The Italian Law Journal

Special Issue

Sustainable Legal Infrastructures: Comparative Responses Across Cultures and Systems

edited by Lucia Ruggeri, Lécia Vicente and Sara Zuccarino

Edizioni Scientifiche Italiane

www.theitalianlawjournal.it

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THE ITALIAN LAW JOURNAL

An International Forum for the Critique of Italian Law

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www.theitalianlawjournal.it

ISSN 2421-2156 October 2024 DOI 10.23815/2421-2156.ITALJ

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Procedural Hurdles of Climate Change Litigation in Italy: Prospects in Light of the ECtHR Decision in the *KlimaSeniorinnen* Case

Davide Castagno* and Maria Pia Gasperini**

Abstract

The paper deals with the main procedural hurdles which individuals and associations meet in lawsuits against the States for the assessment of their failures in facing climate change. The focus is both on the ruling issued by the Court of First Instance of Rome of 6 March 2024 in the *Last Judgment* case and the Judgment of the European Court of Human Rights in the *KlimaSeniorinnen* case of 9 April 2024. The authors examine the content of both decisions, taking into consideration the possible impact of the ECtHR's ruling on future decisions of national courts called upon to adjudicate climate change disputes.

Keywords

Climate Change Litigation, *Last Judgment*, Lack of Jurisdiction, *KlimaSeniorinnen* Case, Human Rights, Legal Standing.

I. Introduction

In recent years, almost all European courts have been called upon to deal with disputes related to climate change raised by non-governmental organizations (NGOs) and individual activists against governments (so-called 'vertical' climate change litigation). After the Dutch pivotal case of *Urgenda*, and without claiming to be exhaustive, the governments of France, Ireland, United Kingdom, Germany, Switzerland, Belgium, Italy and Spain have had to face their climate lawsuit.[1] And the same applies to supra-nationals

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[1] For an overview of these cases and others, see A. Pisanò, *Il diritto al clima. Il ruolo nei diritti nei contenziosi climatici europei* (Napoli: Edizioni Scientifiche Italiane, 2022), 183-299; F. Sindico and M.M. Mbengue eds, *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Berlin: Springer, 2021), *passim*; E. D'Alessandro and D. Castagno eds, *Reports & Essays on Climate Change Litigation* (Torino: Università degli Studi di Torino, 2024), 15-158; C. Rodríguez-Garavito ed, *Litigating the Climate Emergency. How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press, 2022), *passim*; C. Cournil, *Les grandes*

courts like the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).[2]

Even though all these cases differ in their characteristics and legal foundation, their purpose is not to entrust courts with the task of finding a solution to climate change, but rather to push governments to implement their climate policies within a 'global' strategy that complies with international agreements and recommendations. From this point of view, climate disputes are therefore a kind of 'strategic' litigation, meaning that such disputes are initiated with a goal different from what parties typically aim for in an adversarial process.[3] Indeed, all these proceedings always carry media consequences, regardless of the outcome of the process, which normally constitutes the true objective – and therefore a success in itself – for the claimants who lead these kinds of legal battles.[4]

The fact remains that courts normally have to handle these cases with traditional rules of proceedings laid down in national laws, so for climate litigation this involves many procedural hurdles which sometimes make the strategy itself questionable.[5]

Of course, the Italian procedural framework does not escape these problems. Therefore, the aim of this work is to briefly present

affaires climatiques (Aix-en-Provence: Droits International, Comparé et Européen, 2020), *passim*; I. Alogna et al, *Climate Change Litigation in Europe. Regional, Comparative and Sectoral Perspectives* (Cambridge: Intersentia, 2024), *passim*.

[2] Case T-330/18 *Carvalho and Others* v *Parliament and Council*, Order of 9 May 2019, available at www.eur-lex.europa.eu; and Eur. Court H.R. (GC), *Verein Klimaseniorinnen Schweiz and Others* v *Switzerland*, Judgment of 9 April 2024, available at www.hudoc.echr.coe.it.

[3] See B. Hess, 'Strategic Litigation: A New Phenomenon in Dispute Resolution?' *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, 1-33 (2022). With particular regard to the Italian context, see also S. Pitto, 'Public interest litigation e contenzioso strategico nell'ordinamento italiano. Profili critici e spunti dal diritto comparato' *DPCE online*, 1061-1098 (2021). On the notion of 'litigation strategy' in climate change litigation, see M. Carducci, 'La ricerca dei caratteri differenziali della "giustizia climatica"' *DPCE online*, 1345, 13531358 (2020).

[4] On the subject, see also B. Pozzo, 'The Italian Path to Climate Change: Nothing New Under the Sun', in F. Sindico and M.M. Mbengue eds, n 1 above, 475. Regarding the 'relativity' of legal failure in strategic litigation, see also S. Valaguzza, 'Liti strategiche: il contenzioso climatico salverà il pianeta?' *Diritto processuale amministrativo*, 293-334 (2021).

