection of the environment, read in conjunction with the respect for human dignity, could thus be understood as a specific expression of the principle of solidarity. By paraphrasing the Court's reasoning, it could be argued that the principle of solidarity, closely tied to the principle of loyal cooperation, entails rights and obligations both for the European Union and for the Member States with regard to the common interest of the environmental protection. In that context, the European Union is bound by an obligation of solidarity towards the Member States and the Member States are bound by an obligation of solidarity between themselves.

Taking this a step further, the obligation of solidarity could imply intergenerational solidarity.[60]

Because of the binding nature of the values underpinning the Union's policies and actions, the principle of solidarity turned into an obligation by its combination with value would notably entail the right, for residents within the European territory representing both present and future generations, to live in conditions of dignified habitability /healthy environment. If a Member State or an EU institution were to fail to meet such a protective standard, the engagement of responsibility, either of the State before the national courts or of the EU institutions before the ECJ, should be considered admissible. The question would not be to determine whether the violated environmental norm grants rights to individuals or not, but to acknowledge that the principle of solidarity, through the specific obligations it imposes in environmental matters, ultimately grants the “right to live in a healthy environment”.

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[59] *Ibidem*. para. 49.

[60] In that sense Daniel Sarmiento, 2023, notes “In a context of values that are turning into hard law, it will not take long to see the value of solidarity assuming a role in binding the Member States in certain areas which affect redistribution of resources close to the individual, but also of inter-generational solidarity when it comes to matters such as environmental protection”.

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Besides, the ECJ would thus echo the argumentation put forward by the German Constitutional Court, which noted in *Neubauer* that

> It is precisely because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action (…) that it must avoid creating incentives for other states to undermine this cooperation. Its own activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. In practice, resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets.[61]

Such reasoning would allow for a paradigm shift from "sustainable development", in which the subjects are primarily states, to a true "right to a clean, healthy, and sustainable environment" as a human right, as recognised by the United Nations General Assembly in a resolution adopted on July 2022,[62] and as a fundamental aspect of the Union's very identity.

4. Conclusions

Access to EU courts for natural claimants is certainly more restrictive than before national courts because of the procedural obstacles they face in demonstrating their standing in European litigation. However, this is only relevant where citizens are seeking the annulment of European legislation or a declaration of the failure of these institutions to act, due to the strict conditions arising from the *Plaumann* test which applies to such actions. It is likely that the ECJ's reluctance to open its courtroom will persist in these cases. While the ECJ may hide behind the restraint it must maintain in view

[61] German Federal Constitutional Court (2021), *Neubauer v. Germany*, cit. para 202.
[62] Résolution UNGA A/76/L.75.

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of the principle of the separation of powers and the risk of developing judicial activism, its refusal to open up its access to natural claimants more widely also prevents it - and this argument should not be overlooked - from dealing with too many claims that it would not materially be able to address.

But these difficulties of access to the Court for individual claimants only arise in the context of actions for annulment or failure to act and should not be extended to other remedies, such as actions for damages where *locus standi* is easier to establish. Above all, the legitimacy of the ECJ could be called into question if, unlike the national courts of its Member States, it declines jurisdiction when transnational and essential issues for the EU, such as environmental protection, are at stake. Indeed, the Court cannot afford to refuse access to its courtroom when the responsibility of political decision-makers in environmental matters is at stake.

This imperative implies that environmental standards should no longer be seen merely as objectives with general obligations for Member States and/or EU institutions, but rather as the embodiment of every individual's right to live in a healthy environment. If the fundamental right to live in a healthy environment could be enshrined by the ECJ, rather than considering environmental issues merely as a general objective, then the standing of individuals before the Court could be recognised. In that regard, this article proposes to focus on recent developments initiated by the ECJ on the basis of the values of EU law enshrined in Article 2 TEU, which reflect the 'very identity' of the EU and turns into a set of enforceable rules conferring rights on individuals. The hypothesis put forward is that the reasoning applied by the ECJ in relation to the value of the rule of law could be transposed to the values of dignity and/or solidarity, which underpin the right of present and future generations to a healthy environment. Such reasoning implies neither a rewriting of the treaties nor judicial activism and would allow real access to individuals participating in climate justice in both senses of the term.

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