Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe

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Abstract

Public interest litigation aims to enforce through judicial proceedings not only the rights and interests of the individual claimants, but also those of the whole social group to which they pertain, if not of the whole collectivity. In this sense, it seeks to represent the rights of minorities, advance equality and bring positive social change through the courts. This article aims to situate the debate over public interest litigation in Europe by arguing that, although imperfect, it can still represent a key tool for societal change and for the protection of the new social and meta-individual rights, whenever responsible public actors fail to do so. In particular, building on previous academic literature and on the existing case law, the article, first examines the evolving concept of public interest litigation. Second, it generally presents the complex European architecture of judicial protection in which the different procedural techniques of public interest litigation are called to operate. Finally, under the comparative yardstick, it focuses on three relevant techniques available in such a European framework: constitutional review, the pilot-judgement procedure and class actions.

Keywords: public interest litigation, fundamental rights, class actions, enforcement, strategic litigation.

1 Introduction

Individuals within the EU are gifted nowadays with some of the most inspiring and rich constitutions. These fundamental catalogues enshrine civil, social, economic, political and cultural rights and values, which aim to foster the full development of everyone's personality and place human dignity as their largest cornerstone.[1] Their recognition occurs not only at national level, but also at several supranational levels: the European Union, with the Charter of Fundamental Rights of the European Union (hereinafter CFREU), legally binding since 2009; the Council of Europe, with the European Convention of Human Rights (hereinafter ECHR); the United Nations, with the Universal Declaration of Human Rights (hereinafter UDHR).

Despite their guarantee on paper, however, an empirical analysis often delivers the perception that most of these precious substantial provisions lack concrete enforcement. This concerns all kinds of dispositions, from the traditional 'negative' freedoms of the liberal state to the newest socio-economic 'positive' principles of the welfare state, in all fields of law and social contexts. Numerous examples can be found in relation to climate change and environmental pollution, fair working conditions, health care, social assistance, education, data protection, freedom of expression, detention conditions and non-discrimination for reasons such as race, sex, religion, political or sexual orientation. By means of active infringements from public authorities or private entities, but also through the lack of implementation of positive constitutional or statutory principles, social injustice is often provoked.

It is true that some, if not most, of these provisions have a subjective nature, in the sense that they pertain to single individuals. Still, on the one hand, increasingly often the infringements are collective (due to the same act or omission contemporarily impacting a group of people or even the whole community). On the other hand, some of the situations involved may be too diffuse to belong to just a single person (the right to breathe clean air, for example). Moreover, their inclusion in constitutional catalogues directed at the protection of all human beings, makes even individual – in principle, *private* – infringements relevant for the whole society: they erode the expectable standard of enforcement, by setting a precedent that concerns everyone. This qualifies their enforcement as a *public* issue, because it interests the collectivity.[2]

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1 Explicit references can be found in Art. 1(1) of the Basic Law for the Federal Republic of Germany ('Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority'), in Art. 10(1) of the Spanish Constitution ('The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace'), in Art. 3(1) of the Italian Constitution ('All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions') or, at EU level, in Art. 1 of the Charter of Fundamental Rights of the EU ('Human dignity is inviolable. It must be respected and protected').

2 Among the first to highlight this development and the progressive expansion of the grey area between private and public law, M. Cappelletti, *La giurisdizione costituzionale delle libertà* (1995), at 2, or in M. Cappelletti, 'Vin-

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These pages will not dwell on the fascinating yet intricate study of the causes that form the basis of these phenomena, certainly enhanced by the waves of globalisation, digitalisation, massification and standardisation of most relationships within the contemporary society and economy.[3] They should indeed be addressed from a more socio-political angle. Instead, the *procedural techniques* set for the enforcement of the earlier mentioned rights and interest will be examined.

This kind of judicial enforcement of public rights, interests and principles can be labelled in different ways. In the footsteps of several distinguished scholars, mostly from overseas, the term *public interest litigation* will be hereinafter adopted.[4] Its main features will be initially presented, with some significant examples. Subsequently, the EU multilevel and multifaceted architecture for the judicial enforcement of the earlier mentioned public rights and interests will be recalled. The different procedural techniques and the necessary coordination among them will be highlighted. Lastly, a comparative assessment regarding three selected procedural techniques and three illustrative public interest scenarios will be provided, to evaluate the main benefits and challenges to the future development of this kind of litigation within the EU. For these purposes, notable cases and recent relevant legislation will be examined, too.

2 Public Interest Litigation

Public interest, or public law, litigation is a term that dates back to the second part of the last century, in the United States, when it was first used to describe the several lawsuits brought within the civil rights movement – especially in the desegregation arena – and, subsequently, any action aiming to promote social justice.[5] Circumscribing the phenomenon only to this experience, however, would be naïve, since actions for the vindication of the community's interests have been around for centuries and throughout the whole globe. Starting from the so-called *actiones populares* from Ancient Rome, that could be brought to protect the *res publica*, which literally translates as the 'public thing', or 'good'),[6] examples can be found from the Americas to Oceania, through Europe, Asia and Africa.[7] Contrary to other experiences, the US one seemed particularly effective, at least initially, as well as in touch with the needs of the new mass and global society.[8] The lawsuits brought and the percentages of success during the 1960s and 1970s, in fact, met unprecedent numbers. Several advancements in favour of social minorities and disadvantaged groups were obtained in that period thanks to the wave of public interest litigation brought by numerous non-governmental organisations and activists. Notable examples are about racial discrimination, LGBTQ people and religious minorities.[9] The reform in 1966 of the class action model, through the amendments to Rule 23 of the US Federal Rules of Civil Procedure, was not a coincidence. Rather, as it will be further analysed, it represented a key tool for the developing movement.[10]

Despite the terminology, the different results and procedural instruments, the idea behind public interest lit-

dicating the Public Interest through the Courts: A Comparativist's Contribution', 25 *Buffalo Law Review* 643 (1976).

3 Cappelletti (1976), above n. 2.

4 *Ex multis*, A. Homburger, 'Private Suits in the Public Interest in the United States of America', 23 *Buffalo Law Review* 343 (1974); A. Chayes, 'The Role of the Judge in Public Law Regulation', 89 *Harvard Law Review* 1281 (1976); D. Rhode and S.L. Cummings, *Public Interest Litigation: Insights from Theory and Practice* (2009); S.L. Cummings, 'Public Interest Litigation in a Comparative Perspective', 26 *Australian Journal of Human Rights* 184 (2020). In general, academic research on this field in Europe has been rather limited, as remarked, for instance, by L. Carlassarre, 'Introduzione', in V. Angiolini (ed.), *Libertà e giurisprudenza costituzionale* (1992) 5; although, recently, a series of studies on the similar, yet more social and political, concept of 'strategic litigation' has been advanced (e.g., B. Hess, 'Strategic Litigation: A New Phenomenon in Dispute Resolution?', 3 *MPILux Research Paper Series* (2022)). Curiously, in the United States, the term 'strategic litigation' has been used to refer to the right-wing and pro-business organisations' litigation practice started in the 1980s and aimed at judicially dismantling regulations and policies set in favour of minorities and of the less-represented, at different times thus opposed to the more left-wing 'public interest litigation' (J. Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (2016), chapter 2).

5 *Ibid*, Cummings (2020).

6 They are accounted for in *De popularibus actionibus*, Title XXIII, Book XLVII of the Digesto. See, also, C. Fadda, *L'azione popolare: studio di diritto romano e attuale* (1894), F. Casavola, *Studi sulle azioni popolari romane. Le 'actiones populares'*, or, more recent, M. Caielli, *Cittadini e giustizia costituzionale. Contributo allo studio dell'*actio popularis (2015). Among the examples from these authors, actions aimed at removing an object which may dangerously fall from a building (*actio de posito et suspenso*), actions for the good maintenance of aqueducts (*lex Quinctia de aquaeductibus*, y. 745) or actions against those violating a grave (*actio sepulchri violati*) can be reported. Rather interestingly, all these actions could be brought by anyone from the community having the right to vote (hence, not women or children) and in most of them damages could be retrieved in favour of public funds. In general, they were conceived as actions in which *the claimant, by defending the interest of the people, defends also his own interest* (A. Di Porto, Res in usu publico *e 'beni comuni'* (2013), as cited by Caielli, above – unofficial translation). This was certainly encouraged by the identity between private interests and those of the whole community, in Ancient Republican Rome, as opposed to the distinction between the public and private sphere of the modern State from the 19th and 20th centuries (Caielli, above), which, nonetheless, as discussed in this article, lately seems to be increasingly merging.

