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POSSIBILITY OF EXTENDING LEGAL STANDING UNDER ARTICLE 263 (4) TFEU IN THE MATTER OF CLIMATE LITIGATION

Yumiko Nakanishi*

Abstract

Climate litigation cases are filed worldwide. Young people and environmental non-governmental organizations (NGOs) are active in this field. The number of climate lawsuits is growing, and plaintiffs have prevailed in a notable number of cases. In Europe, there are historical climate litigation cases brought about by youth activist groups and NGOs. However, the Court of Justice of the European Union (CJEU) has not yet recognized the legal standing of individuals or NGOs, based on the *Plaumann* judgment. This article is to show possibilities and necessities for the change of the *Plaumann* judgment. First, it examines whether the EU's legal order has established a complete system of legal remedies and procedures. Second, I question whether the *Plaumann* judgment is absolute established case law. Third, I raise a question about the adherence to the *Plaumann* judgment from the viewpoint of the EU's accountability towards the EU citizens.

Content

I. *Introduction*

Climate litigation cases are filed worldwide. Young people and environmental non-governmental organizations (NGOs) are active in this field. The number of climate lawsuits is growing, and plaintiffs have prevailed in a notable number of cases. In Europe, there are historical climate litigation cases brought about by youth activist groups and NGOs. *Urgenda* cases[1] and

* Professor of EU law, Graduate School of Law, Hitotsubashi University, Tokyo, Japan
E-mail: yumiko.nakanishi@r.hit-u.ac.jp

[1] The Hague District Court, *Urgenda Foundation v the State of the Netherlands*, Judgment of 24 June 2015, C/09/456689/HA ZA 13-396 (English translation), ECLI:NL:RBDHA:2015:7196; The Hague Court of Appeal, Judgment of 9 October 2018, *the State of the Netherlands v Urgenda Foundation*, 200.178.245/01 (English translation), ECLI:EU:GHDHA:2018:2610; The Supreme Court of the Netherlands, *the State of the Netherlands v Urgenda foundation*, Judgment of 20 December 2019, Number 19/00135, ECLI:NL:HR:2019:2006.

Shell[2] in the Netherlands, *Grande Synthe*[3] and *Affaires du Siècle* (Cases of the Century)[4] in France, and the *Climate Change Act* in Germany[5] are examples of such cases. However, the Court of Justice of the European Union (CJEU) has not yet recognized the legal standing of individuals or NGOs.[6]

This narrowness in the legal standing of individuals and NGOs under European Union law has been criticized and discussed.[7] Article 263 (4) of the Treaty on Functioning of the European Union (TFEU) demands fulfillment of certain conditions: an act addressed, an act that is of direct and individual concern to applicants, or a regulatory act that is of direct concern to applicants and does not entail implementing measures. The last part was included in the Treaty of Lisbon to extend the legal standing. Even after this amendment, individuals and NGOs still have difficulty challenging the legality of EU measures before the CJEU. The case of *Carvalho*, in which individuals and an association brought proceedings against EU measures before the General Court and subsequently appealed before the Court of Justice, and their applications were rejected before the Court of Justice, showed such a difficulty. Is a further amendment to the provisions necessary to extend the legal standing of natural and legal persons? Was Article 263 (4) of the TFEU not so amended that individuals and NGOs could act before the CJEU and their legal standing would be easily recognized based on the will of the Member States, that is, *Herren der Verträge*? Insofar as Member States will not do so, is there no chance to extend legal standing?

Climate change affects the public, and the public is and will be increasingly affected by it. Furthermore, as the Intergovernmental Panel on Climate Change (IPCC) alerts us, we must prevent the temperature from rising any more than 1.5 degrees Celsius, and in that regard the rapidness and decisiveness of EU measures are indispensable. Therefore, this article discusses the possibilities of extending the legal standing of individuals and NGOs under Union law in climate litigation. First, it examines whether the EU's legal order has established a complete system of legal remedies and procedures. Second, I question whether the *Plaumann* judgment is absolute established case law. Third, I raise a question about the adherence to the *Plaumann* judgment from the viewpoint of the EU's accountability towards the EU citizens.

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[2] The Hague District Court, *Milieudefensie v Royal Duch Shell*, Judgment of 26 May 2021, ECLI:NL:RBDHA:2021:5539.