[5] For an example of such obstacles, see D. Castagno, 'Claimants' Standing in Climate Disputes: Rules of Proceedings and "Political" Decisions', in E. D'Alessandro and D. Castagno eds, n 1 above, 171-186. With particular regard to the Italian situation, see also S. Vincre and A. Henke, 'Il contenzioso "climatico": problemi e prospettive' *BioLaw Journal*, 137-158 (2023) and G. Ghinelli, 'Le condizioni dell'azione nel contenzioso climatico: c'è un giudice per il clima?' *Rivista trimestrale di diritto e procedura civile*, 1273, 1293-1297 (2021).

the current situation of the so-called *Last Judgment* case (in Italian '*Giudizio Universale*'), ie the claim against the Italian Government filed in June 2021 before the Court of First Instance of Rome by more than two thousand activists, which marked the beginning of climate change litigation in Italy. In particular, we intend to analyse both the paths already taken and their procedural obstacles, as well as future possible solutions in light of judicial developments in the field, and namely of the ECtHR decision in the *KlimaSeniorinnen* case.

II. Litigating Climate Change Before Civil Courts

1. The Constitutional Review Mechanism

Constitutional review proceedings are sometimes of help for climate change litigation. The German case of Lisa Neubauer is an excellent example of this. By challenging the Federal Climate Change Act of 2019 (*Bundes-Klimaschutzgesetz*) through the Federal Constitutional Court (*Bundesverfassungsgericht*), the claimants obtained a revision of this Act, successfully securing a reduction of greenhouse gas (GHG) emissions.[6]

Nevertheless, to obtain such a result, at least three conditions must be met. First, the national basic law must include the protection of nature as a fundamental right, as provided by the above-mentioned Art 20a of the German Basic Law (*Grundgesetz*).[7] Second, the mechanism of constitutional review has to be directly open to individuals, as the German constitutional review mechanism is. Finally, since a regulation concerning climate change must be challenged, such a regulation needs to have been previously promulgated by a legislator, as occurred in Germany with the Federal Climate Change Act.

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

[6] Bundesverfassungsgericht 24 March 2021 no 1 BvR 2656/18, available at www.bundesverfassungsgericht.de.

[7] According to Art 20a *Grundgesetz* 'also mindful of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'.

considering the interest of future generations.[8] The fact remains, however, that individuals are not allowed to directly act before the Constitutional Court, since only judges may refer to the Court with a question raised by the parties through an ordinary claim.

Finally, and equally important, even if such a situation were to arise, there is currently no specific regulation enacted by the Italian Parliament that explicitly addresses a national strategy for climate change mitigation.[9]

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

2. Claims for Annulment Before Administrative Courts

Things differ slightly before Italian administrative courts, even if in this case environmental associations benefit from special standing regarding environmental issues. Pursuant to Art 18 of legge 8 July 1986 no 349, which establishes the Ministry of the Environment, environmental associations are indeed granted the authority to represent public interest and contest administrative misconduct related to environmental matters before administrative courts.

Nonetheless, it should be noted that within the Italian legal system, the mere challenge of the State's actions does not

[8] Legge costituzionale 11 February 2022 no 1. In any case, it should be pointed out that the Italian Constitutional Court had already recognised the existence of a fundamental right to live in a healthy environment on the basis of Arts 2 (concerning the protection of the fundamental rights of individuals), 9 (concerning the protection of culture, science and research) and 32 (concerning the protection of the right to health) of the Italian Constitution (see Corte costituzionale 28 May 1987 no 210 and 30 December 1987 no 641, available at www.cortecostituzionale.it).

[9] Speaking about regulations concerning national strategy on climate change mitigation, we refer to general regulations such as the above-mentioned German *Bundes-Klimaschutzgesetz* of 2019, or the British Climate Change Act of 2018, the French *Loi climat et résilience* (Loi 2021-1104 of 22 August 2021), the Spanish *Ley de cambio climático y transición energética* (Ley 7/2021 of 20 May 2021), and the Portuguese *Lei de Bases do Clima* (Lei 98/2021 of 31 December 2021). On 14 October 2019, the Italian Government adopted some urgent measures expressly directed to prevent climate change (decreto legge 14 October 2019 no 111). Nevertheless, this act is not comparable with any of the others national acts just mentioned, containing only specific and temporary provisions. On this topic, see D. Castagno, 'Des petits pas vers une loi sur le climat: la situation italienne entre le parlement et le juge', in A. Lecourt et al eds, *La loi climat et résilience: état des lieux et perspectives* (Paris: LexisNexis, 2024), 167-174, while for an overview of the national framework climate change legislation in the European context, see F. Gallarati, 'Le leggi-quadro sul clima negli Stati membri dell'Unione europea: una comparazione' *DPCEonline*, 3459-3484 (2021). For a more general overview, see also A. Averchenkova et al eds, *Trends in Climate Change Legislation* (Cheltenham: Elgar, 2017), *passim*.

