University of Central Lancashire
UCLan Cyprus

CRoLEV
Centre for the Rule of Law and European Values,
Jean Monnet Centre of Excellence (2022-25)

Co-funded by
the European Union

Yearbook on the Rule of Law and European Values

Issue 1, 2025

Editors:
Professor Stéphanie Laulhé Shaelou,
Head, School of Law, UCLan Cyprus and CRoLEV Director
Dr Andreas Marcou,
Assistant Professor in Legal Theory, School of Law, UCLan Cyprus and CRoLEV Chief Researcher

The Yearbook on the Rule of Law and European Values is a publication seeking to increase discussion in the field of Rule of Law and European Values in the EU and beyond. In particular, the Yearbook investigates important and timely questions about the state of the rule of law, democracy, and other European values across the EU. The Yearbook is published within the framework of the Jean Monnet Centre of Excellence for the Rule of Law and European Values (CRoLEV) (2022-2025). For more information on CRoLEV, visit https://crolev.eu/

The research articles of the issue have been peer-reviewed under the supervision of the CRoLEV Editorial Board. You can find more information about our editorial board here https://crolev.eu/editorial-board/. The Yearbook on the Rule of Law and European Values is an open resource available at our website https://crolev.eu/yearbook-rolev/

We currently invite contributions for the second issue of the Yeabook from researchers working in different disciplines that study themes of relevance. In particular, we invite submissions related to such themes as:

- Civic engagement, the relationship between rule of law protections and grassroots political participation, structures of democracy, political participation, and/or citizen empowerment, both from empirical and theoretical perspectives;

- Democratic governance and the relationship between rule of law and democracy, including institutional and non-institutional means of safeguarding the rule of law in a democratic state (anti-corruption, transparency, access to information, free press), both from empirical and theoretical perspectives.

Submissions should take the form of original research in a scientific article (8000-10000 words). The deadline for the submission of a complete manuscript is the 21st of March 2025. Selected submissions will be notified by April 2025. All submissions will then undergo double blind review.

January 2025

Disclaimer
Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

Co-funded by the European Union

Table of Contents

Prologue

THE RULE OF LAW – THE ACROBAT OF JUSTICE

The truth, Jean Genet said, is tested not on the ground but, like an acrobat, on the suspended rope. Only there, if it walks to the end without falling, can it claim the authority of fidelity. So it is that the truthfulness of the Rule of law as a commanding principle governing civilized society can only be ascertained not in times of calm but in circumstances of conflict. It is when its authority is disputed that its ability to assert it shows itself. Otherwise, the principle remains an empty letter, an idle boast, mere material for pedantic treatise. And the Rule of law commands most authority if, when tested, it can go to the extreme expressed by Lord Mansfield saying 'Let justice be done though the heavens may fall'.

The Rule of Law is no bargaining and compromising tradesman, no merciful and forgiving father. It is a king above, an Olympian god decreeing its dominance. Take away its mastery and you end up with a feeble mortal, vulnerable to all disputants. Make inroads into its province and you end up with avenues of wrongdoing. Bring down a wall and you end up with the castle falling to pieces. For, as Plato said, societies collapse through internal weakness rather than from external threats. The edifice stands or falls together.

The Rule of Law is not in peace with its antagonists. It is in constant war, and needs to show constant attention lest any gate is violated, for, like the prize of freedom, its prize is eternal vigilance. It does have a lot of friends, strong friends, its faithful defenders in all ranks, and it is upon their commitment and ability that it depends for its survival. Woe if these turn coward, corrupt or traitors. The king will fall from his exalted throne, the kingdom seized by the vulgar, society no longer commonwealth.

The Rule of law has many enemies. It cannot claim it has no enemies. If it did, Charles MacKay's poem would be its confounding answer –

'NO ENEMIES

You have no enemies, you say?

Alas! My friend, the boast is poor;

He who has mingled in the fray

Of duty, that the brave endure,

Must have made foes! If you have none,

Small is the work that you have done.

You've hit no traitor on the hip,

You've dashed no cup from perjured lip,

You've never turned the wrong to right,

You've been a coward in the fight.'

