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ARTICLE

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Brown Bear, Brown Bear, What Can You See? Exploring the Tension Between Strategic Choices and Claimants' Voices in Environmental Litigation in the EU

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Abstract

This paper poses an important challenge to the growing trend of strategic environmental litigation in the EU: when making strategic choices about bringing, framing, and litigating claims, what becomes more important—being heard through strategically critical procedural choices or being true through ensuring that rights holders and the environment remain at the forefront of decision-making? There are many legal hurdles to bringing environmental claims and it is possible that the voice of the environment and those most adversely affected by its degradation is lost in the strategic legal decision-making. This study uses a small number unstructured scoping interviews with practitioners active in bringing litigation to the CJEU to inductively analyse voice and representation in strategic environmental litigation. This initial research indicates that there are areas which should be further explored. First, all of the practitioners brought up the issue of access to resources. This raises concerns about potential elitism. Second, practitioners highlighted that there are numerous strategic choices made during case selection and framing which could affect how voices are heard. Finally, practitioners felt strongly that admissibility rules have a negative impact on claimants' voices. Challenges in legal standing and establishing individual harm or direct concern have an enormous impact on what claims are heard and how they are heard.

Keywords: Strategic litigation; environmental claims; voice; representation; marginalized communities; CJEU

A. Introduction

For some, this title will clearly refer to the (in)famous Slovakian Brown Bear case at the Court of Justice of the EU (Case C-240/09) (CJEU). For others, it will bring to mind the delightfully illustrated children's book written by Bill Martin Jr with artwork from Eric Carle. The book teaches children about the beauty of the natural world around us and all of the amazing colourful animals in it—including humans. This Article is therefore not just about strategic litigation in Europe, but about hearing the voice of the environment and those most adversely affected by its degradation.

Strategic litigation, while a powerful tool, does not come without risks. One of those risks is that the voice of the claimant(s) is lost in the strategic drive to develop jurisprudence, test laws, or push political agendas for change.[1] Do strategic choices silence claimants' voices? A recent study in Africa demonstrated that they potentially do.[2] In that study, tribes who were adversely affected by

[1] *See, e.g.* Reilly Anne Dempsey Willis, *Becoming Indigenous or Being Overcome? Strategic Indigenous Rights Litigation in the Sudan*, 25 THE INT'L J. OF HUM. RTS. 925 (2021).
[2] *Id.*

the development of hydroelectric dams in the Sudan were claimants in indigenous rights claims at the African Court of Human and People's Rights, cases brought by a combination of justice brokers and NGOs. The problem was, however, that the tribes themselves did not all identify as indigenous and did not actually want the relief that came with indigenous rights' claims. To those tribes, the issue was economic. Throughout the strategic litigation, however, their voice was lost—strategic choices silenced their voices.

Given the precarious nature of representing the silent environment with copious procedural and resource restraints inherent in the legal system of the CJEU can we really hear the voice of the environment and those most affected by its degradation in strategic litigation? While we know direct access for individuals before the CJEU is extremely limited, can we still use this juridical tool to address environmental harms for citizens? When making strategic choices about bringing, framing, and litigating claims, what becomes more important—being heard through strategically critical procedural choices or being true through ensuring that rights holders and the environment remain at the forefront of decision-making?

This Article aims to begin a conversation about these choices in strategic environmental litigation specifically in the European context, and more specifically at the CJEU. Environmental litigation was chosen as the subject area given the heightened challenges of representing the silent environment via NGOs and the unique ability to bring CJEU claims under the Aarhus Convention, as well as a recent increase in cases.[3]

B. Methods

The work begins with unstructured scoping interviews with practitioners active in strategic environmental litigation at the CJEU to develop a baseline understanding of strategic choices.[4] Building on the work of Cullen, Van Durme, and Vanhala, among others, this Article adopts a qualitative approach through practitioner interviews.[5]

To protect potential participants, strict adherence to anonymity and confidentiality was followed. Seventeen organisations or practitioners were contacted via either direct email or a web form, based on their experience bringing claims to the CJEU, successful or not, on a wide range of