automatically trigger proceedings before administrative courts. Indeed, administrative jurisdiction is only invoked when the State operates within the scope of its public authority, whereas cases related to actions governed by private law fall under the purview of civil judges. Thus, Italian administrative judges usually cannot refer to general liability rules, as was the case for instance of the French *Affaire du Siècle*. In that case, the Paris Administrative Court based its judgment on Art 1246 of the French Civil Code, which is a rule concerning liability for ecological damage.[10]

Therefore, an administrative action is invariably a prerequisite for initiating a lawsuit for annulment before Italian administrative courts. Moreover, such an act must be unlawful. This means that the public administration must have failed to respect some regulation in acting with its public authority. Finally, the effects of such an act must cover a particular area in which the environmental association carries out its social engagement. As per the case law of administrative judges, the eligibility of environmental associations, as stipulated in Art 18 of legge 8 July 1986 no 349, is typically associated with highly localized environmental issues that typically pertain to specific regions within the country's borders.[11] These issues may include matters like industrial pollution, soil extraction, and similar concerns. Consequently, once again, this kind of solution seems to be a treacherously procedural vehicle for climate change issues, which are not easily confined to a certain area.

3. Tort Law as a Procedural Gateway

Given the limitations outlined in the preceding paragraphs, the tort law framework emerges as the preferred avenue for climate activists in the *Last Judgment* group – consisting of twenty-four NGOs, one hundred and sixty-two adults, and seventeen children – to initiate climate change litigation in Italy.[12] According to Art 2043

[10] Tribunal Administratif de Paris 14 October 2021 nos 1904967, 1904968, 1904972, 1904976/4-1, available at www.tribunal-administratif.fr.

[11] On the topic, see F. Scalia, 'La giustizia climatica' *federalismi.it*, 269, 289-299 (2021).

[12] The reasons for such a litigation are explained in M. Di Pierri ed, *La causa del secolo. La prima grande azione legale contro lo Stato per salvare l'Italia (e il pianeta) dalla catastrofe climatica* (Roma: Round Robin, 2021). For some comments on the litigation, see also R. Luporini, 'The "Last Judgment": Early Reflections on Upcoming Climate Litigation in Italy' *Zoom in 77 Questions of International Law*, 27-49 (2021); L. Saltalamacchia, 'Giudizio Universale: Insights from a Pending Leading Case', in E. D'Alessandro and D. Castagno eds, n 1 above, 15-22; M. Fermeglia and R. Luporini, '"Urgenda-Style" Strategic Climate Change Litigation in Italy: A Tale of Human Rights and Torts?' 7 *Chinese Journal of Environmental Law*, 245-260 (2023).

of the Italian Civil Code, any person who commits an unlawful act against another person that can be attributed to him, negligently or intentionally, must repair the damage that this other person has suffered as a result. So, basically, the claimants' main argument is that by failing to implement measures aimed at reducing climate change, the State has acted unlawfully within the meaning of Art 2043 of the Civil Code. With its negligent conduct, the State is alleged to have violated some of the fundamental rights laid down in the Italian Constitution and in the European Convention on Human Rights (ECHR), the right to health and to a healthy environment above all. Thus, the State should promptly take any appropriate measure permitting the reduction of GHG emissions by 2030 on the basis of Art 2058 of the Civil Code, which provides for restoration in kind, as far as it is possible.

The provision of Art 2043 of the Civil Code is intended in a very general sense, allowing action not only to obtain compensation, but also to prevent any potential damage to fundamental rights that may occur.[13] In this regard, the summons points out that each citizen has the right to bring a claim alleging the State's breach of its climate duties, which derives notably from the United Nations Framework Convention on Climate Change (UNFCC) and its juridical instruments, such as the 2015 Paris agreement, as well as from Arts 2 and 8 ECHR.[14]

III. Procedural Hurdles in the *Last Judgment* Case

1. The Justiciability of the Claim

In its defence, the Italian State Attorney's Office first contested the justiciability of the claim. According to the defence, the petitioners' claim amounted to an inadmissible request to review political-legislative choices through an undue intrusion of the judiciary into the competencies of the parliament and the government, thereby violating the higher principle of the separation of powers.[15]

[13] *Ex multis* Corte di Cassazione 21 December 1990 no 12133, available at www.dejure.it.

[14] *A SUD et al* v *Italy*, Summons, available at https://giudiziouniversale.eu/wp-content/uploads/2023/07/Atto-di-citazione-A-Sud-VS-Stato-Italiano-2021.pdf (last visited 26 May 2023).

[15] On the problem of justiciability in Italian climate change litigation, see also G. Ghinelli, 'Justiciability and Climate Litigation in Italy', in E. D'Alessandro and D. Castagno, n 1 above, 23-42.