7 Apart from the already mentioned studies, mainly related to the US experience (above, n. 4), see, ex multis, S. Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', *Revue québécoise de droit international, hors-série* (2015), at 199; M.C. Ucín, *Juicio a la desigualdad. La defensa de los derechos sociales a través del proceso* (2021); A. Durbach, L. McNamara, S. Rice & M. Rix, 'Public Interest Litigation: Making the Case in Australia', 38(4) *Alternative Law Journal* 219 (2013); R. Bigwood (ed.), *Public Interest Litigation: The New Zealand Experience in International Perspective* (2006); S. Budlender, G. Marcus & N. Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014); P.J. Yap and H. Lau (eds.), *Public Interest Litigation in Asia* (2012).

8 Cummings (2020), above n. 4, accounting also the political backlash begun at the end of last century and recently culminated during Trump's mandate.

9 *Ibid*., quoting a study on the Supreme Court's case law at the time, 'showing that of "219 cases involving the rights of the poor … brought to the high court, 136 were decided on the merits, and 73 of these were won"'.

10 See, *inter alia*, J. Greenberg, 'Civil Rights Class Actions. Procedural Means of Obtaining Substance', 39 *Arizona Law Review* 575 (1997); D. Marcus, 'Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action', 63 *Florida Law Review* 657 (2011).

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igation is, thus, an ancient one, which stems both from the civil and common law tradition. The procedural techniques, as well as the kinds of relief sought, may be distinct, but the goal is certainly the same: the promotion of the interests of the society as a whole and, in particular, of those less represented and powerful in the political and economic context, through judicial actions. These actions, even when commenced by private individuals, seek to advance the public interest. They defend not only the rights of the claimants, but also those of the whole social group to which they pertain. It should be, thus, conceived as a litigation which benefits, in general, the community of a certain legal order, fostering its moral and material progress.[11] Common criteria to concretely meet such a broad definition are contested among scholars and, according to some, even impossible to find.[12] Different views touch the issue of whether the public interest should be conceived as an abstract, merely theoretical and singular concept, related to the community in general, or as the sum of the various concrete interests which pertain to the public or to a portion of it. Moreover, public interest –much like 'public order' or 'public decency' – is a constantly changing concept, strictly connected to the evolutions of society. Still, to clearly define the perimeter of the present contribution – that is, whether public interest litigation exists in the EU and how (if it exists) it can be successfully practiced there – five main features will be highlighted. Their selection stems from an analysis of the case law and existing academic literature.[13]

First, public interest litigation pursues adjudication that transcends the rights and interests of the parties involved in the proceedings.[14] This may occur in several ways. For instance, by removing obstacles – such as a law, an act or a condition – to the effective enjoyment of subjective rights shared by a large community or a group of people. An iconic case, in relation to the rights to education and non-discrimination, is *Brown v. Board of Education*, from 1954 in the United States, in which the Supreme Court declared the unconstitutionality of racial segregation in public schools. Other examples from the United States are the well-known *Roe v. Wade*, from 1973, regarding the right to abortion and very recently overturned by the Supreme Court;[15] *Harris v. Rainey*, from 2014, on marriage from same-sex couples in Virginia; *Hall* v. *Werthan Bag*, from 1966, on employment discrimination; or the so-called *El Monte Thai Garment Slavery Case*,[16] from 1995, regarding unfair working conditions. Numerous other examples can be found in other jurisdictions and sectors of law, too: for example, in relation to the right to education of students with disabilities,[17] to the right to social housing, to the right to proper health care,[18] to privacy and data protection, to police abuse, to foster care, to environmental disasters. Evidently, not only individual, but also collective rights and supra-individual diffuse interests can be enforced through public interest litigation. The general right to breathe clean air or to live in a healthy environment, not affected by climate change's adverse effects, is an extremely relevant example today. Several cases (approximately 2,000, as recently estimated)[19] have been brought in the whole world so far to fight climate change. Other rights too small to be enforced individually could be those of the inmates from a persistently overcrowded prison system, like in *Brown* v. *Plata*, from 2011, regarding the desperate conditions in Californian state prisons: each inmate could individually claim a right to live in healthier conditions, but none to be released or to significantly reduce the number of inmates in the whole system.

It is, in short, *meta-individual* litigation, which *per se* concerns single individuals, but, at the same time, also goes *beyond* (*meta*, in ancient Greek), in the sense that it affects a whole group or community, in a similar way. As such, given the collective, or even diffuse, nature of the situations enforced, the traditional dualistic mechanisms of civil litigation may not be efficient anymore to allow participation of all the parties involved. As subsequently analysed, issues of standing, adequacy of representation of all the stakeholders and extension of the res judicata effects of the decision inevitably arise, too.

Second, the rights and interests vindicated are of *fundamental* nature, in the sense that they are recognised and guaranteed under a constitutional text.[20] This recognition can occur either explicitly or implicitly. Both traditional liberties – which basically require no state interference within one's sphere (e.g., the right to life and to physical integrity, freedom of expression, freedom of movement, right to property) – and social rights – which

11 A. Pizzorusso, 'Interesse pubblico e interessi pubblici', 26 *Rivista trimestrale di diritto e procedura civile* 57 (1972).

12 *Ibid.*; Rhode and Cummings, above n. 4.

13 See, in particular, the scholarship mentioned above, under n. 4.

14 Cappelletti (1976), above n. 2.

15 *Dobbs* v. *Jackson Women's Health Organization*, US Supreme Court decision, from 24 June 2022.

16 For further analysis, see, S.L. Cummings, *An Equal Place: Lawyers in the Struggle for Los Angeles* (2021), chapter 2.

17 Italian Constitutional Court, sent. 275/2016, which, rather interestingly, focuses also on the relationship between budgetary equilibrium and the guarantee of the essential rights' minimal core, the latter of which must always be preferred, and in accordance to which budgets must be drafted (not the contrary).

18 In relation to social housing and basic shelter, *Grootboom* v. *Oostenberg Municipality*, [2000] 3 BCLR 277, High Court of South Africa. For further analysis, see M. Langford, 'The Impact of Public Interest Litigation: The Case of Socio-Economic Rights', 27(3) *Australian Journal of Human Rights* 505 (2021). In relation to health care, connected to medicines to reduce the risk of HIV infection and their availability, *Minister of Health* v. *Treatment Action Campaign*, [2002] SA 721, Constitutional Court of South Africa. For further analysis, see A. Chilton and M. Versteeg, *How Constitutional Rights Matter* (2020), at 153.

19 J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* (2022), according to which as of 31 May 2022, 2002 cases of climate change litigation have been filed in 44 jurisdictions around the globe.

20 R. Alexy, *A Theory of Constitutional Rights* (2010). Fundamental rights constitute a transposition of human rights into the positive law of a specific legal order, to which they are strictly connected. Through their recognition and guarantee into the constitution, a specific democratic State sets them as one of its building blocks (M. Olivetti, *Diritti fondamentali*, II ed. (2020)). They provide guidelines for future interventions and interpretations, as well as contribute to shaping its true essence. See Hess, above n. 4, at 14.

demand an active role from the state (e.g., right to social security, to education, to health care, to fair working conditions) – can be accounted. Moreover, by the end of the century a third and fourth 'generation' of rights and interests have appeared and still contribute to the expansion of constitutional catalogues. Their emergence is mainly related to the new technologies and developments in the economy and society: for instance, they regard privacy and the protection of personal data, the environment and climate change, bioethics and artificial intelligence. In the wake of social rights, a common trait among these newly protected fundamental positions is the active role expected from the legislator, on the one hand, and from the public administration, on the other hand, for their implementation and enforcement.[21] Inevitably, their recognition within constitutional texts which trace back to the mid-twentieth century can occur only implicitly, thanks to the use of general clauses[22] and flexible concepts, capable of evolving and keeping pace with the challenges posed by advancements that could not even be imagined during the drafting of the constitutional texts.[23] This characteristic is significantly conveyed by the European Court of Human Rights (hereinafter ECtHR) in its now frequent depiction of the Convention (hereinafter 'ECHR') – and, of course, of the rights enshrined therein, too – as a 'living instrument', able to adapt to new necessities and to societal progress.