[3]Sam Bookman & Matthias Petel, *Climate Litigation & Climate Justice: The Distributional Implications of Systemic Rights-Based Climate Actions in Europe*, GLOBAL JUSTICE: THEORY, PRACTICE, RHETORIC (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4666101 (last visited Mar 8, 2024); Tanja A. Börzel, *Participation Through Law Enforcement: The Case of the European Union*, 39 COMPAR. POL. STUD. 128, 131 (2006); Katharina Franziska Braig, Nadezhda Kutepova & Vicky Vouleli, *Playing Second Fiddle to the Aarhus Convention: Why the ECtHR Can and Should Go Further*, 19 J. FOR EUR. ENV'T & PLAN. L. 74 (2022); Sonja Buckel, Maximilian Pichl & Caroline Vestena, *Legal Struggles: A Social Theory Perspective on Strategic Litigation and Legal Mobilisation*, 33 SOC. & LEGAL STUD. 21 (2023); Jacques Hartmann & Marc Willers, *Protecting Rights through Climate Change Litigation before European Courts*, 13 J. OF HUM. RTS. AND THE ENV'T 90 (2022); Jasper Krommendijk, *Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation*, 31 REV., EUR., COMPAR. & INT'L ENV'T L. 60 (2022); Koen Lenaerts, *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection*, 1 IL DIRITTO DELL'UNIONE EUROPEA 9, 11 (2018); Mario Pagano, Overcoming Plaumann: Environmental NGOs and Access to Justice before the CJEU (Dec. 5, 2022) (Ph.D. thesis, European University Institute), (available at https://cadmus.eui.eu/handle/1814/75102); Konstantin Reiners & Esther Versluis, *NGOs as New Guardians of the Treaties? Analysing the Effectiveness of NGOs as Decentralised Enforcers of EU Law*, 30 J. OF EUR. PUB. POL'Y 1518 (2023); Lisa Vanhala, *Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy*, 51 COMPAR. POLI. STUD. 380 (2018).

[4]This pilot project was given ethical approval by the University of Suffolk.

[5]Pauline Cullen, *European Union Non-Governmental Organizational Coalitions as Professional Social Movement Communities*, 11 J. OF CIV. SOC'Y 204 (2015); Suzanne Kingston, Edwin Alblas, Micheál Callaghan & Julie Foulon, *Empowering Through Law: Environmental NGOs as Regulatory Intermediaries in EU Nature Governance*, 12 TRANSNATIONAL ENVIRONMENTAL LAW 469 (2023); Reiners and Versluis, *supra* note 3; Florence Van Durme & Alberto Nicòtina, *Funding as an Element of Access to Justice in Environmental Protection Cases in Belgium: A Socio-Legal Analysis*, in YSEC YEARBOOK OF SOCIO-ECONOMIC CONSTITUTIONS (available at https://doi.org/10.1007/16495_2023_46); Vanhala, *supra* note 3; Willis, *supra* note 1.

environmental issues. Major environmental cases were identified through the literature and legal representatives or organisations involved in the cases were then invited to participate. Seven legal professionals accepted the invitation to interview, all of whom were experts in strategic environmental litigation and all of whom had been involved in multiple cases historically and/or contemporarily. Due to time constraints, only five were then able to participate in the interviews. This small sample size is clearly a limitation on the wider impact of this study but can be used as a springboard for future research. Interviews were carried out virtually and lasted between thirty and sixty minutes. Transcripts were cleaned and inductively analysed using Atlas.ti and Braun and Clarke's thematic analysis.[6]

C. Practitioner Perspectives

These scoping interviews explored strategic choices in environmental litigation in the EU and the potential tension between those choices and claimants' voices—including that of the environment via NGOs. Three primary themes inductively emerged from the interviews which pose important questions about this tension. First, all of the practitioners brought up the issue of access to resources. This raises concerns about potential elitism. In this vein, the hurdles to initiate strategic environmental litigation could potentially be further silencing minority voices, which already struggle to be heard as they do not have access to the resources needed to engage in costly, lengthy, extremely complex litigation. Second, practitioners highlighted that there are numerous strategic choices made during case selection and framing. These choices are made by practitioners based on legal frameworks and existing jurisprudence. In choosing who is heard, where they are heard, and how they are heard, practitioners make choices which are not necessarily based on what the claimants want or need—as in the earlier illustration from Africa—but rather primarily based on what is more likely to produce a positive, impactful legal outcome. Finally, practitioners felt strongly that admissibility rules have a negative impact on claimants' voices. Challenges in legal standing *(locus standi)* and establishing individual harm or direct concern (*actio popularis)* have an enormous impact on what claims are heard and how they are heard—climate change and environmental degradation by definition affect groups creating an enormous framing challenge.[7] The strategic choices inherent in meeting these overly restrictive procedural legal requirements in the EU could have a silencing effect in only allowing a very small particular subset of claims to be heard.