Adhering to such a defence, in its judgment of 6 March 2024, the Court of First Instance of Rome declared the questions posed by the claimants as 'inadmissible', due to an absolute lack of jurisdiction of the court. Indeed, according to the court ruling, the questions posed by the claimants – seeking to ascertain the responsibility of the State and to condemn the defendant to adopt all necessary initiatives to reduce national artificial CO2-eq emissions by 92% by 2030 compared to 1990 levels, or to adopt another, higher or lower, measure to be determined during the proceedings – were clearly expressive of the function of 'political direction', consisting in determining the fundamental lines of development of the State's policy on the delicate and complex issue of climate change. Therefore, the court ruled that the claimants' assertions were not justiciable by any Italian civil court.[16]

As for the subordinate request of the claimants – aimed at obtaining a modification of the Italian National Integrated Energy and Climate Plan (PNIEC) due to the failure to comply with the objectives set by the European legislator in the European Parliament and Council Regulation 2018/1999/EU of 11 December 2018 on the Governance of the Energy Union and Climate Action – according to the court, this was a matter that could be challenged before the administrative courts, dealing with issues attributable to the exercise of public powers (see above para II.2).

So, after about three years (the lawsuit was filed in June 2021), the Court of First Instance decided not to enter the merits of the case, denying outright the justiciability of the issue at stake.

2. The Claimants' Standing and Interest

Since the judgment of the Court of First Instance stopped the claim at the very first procedural stage, not only the merits of the case but also all other procedural requirements remained unexplored. For this reason, these requirements will arguably have to be addressed by the Court of Appeal of Rome, before which the judgment will certainly be appealed.[17] This means that in the event that the Court of Appeal recognises the jurisdiction denied by the

[16] Tribunale di Roma 6 March 2024, available at www.giudiziouniversale.eu (last visited 23 May 2024). For a comment on the judgment, see C.V. Giabardo, 'Qualche annotazione comparata sulla pronuncia di inammissibilità per difetto assoluto di giurisdizione nel primo caso di Climate Change Litigation in Italia' www.giustiziainsieme.it, 29 April 2024.

[17] See the comments of the promoters at https://giudiziouniversale.eu/2024/03/06/arrivata-la-sentenza-il-tribunale-di-roma-decide-di-non-decidere-non-ce-giustizia-per-il-clima/ (last visited 23 May 2024).

first-instance judge, it will then need to determine whether the further procedural requirements to decide the case on its merits, and namely the standing and interest of the claimants, are met.[18]

This aspect must be addressed by the court according to the ordinary rules provided by the Italian Code of Civil Procedure, according to which, except in cases expressly provided for by a particular regulation, no one may bring a claim on behalf of others (Art 81). Moreover, to bring a claim, the claimants must have an interest in it, that is, the claimants must be directly concerned in the case they bring to the court (Art 100).

Thus, the one hundred and seventy-nine individual claimants must firstly assert a direct and personal interest, that is, they must be able to demonstrate that, due to the State's climate negligent policy, each of them has indeed incurred harm, as defined under Art 2043 of the Civil Code. Of course, following the Belgian *Klimaatzaak* case law,[19] it is possible to affirm that any individual claimant might conceivably be permitted to substantiate a concrete injury, primarily arising from the purported infringement of the fundamental right to reside in a clean and healthy environment by the State. This would be especially relevant given the Constitutional 'ecological' reform that became effective subsequent to the commencement of the *Last Judgment* (para II.1 above). But judges might also emphasise that the right to reside in a clean and healthy environment is unquestionably a universal entitlement, signifying that a broadly shared interest is at stake in the case. However, such an interest cannot be pursuable by an individual claim, nor does the Italian legal order allow any public interest litigation whatsoever.[20] From this perspective, the claimants' petition in the *Last Judgment* could therefore be considered as an inadmissible *actio popularis*, since no individual right is affected in a way that differs from that of the entire population.

[18] Following the latest reform of the Italian Code of Civil Procedure (the so-called 'Cartabia Reform', decreto legislativo 10 October 2022 no 149), Art 354, para 3, of the Code of Civil Procedure stipulates that if the appellate judge recognises the jurisdiction denied by the first judge, the parties are allowed to carry out the activities that would otherwise be precluded, and the judge proceeds to the decision. Unlike before, the merits of the dispute are thus addressed for the first time on appeal, without the need to return to the first-instance judge.

[19] Tribunale de première instance francophone de Bruxelles 17 June 2021 no 167, available at www.climatecasechart.com. For a comment on the case, see C. Renglet and S. Smis, 'The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?' 25 *American Society of International Law*, 1-6 (2021).

[20] A sort of public interest litigation is provided for electoral issues on the basis of Arts 9 and 70 of decreto legislativo 18 August 2000 no 267, which allow any citizen to bring an action before the administrative or civil courts, as the case may be.

Apparently, the same difficulties apply when it comes to admitting the claim of the associations on behalf of the individual interests they intend to protect, since in that case it would mean admitting a collective action that is currently not provided for by the Italian Code of Civil Procedure. Indeed, the new Title VIII-*bis* of the Code allows associations to act on behalf of the consistent rights of individuals through collective actions.[21] Nonetheless, such a remedy can only be pursued against companies, as stipulated in Arts 840-*bis*, para 3 and 840-*sexiesdecies* of the Code of Civil Procedure.[22]

In any case, on both justiciability and legal standing, the ECtHR's ruling in the *KlimaSeniorinnen* case will certainly have a significant impact on future decisions of national courts called upon to adjudicate climate change disputes, like the Italian ones. Hence, it is now appropriate to further investigate the procedural content of such a decision.