It is important to note that the enforcement of rights and interests usually recognised in constitutional texts does not make this kind of litigation directly fall within the concept of constitutional review. Constitutional review, as subsequently analysed, can be a valuable tool of public interest litigation, but it is, still, a very different notion. It is a procedural technique focused on interpreting and enforcing the constitution, as it ensures it is respected by legislative and governmental acts. It usually focuses on specific legal questions, stemming from a specific legal act from a public authority which violates the constitutional text. Its scope is, thus, narrower. Public interest litigation, on the other hand, is guided by altruistic values. Its main objective is to address broader societal issues, in the interests of a community, rather than single individuals. It does not necessarily question specific legislative or administrative acts. On the contrary, it can also address larger issues that affect civil society or, often, a marginalised group, both caused by public or private entities. Violations of broader fundamental principles – such as that to equality, to non-discrimination – are usually claimed, rather than violations of specific constitutional norms. For instance, cases may involve access to clean water, to social housing, air pollution, or discrimination against a specific social group or minority. It is this collective beneficial goal of the claim that determines its extensive effects, which may be obtained also through new policies or media attention, irrespective of the outcome of the judicial proceedings. Consequently, its extensive effect is not determined merely by the interpretation of the law given by the Court, as with constitutional review, but, instead, by the collective matrix of the conflict and of the interests at stake.

Third, public interest litigation hardly ever is conducted exclusively between natural persons. Claimants may be natural persons, but also NGOs, unions, associations, other organisations or even, in certain jurisdictions like the United States, specialised law firms.[24] If they are private parties, they may be pursuing their own personal interest, but, at the same time, they also set themselves as champions for the whole community. This is a key element of this kind of litigation.[25] Because of this, they have been at times described as 'private attorney generals'.[26] In different jurisdictions, also public authorities have standing to bring these claims to the courts. On the other hand, very rarely *defendants* are natural persons. The target of the lawsuits, in fact, are usually the state itself or administrative agencies (e.g., to foster active implementation of social rights), public or private entities (such as hospitals or schools; prisons among the former or large corporations among the latter; e.g., for mass harms or discriminations). They are a precious tool for unrepresented political minorities to fight majoritarian oppression or inaction,[27] on the basis of rights and principles enshrined in their fundamental catalogues. Given the legislative or political inertia, through public interest litigation, claimants try to bring to another arena, the judicial one, the voices and needs of the poorest, least advantaged and weakest members of the society. As a consequence, these actions may be perceived as directed against the state, or specific public authorities. This is often, but not necessarily the case: in the contemporary globalised society it is not rare to see large corporations with budgets significantly higher than the states themselves. Inevitably, these powerful, usually transnational, players radically influence in their everyday activities the lives and the interests of the different members of the society that interact with them: when they handle their personal data, provide goods or services to them, employ them or, in general, conduct (possibly dangerous) actions where they live: all these situations rescale traditional one-to-one power balances and, at the same time, offer fertile ground for substantial infringements to several fundamental rights within a community.

21 To quote Art. 226 of the Portuguese Constitution, for instance, 'The Public Administration shall seek to pursue the public interest, with respect to all those citizens' rights and interests that are protected by law'.

22 Such as Art. 2 of the Italian Constitution: 'The Republic shall recognise and protect the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed'.

23 E.g., issues related to climate change, the internet or other subsequent scientific discoveries.

24 Rhode and Cummings, above n. 4.

25 Hess, above n. 4, at 15.

26 Homburger, above n. 4.

27 L.R. Barroso and A. Osorio, 'Democracy, Political Crisis and Constitutional Jurisdiction. The Leading Role of the Brazilian Supreme Court', in C. Landfried (ed.), *Judicial Power. How Constitutional Courts Affect Political Transformations*(2019) 174; S. Issacharoff, 'Class Actions and State Authority', 44 *Loyola University Chicago Law Journal* 369 (2012).

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Fourth, the *relief* sought is not a mere compensation for damages, as in the traditional civil liability scheme.[28] Rather than past-focused, it is more forward-looking. Claimants often aim to provoke systemic, structural or regulatory change.[29] The main goal of public interest litigation is to stop an unjust activity, condition or omission affecting the collectivity in general or a class of people, not just those bringing the lawsuit. Hence, injunctive or interim measures are more common. Success is not measured merely by the results of the judicial proceedings, but also by the impact that they have generated within the society: for instance, by raising public awareness or by motivating legislative forces or large corporation to act or change their policies. Sums may still be pursued, but in that case usually as adaptation costs,[30] through equitable remedies (*cy-prés*, in common law jurisdictions)[31] or fluid recovery mechanisms.[32] Even so, despite their significantly lesser use, the possible great deterrent role of compensatory actions should not be underestimated (quite exceptionally, in relation to other litigation fields): society and public policies are powerfully moved by economic incentives.

Given the ambitious and complex reforms often pursued by public interest litigation, one of its main critiques has been exactly redressability and the difficulty in executing judgements even when a favourable outcome is reached, due to the necessary oversights and implementations still required by several players.[33] Two important counter-strategies highlighted in this regard by S.L. Cummings are, on the one hand, the shift towards narrower, more local, litigation, and, on the other hand, the so-called 'integrated advocacy', that is the coordination of litigation with political campaigns aimed at simultaneously moving legal decision-making and changing social perception.[34]

Last, public interest litigation fundamentally emphasises the role of the *judge*.[35] The Montesquieuian conception of the judge as *bouche de la loi*, who passively interprets and applies the law to the facts presented by the parties, is definitively abandoned.[36] Instead, they become the main directors of proceedings of the highest complexity, due to the different interests at stake and voices to be heard, some of which do not even formally participate in the trial.[37] In most cases, their control will continue also after the decision, not only to ensure a correct application of the tasks set therein (e.g., urging action from the legislative bodies, administrative agencies, corporations or other entities acting as defendants, but also from the claimants, for instance, towards the rest of the community not formally involved in the proceedings). This may require creative thinking, even during the examination of the case, as well as an active check regarding adequacy of representation and lack of conflicts of interests among all the parties.[38] The casual relations of the modern global world are highly ramified and interconnected,[39] to the point that it becomes extremely complex, if not impossible, to deliver a public interest decision which does not have consequences on other stakeholders than the ones directly involved in the proceedings. This is exemplarily shown by climate change litigation: aside from the interests of the claimants – their right to health and other fundamental liberties – and those of the defendants, other interests come into play, like the ones from the workers of the polluting companies, who might lose their jobs. The same applies to the investors of those companies, whose shares might drop significant value. For a well-rounded decision, all these positions should be evaluated. The toughest challenge for judges is often how to achieve this full, comprehensive assessment, while simultaneously proceeding on the thin line of the separation of powers.

Additionally, as a general assumption, it must be considered that rights – especially social ones – cost. Their costs can be internalised through taxes, which will be directly borne by the collectivity, and by renouncing other rights, which will thus be limited in favour of the ones enforced. But to what extent does, and should, a non-elected judge have the power to impact on the rest of the society to such a degree? Inevitably, the principle of the rule of law is put into question, together with the limits of the counter-majoritarian force of the judiciary

28 Hess, above n. 4, at 27.

29 In the words of Cummings (2020), above n. 4: 'the litigation is part of an effort to shift culture not just rules'.

30 See the case, currently pending on appeal, of *Lliuya* v. *RWE*, in Germany, where a Peruvian farmer brought a lawsuit against REW, the largest electricity producer in Germany, seeking adaptation costs for approximately 15,000 €. That sum, which equals the 0.47% of the total costs he expects to pay for flood protection in his Peruvian hometown, was calculated based on the same percentage (0.47%) of global greenhouse gas emissions that scientific data attribute to RWE since the start of industrialisation.

31 J. Kalajdzic, 'Climate Change Class Actions in Canada', 100(2) *Supreme Court Law Review* 29-58 (2021): 'The cy-près doctrine in class action law permits the distribution of class members' compensation to a third party when it is impracticable to direct the payment to class members themselves. Such a distribution is to indirectly benefit the class and is thought to advance the deterrence function of class actions'.

32 R.B. Cappalli and C. Consolo, 'Class Actions for Continental Europe: A Preliminary Inquiry', 6 *Temple International and Comparative Law Journal* 217 (1992), mentioning *Daar* v. *Yellow Cab Company*, [1967] 433 P.2d 732, Supreme Court of California, regarding a taxi company in the Los Angeles area which had been adjusting its meters – and, thus, illegally overcharging its passengers – for four years. The court, unable to identify all the cab riders, after satisfying the proven individual damages, decided to use the unclaimed sums to subsidise the lowering of future cab rates from the defendant company.

33 The so-called 'bureaucratic contingency', see J.F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978).

34 Cummings (2020), above n. 4.

35 Hess, above n. 4, at 29; Chayes, above n. 4; M.C. Ucín, *And What If the Courts Could Strengthen Our Democracies?* (2022).

36 M. Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"', 35 *Catholic University Law Review* 1 (1986).

37 Cappalli and Consolo, above n. 32, at 253.

38 Quite sceptical, A. Uzelac, 'Why No Class Actions in Europe? A View from the Side of Dysfunctional Justice Systems', in V. Harsagi and C.H. van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, (2014) 53: 'The organisational design of the European judiciary the personal and organisational design of the European judiciaries in several aspects collide with the ideals of appropriate decision-making regarding claims affecting interests of large groups of people'. The formalistic, lengthy, rigid and one-to-one traditional organisational design of the European judiciary is probably one of the highest obstacles for public interest litigation.