Through the centuries, the Rule of Law has earned its ground inch by inch, yard by yard, mile by mile. It has often lost ground, often regained it. It must ever hold fast to what it possesses. Its state today, in Europe and not only, is more extensive than ever. But old and new enemies, old and new armories are turned against it, raising threats of magnitude. Apart from organized crime, as to which the response of the law-enforcement agencies is often ineffective, the causes are in the main of a political and social nature.

The establishment of the representative system through professional party politics has gradually deprived the citizen of democratic participation. The failure to disengage from paternalism and protectionism has caused multitudes of antagonistic claims involving social conflict. The aggrandizement and complexity of government has led to unprecedented corruption in all quarters and at all levels. The delays in the administration of justice have corroded public confidence. The failure to effect adequate enforcement of laws and regulations has produced anarchy. The limited environmental policy had caused serious and extensive health and amenities problems. The emergence of monstrously large companies leads to monopolistic conditions, exploitation and large-scale financial risks. The concentration of wealth, through which oligarchic power grows, and the ever-increasing gap between rich and poor, excessive wealth and excessive poverty, as Plato said, being the greatest enemy of society, feeds discontent, discord and disorder.

These and other such are the challenge to the Rule of Law today. There is no denying that the challenge is formidable. So, however, must be the response. What is at stake allows nothing less. Those who believe in the Rule of Law are convinced that it will rise to the challenge and hold its authority with renewed strength, ensuring its supremacy over all. The very idea of the principle, going hand in hand with civilized society, is no other. We are all slaves to the law, for that is the condition of our freedom.

Judge Akis Hadjihambis (Ret'd)

The Necessity for An Adequately Reasoned Judicial Decision as A Prerequisite for A Fair Trial

The European Convention on Human Rights envisages and protects the fundamental Rights and Liberties of the citizens, thus ensuring the smooth operation of the rule of law in all states in which the Convention is applicable.

One of these fundamental rights which is interwoven with the general principle of the rule of law is undoubtedly the right to a fair and public hearing before an impartial tribunal.

In order to ensure that this right which is envisaged by Article 6 of the Convention is safeguarded and properly exercised in practice, procedural rules as to the conduct of the trial have been adopted by the case law or by legislation or by both. In accordance with these rules, it is not sufficient for a court or a tribunal to deliver a final decision, favourable or unfavourable to the accused person in a criminal case or for the litigants in a civil case. It is not sufficient either for such a decision to be objectively regarded as a right decision, judging from its outcome. It is much more important for a judicial decision to be adequately reasoned. This aspect of a fair trial is a right of every person involved in any kind of litigation and at the same time it forms a corresponding obligation of the judge or of the decision maker.

The case law of the European Court of Human Rights (ECtHR) has set down general guidelines as to the meaning and extent of judicial reasoning. For example in the case of *Hiro Balani v. Spain (Application no. 18064/91) 09 December 1994*, the Court had said the following:

> "*27. The Court reiterates that Article 6 para. 1 (art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61). The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the*

> *presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 (art. 6) of the Convention, can only be determined in the light of the circumstances of the case.*"

One of the main purposes which is served by the requirement for an adequately reasoned judicial decision is legal certainly i.e. the need for consistency and uniformity in the case law of every state where the rule of law applies. This need had been clearly stressed by the ECtHR in the case of *Nejdet Sahin and Perihan Sahin v. Turkey (Application no.13279/05 dated 20.10.20110)* in the following terms:

> *"55. In this regard the Court has reiterated on many occasions the importance of setting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case-law (see Schwarzkopf and Taussik, cited above). It has likewise declared that it is the States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments (see Vrioni and Others v. Albania, no.2141/03, § 58, 24 March 2009; Mullai and Others v. Albania, no. 9074/07, § 86, 23 March 2010; and Brezovec v. Croatia, no.13488/07, § 66, 29 March 2011).*
>
> *56. Its assessment of the circumstances brought before it for examination has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, Beian (no. 1), cited above, § 39; Iordan Iordanov and Others, cited above, § 47; and Ştefănică and Others, cited above, § 31). Indeed, uncertainty – be it legal, administrative or arising from practices applied by the authorities – is a factor that must be taken into consideration when examining the conduct of the State (see Păduraru, cited above, § 92; Beian (no. 1), cited above, § 33; and Ştefănică and Others, cited above, § 32).*
>
> *57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the*