IV. Procedural Issues in the *KlimaSeniorinnen* Case: Legal Standing

1. The ECtHR's Judgments of 9 April 2024

On 9 April 2024, the Grand Chamber of the European Court of Human Rights delivered three remarkable rulings in three proceedings started by individuals and NGOs which alleged the infringement of human rights enshrined in the ECHR, due to the failure of legislative and administrative measures adopted by the States to tackle climate change. In *Duarte Agostinho and Others* v *Portugal and 32 Others*, the ECtHR dismissed the application submitted by six young Portuguese nationals as inadmissible for non-exhaustion of domestic remedies, as the applicants had brought their legal action before the Court of Strasbourg without first filing a lawsuit before Portuguese courts.[23] In *Carême* v *France*, the application of the former mayor of Grand-Synthe was dismissed as inadmissible given that the claimant no longer had any links with Grande-Synthe, so he could not claim to have victim status under

[21] In 2021, the class action reform provided by the legge 12 April 2019 no 31 came into force. Before this date, Italian class action was regulated by the so-called Consumers Code (decreto legislativo 23 October 2005 no 206) and referred to the consistent rights of consumers only.

[22] On this topic, see also E. Gabellini, 'Accesso alla giustizia in materia ambientale e climatica: le azioni di classe' *Rivista trimestrale di diritto e procedura civile*, 1105-1132 (2022).

[23] Available at https://hudoc.echr.coe.int/eng?i=001-233261.

Art 34 of the Convention, nor could he lodge a complaint on behalf of that municipality.[24]

In both these cases, therefore, the ECtHR did not deal closely with the crucial issue of legal standing. In *Verein Klimaseniorinnen Schweiz and Others* v *Switzerland*, on the other hand, the European Court addressed such an issue (as well as the legal standing of associations), as it had been called on to rule on both individual and collective claims previously submitted, albeit unsuccessfully, to domestic authorities, both administrative and judicial.[25]

2. Legal Standing of Individuals

In addressing such an issue as concerns the breach of Arts 2 and 8 ECHR, the Court observed, on the grounds of 'best available science', that anthropogenic climate change exists, and the States are aware of this, so they are able to take appropriate measure to mitigate the impact of climate change on people's health, well-being, and the survival of mankind itself. The acknowledgement of the standing of individuals requires, in any case, an assessment of victim status under Art 34 ECHR, which in turn implies a causal relationship between the increasing risk for people's health and life and failure to fulfil positive obligations undertaken by States in the field of climate change. While accepting that a legally relevant relationship of causation may exist between State actions or omissions and the harm affecting individuals, the Court nevertheless pointed out that in the particular context of climate change litigation a strict approach to the setting of victim status is appropriate, taking into account, on one hand, that failures in the adoption of mitigating measures have an impact on the overall population and, on the other hand, that the legal system of the ECHR does not provide for an *actio popularis*. Thus, according to the Court's case law, victim *status* can be granted to individuals only when they appear to be personally and directly affected by the alleged failures, which means, in the present context, that the applicant has to prove to be subject to a high intensity of exposure to the adverse effects of climate change, and there must be a pressing need to ensure the applicant's individual

[24] Available at https://hudoc.echr.coe.int/eng?i=001-233174.

[25] Available at https://hudoc.echr.coe.int/eng?i=001-233206. This case (ruled by a majority, with the sole dissenting opinion of British Judge Eicke) was submitted to the ECtHR by a Swiss association for the protection of climate and by four older women, members of such an association, who complained that their health problems became more severe during heatwaves related to climate change, significantly affecting their lives, living conditions and well-being.

protection.[26] The threshold for fulfilling these conditions is especially high, given the lack of *actio popularis* under the ECHR legal framework, and, in this case, it was deemed not to have been reached. The Court hence dismissed the complaints of four individual applicants as inadmissible.

3. Standing of Associations

Regarding the admissibility of the *KlimaSeniorinnen* Association's complaint, the ECtHR delivered a disruptive decision, considering that in modern democratic societies political and administrative choices having an overall impact on citizens (such as in the field of climate change, where intergenerational burden-sharing assumes particular importance) must allow the involved people to defend their own interests even in a collective manner. Under conventional law, NGOs play a key role in ensuring access to information, the participation of citizens, and access to justice in environmental matters, as expressly stated in the Aarhus Convention of 1998, which the European Union joined in 2005.[27]

Given the above, the ECtHR considered that the special features of climate change cases require a 'tailored approach' that prevents the Court from directly transposing its case law in environmental matters into the climate change context. On one hand, it noted that this kind of litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination; on the other hand, it emphasised that climate change is 'a common concern of humankind', so it is appropriate to grant associations with a dedicated purpose in the defence of the human rights of its members in relation to climate change legal standing before the ECtHR, regardless of their members having victim status as individuals.[28]

However, given the inadmissibility of an *actio popularis* in the ECHR's legal framework, the Court focused on some basic conditions which NGOs have to comply with to be allowed to lodge a complaint under Art 34 ECHR. Specifically, they have to be: lawfully

[26] See no 487-488.