[3] Council d'État, 19 novembre 2020, *Grande Synthe*, No.427301.

[4] Tribunal administratif de Paris, 3 février 2021, No 1904967, 1904968, 1904972, 1904976/4-1 ; Tribunal administratif de Paris, 14 octobre 2021, No 1904967, 1904968, 1904972, 1904976/4-1.

[5] BVergfG, 1 BvR 2656/18, Beschluss des Ertsten Senats vom 24. März 2021.

[6] Case T-330/18, *Armando Carvalho and Others v European Parliament and Council*, Order of 8 May 2019, ECLI:EU:T:2019:324; Case C-565/19 P, *Armando Carvalho and Others*, Judgment of 25 March 2021, ECLI:EU:C:2021:252.

[7] Ex. Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union,* Opinion Advocate General Jacobs of 21 March 2002, ECLI:EU:C:2002:197; Liv Christiansen and Cora Masche, "Klimarechtsschutz und Paradoxien beim EuGH-Warum die Plaumann-Formel nicht mehr zeitgemäß ist", *Zeitschrift für europarechtlichen Studien*, 1/2023, p.32; Ludwig Krämer, "11 Article 47 of the Charter and Effective Judicial Protection in Environmental Matters: The Need to Grand Civil Society the Right to Defend the Environment", in Matteo Bonello, Mariolina Eliantonio, and Giulia Gentile (ed.), *Article 47 of the Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective*, Hart Publishing, 2022, p.195; Gerd Winter, "Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation", *Transnational Environmental Law*, 9:1, p.2020, p.137; Alessandora Donati, "60 years from Plaumann: Access to Justice in Environmental and Climate Cases before the CJEU", *Revue européenne de droit de la consummation*, n° 3/2023, p.551.

II. *A complete system of legal remedies and procedures?*

The CJEU has held that EU treaties have established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of the measures adopted by the institutions. This complete system is ensured by the annulment procedures in Articles 263 and 277 TFEU and the preliminary rulings procedure in Article 267 TFEU. This expression of a complete system is connected to the concept of the rule of law. In the case of *Les Verts* (Case 294/83), where the Court of Justice used, for the first time, a description of the treaty as the basic constitutional character of the Community, invoking the idea of the rule of law and giving an explicit account of what the rule of law requires[8], the Court held it.

It is very true that individuals and NGOs may file lawsuits in national courts and be recognized as plaintiff in such cases. Indeed, admissibility criteria regarding legal standing certainly depends on national procedural laws; however, national courts are required to interpret, to the fullest extent possible, the procedural rules as the conditions to be met to bring proceedings in a manner consistent with the obligations (ex. ensuring the right to justice) arising from the Aarhus Convention.[9] In Germany, after the Trianel case[10], procedural rules were amended so that NGOs could bring proceedings and stand in lawsuits. However, individuals and NGOs cannot have legal standing before the CJEU because they cannot fulfil the condition, particularly the individual concern of a measure.

Based on the complete system of legal remedies and procedures, individuals and NGOs have the opportunity to bring proceedings and have legal standings before national courts through the preliminary rulings procedure in Article 267 TFEU, even if their legal standing is not recognized before the General Court and Court of Justice in Article 263 (4) TFEU. Then, are there any problems?'

However, there are several limitations. First, the legal standing of NGOs is not recognized by all Member States. The EU has not succeeded in adopting a measure that ensures the right to access to justice in member states, even though the Commission has proposed it. Some EU measures guarantee the right to justice over certain environmental issues. For example, Directive 2003/4, on public access to environmental information, stipulates that Member States must ensure the right to access justice. Article 11 of the Environmental Impact Assessment Directive 2011/92 enables individuals and NGOs to have access to a review procedure before national courts as long as they have sufficient interest or maintain the impairment of a right. In addition, the Environmental Liability Directive 2004/35 stipulates that persons who have sufficient interest or alleges the impairment of a right must have access to a court or other independent and impartial public bodies (Article 13). Furthermore, since the European Commission published a communication document, "Improving access to justice in environmental matters in the EU and its Member States"[11], the Commission has proposed provisions regarding access to justice in EU measures.[12] For example, paragraph 78 of Deforestation

[8] Francis G. Jacobs, *The Sovereignty of Law*, 2007, Cambridge University Press, pp.43-44.