39 Y.N. Harari, *21 Lessons for the 21st Century* (2018), Lesson 16, 'Justice'.

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within democratic societies. Apart from all the parties potentially affected by the decision, a dialogue with the legislator will, thus, be necessary in many cases to avoid overstepping its competences. In the complex EU judicial architecture for the protection of fundamental rights and principles, a coordination with other supranational Higher Courts (like the Court of Justice of the European Union – hereinafter CJEU – or the ECtHR) might be required, too.

3 The EU Judicial Architecture for Vindicating the Public Interest

Before dwelling on a selection of procedural techniques of public interest litigation in Europe, it is important to clearly situate both the historical and judicial framework in which these techniques are called to operate. As it will be highlighted, the latter is a rather intricate one, constituted of different layers and levels.

As a premise, a brief historical contextualisation may be useful. Litigation in the public interest had already been conducted in Europe, even long before the development of the US movement in the 1960s and 1970s. If, as conceptualised, it concerns the enforcement of fundamental rights, interests and principles, evidently most claims in front of national constitutional courts can be included therein, as well as several others in front of the ECtHR and, to some degrees, the CJEU, as long as they have an effect on the rest of the community.

For instance, in 1958, the German Constitutional Court in the landmark Luth case stated how 'fundamental rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of law … and which provides guidelines and impulses for the legislature, administration and judiciary'.[40] In this judgement, the basis for the so-called 'radiation thesis' was first formulated. According to it, 'fundamental rights norms "radiate" into all areas of the legal system' and set principles that affect all actors within their jurisdiction: vertically, with individuals having a right to positive actions of the state, but also horizontally, among private parties. This sets the grounds for an enhanced protection of disadvantaged subjects, under the principles of solidarity and equality.[41] Several other decisions have since then followed in that and in all other European jurisdictions, significantly contributing to the material and moral development of society and its individual members. It is, thus, certain that public interest litigation – although, perhaps, vested with different names – has been and is repeatedly practiced within the EU.

To gauge its efficiency and potential, before focusing on some of the specific techniques of enforcement (in the next paragraph), it is essential to consider the complex judicial framework from which such litigation stems. Such an architecture is characterised by multiple levels and courts that offer valuable alternatives, but also pose the risk of dangerous intertwinements, or even confusion.

When referring to the system of protection of fundamental rights in Europe, the term *multilevel* is now widely employed.[42] Apart from the national legal order to which they pertain, individuals in Europe benefit, in fact, also from the substantial and procedural guarantees set under the European Union, as well as under any international treaty agreed upon by their state. For instance, since all Member States of the EU are also Member States of the Council of Europe, the array of protection encompasses the provisions of the ECHR and, consequently, the possibility of applying in front of the ECtHR, too. The same applies to the UN system of protection and its (mostly substantial) guarantees.

From a substantial point of view, the most relevant catalogues of rights applicable in Europe are undoubtedly the national constitution of each state, the CFREU, the ECHR and the UDHR. Although each of them has been achieved through its own constitutional and historic process, declined in its own peculiar way, deep ties with one another – both explicit and implicit – can be found in almost every European constitution. A shared core of fundamental rights can indeed be found within the EU 'as they result, in particular, from the constitutional traditions and international obligations common to the Member States', as stated in the Preamble of the CFREU. The Treaty of the European Union (hereinafter 'TEU'), in its Article 2, emphasises how

> the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The CFREU, which is legally binding since the 2009 Treaty of Lisbon, 'substantially reproduces in a written catalogue the general principles of law set forth by the CJEU in its jurisprudence, developed over the years'.[43] A close influence derives also from international law. The

40 *Luth* Case, [1958] 9 BVerfGE 7, 198, German Constitutional Court, as cited by M. Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* 341 (2006).

41 M. Kumm, *ibid.*

42 Among the firsts to employ this term, I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', 36(4) *Common Market Law Review* 703-50 (1999), https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/36.4/233680. See also M. Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?', 25(1) *European Journal of International Law* 177-99 (2014), https://doi.org/10.1093/ejil/cht083.

43 C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (2018), at 16.

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CFREU, for instance, explicitly refers to the ECHR in its Article 52.3

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Some national Constitutions explicitly mention the Universal Declaration of Human Rights (e.g., Art. 10.2[44] of the Spanish and Art. 16.2[45] of the Portuguese Constitutions). General and implicit influences can be found in almost every European constitution. These references to one another demonstrate an increasing degree of inter-connection between the domestic and supranational level, which lately can be perceived through a vibrant growing dialogue between courts at all levels and coordinates, even from different continents.[46]

From a procedural perspective, the *fora* within the EU in which these rights and principles can be enforced pertain to three earlier mentioned levels: national courts (in front of the ordinary judge, the administrative one or, if present, the constitutional one), the CJEU and the ECtHR. Within these levels, there are numerous procedural paths through which private parties (either as natural persons or as organised entities, like NGOs) can reach the courts. Each of these routes has different procedural features, due to political design, to historic tradition, to the composition of the Court or to the legal system to which they belong.

For instance, each way presents its own peculiar requirements to access it. Regarding standing, some techniques entitle everyone to bring the claim before the Court, whereas in most cases only certain subjects are allowed to, such as, depending on the procedural tool, the individuals directly affected by the act, the public minister, specifically named administrative agencies or institutions, or a Member State. Different admissibility criteria are set, too: previous exhaustion of other (or all) available remedies, previous establishment of ordinary proceedings,[47] homogeneity of the rights enforced, proof of notice to the interested parties, adequacy of representation, direct connection with the case. Moreover, most actions can be started within a very strict time limit, whereas others do not have one.

In relation to the types of claims that can be filed through each procedural route, divergences regard the possible defendants of the case: certain procedures can be brought only against Member States, private parties, public entities, agencies or institutions. Limitations may also concern the types of acts (or omissions) that can be claimed to be infringing a series of rights and interests: for example, only those from the legislative, administrative power and not from the judiciary or, rather, from private parties or linked to specific sectors of law. Additionally, third parties may or may not contribute to the discussion in the proceedings, for example, as *amici curiae*. In others, their involvement is even mandatory (i.e., Advocates General in front of the CJEU).

Finally, each procedural route can lead to different outcomes. In relation to the type of relief, some allow the judge to award interim measures or injunctions, others allow compensation and some allow even more structural change, such as a reform in the law. Regarding the effects of the decision, instead, some are binding only *inter partes*, whereas others are *erga omnes*, on the whole community. Certain decisions can be appealed within a number of days, others are final and absolutely cannot be appealed.

The different interlocking of all these elements contributes to shaping each procedural technique and its potential in enforcing specific rights and interests. Like pieces of a complex puzzle, each composition delivers a different outcome. Some will be more effective for vindicating certain policies, whereas others will be better suited for other litigative aims. The choices behind some of the elements are rooted in the tradition of the legal order or system to which they belong, whereas others are due to temporary political choices. Some are easier to change, while others will probably remain fixed for long. In the ambitious quest to find which, if any, procedural technique is more suitable to vindicate the public interest, naturally the sum of the correct elements becomes cardinal. Probably, however, unlike in ordinary puzzles, there is no correct universal answer, or 'perfect formula'. There is no procedural tool or system of intertwining which *per se* delivers the most efficient result every time. This is especially true considering the broadness of the perimeter of the present research: the vindication of the public interest. Depending on the concrete circumstances of the case – that is, the specific public interest vindicated, the community involved, the urgency, the overall legal system – certain procedural techniques may be better suited than others.

In any case, as described in the preceding paragraph, successful litigation in this field transcends the interests of the parties involved in the proceedings, enforces rights and principles of fundamental nature, seeks systemic change by going against public or large private entities, if not the state itself, and finds in the judge an active and flexible director: these features evidently still give precious directions on which paths may or may not work best. For instance, procedures that cannot be start-

44 'The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain' ('Legal guarantees').

45 'The constitutional and legal precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights' ('Scope and interpretation of fundamental rights').

46 B. Randazzo, 'Accesso alla giustizia e diritti fondamentali nella dimensione costituzionale nazionale e sovranazionale. Introduzione', in C. Amalfitano, L. Violini & D.U. Galetta (eds.), *Law, Justice and Sustainable Development: L'Accesso alla giustizia nel quadro del SD Goal 16* (2023), at 117.

47 This requisite is typical of indirect systems of constitutional review, as subsequently examined. For the Italian perspective, see Corte Costituzionale, *Giudizio "a quo" e promovimento del processo costituzionale. Atti del seminario* (1990).