[27] See European Council Decision 2005/370/EC of 17 February 2005. The European Court of Justice has ruled several times in favour of legal standing of environmental associations: see Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV* v *Bezirksregierung Arnsberg*, Judgment of 12 May 2011; Case C-664/15 *Protect Natur- Arten- und Landschaftsschutz Umweltorganisation* v *Bezirkshauptmannschaft Gmünd*, Judgment of 20 December 2017; Case C-873/19 *Deutsche Umwelthilfe eV* v *Bundesrepublik Deutschland*, Judgment of 8 November 2022 (all cited judgments are available at www.eur-lex.europa.eu).

[28] See no 497-499.

established in the jurisdiction concerned or have standing to act there; able to demonstrate that they pursue a dedicated purpose in accordance with their statutory objectives in the defence of the human rights of their members or other affected individuals within the jurisdiction concerned; able to demonstrate that they can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals.[29]

The conditions mentioned above were deemed to have been met in the *KlimaSeniorinnen* case. Accordingly, the ECtHR held that the applicant association had *locus standi* in the proceedings, and its complaint should be examined under Arts 8 and 6 ECHR.

V. Climate Change Policies and Enjoyment of Human Rights

1. The Margin of Appreciation of States

In reasoning its judgment, the ECtHR wished to stress, preliminarily, that judicial intervention is complementary to democratic processes, and cannot provide any substitute for the action which must be taken by the legislative and executive branches of government. Whilst the States Party to UNFCCC had made a legal commitment to protect the climate system for the benefit of present and future generations of humankind, in the peculiar context of climate change it is not easy to distinguish issues of law from issues of political choices. In any case, given such legal commitment, scientific evidence and the urgent need to act against climate change, the Court considered itself in a position to rule on general measures adopted by the States (or failures in their adoption) insofar as they have an impact on the enjoyment of human rights enshrined in the Convention.

The ECtHR, therefore, drew a distinction between what could be examined by both national and supranational courts and what is reserved for political choices: a) setting a relevant legislative and administrative framework for aims and objectives, tools of governance and monitoring; effective and consistent implementation of such a legal framework;[30] b) choice of means

[29] See no 502.

[30] The ECtHR argued that a domestic legal framework could be deemed adequate if it: adopts general measures specifying a target timeline for achieving carbon neutrality; sets out intermediate GHG emissions reduction targets; provides evidence showing whether due compliance has been achieved; keeps the relevant GHG reduction targets updated; acts in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures (see no 550).

designed to achieve these objectives. Aspect a) may be examined by judicial power, being the content of positive obligations undertaken by the States Party to UNFCCC, but aspect b) falls within the margin of appreciation of States as it involves an assessment of priorities for interventions and the allocation of resources, by balancing the interests at stake.

In the *KlimaSeniorinnen* case, the Court held that Switzerland did not comply with the obligation, undertaken under UNFCCC, to set a relevant domestic regulatory framework, failing to quantify, through a carbon budget or otherwise, national GHG emissions limitations.

2. Breach of Arts 8 and 6 ECHR

As concerns violation of human rights, the Court held that Switzerland had violated Art 8 ECHR, considering that, in the context of climate change, an effective protection of rights under such a provision (private and family life, home) requires that each Contracting State of UNFCCC undertake effective measures for the progressive reduction of their respective GHG emission levels.[31] In this regard, the ECtHR emphasised that the UNFCCC legal system is based on the principle of common but differentiated responsibilities, namely that each State has its own responsibilities within its own territorial jurisdiction in respect of climate change and cannot evade them by pointing to the responsibility of other States. According to the ECtHR's case law, Art 8 is involved not only in the case of adverse effects on the health, well-being and quality of life of individuals, but also when there is a severe risk of such effects, so that each State may be considered responsible within own jurisdiction for failures in adopting appropriate measures to anticipate or prevent the causes of climate change and mitigate its adverse effects.[32]

Furthermore, the Court of Strasbourg assessed the infringement of Art 6 ECHR, holding that the applicant association has victim *status* also for the complaint of lack of access to a court. Although the legal action brought by the Swiss NGO before the domestic courts was deemed to be 'hybrid' in nature (as it includes issues pertaining to democratic processes), the Court observed that the complaints of the applicant association had not been 'engaged with seriously' by national courts, which had underestimated scientific evidence, the

[31] Although the applicant association had also complained of an infringement of Art 2, the ECtHR considered it appropriate to examine the complaint from the angle of Art 8 alone, as the principles developed in its case law under Art 2 are similar to those under Art 8.

[32] See no 545-548.

severity of risk on the health and life of people, and the pressing need to ensure legal protection of human rights affected by climate change.

VI. What Is the Impact of the *Last Judgment* Case?

1. The Issue of Lack of Jurisdiction

When considering the future impact of the ECtHR's ruling on national courts' case law in matters of legal actions against States for climate responsibility, the focus is, primarily, on the issue of justiciability of the claim as regard its relationship with the margin of appreciation of legislative and administrative branches of the State.[33] Specifically, the future outcome of the *Last Judgment* depends on the reasonable prospects of overcoming the issue of lack of jurisdiction, on which basis the Court of First Instance of Rome delivered its decision.