[9] Ex. Case C-873/19, *Deutsche Umwelthilfe*, Judgment of 8 November 2022, ECLI:EU:C:2022:857, para.75.

[10] Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland v Bezirkregierung Arnsberg*, Judgment of 12 May 2011, ECLI:EU:C:2011:289.

[11] COM(2020)643.

[12] Laurens Ankersmit, "Case C 873/19 Deutsche Umwelthilfe: the Aarhus Convention secures enforcement of EU

Regulation 2023/1115 indicates that Member States should ensure that the public has access to justice in line with obligations under the Aarhus Convention, and Article 12 is a provision for access to justice. However, ensuring that the general right to justice depends on the national procedural rules remains challenging. Consequently, if national procedural rules do not recognize the legal standing of NGOs or restrict their admissibility before national courts, they cannot proceed easily to the preliminary rulings procedure in Article 267 of the TFEU. Even if national courts at last instance are obliged to bring the matter before the Court of Justice according to Article 267 (3) of the TFEU, it would take a long time for NGOs to reach the last instance.

Second, even if the EU system of legal remedies and procedures with the combination of the annulment procedure and the preliminary rulings procedure worked well, it could be considered a complete system that no longer applies to climate change litigation. The climate crisis is imminent, and continuing litigation for several years renders the filing of lawsuits meaningless. If NGOs bring proceedings before a national court, they may seek preliminary rulings before the Court of Justice but are not obliged to do so insofar as the issue is not related to the validity of an EU measure.[13]

III. *The Plaumann judgment is absolute?*

1. The *Plaumann* judgment

The *Plaumann* judgment was handed down in 1963. The Court announced, "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them 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 distinguishes them individually just as in the case of the person addressed."[14] The *Plaumann* judgment defines what an individual concern is. Since this Judgment, the CJEU has always referred to the *Plaumann* judgment when the legal standing of individuals and NGOs is at issue and has rejected their application by stating that they do not fulfil the condition for the individual concerned. It is very true that the *Plaumann* judgment is established case law. In the *Carvalho* case, the General Court indicated that every individual was likely to be affected one way or another way by climate change. However, the fact that the effects of climate change may be different for one person than for another does not lead to recognition of the legal standing of the former person. A different approach would render the requirements of Article 263 (4) TFEU meaningless and create a locus standi for all without the criterion of individual concern within the meaning of the case law resulting from the case of *Plaumann*.[15] In the appeal case of *Carvalho*, the Court of Justice referred to the establishment of a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the institutions.[16] It then clarified that, according to settled case law, the General

vehicle emission rules before national courts", *European Law Blog*, 24 October 2023.

[13] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, Judgment of 22 October 1987, ECLI:EU:C:1987:452.

[14] Case 25/62, *Plaumann & Co. v Commission*, Judgment of 15 July 1963, ECLI:EU:C:1963:17.

[15] Case T-330/18, note (6), para.50.

[16] Case C-565/19 P, note (6), para.67.

Court and the Court of Justice may not interpret the conditions under which an individual may institute proceedings against an act of the Union in a way that has the effect of setting aside those conditions that are expressly laid down in the TFEU.[17]

2. Possibilities and necessities of change of the narrow interpretation on the concept "individual concern"

I will discuss whether the *Plaumann* judgment must not be changed from several aspects. First, I will examine the *Plaumann* judgment from the viewpoint of precedent binding. Second, I will argue that the legal standing of individuals and NGOs should be recognized, relying on Article 47 of the Charter of the EU Fundamental Rights (Charter). Third, I will focus on the legal standing in the context of human rights and climate litigation. Finally, I will deal with the legal standing in the context of the Compliance Committee under the Aarhus Convention and the Aarhus regulation.

(1) Precedence binding?