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ed directly by private parties, because they have a very long and complex process to reach the Court, which have a very narrow scope of application, which cannot be addressed against the State or public authorities, which do not have *erga omnes* effects, or which do not offer sufficiently effective remedies to the judges, may be disregarded. Although, it should also be considered how slight (yet difficult to achieve) changes in the composition of the earlier mentioned elements may significantly alter – positively or negatively – the impact, and potential to vindicate the public interest, of a certain procedural mechanism. Moreover, the impact could be perceived differently among the various affected stakeholders. It is, thus, a very delicate contest of balancing and choosing the best available procedure according to the concrete circumstances of the case at hand.

With this contextualisation, a more specific analysis of a selected number of procedural models of public interest litigation in Europe can now be proposed.

4 A Comparative Assessment through Case Studies

Among the wide catalogue of techniques offered by the EU multilevel judicial architecture, three in particular seem more fit to conduct public interest litigation. They are domestic constitutional review, the ECtHR pilot-judgement procedure and class actions. Their selection draws from a comparative study of the procedural features of all the available mechanisms, as well as from the case law. This choice is due to their differences (i.e., scope, standing, competence, remedies and effects), which will be properly highlighted, in order to provide a limited but still varied array of paths of enforcement. Especially domestic constitutional review and class actions can easily differ based on the specific design given to them by the legislator. This can substantially shift the effectivity of each model in guaranteeing the public interest. Alongside their presentation, their ability to impact illustrative public interest scenarios will be evaluated, too. In particular, three selected types of cases will be brought as *fils rouges* between the three earlier mentioned procedural routes: litigation concerning climate change, prison overcrowding and discrimination practices. Their choice is due to the vast array of related case law, throughout the whole globe, and to the different nature and extent of the rights, necessities and communities involved. It will thus be a limited, but still varied spectrum of situations.

4.1 Domestic Constitutional Review

The first technique to highlight under the public interest litigation lens, *domestic constitutional review*, is probably the obvious choice. It is undisputable that constitutional review has and continues to be in Europe an essential backbone in protecting the rights and principles enshrined in the national constitutions and in advancing society in accordance with them. Countless judicial decisions up to today have proved this.

Naturally, each national legal order presents its own peculiar features in its system of constitutional adjudication, as a result of its historical, cultural and political tradition. For instance, some countries, like Germany,[48] have a Constitutional Court with strong powers which serves as a weighty counterbalance to the parliament's majority, whereas others, like Italy, as a result of compromise, have shaped a delicate yet efficient system of 'inter-judicial relationality',[49] in which constitutional and ordinary courts cooperate with one another. Both these countries have a centralised system of constitutional review, which is by far the prevalent one in the EU. There is, however, at least one notable exception, Portugal, which has adopted a decentralised system,[50] according to which ordinary courts exercise a control on constitutionality. This is certainly not the place to classify and examine all the different systems. Rather, a few selected common characteristics of the predominant model of centralised constitutional review within the EU will be stressed, mainly to find whether some adjudicatory gaps exist, and whether they can instead be filled by other procedural models.

First, among those entitled to file a constitutional claim, certain systems – like the German or Spanish one – encompass private parties also. This means that, at least on paper, any single individual has the possibility to directly address the Constitutional Court. Other countries, like Italy, on the other hand, have adopted an indirect mechanism, according to which only ordinary courts are allowed to raise questions of constitutionality. The latter model, at times, can be a significant limitation, in light of the need to find a concrete case in which the resolution of the question of constitutionality is necessary in order for it to proceed. For example, the German Constitutional Court in 2021 delivered a landmark decision regarding the national climate change legislation, which was deemed insufficient.[51] As a result, the German Parliament was given a short period of time (until 31 December 2022) to implement the legislative changes necessary to safeguard the different fundamental rights of present and future generations, otherwise posed at risk. It was indeed a remarkable ruling from the point of view of public interest litigation, brought to the German Court through a direct constitutional challenge

48 Arts. 93 (Jurisdiction of the Federal Constitutional Court) and 94 (Composition of the Federal Constitutional Court) of the Basic Law of the Federal Republic of Germany.

49 V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), at 236.

50 Art. 204 (Compliance with the Constitution) of the Portuguese Constitution,: 'In matters that are submitted for judgement the courts may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein'.

51 BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, www.bverfg.de/e/rs20210324_1bvr265618en.html (last visited 2 May 2023). In particular, the Court deemed the KSG unconstitutional since the reductions until 2030 were too soft, consequently imposing an unbalanced burden on future generations to battle climate change and adapt to a green society, thus limiting fundamental freedoms too severely.

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from private citizens. Shifting the perspective to indirect systems of constitutional review, like the Italian one, it is difficult to imagine a concrete case where a similar question becomes essential for its resolution, to the point that the ordinary judge feels compelled to raise a question of constitutionality. Even if it was raised, it is extremely unlikely that the concrete case from which the question stems would allow the Court to give such broad indications to the legislator, other than a more or less subtle reprimand or warning. Other examples of possible adjudicatory gaps posed by an indirect system of constitutional review have been highlighted by Spanish scholars, too, based on their concrete experience with direct constitutional challenges. For instance, in cases regarding the constitutionality of abortion law or same-sex marriage, it has been argued that it may have been difficult, if not impossible, to find a concrete case in which the constitutional question was relevant.[52] In any case, even if there were no adjudicatory gaps, it is undisputable that it could take time – hence, a loss of effectivity – to find the proper case: as it has happened, for example, in relation to assisted suicide (the so-called *Cappato* case)[53] or, recently, to the bearing of the surname of both parents.[54] Moreover, private parties are always dependent on the approval from ordinary judges, true and only 'gatekeepers', to the Constitutional Court.

The issue of time, on the other hand, together with that of efficiency, weighs on the scale of comparison against direct constitutional review. These systems, in fact, usually require the previous exhaustion of all the other available remedies. Moreover, statistics show how only a very small percentage of claims are considered, due to the screening that the Constitutional Courts inevitably must operate, with a risk of discretionary oversight of founded claims. The burden on them, otherwise, would be – and, partially, has been – excessive to pursue their ordinary work. As a result, in Germany, a second Senate of the Constitutional Court has been opened, only to help dealing with these cases. The result, however, is that the composition of the Court varies, and not all the judges decide on the same cases. This possibility has been keenly rejected in the past in other jurisdictions, such as the Italian one.[55]

Second, an important limitation of constitutional review is related to the possible infringements raised and to the respondents in the case. In certain systems, only legislation can be reviewed, whereas in others administrative acts and judiciary decisions can be reviewed, too. This represents a significant difference, on which, however, the present contribution does not focus. Rather, it should be considered how they are exclusively acts from *public* authorities. It is not possible to seek relief from the Constitutional Court when there is an infringement caused by another *private* party, when it has clearly violated fundamental rights and principles. In that case, the competence will pertain to the ordinary judge. But what about cases concerning *systemic* violations committed by private parties? For example, in a case of collective employment or educational discrimination conducted by a private institution; or of lack of fair working conditions in a large corporation; or of environmental pollution harming a local community. In these cases, there may be considerable practical obstacles (e.g., information asymmetries, economic or organisational ones) concretely hindering access to ordinary courts to all, or at least most, of the affected individuals. And even if some of them, against all rational disincentives, will file their individual claim in the ordinary courts and obtain a favourable decision, it will not have *erga omnes* effects like a favourable constitutional ruling would. Moreover, it will only represent a small fraction of the affected community, thus still not pushing the responsible private party to alter its wrongful conduct.

Third, a similar shortcoming of constitutional review regards the available remedies. Several public interest cases may not *merely* require a regulatory reform. In certain cases, compensation may play a central role: this would make the claim more suited for the ordinary judge, although with the earlier mentioned drawbacks due to the systemic nature of the cases. In other scenarios, sums *stricto sensu* may not be required, but material redress through expensive actions could still be part of the claims. This is, for instance, the case of prison overcrowding, where either massive investments to build new structures or a huge depenalisation would be necessary. Both alternatives are of political nature and, especially the former, encompass high costs. It was this plurality of solutions that induced the Italian Constitutional Court in 2013 in declaring inadmissible the issue in a case on that matter, since it would have meant crossing the line of political, hence parliamentary, discretion.[56] Technically the solution may be correct (although the same Court, in several occasions, has stressed how even the principle of the separation of powers wanes in front of clear violations to essential rights –

52 V. Ferreres Comella, 'The Potential Virtues and Risks of Abstract Constitutional Challenges and Individual Complaints: Some Reflections from Spain', in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini (eds.), *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2021), at 165: 'It would have been difficult for the Court to address this controversial issue in the context of a concrete case. Even if judges in Spain often intervene in administrative procedures to formalize marriages, they cannot refer questions to the Constitutional Court when they do so. Under Spanish law, the constitutional question can only be posed when the judge is exercising "jurisdiction', with all the attributes of judicial independence. According to the Constitutional Court, when judges handle the matrimonial proceedings, they act as administrative organs that are subject to the instructions of the executive branch. So the Court refused to examine the constitutional questions that several judges had formulated in that capacity. Moreover, once two persons of the same sex have entered into marriage, it is hard to see who would have standing to challenge its validity before the ordinary courts on the grounds that the statute authorizing same-sex marriage is constitutionally infirm'.