> *fundamental aspects of the rule of law is the principle of legal certainty (see Brumărescu v. Romania [GC], no.28342/95, § 61, ECHR 1999-VII), which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts (see, mutatis mutandis, Ştefănică and Others, cited above, § 38). The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see Paduraru, cited above, § 98; Vinčić and Others v. Serbia, nos.44698/06 and others, § 56, 1 December 2009; and Ştefănică and Others, cited above, § 38).”*

On the other hand, the ECtHR in stressing the importance of maintaining legal certainty in a state, was very careful not to disturb the other equally important need for a continuous development of the case law which should not remain static. It was in this respect that the Court had this to say in the abovementioned case:

> *“58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04 § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see Atanasovski v. “the Former Yugoslav Republic of Macedonia”, no.36815/03, § 38, 14 January 2010).”*

It should further be reminded that the judicial decisions in the Anglo – Saxon common law systems form a standalone source of law and they are binding on inferior courts. The principle of binding precedent, known as "*stare rationibus decidendi*" or "*stare decisis*" is a well-known maxim of English law on which a consistent development of legal principles is based.

Taking into consideration that a system of binding precedent is applicable, the resulting necessity for delivering judicial decisions which are detailed, well built and fully reasoned is a *sine qua non*. Given that the decisions of the higher courts are binding on all inferior courts, this fact creates an extra strong reason for them to bare the abovementioned characteristics, so as to provide clear

guidance to the courts which are called upon to follow them. In addition to that, the judgments of the inferior courts should also bare the same characteristics of clarity and reasoning not only in order to be well understood by the persons involved in the litigation but also in order for them to be easily reviewed as to their correctness or their legality by the appellate courts.

Following the declaration of its independence in 1960, the Republic of Cyprus continued applying the principles of common law with certain additions or differentiations with respect mainly to the Administrative and the Constitutional Law.

In its judgment in the case of *Mavrogenis v. The House of the Representatives (Appl.1/95 of the 26.3.1993)* the full bench of the Supreme Court of Cyprus stressed that the principle of the binding precedent constitutes a separate source of law since in the judgments the applicable law is exposed. Deviation from a judgment of the Supreme Court can only be justified if the previous decision is manifestly wrong, or if the facts of the two cases are clearly distinguishable.

It should also be noted that the Constitution of Cyprus makes the necessity for due reasoning of judicial decisions even clearer than the Convention itself. Whereas the Convention in *Article 6.1* only requires that "*judgments shall be pronounced publicly*……") the corresponding text of *Article 30.2* of the *Cyprus Constitution* which deals with the right to a fair trial, specifically requires that "*judgments shall be reasoned and pronounced in public session*…."

In another judgment in the case of *Orestis Vassiliou and Others v. The Republic Criminal Appeals no. 12 – 17/2015 dated 4.7.2017* the Supreme Court sitting as a Criminal Appeal Court confirmed the following (translation from Greek by the author):

> "*The notion of fair trial has in its nucleus the reasoning of the judicial decisions. Any deviation from the express terms of Article 30.2 of the Constitution is targeting against the right to a fair trial and invalidates the decision. The necessary components of a reasoned judgment were set out in a series of Supreme Court judgments. A sufficiently reasoned judgment must inescapably contain a specification of the disputed issues, a summary of the material evidence, a clear exposition of the court's findings and a connection of the decision with the disputed issues, both legal and factual. The exposition of the findings stems of course as a result of a correct examination of the evidence adduced, without the court being*

> *obliged to record in the decision the totality of the evidence brought before it. It is also recognized through the case law that it is unnecessary for the Court to refer to every aspect of the evidence or to deal with each and every argument put forward which cannot be termed as material or admissible in law" (Andronicou v. The Republic (2008) 2 AAD 486, 534 – 535).*"

The necessity for a sufficient reasoning of judicial decisions also reflects upon another related issue i.e. the matter of the structure and the proper way of drafting judicial decisions. Without attempting to strictly standardize the mode of drafting decisions by judges, an attempt which would be unfeasible as well as undesirable, the Supreme Court has in some instances provided general guidelines regarding at least the minimum requirements which a decision should comply with and the various stages through which a well structured judicial decision should go through. Thus, in the case of *L. Papaphilippou & Co Ltd v. Demetra Louca Civil Appeal no. 59/2010 dated 206.2014* the following was said by the Supreme Court (translation from Greek by the author):