Judgments by the CJEU have binding in each case but do not have precedence binding. This differs from the common law system such as that in the UK. Six original members of the European Community of Coal and Steel belong to the continental legal system (civil law system), in which judgments are not precedent-binding. Christiansen and Masche explained the continental legal system and common law system and argued that the interpretation of legal standing can be changed because judgments of the CJEU do not have precedence binding, even if the established case law has an effect beyond each individual case, to ensure legal certainty.[18] It is true that there is settled case law under the Union law. The principles of primacy[19], direct effect[20], and State responsibility[21] are not explicitly laid down in EU Treaties. The Court of Justice has created principles that are indispensable for the functioning of the EU and ensuring the effectiveness of the EU law. The *Plaumann* judgment is also settled case law. However, this Judgement is just an interpretation of Article 263 (4) of the TFEU and therefore differs from the judgments that created those principles. In fact, Advocate General Jacobs indicated another interpretation of Article 263 (4) TFEU in the case of *Unión de Pequeños Agricultores*.[22] He suggested that a person is to be regarded as individually concerned by a Union measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.[23] He also indicated that the time is now ripe to reconsider the strict interpretation of Article 263 (4) TFEU which has the effect of removing cases from the court which was created for the purpose of dealing with them, and to improve the judicial protection of individual interests.[24] Furthermore, changes in interpretation differ from

[17] Case C-565/19 P, note (6), para.69.

[18] Christiansen and Masche, note (7), p.46.

[19] Case 26/62, *Van Gend & Loos*, Judgment of 5 February 1963, ECLI:EU:C:1963:1.

[20] Case 6/64, *Costa v E.N.E.L.*, Judgment of 15 July 1964, ECLI:EU:C:1964:66.

[21] Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Judgment of 19 November 1991, ECLI:EU:C:1991:428.

[22] Case C-50/00 P, note (7).

[23] Case C-50/00 P, note (7), para.60.

[24] Case C-50/00 P, note (7), para.99.

amendments to provisions. An amendment of provisions needs the will of all the Member States, i.e. *"Herren des Vertrages*." The *Plaumann* judgment is just an interpretation on the notion "individual concern" of Article 263 (4) TFEU.

The interpretation of the provisions of the EU Treaties can be changed; rather, it would be necessary. For example, in the case of *Keck*,[25] the Court of Justice did so, which can be considered a change in the established case law. First, the Court held that it is established by the case-law beginning with "*Cassis de Dijon*" (Case120/78 *Rewe-Zentral*) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect prohibited by Article 30 TEC (Article 34 TFEU).[26] Then, the Court stated that "by contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."[27] In this case, after using the words "contrary to what has previously been decided," the Court changed the interpretation of the provision of Article 34 TFEU.

In addition, changing the *Plaumann* judgment does not mean abolishing the conditions laid down in Article 263 (4) TFEU. That means just a change of the interpretation of "individual concern." In the case of *Carvalho*,[28] applicants claimed that the acts at issue affect each of them differently, and each has different characteristics that are peculiar to it: some families are affected by drought, others by flooding, and others by melting snow or heatwaves caused or intensified by climate change. In the case of *Carvalho*, the General Court acknowledged that every individual was likely to be affected one way or another by climate change.[29] In the case of *Grande Synthe* in France,[30] the Conseil d'État acknowledges that a particular region has been affected by climate change. Furthermore, if an increasing number of individuals are affected by climate change, the condition of "individual concern" would be hardly fulfilled.[31] Thus, climate litigation should be differentiated from other types of litigation. Climate change has resulted in warming and frequent extreme weather events. It is time to change the interpretation of Article 263 (4) TFEU.

(2) Article 47 of the Charter

The Charter is legally binding and has the same legal values as the EU treaties. Article 47 of the charter provides the right to an effective remedy and fair trial and concretizes the

[25] Case Joined cases C-267/91 and C-268/91, *Criminal proceedings against Keck and Mithouard,* Judgment of 24 November 1993, ECLI:EU:C:1993:905.

[26] Ibid., para.15.

[27] Ibid., para.16.

[28] Case C-565/19 P, note (6).

[29] Case T-330/18, note (6), para.46.

[30] Conseil d'État, note (3).