In this respect, the *KlimaSeniorinnen* judgment leads us to reflect, firstly, on different legal frameworks in Switzerland and Italy in relation to their responsibilities in fulfilling positive obligations in matters of climate change, and on the claim's content submitted to the judge in the *Last Judgment*.

Regarding the former, it must be considered that, in its decision, the ECtHR was mindful of the need to respect the principle of separation of powers, and more than once it pointed out the limits of judicial intervention in the scope of discretional choices of legislative and administrative power. From this point of view, as seen above, the European Court held as 'justiciable', on the grounds of failures of positive obligations by Switzerland, the lack of setting an appropriate legal framework, including the provisions of aims and objectives, governance and monitoring processes, leaving the government the choice of proportional measures to achieve such aims and objectives. In the context of the *Last Judgment*, however,

[33] On this point, see L. Magi, 'Giustizia climatica e teoria dell'atto politico: tanto rumore per nulla' *Osservatorio sulle fonti*, 1029-1049 (2021). The relationship between justiciability of climate claims and separation of powers is the crucial point of the ruling of the Ninth Circuit Court of Appeals of 17 January 2020 in the famous case *Juliana* v *United* States (available at https://climatecasechart.com). In this regard, see M.C. Blumm and M.C. Wood, '"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine' 67 *American University Law Review,* 1-87 (2017); M.C. Wood, '"On the Eve of Destruction": Courts Confronting the Climate Emergency' 97 *Indiana Law Journal*, 239-295 (2022). For an interesting comparison, see P.D. Farah and I.A. Ibrahim, 'Urgenda vs. Juliana: Lessons for Future Climate Change Litigation Cases' 84 *University of Pittsburgh Law Review*, 547-584 (2023).

such *distinguo* (also crucial in the *Urgenda* case) could not be useful to argue the justiciability of claims against the Italian Government. Italy, indeed, falls under the EU legal system, and the European Union, after joining the UNFCCC and the Paris Agreement, has launched various legislative measures with the aim of combating climate change, providing for targets of GHG reduction, governance and monitoring processes.[34] Given this, it is difficult to say whether the adoption of this binding legal framework is enough to exclude the responsibility of the Italian Government in protecting human rights, and whether the choice of implementing measures also falls within the wide margin of appreciation of public branches.[35]

To further complicate matters, as said above, the claimants of the *Last Judgment* case asked the Court to order the Italian Government to take any corrective measure to reduce national emissions by 92% by 2030, compared to 1990 levels, or to adopt another, higher or lower, measure to be determined during the proceedings. In bringing this action, the applicants did not just complain of the non-fulfilment of positive obligations undertaken by the Italian Government to combat climate change but challenged the percentage target of reduction of GHG emissions as set under the EU legal system (-55% compared to 1990 by 2030), asking for a far greater percentage of reduction.[36]

Despite this procedural hurdle, it is to be expected that the claimants will reiterate their complaint before the Court of Appeal, even on the grounds of the ECtHR's judgment, as well as the most recent scientific findings on the urgent adoption of the most efficient measures.[37] In this strategic perspective, they may argue the

[34] We are referring, most recently, to the European Parliament and Council Regulation 2021/1119/EU establishing the framework for achieving climate neutrality (the so-called 'European Climate Law'), followed by the adoption of the plan 'Fit For 55', which is part of the European 'Green Deal'.

[35] On this point, see F. Cittadino, 'The A Sud v. Italy Case after the KlimaSeniorinnen Judgment. Implications of the ECtHR's Decision for Climate Litigation in Italy' (24 May 2024), available at https://voelkerrechtsblog.org.

[36] See C.V. Giabardo, n 16 above, who considers as questionable the distinction, drawn by the Dutch courts in the *Urgenda* case, between an order to achieve specific percentages of reduction of GHG emissions (legitimate scope of judiciary) and the political-legislative choices for achieving such targets (legitimate scope of politics).

[37] See the report IPCCC 2023 (available at https://www.ipcc.ch), which recommends the further implementation of appropriate measures against climate change in order to meet the targets of the Paris Agreement, pressing for an increase in funding renewable energy and new zero-emissions technologies. Furthermore, the European Commission, in its communication of 6 February 2024 (available at https://eur-lex.europa.eu/), recommends a 90% reduction of GHG emissions by 2040 to achieve climate neutrality by 2050.

responsibility of the Italian Government in failing to implement appropriate mitigating measures to achieve, at least, the EU target of -55% emissions by 2030, considering it as a 'minimum threshold'.[38] They may also insist on obtaining a declaratory judgment under Arts 2043 and 2051 of the Civil Code, to bypass the issue of redressability, related to the (im)possibility of enforcement of judicial orders to draft plans to reduce GHG emissions.[39]