I. Elitism and Case Law

This aspect, manifested in concerns over access to resources, factored very prominently in the interviews as a significant challenge in the ability to bring claimants' voices to the courts and beyond. Those without capital are far less likely to be heard:

[6]*See, e.g.,* Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, 3 QUALITATIVE RSCH. IN PSYCH. 77 (2006).

[7]Karen J Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMPAR. POL. STUD. 452, 470 (2000); Sebastian D. Bechtel, *Access to Justice on EU Level: The Long Road to Implement the Aarhus Convention*, 19 OPOLSKIE STUDIA ADMINISTRACYJNO-PRAWNE 19 (2021); Sanja Bogojevic, *CJEU, Can You Hear Me? Access to Justice in Environmental Matters*, 16 EUROPARÄTTSLIG TIDSKRIFT 728 (2013); Audrey Danthinne, Mariolina Eliantonio & Marjan Peeters, *Justifying a Presumed Standing for Environmental NGOs: A Legal Assessment of Article 9(3) of the Aarhus Convention*, 31 REV. EUR., COMPAR., & INT'L ENV'T L. 411 (2022); Mariolina Eliantonio, *The Role of NGOs in Environmental Implementation Conflicts: 'Stuck in the Middle' between Infringement Proceedings and Preliminary Rulings?*, 40 J. OF EUR. INTEGRATION 753 (2018); Martin Hedemann-Robinson, *Access to Environmental Justice and European Union Institutional Compliance With the Aarhus Convention: A Rather Longer and More Winding Road than Anticipated*, 31 EUR. ENERGY AND ENV'T L. REV. (2022) (available at https://kluwerlawonline.com/journalarticle/European+Energy+and+Environmental+Law+Review/31.2/EELR2022012); Kingston et al., *supra* note 5.

> *If you lose a case, you have to include the cost of the other party . . . and then for a strategy for them would be to get as many institutions as possible to support their defence.*[8]
>
> *NGOs also face really serious cost risks if they lose.*[9]
>
> *We have a lot of issues with costs.*[10]

It was very clear in the interviews that the issue of cost bearing had not yet been properly addressed by the CJEU. This was echoed as a significant barrier to NGOs bringing cases, and therefore voices, to the courts. This issue of costs seems to have a substantial impact on the ability of claimants to be heard in that so many cases are not brought due to the financial risk.

This then begs the question: If costs are denoting who is able to bring a claim, are we creating a system which only hears the elite? A very small number of claimants, including NGOs, have access to the capital needed to mount a claim and indeed see the case through what can be a very lengthy process. Here capital is also not just defined as economic, but as legal expertise, time, networks, and geo-political positioning:

> *As an NGO, you rely a lot on an external legal Council, which is usually one person, whereas the Commission is an internal legal service.*[11]

The risk of silencing minority voices is clear. Strategically, cases which have more capital—majority voices, economic resources, access to legal expertise—are more likely to be heard—thus potentially creating an elite system and body of jurisprudence which calls into question the democratic ideals of the EU. This practitioner also discussed the importance of scientific evidence and knowledge—another aspect of access to resources that may again favour a subset of those with scientific capital.

II. Cyclical Disempowerment

According to these practitioners, there was a clear hierarchy of potential legal avenues based on potential impact: At the top, challenging the legislation itself—which has a very small likelihood of success—then requesting a preliminary reference—which requires action from Member States via national courts—and finally Aarhus arguments around participation and access to justice.[12] This perceived hierarchy appeared to be based mostly on the reach of any potential decision or judgment.