[31] See, Donati, note (7), pp.557-558.

principle of effective judicial protection. The first sentence in Article 52 (3) of the Charter states that the meaning and scope of fundamental rights should be the same as those laid down by the ECHR as long as the Charter contains rights that correspond to rights guaranteed by the ECHR. In the case of *Dumitru-Tudor Dorobantu*[32], the CJEU stated that Article 4 of the Charter has the same meaning and scope as the ECHR article, referring to the first sentence of Article 52 (3) of the Charter and the explanations of the Charter regarding Article 52; the Court then made use of the criteria established by the ECtHR. The Court of Justice took into consideration and accepted the ECtHR's interpretation ad litteram.[33] However, Article 47 of the Charter is unique. Explanations of Article 47 of the Charter indicate that Article 47 of the Charter is based on Article 13 of the ECHR; however, in Union law, protection is more extensive because it guarantees the right to an effective remedy before a court.[34] Rauchegger commented in the following way: Article 47 of the Charter needs to be interpreted consistently with the ECHR rights in Article 6 (1) and 13 of ECHR. However, Article 47 of the Charter is not merely the sum of the provisions of Articles 6 and 13 of the ECHR; it is an independent and self-standing fundamental right to the EU legal order.[35]

The Court relied on Article 47 of the Charter in several fields and developed an interpretation of the provision. First, in the case of Schrems, in which the protection of personal data was dealt with, the Court of Justice held that legislation not providing for any possibility for an individual to pursue legal remedies does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter, and it requires everyone to have the right to an effective remedy before a tribunal.[36] The CJEU does not have jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy (CFSP) or acts adopted based on those provisions (Article 24 (1) TEU and Article 275 TFEU). However, the Court of Justice examined the CFSP issues by referring to Article 47 of the Charter. For example, in the case of *H v Council*, the Court of Justice indicated that the rule of law and the review of legality would apply to the acts of the CFSP, although it is limited to acts of staff management, taking into account Article 19 (1) of the TEU and the right to an effective remedy in Article 47 of the Charter.[37] In the case of the *Rosneft Oil Company*, the Court of Justice held that Article 47 of the Charter requires that any person should have the right to an effective remedy before a tribunal, and the existence of an effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law.[38] In the case of *A.K.* and others, where judges in Poland are independent, the Court of Justice held that Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right that they may rely

[32] Case C-128/18, *Dumitru-Tudor Dorobantu*, Judgment of 15 October 2019, ECLI:EU:C:2019:857.

[33] I discussed this under the autonomous interpretation of the CJEU, see, Yumiko Nakanishi, "Autonomy of the European Union Legal Order and Autonomous Interpretation", *Hitotsubashi University of Law and Politics* 51, 2023, pp.1-12.

[34] The explanations relating to the Charter of Fundamental Rights, see OJ 2007 C303/17.

[35] Clara Rauchegger, Article 47, in Steve Peers, Tamara Hervez, Jeff Kenner and Angela Ward (ed.), *The EU Charter of Fundamental Rights, A Commentary,* Second edition, Hart Publishing, 2021, p.1253, para.47.14

[36] Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, ECLI:EU:C:2015:650, para.95.

[37] Case C-455/14 P, *H v Council and Others*, Judgment of 19 July 2016, ECLI:EU:C:2016:569, para.58.

[38] Case C-72/15, PJSC *Rosneft Oil Company v Her Majesty's Treasury and Others,* Judgment of 28 March 2017, ECLI:EU:C:2017:236, para.73.

on as such.[39] In the case of *Deutsche Umwelthilfe* in 2022, where the issue was the right to access justice in the context of the Aarhus Convention, referring to the case of *A.K. and Others*, the Court of Justice held that Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of the EU or national law to confer on individuals the right that they may rely on as such.[40] According to German procedural rules, *Deutsche Umwelthilfe*, an environmental NGO, was unable to challenge a decision before a court. However, the Court of Justice held that Article 47 of the Charter may be relied upon as a limit to the discretion left to Member States, which regulates national procedural rule.[41] Finally, it held that Article 9 (3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as precluding a situation in which an environmental association is unable to challenge a national court or administrative decision.[42]

The Court of Justice developed case law under Article 47 of the Charter. Christiansen and Masche indicated that the content of Article 47 of the Charter concerns not only the legal remedies and procedures system of the Member States, but also that of the EU.[43] What is the EU's remedy and procedure system based on Article 47 of the Charter? The current situation is as follows.