2. Infringement of Human Rights and Legal Standing

The ECtHR ruling in the *KlimaSeniorinnen* case has a decisive role insofar as it provides a stronger legal basis for judicial actions brought on the grounds of infringement of human rights, giving to the *Last Judgment*'s claimants a further foothold to face the issues of lack of jurisdiction. It is also remarkable that, according to the European Court's decision, an infringement of Art 8 ECHR may occur not only when governments fail to set the necessary legal framework providing for aims and tools to tackle climate change, but also when they fail to enforce such a legal framework. In the *Last Judgment* case, therefore, the alleged breach of human rights enshrined in the ECHR could fill Art 2043 of the Civil Code with more content, confirming the thesis of the right to a stable climate as a fundamental right whose infringement constitutes a tort under such a legal provision. Furthermore, the 'intergenerational burden-sharing' mentioned by the ECtHR may be interpreted as a validation of the need to grant effective protection to the 'interest of future generations' currently laid down by Art 9 of the Italian Constitution, as reformed in 2022.[40]

Despite the assessment of the infringement of human rights, the ECtHR's ruling excludes the legal standing of individuals, but acknowledges the standing of NGOs pursuing dedicated aims and

[38] In the *Klimaatzaak* case, the Court of Appeal of Brussels, in its judgment of 30 November 2023 (available at https://climatecasechart.com), considered that a 55% reduction in GHG emissions compared to 1990 by 2030 constitutes this minimum threshold, below which Belgium cannot go without violating both Arts 2 and 8 ECHR and the general duty of care. Furthermore, insofar as the Court's injunction is limited to a GHG emissions reduction target that has already been validated at the European level, this injunction can in no way constitute an infringement of the principle of the separation of powers. For a first comment, see M. Petel and N. Vander Putten, 'The Belgian Climate Case: Navigating the Tensions Between Climate Justice and Separation of Powers' (5 December 2023), available at https://verfassungsblog.de/the-belgian-climate-case.

[39] In *Juliana* v *United States*, after the ruling of the Ninth Circuit Court of Appeals of 17 January 2020, the claimants amended their complaint, waiving the request for an order for public branches to adopt a plan of mitigating measures of climate change, and limiting themselves to asking the Court for a declaratory judgment.

[40] Legge costituzionale 11 February 2022 no 1.

objectives in the defence of the human rights affected by climate change. This issue, dealt with by Court of Strasbourg in an innovative manner, remains questionable in the Italian legal system, where associations have *locus standi*, on behalf of their members, to act through collective actions only against companies, as mentioned above.[41] Considering the ECtHR's decision, also questionable is whether the legal standing of NGOs in the field of climate change could be justified on the grounds of its case law in environmental matters. Under the Italian legal framework, such an approach would require a significant level of creativity in judicial interpretation, since the standing of environmental associations is provided for by Art 309 of the Consolidated Environmental Act for challenging acts and measures adopted by public bodies before administrative courts, namely in a procedural context other than litigation before civil courts.[42]

3. Final Remarks: A Message for Governments and Domestic Courts

Although the ECtHR's ruling in the *KlimaSeniorinnen* case might not have a decisive impact on the procedural issues arising in domestic legal frameworks, it represents, nonetheless, a milestone along the path towards effective protection of human rights through legal actions against States for their climate inaction. There can be no disregarding the considerations of the European Court regarding 'the key role which domestic Courts have played and will play in climate-change litigation (...) highlighting the importance of access to justice in this field', as well as the assertion that 'given the principles of shared responsibility and subsidiarity, it falls primarily to national authorities, including the Courts, to ensure that Convention obligations are observed'.[43] It is possible to take from these arguments a call to domestic courts to do their part to ensure effective protection of human rights affected by climate change, including also the prompting of a bolder approach to this kind of litigation, in light of the gravity of the situation and the primary importance of the interests at stake.[44] Thus, the ECtHR's judgment is also rightly included in the context of strategic litigation in a

[41] See para III.2 above.

[42] Accordingly, NGOs lawfully established in Italy could challenge the PNIEC before administrative courts, having jurisdiction on such a point (para III.1 above). At the time of writing this paper, the Italian Government has just sent a new PNIEC to the European Commission (available at https://www.mase.gov.it).

[43] No 639.

[44] See L. Magi, n 33 above.

double perspective: firstly, although it has not issued any specific order to the respondent State, it could be a powerful instrument of pressure on public branches for the adoption of appropriate measures to tackle climate change. Secondly, it calls on national courts to 'engage seriously' with the complaints of infringement of human rights in matters of climate change. A doubly political message, therefore, from a judicial decision in political matters.

A special thank to

Adele Emilia Caterini, Federica Laura Maggio, Maria Paola Nico, Riccardo Perona, Karina Zabrodina for their precious support in the realization of this Special Issue.

This Special Issue is published as a part of the research funded by European Union – NextGenerationEU, MUR – Fondo Promozione e Sviluppo – D.M. 737/2021, ESCOP4Green – *Enhancing Sustainable Consumption and Production for the Green transition*, as Deliverable D.2.3., WP 2.