This strategic legal preference may not always reflect the desires of the claimants themselves, or indeed the silent environment. For example, as with the tribes in Africa, claimants may seek a particular redress which is not available with a direct legislative challenge—but the legal experts may see a potential for a wider strategic impact in seeking the latter. This creates a possible disempowering conflict; although the legal expert preference may help to progress a case with a more impactful outcome, if the process silences the voice of the claimant it may be problematic.

Two practitioners highlighted the importance of local, smaller cases in a multi-faceted approach, bringing cases at local, national, and supranational forums:

[8]Interview 1.
[9]Interview 2.
[10]Interview 5.
[11]Interview 1, *supra* note 8.
[12]Teall Crossen & Veronique Niessen, *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?*, 16 Rev. of Eur. Cmty. & Int'l Env't L. 332 (2007); Hartmann & Willers, *supra* note 3.

> *Access to justice is definitely better at national level. [However], the impact is not really there and also the voices of those people might not be the best represented and ultimately, if we focus on only specific countries . . . It's also very limiting because we are always focusing in the same countries and in those countries they are particularly building a strong environmental precedent or they have this strong environmental rules. But the other countries are not following suit.*[13]

> *Because I think the higher you go in the in the system, the bigger the issues become but also the slower the process becomes. So I think you have to always do both in parallel and not kind of forget the side of the local level because that's often the most difficult.*[14]

Interviewee 1 went on to discuss at length how this had a negative impact on representation as only some voices and perspectives were ever being heard, coupled with the cyclical effect of court rulings (in other words, judgments are then implemented and tested creating a cycle). The practitioner shared that there is very little environmental litigation from Eastern Europe as compared to Western Europe, partially because of both a more hostile domestic legal system:

> *So of course there's a lot of, like, a health concerns, environmental concerns that have been left unanswered and a lot of NGO's, even in that area [Eastern Europe], focus on other jurisdictions that could bring them more impact.*[15]

Countries with more developed jurisprudence will then produce more litigation, while countries with little to no jurisprudence will not likely see many cases emerge. Another interviewee shared that domestic civil courts were the most accessible in terms of actually litigating the issues and hearing the voice of the claimants, again underscoring the potential imbalance in jurisprudence development:

> *I would say it was a case where we could actually talk about climate change . . . which I'm taking in a civil law court, that's always been a place where I could where I felt that the court was open to the facts and to the to the reality.*[16]

Related is potential disempowering impact of framing. The available legal framework(s) in the EU, while arguably more robust than in some other regions, are still restricted at best. Claims must be framed around existing rights, and, with the exception of Article 37 of the Charter, there are no direct environmental rights.[17] Strategic choices must therefore be made in how cases are legally framed and argued based on available laws, of which there are very limited avenues. These limitations dictate how claims are framed far more than what the claimant wants or needs, again resulting in potential disempowerment. On the one hand, some advocates felt that it was deeply problematic that they could not litigate directly on climate change:

> *We could not even voice the term and the word climate because you know, you have to go around arguing other things like noise, which is really, for most people not . . . I mean, noise is a problem, but I mean in those cases it isn't and really and we used all sorts of arguments and as*

[13]Interview 1, *supra* note 8.
[14]Interview 5, *supra* note 10.
[15]Interview 1, *supra* note 8.
[16]Interview 3.
[17]Bookman & Petel, *supra* note 3 at 18; Braig, Kutepova, & Vouleli, *supra* note 3; Jasper Krommendijk & Dirk Sanderink, *The Role of Fundamental Rights in the Environmental Case Law of the CJEU*, 2 Eur. L. Open 616 (2023); Ole W. Pedersen, *Any Role for the Echr When It Comes to Climate Change?*, 3 Eur. Convention on Hum. Rts. L. Rev. 17 (2021).