53 Corte cost. ita., ord. n. 207, 2018.

54 Corte cost. ita., sent. n. 131, 2022.

55 For a comparative analysis of the Italian and German constitutional system, see A. von Bogdandy and D. Paris, 'Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court', in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini (eds.), above n. 49, at 264.

56 Italian Constitutional Court, No. 279, 2013.

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e.g., in relation to the right to education of disabled individuals, otherwise discriminated), but practically is ineffective.[57] As it will be analysed, a partial solution to this specific case – prison overcrowding in Italy in 2013 – was reached through the next examined procedural route.

4.2 The ECtHR Pilot-Judgement Procedure

The second technique of public interest litigation considered, the *pilot-judgement procedure* in front of the ECtHR, instead, pertains to the supranational level, and, to some degree, can fill the gaps left by domestic constitutional review. This procedure, first introduced in 2004 with the *Broniowski* v. *Poland* case and, subsequently, in 2010, codified in the Rules of the Court, was designed as a solution for its historic backlog and increasing workload.[58] It stems from the consideration that a large number of similar, repetitive cases deriving from the same root cause – an unaddressed systemic issue in a Member State – are often filed in front of it. By selecting one or a few of these cases, the Court seeks to deliver a decision that covers all the other pending and future similar cases. Rather interestingly, with this procedure the Court overcomes its individualistic and case-by-case approach. It delivers a decision that presents a solution for a wider audience than the single applicant from the selected pilot case. Apart from determining a violation in the particular case, in fact, the Court identifies a dysfunction within the national legal system as the root of the violation and gives 'clear indications to the government as to how it can eliminate the dysfunction'. In particular, it usually asks the Member State found responsible for the violation to put in place a (retroactively applicable) domestic remedy for all the other cases stemming from the common root cause.[59]

At first glance, this feature alone puts the procedural instrument into the spotlight as especially suited for public interest litigation. Pursuing structural change, through reforms in the state's regulations or policies affecting a large part of the population is indeed one of its key features. The fact that it takes place in the ECtHR and that it grants a degree of flexibility in the judges' decision checks all the components of public interest litigation.

Quite extraordinarily, contrary to individual applications under Article 34 ECHR, through pilot-judgement procedures the Court can steer new domestic legislation and adopt decisions with both a direct and *erga omnes* effect.[60] This is shown, for instance, by the *Torreggiani and Others* v. *Italy* case,[61] concerning systemic prison overcrowding in Italy, which pushed the national government to enact a number of legislative measures, among which the introduction of a form of complaint to a judicial authority about the material conditions of detention and a compensatory remedy. Despite several critiques on the effectivity and execution of the measures, the numbers of prison overcrowding in Italy decreased and the ECtHR itself, in subsequent decisions, praised the Member State.[62] In this specific case, hence, the pilot-judgement procedure was more effective than constitutional review. This shows the potential – that is exhorting state action whenever there is political inertia, there is a lack of appropriate or efficient remedies for the specific type of issue and the domestic legislative process is slow [63] but also one of the main risks of the pilot-judgement procedure: it is completely dependent on state cooperation. The current situation in Italy demonstrates how the root cause of the dysfunction was not, in any case, completely eliminated, and how, thus, significant fundamental rights' violations still take place in this sector.[64] Other unaddressed pilot judgements on the same matter against other Member States, such as Hungary or Romania, confirm this point.[65]

Another completely unaddressed case, despite the easy solution to its systemic root cause, is *Novruk and others* v. *Russia*,[66] related to the discrimination against HIV-infected individuals who were not allowed to enter or reside in Russia (at the time still in the Council of Europe system) because of their health condition, corroborates it. In that case, it would have sufficed for the Member State to change the legislation and for the domestic courts to stop deporting HIV-positive foreigners, without having to take upon any significant economic or organisational burden (contrary to prison overcrowding). Nonetheless, Russia failed to do so, leaving the pilot judgement completely ineffective. Basically, should the Member State found responsible for a structural violation fail to comply with the ECtHR's requests or, in the future, fail to execute the terms agreed upon, no real benefits would be offered to the affected community. In those circumstances, as stated in the *Burmych* case, the Court would simply hand over the matter to the Committee of Ministers (a political body).[67]

Other possible shortcomings are inherent to the specific characteristics of the pilot-judgement procedure itself. The bundling of the proceedings cannot be chosen by the applicants. Rather, it is the Court itself that decides when to deliver a pilot-judgement. This could entail a lack of (systemic) remedy due to the Court's unwillingness, or impossibility, to proceed on that route, especially if there is not a consistent number of repetitive

57 Corte cost. ita., sent. n. 275, 2016. See above n. 15.
58 *Broniowski* v. *Poland*, ECHR (2004) 31443/96 [GC].
59 See Information Note of the Court's Registrar on the Pilot-Judgement Procedure, www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf, (last visited 2 May 2023).
60 M. Fyrnys, 'Expanding Competences by Judicial Law-making: The Pilot Judgment Procedure of the European Court of Human Rights', 12(5) *German Law Journal* 1231 (2011).
61 *Torreggiani and Others* v. *Italy*, ECHR (2013) 43517/09, 46882/09, 55400/09 et al.
62 *Stella and Others* v. *Italy*, ECHR (2014) 49169/09 et al.
63 Fyrnys, above n. 60.
64 F. Favuzza, 'Torreggiani and Prison Overcrowding in Italy', 17(1) *Human Rights Law Review* 153 (2017).
65 E. Kindt, 'The Pilot Judgment Procedure at the European Court of Human Rights: An Evaluation in the Light of Procedural Efficiency and Access to Justice' (doctoral dissertation, on file at Universiteit Gent, Gent, 2018).
66 *Novruk and Others* v. *Russia*, ECHR (2016) 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14.
67 *Burmych and Others* v. *Ukraine*, ECHR (2017) 46852/13, 47786/13, 54125/13 et al. [GC].

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cases brought to it. A relevant example is climate change, since very few related cases are pending before the Court. Evidently, despite it being a major and structural issue in several Member States, the Court will not be able to deliver a pilot judgement in this field for a very long time. Another element to consider is the necessarily systemic character of the violation, which from advantage could become a relevant limitation in cases where there is a collective infringement, but specifically situated. For instance, in the case of *Mandić and Jović* v. *Slovenia*,[68] regarding prison enforcement, the Court found that there was no structural problem, since the overcrowding concerned mainly only one prison (but, still, hundreds of inmates) throughout the whole nation. This could happen in several other cases, regarding local discrimination practices, for instance.

Finally, four other drawbacks which are common to any kind of litigation before the ECtHR may arise, too. First, the extreme length of the process should be considered: before a review of the case, the Court usually takes several years; and all available national remedies must be exhausted in advance. Moreover, concerning specifically the pilot-judgement procedure, all the other similarly situated cases will be declared inadmissible due to non-exhaustion of the newly set domestic remedies. Hence, individuals will need to start the judicial proceedings again before their national courts, perhaps to find out that the new domestic remedies are not that effective, after all. Inevitably, this creates a serious issue of access to justice, as well as, to some degree, a problem of non-representation of all the parties involved. Second, another important limitation is the fact that the ECtHR only addresses violations from Member States. Hence, it cannot be used in cases brought directly against a private corporation or public entities, which may still arise and concern the public interest. Third, it cannot be used to claim compensation, either, or at least not for all the parties affected by the infringement. Finally, a direct connection of the applicant with the specific case is required. This could hinder the admissibility of cases concerning certain rights – especially diffuse ones – and principles – especially positive and programmatic ones. Despite the obvious positive features of this procedural path before the ECtHR, these highlighted obstacles may hinder its effectivity in pursuing public interest litigation, as framed under this contribution.