In the case of *Carvalho* of the General Court in 2019, although the applicants insisted that the interpretation of the concept of "individual concern" is incompatible with the fundamental right to effective judicial protection inasmuch as it results in a directly applicable regulation being virtually immune to judicial review, the General Court held that the protection conferred by Article 47 of the Charter does not require an individual to have an unconditional entitlement to bring an action for annulment of such a legislative act directly before the Courts of the EU.[44] The applicants appealed against the General Court's order before the Court of Justice. In the case of *Carvalho* of the Court of Justice in 2021, it held that the applicants could not ask the Court of Justice to set aside the conditions of Article 263 (4) of the TFEU and, in particular, to adapt the criterion of individual concern as defined by the *Plaumann judgment*, so that they may have access to an effective remedy.[45] The Court of Justice repeated the argument of the General Court regarding Article 47 of the Charter.[46]

As Krämer noted, this conservative approach stands in stark contrast to the creative attitude of the CJEU when it had to decide whether national law effectively implemented EU environmental law.[47]

In addition, we can also argue from the rule of law as a Union value. The legal standing of natural and legal persons under Article 263 (4) of the TFEU was extended by the Treaty of

[39] Joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, Judgment of 19 November 2019, ECLI:EU:C:2019:982, para.162.

[40] Case C-873/19, note (9), para.79.

[41] Case C-873/19, note (9).

[42] Case C-873/19, note (9), para.81.

[43] Christiansen and Masche, note (7), p.39.

[44] Case T-330/18, note (6), para.52.

[45] Case C-565/19 P, note (6), para.76.

[46] Case C-565/19 P, note (6), para.77.

[47] Ludwig Krämer, "11 Article 47 of the Charter and Effective Judicial Protection in Environmental Matters: The Need to Grand Civil Society the Right to Defend the Environment", in Matteo Bonello, Mariolina Eliantonio, and Giulia Gentile (ed.), *Article 47 of the Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective*, Hart Publishing, 2022, p.204.

Lisbon. In the case of *Venezuela*,[48] the Court of Justice extended the legal standing under Article 263 (4) of the TFEU. First, the Court of Justice held that "according to settled case-law, the Court may rule, if necessary of its own motion, whether there is an absolute bar to proceeding arising from disregard of the conditions as to admissibility laid down in Article 263 TFEU."[49] Second, the Court held that the Court must raise of its own motion the question whether Venezuela is to be regarded as a "legal person" within the meaning of Article 263 (4) TFEU.[50] Third, the Court indicated that the notion of a "legal person" must be regarded as an autonomous concept of EU law that must be interpreted uniformly throughout the territory of the European Union. The Court held that in interpreting the notion of a "legal person", it is necessary to consider not only the wording of that provision, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[51] The Court also held that the term "legal person" used in Article 263 (4) of the TFEU cannot be interpreted restrictively.[52] Furthermore, the Court held that the existence of an effective judicial review system designed to ensure compliance with the provisions of EU law was inherent in the existence of the rule of law.[53] Finally, the Court of Justice acknowledged Venezuela's position as a Third Country.

This extension of legal standing is combined with one of the EU values: the rule of law. This judgment shows the possibility of extending the legal standing of individuals and NGOs according to Article 263 (4) of the TFEU.

(3) Human Rights and climate litigation

Article 47 of the Charter provides the right to legal remedies and procedures, that is, procedural rights. The Charter also stipulates that human rights are related to climate litigation. The Charter applies to EU institutions, including the European Parliament and the Council as legislators; the European Commission, which proposes measures; and the CJEU, which must ensure effective legal protection (Article 51 (1) of the Charter). Furthermore, respect for human rights is a union's value (Article 2 TEU).