> *long as they were hard substantive legal arguments,* ***but we could not actually talk about the things that concerned people most, which is climate impacts****. [emphasis added]*[18]

> *All of my clients are concerned with climate change. And the impact it has on society as a whole, also on the property of homes, but mostly on their whole lives.*[19]

> *(when asked about framing a specific case) We had no other procedural way, we had no other procedural way to follow.*[20]

> *Law is very abstract. It always is abstract. It always simplifies the reality, and it even construes a reality that doesn't exist.*[21]

However other practitioners felt that it *was* appropriate to litigate environmental concerns under existing legal avenues and rights because the environment *does* affect all areas of life, and that these strategic choices did not necessarily adversely affect claimants' voice:

> *Because you don't have, you know, a right to a healthy environment. And so trying to really work with that and advance the interpretation of Article 6, Article 8 and legal avenues that have never been used for this purpose for kind of a new purpose. We're trying to repurpose. We often have to do a lot of repurposing of the law because the environment, it impacts everything.*[22]

The practitioners were therefore divided on framing—on the one hand, some advocates felt as if it was problematic for voice and representation and potentially disempowering that we cannot directly litigate climate change and many environmental issues, but for others, it made perfect sense to use existing framework but to "repurpose" to demonstrate the environmental impact, thus staying true to the heart of claimant's concerns and voices. This poses an interesting challenge—from a legal perspective, it may of course make sense to frame claims based on planning permission, or trade regulations, or taxonomies, but for claimants this may be disingenuous.

III. Closed Doors

> *So it's like you were allowed to go into the entrance room. So the first door is opened, so you go into the entrance room and then you wait until you will be allowed to go into the main room and there the door remains closed.*[23]

Admissibility was discussed more than any other issue in the interviews, with standing seen as the most difficult hurdle to all practitioners:

> *If you don't have standing at all as an environmental NGO and there's very restrictive standing for individuals, often you don't even get into the court, then it kind of stops there.*[24]

> *You need to have participated in the decision making process to have standing to go to court at the national level, which gives a hurdle for NGOs to be like involved in all of these projects in all*

[18]Interview 3, *supra* note 16.
[19]*Id.*
[20]Interview 4.
[21]Interview 3, *supra* note 16.
[22]Interview 5, *supra* note 10.
[23]Interview 4, *supra* note 20.
[24]Interview 5, *supra* note 10.

> *of these different programs and being maybe even you don't know when the project is put into place, what's the main concerns will be and if the concerns come up afterwards having the right that allows us to go to court to protect them.*[25]

The individual harm requirement was explored in several interviews, though one interviewee discussed this particular issue at length:

> *But it is obvious that even though everybody is affected,* ***these people*** *are also affected! [emphasis added]*[26]

Another practitioner said that in their experience, the issue of individual harm was so thorny that they did not even attempt to litigate it:

> *For us, we haven't explored in litigation so far the idea of proving harm. So we always prove a non-compliance with existing legislation.*[27]

According to these front-line perspectives, these procedural restrictions were seen as hugely challenging—not here in terms of potential disempowerment through skewed representation of claimants' voices—as we saw in the African context—but in terms of who *can* and who *can't* be heard, creating a system based on a particular subset of voices which fit the legal criteria, not based on righting environmental wrongs.

D. Exploring in Existing Research and Scholarship

It appears that there are some potential concerns about the tension between strategic choices and claimants' voices. With this practitioner backdrop, this piece now turns to existing literature and research to explore some of these inductively emerging themes in more detail and to understand our current field of knowledge, identifying gaps.

I. Elitism: Access to Resources

Scholars are not shy in stating that it is a particular subset of individuals which are privileged in their access to strategic litigation, thus not only restricting *how* voices are heard, but *which* voices are heard.[28] It is a fact that bringing claims to the CJEU is expensive and requires access to a legal elite who understand the rules of access.[29] It has not gone unnoticed that there is a rather large body of scholarly research by experts in the field just trying to unpick the overlapping and inconsistent rules and requirements for bringing a claim, rendering the whole framework largely

[25]Interview 1, *supra* note 8.

[26]Interview 3, *supra* note 16.

[27]Interview 1, *supra* note 8.

[28]Börzel, *supra* note 3; Pauline Cullen, *The Platform of European Social NGOs: Ideology, Division and Coalition*, 15 J. OF POL. IDEOLOGIES 317 (2010); Henrik Hermansson, *The European Commission's Environmental Stakeholder Consultations: Is Lobbying Success Based on What You Know, What You Own or Who You Know?*, 5(3) INTEREST GROUPS & ADVOCACY 177 (2016); Larissa Parker et al., *When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World*, 13 J. OF HUM. RTS. & THE ENV'T 64 (2022).