4.3 Class Actions

This leaves space for the last analysed technique, the *class action*. Class actions are an institution that is typical of common law jurisdictions. Class actions are the procedural mechanism by which a natural person or an organisation acts on behalf of a group of individuals simultaneously, whose rights or interests are being enforced as harmed by the same conduct and who are, or can be, bound by the res judicata effects of the decision, without necessarily being a party to the proceedings. Both compensatory and injunctive relief can be sought with them. Though class actions originated in the thirteenth century in the United Kingdom, not until 1966 was their full development seen in the United States, with the introduction of the new Rule 23 of the Federal Rules of Civil Procedure. Since then, they gained a lot of attention and proved to be an extremely powerful tool for social change in that jurisdiction, especially in the civil rights arena, as well as for overcoming power and information asymmetries, mainly in the consumer law, mass tort and securities fields. They were, in short, one of the main reasons behind the success of the new public interest litigation movement.[69] In recent years, however, legislative backlash, pressured by defendants and fear of possible abuse of the model (the so-called 'buccaneering attorneys', fishing for settlements with high contingency fees), led to numerous procedural restrictions which have severely hampered the instrument.[70] In the meantime, its legal transplant has reached numerous other shores throughout the whole globe, among which are those from Continental Europe, too. In particular, since the early 2000s, EU institutions started to seriously consider the introduction of similar models on European soil. This process was accelerated by a series of major scandals in the consumer law sector (Volkswagen's Dieselgate, Poly Implant Prothèse, Ryanair), which led to the European Commission's launch in 2018 of the so-called 'New Deal for Consumers', a series of initiatives aiming to enhance European consumers' level of protection.[71] The last step in this process was the adoption, in late 2020, of the so-called RAD Directive, the implementation of which at national level took place by 25 December 2022.[72] The main objectives of the RAD Directive are to ensure that at least one injunctive and compensatory class action mechanism is available in each Member State, on the one hand, and that a minimum common level of harmonisation is reached among the already existing national procedures, on the other hand (Art. 1, RAD Directive, 'Subject matter and purpose'). Nonetheless, contrary to the previous EU Recommendation from 2013,[73] its scope of application is rather limited, as it appears to be circumscribed exclusively to consumer protection. This step back is immediately portrayed by the title of the Directive ('on representative actions for the protection of the collective interests of consumers and repealing Direc-

68 *Mandic and Jovic* v. *Slovenia*, ECHR (2011) 5774/10 and 5985/10.

69 D. Marcus, 'The Public Interest Class Action', 104 *Georgetown Law Journal* (2015), at 7.

70 Cummings (2020), above n. 4.

71 See the press release of the European Commission from 11 April 2018, *A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement*, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041 (last visited 2 May 2023).

72 A. Uzelac and S. Voet, *Class Actions in Europe. Holy Grail or Wrong Trail?* (2021), for a comprehensive evaluation of the current state of the field in Europe.

73 Recommendation 2013/396/EU of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 206/60. See S. Voet, 'Where the Wild Things Are – Reflections on the State and Future of European Collective Redress', in A. Keirse and M.B.M. Loos (eds.), *Ius Commune Europaeum*, vol. 158 (2017), at 115.

tive 2009/22/EC'). Article 2(1) clarifies that it 'applies to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I … that harm or may harm the collective interests of consumers', whereas Article 3 defines 'consumer' as 'any natural person who acts for purposes which are outside that person's trade, business, craft or profession' and Annex I provides a list of consumer-centred Directives and Regulations. Hence, at least on paper, it appears as if rights non-related to the consumer sphere – and, in particular, fundamental rights – fall outside of its scope.

Some States, such as Belgium, have already seen procedures before their Constitutional Courts claiming the unconstitutionality of class actions regimes with a too narrow scope of application, such as those merely limited to consumer law.[74] Although, these attempts to expand the scope of application have so far been unsuccessful, it must be monitored whether this trend will be followed in other Member States, possibly with different results.

Still, in the meantime, not all doors are shut. Some of the provisions in Annex I of the Directive, in fact, might be used as leverage into enforcing other rights: for example, the right to health,[75] to private life,[76] to a clean environment,[77] freedom of information.[78] There would always need to be a link to consumer substantive rights, but they could indeed be a way to pursue the public interest, at least in certain circumstances.

Most importantly, it must be highlighted how under the RAD Directive Member States have, in any case, the possibility to adopt class action models with a larger scope of application. This is, for example, the case of Italy or the Netherlands, that have adopted a horizontal scope of application for both injunctive and compensatory collective relief, or of France, which provides the so-called 'actions de groupe' also for other areas of law (e.g., environmental law or anti-discrimination). In particular, the Netherlands through its injunctive actions, has found, especially in the climate change sector, great victories for the public interest: for instance, with the *Urgenda* v. *the Netherlands* and *Milieudefensie* v. *Royal Dutch Shell*, respectively from 2019 to 2021, through which the plaintiffs obtained an order (directed, in the former case, to the state and, in the latter, to a major corporation) to significantly reduce carbon emissions.[79]

In Italy, where the legislation is more recent, three injunctive class actions which could be labelled as 'public interest' ones are currently pending: one against the steel plant of ILVA,[80] near the city of Taranto, which has been recently described as a 'sacrifice zone' in a report from the UN Special Rapporteur on Human Rights and the Environment due to the high level of air pollution;[81] one against ITA Airways for employment discrimination of female workers, especially those with disabled children; another one against the food delivery company Deliveroo for unfair working conditions, building on previous favourable decisions from ordinary judges.[82]

The class action instrument is relatively new in Europe and, consequently, its case law still has to fully develop. Still, future trends can be considered by observing the richer experiences from other jurisdictions. For instance, countries such as US and Canada, where the class action instrument has been established for years, have seen some of the following cases: prison overcrowding or persistently unfair and inhuman treatment of inmates;[83] school desegregation;[84] mass harms; of employment discrimination.[85] It can, therefore, be expected that the European case law of class actions will grow in these sectors, too.

In any case, the already pending and decided cases in Europe show how class actions can be a precious tool for filling some of the adjudicatory gaps of the more traditional procedural techniques.

First, they can be brought directly, without a previous exhaustion of other remedies or without the need for previously establishing ordinary proceedings (typical of indirect systems of constitutional review). This allows

74 Belgian Constitutional Court, [2006] Case 41-2016, as cited and commented by S. Voet, 'Class Actions in Belgium: Evaluation and the Way Forward', in A. Uzelac and S. Voet (eds.) (2021), at 131, above n. 72.

75 See references in Annex I to: Directive on the Community code relating to medicinal products for human use, Directive on general product safety; Regulation laying down the general principles and requirements of food law … and laying down procedures in matters of food safety; Regulation on the liability of carriers of passengers by sea in the event of accidents.

76 See references in Annex I to: Directive concerning the processing of personal data and the protection of privacy (in the electronic communications sector); the principle of equality and the right to non-discrimination; Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

77 See references in Annex I to: Directive on energy efficiency; Directive concerning common rules for the internal market in natural gas.

78 See references in Annex I to: Regulation … concerning open internet access.

79 *Urgenda Foundation* v. *State of the Netherlands*, [2015] HAZA C/09/00456689; *Milieudefensie et al.* v. *Royal Dutch Shell*, [2021] C/09/571932, currently appealed.

80 *Zaninelli et al.* c. *ILVA S.p.a.*, *Acciaierie d'Italia Holding S.p.a. e Acciaierie d'Italia S.p.a.*, Trib. Milano, Sez. spec. impresa, 10166/2021.

81 From 12 January 2022. The Ilva steel plant in Taranto, Italy, has compromised people's health and violated human rights for decades by discharging vast volumes of toxic air pollution. Nearby residents suffer from elevated levels of respiratory illnesses, heart disease, cancer, debilitating neurological ailments and premature mortality. Clean-up and remediation activities that were supposed to commence in 2012 have been delayed to 2023, with the Government introducing special legislative decrees allowing the plant to continue operating. In 2019, the European Court of Human Rights concluded that environmental pollution was continuing, endangering the health of the applicants and, more generally, that of the entire population living in the areas at risk. The foregoing examples of sacrifice zones represent some of the most polluted and hazardous places in the world, illustrating egregious human rights violations, particularly of poor, vulnerable and marginalised populations. Sacrifice zones represent the worst imaginable dereliction of a State's obligation to respect, protect and fulfil the right to a clean, healthy and sustainable environment', https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/004/48/PDF/G2200448.pdf?OpenElement (last visited 2 May 2023).

82 For an analysis of the new Italian class action model, see A. Maglica and B. Randazzo, 'La class action all'italiana: dubbi di costituzionalità e prime problematiche applicative', forthcoming.

83 For instance, *Brown* v. *Plata* (settled in 2011), in California, *Ashker* v. *Brown* (settled in 2015 – where, after one year, conditions were believed to have improved by 99%), *Brazeau* v. *Canada* (2020).