Climate litigation is related to human rights. In the *Urgenda* case, the Court of Appeals relied on Articles 2 and 8 of the ECHR for the first time to establish a positive state obligation to take action against climate change.[54] Article 2 of the ECHR concerns the right to life, which includes environment-related situations that affect or threaten the right to life, and Article 8 protects the right to private life and family and may also affect environment-related situations.[55] The case of *Urgenda* of the Supreme Court confirmed this.[56] Before the ECtHR, elderly people sued Switzerland before the ECtHR.[57] In addition, six young people in Portugal sued 33 countries before the ECtHR.[58] Furthermore, in the case of *Waratah* of the Queensland Land

[48] Case C-872/19 P, *Bolivarian Republic of Venezuela v Council*, Judgment of 22 June 2021, ECLI:EU:C:2021:507.
[49] Ibid., para.22.
[50] Ibid., para.23.
[51] Ibid., para.42.
[52] Ibid., para.44.
[53] Ibid., para.48.
[54] The Hague Court of Appeal, note (1).
[55] The Hague Court of Appeal, note (1), para.40.
[56] The Supreme Court of the Netherland, note (1).
[57] ECtHR, Case *KlimaSeniorinnen v Switzerland*, application no.53600/20.
[58] ECtHR, Case *Duarte Agostinho and Others v Portugal and 32 other states*, application no.39371/20.

Court in Australia,[59] President Kingham approved that the mine would cause climate change impacts, and approval of the mine would limit several rights, including the right to life, the cultural rights of First Nations people, the rights of children, the right to property, privacy, and home, and the right to enjoy human rights equally.[60]

Thus, an increasing number of courts have recognized the link between climate litigation and human rights. It is time for individuals and NGOs to rely on the Charter that lays down climate-related articles. Article 1 of the Charter stipulates that human dignity is inviolable and must be respected and protected. This provision was derived from Article 1 of the *Grundgesetz* (GG, Basic Law).[61] In the case of the *Climate Change Act*, the German Federal Constitutional Court relied on Article 1, read with 20a GG and Article 2, para. 2, and the derived state's obligation to protect young people from climate change. Dupre indicated that the right to a healthy environment can be derived from Article 1 of the Charter. In addition, human dignity is a EU's value (Article 2 TEU).

Second, Articles 2 and 8 of the ECHR were used in the *Urgenda* cases in the Netherlands.[62] If the ECtHR recognizes the rights of applicants based on Articles 2 and 8 of the ECHR in the cases of *KlimaSeniorinnen*[63] and *Agostinho*[64], the CJEU should respect the interpretation of these articles. Article 2 of the Charter lays down the right to life, which is equivalent to Article 2 of the ECHR, and Article 7 of the Charter is related to the right to privacy, which is Article 8 of the ECHR; the meaning and scope of the articles of the Charter shall be the same as those laid down by the ECHR according to Article 52 (3) of the Charter.

Third, as the CJEU itself held that the Charter was a "living document"[65], it should be interpreted over time. In the case of *Centraal*, where animal welfare and freedom of religion were at issue, the Court of Justice held that the Charter of Fundamental Rights of the EU is a living instrument like the European Convention on Human Rights (ECHR).[66] The Court of Justice held that "the Charter is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today, with the result that regard must be had to pay in values and ideas, both in terms of society and legislation, in the Member States."[67] The *Plaumann* judgment was issued in 1963. This implies that the Judgment was made by seven judges approximately 60 years ago. The interpretation provided by the Judgment should be examined "in the light of present-day conditions and of the ideas prevailing in democratic States today" and if necessary, the interpretation should be changed.

(4) The Compliance Committee under the Aarhus Convention

The EU and its Member States are contracting parties to the Aarhus Convention. The

[59] Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21.

[60] See, Julia Dehm, "Undermining the Energy Transition", *Verfassungsblog*, 19 November 2023.

[61] The president of the Convention was the former president of German Federal Constitutional Court. The concept of "human dignity" is essential in Germany. See, case C-36/02 *Omega*. Judgment of 14 October 2004, ECLI:EU:C:2004:614.

[62] The Hague Court of Appeal, note (1); the Supreme Court of the Netherland, note (x).

[63] ECtHR, note (57).

[64] ECtHR, note (58).

[65] Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, Judgment of 17 December 2020, ECLI:EU:C:2020:1031.

[66] Ibid., para.77.

[67] Underlined by author.

Convention applies not only to Member States, but also to the EU institutions. The Union has the responsibility of being an international organization as a contracting party. The EU adopted a measure to comply with the obligations arising from the Arhus Convention, namely Regulation 1367/2006, on the application of the provisions of the Aarhus Convention to the EU's institutions, offices, and bodies (the Arhus regulation). A compliance mechanism was established based on Article 15 of the Aarhus Convention. According to this mechanism, the Compliance Committee reviews the Parties' compliance with the provisions of the Convention and reports to the Meeting of the Parties.