[29]Bookman & Petel, *supra* note 3 at 7. *See* Heidi Nichols Haddad & Lisa McIntosh Sundstrom, *Foreign Agents or Agents of Justice? Private Foundations, Backlash against Non-Governmental Organizations, and International Human Rights Litigation*, 57 L. & SOC'Y REV. 12 (2023); Marjan Peeters, *About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs*, 24(3) EUR. PUB. L. 449 (2018).

inaccessible.[30] Bookman and Petel suggest that some rights are indeed more accessible to middle-class individuals.[31] Börzel's study showed that:

> The EU's legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the "haves" who benefit—those actors that already command considerable resources that enable to them to broadly participate in political and legal processes . . . Actors poor of organizational and resources capacities, by contrast . . . so far stand little chance to benefit from the increased opportunities for participation through EU law enforcement.[32]

Some scholars in fact point to resource constraints as being the primary barrier to accessing environmental litigation in Europe.[33] These are things not readily accessible to many marginalised or silenced groups.[34]

However, we do not specifically know how this potential elitism relates to voice in the context of strategic environmental litigation. Practitioner interviews indicated that claims were certainly silenced through lack of access to resources, and the literature affirms this point theoretically, but we still do not know *who* is being heard and *who* is being silenced. Is this creating an elite system as posited by practitioners and theorised by scholars? Further empirical research is needed to understand more about the cases, and by extension voices, that lack the resources and are therefore excluded from jurisprudence development.

II. Cyclical Disempowerment: Case Selection and Framing

According to van der Pas "[h]igh-profile cases decided by, for example, the Court of Justice of the European Union (CJEU), do not coincidentally end up there but were the product of considerable strategic planning."[35] Current research seems to be limited to those cases which are brought.[36] We do not, at least not very often, learn about the cases that were not brought.[37] Cases that are not selected to be litigated will of course never even be heard in these forums, and therefore there may be a bias in the voices that we *do* hear as certain cases will more readily lend themselves to litigation, disempowering potential claimants. This emerged from the interviews where many of the practitioners shared that their role only kicked in once the case had progressed to the point of litigation. This may therefore be a critical gap in knowledge—to understand more about the voices which *are* heard by learning about the voices that *aren't*.

When it comes to framing, we know that claims must be framed around existing rights, of which there are no direct rights against climate change and its impacts. Even Article 37 in the Charter, the closest we come to a substantive right, dances around the heart of the issue, with scholars such as Krommendijk describing it as an "interpretive tool" more than a "freestanding

[30]For a lively discussion of early issues, see J.H. Jans, *Who Is the Referee? Access to Justice in a Globalised Legal Order*, 4 Rev. of Eur. Admin. L. 87 (2011); Marjan Peeters & Mariolina Eliantonio, *On Regulatory Power, Compliance, and the Role of the Court of Justice in EU Environmental Law: Concluding Chapter to the Research Handbook on EU Environmental Law*, *in* Research Handbook on EU environmental law 475 (Marjan Peeters & Mariolina Eliantonio eds., 2020).

[31]Bookman & Petel, *supra* note 3, at 7.

[32]Börzel, *supra* note 3, at 147–9.

[33]Alter & Vargas, *supra* note 7; Bogojevic, *supra* note 7 at 731; Börzel, *supra* note 3.

[34]Elias Van Gool, *Searching for 'Environmental Justice' in EU Environmental Law*, 31 Eur. Energy & Env't L. Rev. 334 (2022).

[35]Kris van der Pas, *All That Glitters Is Not Gold? Civil Society Organisations and the (Non-)Mobilisation of European Union Law*, 62(2) JCMS: J. of Common Mkt. Stud. 525, 525 (2024).

[36]Buckel, Pichl, & Vestena, *supra* note 3 at 24; Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 Ann. Rev. of L. & Soc. Sci. 21 (2020); Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs Climate Change e580 (2019).