84 E.g., *Brown* v. *Board of Education* (1954).

85 Greenberg, above n. 10.

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expeditious adjudication, especially for injunctive actions. Moreover, any affected private party can bring them, either as a natural person or as an association or NGO. Some injunctive class actions, like the Italian one, even entitle any individual who might be interested: hence, it is not even necessary to prove a direct connection to the case.[86] This could be extremely relevant when enforcing supra-individual or diffuse interests. To this regard, any requirements for standing naturally become key: for example, being part of a special registry or having been constituted at least a number of years before may set unnecessary and dangerous barriers. On the other hand, it is also important to fully check the adequacy in representing the public interest of those bringing the claim: a mere criterion of 'first come, first representing' may be ineffective from this perspective.

Second, they can be brought against private parties and for more local, narrower, infringements, too.[87] A number of the earlier mentioned cases are against private corporations – for example, against Milieudefensie, ILVA, ITA Airways, Deliveroo, and so on, companies that were responsible for causing mass harm, employment discrimination or possibly even problems in private schools, hospitals or for-profit detention centres (in the United States).[88] This fills, on the one hand, the gap created by those procedural techniques that can be used only against the state, public authorities or an unconstitutional provision; on the other hand, it also addresses, in a uniform way, cases of *systemic* nature which otherwise could not be brought individually before the ordinary judge by all the members of the affected community. Among the possible, but easily prevented, drawbacks, is the one that some class action models – such as the Italian one – may not allow claims to be filed directly against the state *per se* (but they can be filed against specific public entities).[89]

Third, the bundling of the claims is efficient from a point of view of judicial economy and in order to share the effects of the decision directly on all those affected, without the risk of divergent outcomes of the proceedings. This could be favourable for the defendants, too. For compensatory class actions, members of the affected class will need to have at least the possibility to opt out, if an opt-in regime is not in place. In that case, appropriate ways of notice will need to be devised.

Fourth, the sum of all the infringed positions into a single lawsuit has numerous advantages: it favours settlements, which open the door to more flexible and creative forms of relief (i.e., fluid recovery through specifically set foundations); it has more resonance within the public opinion, which puts pressure on defendants and legislators to act, apart from the concrete outcome of the case; facilitates the involvement of all the stakeholders, even third parties, creating a *forum* for discussion and, once again, raising media attention on the public issue beyond the private situation discussed (e.g., workers of a polluting company); it makes it easier for attract third-party funders (litigating costs and someone needs to take over that burden, as well as risk).

Despite these possible advantages, it must be stated that there have also been numerous cases in which class actions have not worked to vindicate the public interest. Some of the possible shortcomings have already been highlighted, whereas others pertain to possible difficulties in composing a 'homogeneous class', in the struggles that some ordinary (not even supreme or constitutional) judges may have in issuing partially political decisions,[90] or, in the end, in executing them.[91] Still, the empirical experience, mostly from overseas, clearly shows that there has also been a large portion of cases where this procedural technique has been extremely successful. For this reason alone, when debating about the different ways in which fundamental rights and principles of the whole community can be enforced, this instrument – typical of the common law world, but now slowly transplanted onto EU soil – deserves attention, next to the more traditional civil law mechanisms.

4.4 Final Assessment

A table summarising the main advantages and disadvantages of each procedural technique is hereby proposed. Naturally, as already discussed, significant differences can be found at national level, depending on the rules on domestic constitutional review and class actions. Especially with regard to the latter, the effectiveness of the procedural model can substantially differ based on the specific choices. As shown in the table, the most evident limitations of domestic constitutional review and of the ECtHR pilot-judgement procedure are probably those concerning the establishment of the proceedings: that is, the requirements for admissibility – such as the previous exhaustion of domestic remedies – and the limited type of acts and entities against which enforcement can be sought. On the other hand, class actions – even with the most favourable procedural rules (e.g., with a general scope of application) – still can display drawbacks from the point of view of *erga omnes* effects of the decision, appealability of the decision and suitability of an ordinary judge in deciding such delicate issues.

86 Art. 840-*sexiesdecies* c.p.c. ita.

87 On the growing trend of 'localising' public interest litigation for more effective results, see Cummings (2020), above n. 4.

88 The case, known also as the 'Kids for cash scandal', regarded hundreds of children sent to a private detention centre by two judges from Pennsylvania in exchange for large amounts of money from the developers of the detention centre (Mericle Properties). Several of the children were sent for minor issues (such as, literally, stealing candy) or for no issues at all, and suffered traumatic stress from this experience, leading some of them even to suicide. After the criminal trial, a settlement was reached with Mericle Properties for around 20 million dollars, which were put in a specifically set foundation. Additionally, in August 2022, a 206-million-dollar verdict was handed down in a civil law class action against the two judges.

89 For instance, administrative agencies or State-controlled entities. It is currently disputed whether city halls are encompassed or not.

90 Justiciability and separation of powers have often been invoked as grounds for inadmissibility.

91 See, for example, the 'Kids for cash scandal', above n. 88: despite the enormous sum recovered, it is doubtful that the two judges will have any similar sum on which to execute.

Table 1 Comparative Assessment

Technique	*Scope / type of infringement*	*Standing to start the proceedings*	*Possible defendants*	*Admissibility requirements*	*Competence*	*Possible remedies and effects of the decision*
Domestic constitutional review	Depending on the jurisdiction, only legislative acts or also administrative acts and judiciary decisions.	Depending on the jurisdiction, anyone, specific authorities or only an ordinary judge called to decide on a concrete case where the question becomes relevant.	The government or the state authorities who issued the act	Depending on the specific jurisdiction, previous exhaustion of all domestic remedies or previous establishment of ordinary proceedings where the specific legal question becomes relevant	Safe for exceptions (e.g., Portugal, the Netherlands), the Constitutional Court	Review of the unconstitutional act in accordance to the constitution, with *erga omnes* effects.
ECtHR pilot-judgement procedure	Violation of the rights set forth in the ECHR and its Protocols.	Any person, non-governmental organisation or group of individuals claiming to be the victim of a violation (Art. 34 ECHR). The bundling of the claims to start the pilot-judgement procedure is decided by the Court.	CoE Member States	Previous exhaustion of all domestic remedies	ECtHR	The Court gives clear indications to the government as to how it can eliminate the dysfunction, even with structural or legislative reform. Collective compensatory redress cannot be obtained directly through this procedure.
Class actions	Any right or interest of a group of people. In certain jurisdictions, only the rights and interests within a certain sector of law can be enforced (i.e., consumer and competition law).	Any person, non-governmental organisation or group of individuals. Depending on the jurisdiction, more requirements could be added (i.e., constitution of the organisation at least two years prior).	Private parties and, depending on the jurisdiction, certain or all state authorities	Homogeneity or commonality of the subjective positions of the group. The concept can be interpreted differently, depending on the jurisdiction. Other requirements may be added, too	Ordinary judge	Both compensatory and injunctive relief can be obtained. Different rules (opt-in v. opt-out; different timeframes to opt-in or opt-out) apply, depending on the jurisdiction.

5 Conclusion

The aim of this contribution is not to find the best mechanism to vindicate the public interest in Europe. That is, by all means, an impossible task. Rather, the focus has been, preliminarily, on what public interest litigation really means. Building on previous academic literature and analysing the available case law, the aim has been to fully understand its main features and, most importantly, necessities. Once the stage was set, that is, the complex EU framework for the judicial enforcement of fundamental rights and principles, three procedural paths of public interest litigation in Europe have been as-

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sessed. Their selection is due to their differences in order to provide a limited but still varied array of paths of enforcement. The result delivered shows how each instrument has its own advantages and limitations. Some may be better suited for certain types of cases: for instance, the pilot-judgement procedure before the ECtHR, when there is a lack of an effective remedy, accompanied by severe political inertia; or constitutional review for provisions which clearly go against the principles, even programmatic ones, set under the Constitution. Others may be more effective in certain legal orders, according to the available system of enforcement. What is also certain is that the new class action model, currently implemented at national EU level, presents a number of features that can address some of the shortcomings of the other mechanisms. The common law experience, as well as the first applications within Europe, give us precious lessons on what has worked and what has not. Other, even more valuable, insights will be given by the future applications and case law developments within civil law systems. In the meantime, not seizing this opportunity while crafting the new collective mechanisms, by limiting their scope only to consumer redress, would indeed be a misfortune. Vindicating the public interest is, in fact, already a too harsh challenge (almost as that of unquestionably and universally identifying what public interest really is). For such a quest, all possibly effective mechanisms must be used. This is, hence, as it has already been said in the past, a lesson on pluralism.[92]

92 M. Cappelletti, 'Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study', 73(5) *Michigan Law Review* 883 (1975).