In 2008, the non-governmental organization *ClientEarth* submitted a communication to the Compliance Committee. It alleged that the EU failed to comply with its obligations under the Arhus Convention regarding access to justice in environmental matters, particularly regarding the legal standing criteria for private individuals and NGOs to challenge decisions before the CJEU. According to the findings and recommendations of Part II on March 17, 2017, the EU failed to comply with Article 9 (3) and (4) of the Arhus Convention with regard to access to justice by members of the public because neither the Arhus Regulation nor the jurisprudence of the CJEU implemented or complied with the obligations arising under those paragraphs.

After receiving these findings and recommendations, the Council adopted decision 2018/881 requesting the Commission to submit a study on the Union's options for addressing the findings of the Compliance Committee and a proposal for amending the Arhus regulation. Upon receiving this request, the Commission proposed a regulation to amend the Arhus regulation. Regulation 2021/1767, which amended the Arhus regulation, was adopted by the European Parliament and the Council on October 6, 2021. Owing to these amendments, the Arhus regulation allows better public scrutiny of EU acts that affect the environment by NGOs and other members of the public. NGOs may submit requests for internal reviews relating to administrative acts adopted by EU institutions and bodies that violate EU environmental law, and individuals and other organizations subject to certain criteria may also submit requests. On 18-20 October 2021, the seventh session of the Meeting of the Parties to the Convention took place. The meeting of the Parties noted that the amendments to the Aarhus regulation fully met the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (para.5).

The Compliance Committee's findings led to the amendment of the Aarhus Convention, which extended the legal standing of individuals and NGOs in the context of the internal review of administrative acts by EU institutions. The legal standing of individuals and NGOs in the context of the legality of legislative acts by EU institutions remains certainly limited. However, analyzing the amendments, Donati envisages that the CJEU might broaden its traditional scope of review by including de facto the control of the legality of the initial measure adopted by EU institutions or body.[68] We should observe the development in this context.

[68] Donati, note (7), pp.563.

IV. *Transfer of competence and accountability for the EU citizens*

I discuss the legal standing of individuals and NGOs from different perspectives. Member States have transferred their sovereign rights to the Union[69]; therefore, the Union has the competence to legislate and conclude international agreements. Member States transferred their sovereign rights to the Union in the field of the environment under Article 192 of the TFEU. Consequently, the Union has shared competence in this field and exercises competence in compliance with the principle of subsidiarity. The EU has taken many measures related to climate change, including the emissions trading system[70] and European Climate Law[71], and has concluded international agreements, including the Paris Agreement.[72] As the Union has exercised its competence in the environmental field, Member States cannot do so to that extent (Article 2 (2) TFEU). Modern states are based on national sovereignty. This means that the sovereignty of each Member State is derived from its citizens, and the very constitutional authority is that of citizens. The EU institutions, including the CJEU, have accountability towards EU citizens, including individuals and NGOs, as far as they are transferred competence from the Member States and thus the EU citizens in the field of climate change issues. Individuals are subject to the Union's legal order. Individuals have fundamental rights under the Charter. If their rights are violated by the measures of EU institutions, they should have the right to a legal remedy under Article 47 of the Charter and rely on it.

V. *Concluding remarks*

The hurdle of the condition "individual concern" in Article 263 (4) TFEU seems almost impossible to be overcome. Similar to other researchers, I pointed out some possibilities and necessities to change *Plaumann* judgment in climate litigation. Legislators, judges, and individuals live on Earth, which is affected by global warming. Climate litigation is a tool used to raise alarms. Hence, this tool should be provided to both individuals and environmental NGOs, in particular which represent future generations.[73]

[69] Case 6/64, note (20)

[70] Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading (EUETS).

[71] Regulation 2011/1119 establishing the framework for achieving climate neutrality and amending regulation 401/2009 and 2018/1999.

[72] Council Decision 2016/1841 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.

[73] See, Yumiko Nakanishi, "The rights of and obligations towards future generations", in Hélène Ruiz Fabri, Valérie Rosoux, Alessandra Donati (ed.), *Representing the Absent*, 2023, Nomos, pp.237-264.