[37]Börzel, *supra* note 3; Krommendijk, *supra* note 3; Setzer and Vanhala, *supra* note 36.

right."[38] Therefore claims must be made around tangential rights, and with harm requirements must also therefore be retrospective—as in the harm has already occurred—rather than prospective—where the harm has not yet occurred, common to many issues in climate change for example.[39] Environmental concerns are attached to issues over planning permissions, or investment, or noise, or rights to privacy—though tentatively human rights courts are working more towards considering more progressive interpretations around intergenerational claims and collective rights.[40]

These strategic choices around case selection and framing again point the need for further empirical research to understand not what makes it into the law books in the forms of opinions and judgments, but what doesn't. What do the claimants themselves think about how their case was framed? Was their voice lost or silenced as was the case in the African study? Without first-hand empirical data to answer this question, the risks continue.

III. Closed Doors: Admissibility

Admissibility—standing and individual harm—dominated the interviews.[41] Arguably, standing has received more attention in the literature, exploring challenges at national level and before the European courts.[42] As echoed by many scholars, ENGOs are the voice of the environment, and to exclude them from courts via standing renders environmental voice mute.[43] While Aarhus went some way to addressing this issue in recognising that ENGOs must be there to 'speak' for the environment, restrictions still abound.[44] The irony is not lost that Aarhus is meant to increase access to justice and participation but then makes it difficult to access justice and participate. But beyond practitioner insight and theoretical positing, do we really know whether admissibility silences potential claimants? Or are those that make it through representative enough that we are confident we are building a democratic, multi-faceted, diverse, and inclusive body of jurisprudence and case law?

While more widely used in the US context, denial of standing has been used as a political tactic to silence environmentalists, with a continued concern that the silencing may then have a ripple effect of discouraging claims being brought at all:

> If the public comes to believe that their efforts will be futile—that access to justice will be impeded and that they will be unable to make their claims in court (to say nothing of prevailing)—then procedural environmental rights will have little meaning, the assurances of environmental due process in many international, regional, and national legal instruments will ring hollow, and the assertion that citizens and NGOs play an important role in the

[38]Krommendijk & Sanderink, *supra* note 17 at 634. *See also* Peeters & Eliantonio, *supra* note 30.

[39]Natalia Kobylarz, *The European Court of Human Rights, an Underrated Forum for Environmental Litigation*, *in* 5TH EUROPEAN ENVIRONMENTAL LAW FORUM'S BOOK (Helle Tegner Anker & Birgitte Egelund Olsen eds., 2018).

[40]*Id.* Note also that after this study had concluded, the ECtHR made a landmark decision in allowing a claim from an association KlimaSeniorinnen and found that the Swiss government had violated Arts 8 and 6 (application no. 53600/20).

[41]Bechtel, *supra* note 7, at 22–23; Bogojevic, *supra* note 7; Börzel, *supra* note 3; Jan Darpö, *Article 9.2 of the Aarhus Convention and Eu Law: Some Remarks on Cjeus Case-Law on Access to Justice in Environmental Decision-Making*, 11 J. FOR EUR. ENV'T & PLAN. L. 367 (2014); Luca De Lucia, *The New Aarhus Regulation and the Defensive Behaviour of the European Legislator*, 15 REV. OF EUR. ADMIN. L. 7 (2022); Eliantonio, *supra* note 7; Elizabeth Fisher, Eloise Scotford & Emily Barritt, *The Legally Disruptive Nature of Climate Change*, 80 THE MOD. L. REV. 173 (2017).

[42]Alter & Vargas, *supra* note 7, at 470; Bechtel, *supra* note 7; Bogojevic, *supra* note 7; Danthinne, Eliantonio, & Peeters, *supra* note 7; Eliantonio, *supra* note 7; Hedemann-Robinson, *supra* note 7; Kingston et al., *supra* note 5.

[43]Bogojevic, *supra* note 7; Eliantonio, *supra* note 7; Alter & Vargas, *supra* note 7, at 488; Peeters & Eliantonio, *supra* note 30 (suggesting that "it could be wondered to which extent the right to public participation in environmental decision-making is not largely a paper tiger").

[44]Crossen & Niessen, *supra* note 12; Hartmann & Willers, *supra* note 3.

> creation of environmental policy and the enforcement of environmental law will be little more than lip service.[45]

Then there is the thorny issue of individual harm. The CJEU has fairly strict requirements and burdens of proof for individual harm and direct concern.[46] *Actio popularis* will not be heard.[47] When looking at environmental claims, this becomes extremely challenging, as environmental issues tend to affect many people across a broad range, and environmental laws do not tend to have individuals rights and obligations.[48] Buckel in fact describes how social movements can only take hold when society recognises the impact of the issue at hand;[49] in this way, to become a social movement there must be wide-reaching impact, but to engage in strategic litigation, there must be individual harms. It is very difficult indeed to frame a claim in a way that will meet the requirements of individual harm—or direct concern when looking at regulatory acts—clearly demonstrating that the alleged violation or illegal act impacts one or more individuals specifically and differently than others.[50]

Yet once again, our insight appears to be limited to theory and practitioner insight, lacking full understanding of the cases which fail on standing or individual harm. Do these procedural requirements have a meta-level impact on environmental law-making through strategic litigation which is not representative? If we are only hearing a particular sub-set of cases then we can only change certain laws, thus leaving a whole sphere of potential cases and challenges unheard and thus left out of our democratic law-making process.

E. Reflections and Next Steps

> *It's a very, very attenuated form of access to justice.*[51]

> *There is still no genuine interest having actual access to court for people and society.*[52]

We knew that, in the context of indigenous rights litigation in Africa, strategic choices did, to some extent, silence claimants' voices. We now also know that practitioners in strategic environmental litigation in the EU see potential challenges that could negative impact the ability of claimants to be heard, which was underscored but not answered by existing literature and scholarship. This leads to two overarching findings.

First, it is entirely possible that we are only hearing the voices of a potentially elite set of claimants who have access to the resources and capital needed to engage in strategic litigation. This is compounded by strategic case selection and admissibility requirements where, once again, we only hear the voices of those cases which the ENGOs think have a chance at successful

[45]Avi Brisman, *The Violence of Silence: Some Reflections on Access to Information, Public Participation in Decision-Making, and Access to Justice in Matters Concerning the Environment*, 59 CRIME, L. AND SOC. CHANGE 291, 300 (2013). *See also* Haddad & Sundstrom, *supra* note 29; David Luban, *Silence! Four Ways the Law Keeps Poor People from Getting Heard in Court*, 1 LEGAL AFFAIRS 54 (2002).

[46]Ludwig Krämer, *Access to Environmental Justice: The Double Standards of the Ecj*, 14 J. FOR EUR. ENVIRONMENTAL & PLAN. L. 159 (2017); Ludwig Krämer, *Climate Change, Human Rights and Access to Justice*, 16 J. FOR EUR. ENV'T & PLAN. L. 21 (2019); Van Durme & Nicòtina, *supra* note 5.

[47]Krommendijk, *supra* note 3.

[48]Eliantonio, *supra* note 7; Matthijs van Wolferen & Mariolina Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention*, *in* RESEARCH HANDBOOK ON EU ENVIRONMENTAL LAW 148 (Marjan Peeters & Mariolina Eliantonio eds., 2020); Fisher, Scotford, & Barritt, *supra* note 41; Krämer, *supra* note 46.

[49]Buckel, Pichl, and Vestena, *supra* note 3, at 31.

[50]Braig, Kutepova, & Vouleli, *supra* note 3.

[51]Interview 2, *supra* note 9.

[52]Interview 3, *supra* note 16.

litigation. Neither the practitioners nor existing scholarship provided evidence or data about the cases that *are not heard*. This leads to the second important initial finding, that we also do not know enough about the claimants' perspectives themselves. Even in research about the potential silencing of claimants' voices, we do not generally hear their voices. There is a strong sense from evidence in Africa, from practitioners, and from theory that there could be a silencing effect, but without empirical evidence on the cases that we don't hear, and listening to the voices of the claimants themselves, we cannot fully answer these questions.

This initial scoping study therefore does manifest a need for further, in-depth research into a) cases which are *not* heard, and b) the perspective of the claimants themselves, specifically looking at the newly emerging—and potentially very powerful—tool of strategic environmental litigation at the CJEU. Then, potentially, we can understand whether and how strategic choices are silencing claimants' voices. As with all good research, once we understand then, and only then, can we make changes to improve our work and create a more representative and empowering form of strategic environmental litigation in the EU.

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