> "*Judicial independence and the autonomy of the judicial decision making leave a wide margin of discretion regarding the mode of drafting decisions. The text wrap, however, of the judicial thinking with a logical and coherent approach is a necessity so as to avoid the danger of missing the train of the judge's thought and to identify with clarity the judicial reasoning. Whereas the structure of a judicial decision is up to the judge, the final determination should have a logical consistency by setting down the evidence, by evaluating the evidence and by submitting the findings to the existing legal substratum….*"

In the case of *Evgeniou v. The Police (2000) 2 AAD 540* the Supreme Court had remarked the following (translation from Greek by the author):

> "*It has been repeatedly stressed that the reasoning of a decision which is envisaged by Article 30.2 of the Constitution, safeguards the validity of the judicial process. (Ioannidou v. Dikeos (1969) 1 CLR 235, Pioneer Candy Ltd. v. Tryphon and Sons Ltd. (1981) 1 C.L.R. 440, Droussiotis v. Ieronymides (1990) 1 CLR 1026 Vassiliou v. Menelaou and another (1990) 1 CLR 1125.The reasoning is based upon the analysis of the evidence adduced. The extent of the analysis varies according to the*

> *contents and the nature of the evidence. (Andreou v. Christophorou (1991) 1 AAD 828). In the case of Pioneer Candy Ltd. v. Tryphon and Sons Ltd (supra) it had been stressed that a reasoned judgment should contain:*
>
> *(a) An analysis of the evidence in the light of the issues in dispute,*
>
> *(b) The exposition of specific findings and*
>
> *(c) A clear judicial decision.*
>
> *The detailed elaboration with all the differences which are spotted amongst the testimonies of the witnesses, their analysis and evaluation does not constitute a necessary prerequisite of the reasoning of a judicial decision. The analysis of the evidence should focus mainly on the basic elements which have a direct connection with the issues in dispute."*

In our days, with so many instances of corruption or of suspected corruption in all aspects of life, it is without doubt that a persuasive and well reasoned judicial decision enhances the respect towards the judiciary and to the administration of justice in general. Clear, unambiguous and fully reasoned judgments which are drafted in plain language making them easily understandable, serve this important purpose. They assist in building or preserving the public's confidence towards the judiciary and the fair administration of justice, thus avoiding any criticism of arbitrariness.

The obligation to explain a decision is also a factor which tends to improve its quality and it also ensures that the decision is not based on irrelevant considerations or speculations.

It should always be remembered that the parties to a dispute have resorted to the court in order to have their differences solved. They are therefore entitled not only to a result, but to a reasoned decision which has dealt with their main positions and arguments, with the evidence adduced and which contains a detailed reasoning as to the court's final assessment.

Generally speaking, a judicial decision can be described as arbitrary and consequently voidable, where there are no reasons provided for it at all or regarding any issue of crucial importance to the case, or of course where the reasons given are based on manifest factual or legal error.

Concluding, it can be said that the mode of drafting a judicial decision depends upon the subjective style of the judge. The way of expressing is not standardized and provided that it contains the basic characteristic components of a reasoned judgment, this will suffice for the purpose of achieving a fair trial.

Hon. Mr. Justice Costas Clerides (Ret'd)

April 2024

The rule of law, the Brexit saga and Boris Johnson's first three months as Prime Minister, 24 July – 23 October 2019

Klearchos A. Kyriakides[1]

Abstract

This chapter explores one basic question – whether and, if so, how the UK Government exhibited disdain for the rule of law during a critical phase in the Brexit saga, the three months after Boris Johnson became Prime Minister on 24 July 2019. It is argued that elements of the UK Government appeared to exhibit disdain for the rule law, the Westminster model of parliamentary democracy and applicable ethical standards. The person primarily responsible was Johnson. Contrary to the rule of law, Johnson displayed a cavalier approach to the UK constitution, constitutional principles and binding legislation, until he was reined in.

Introduction

During a lengthy filmed interview circulated on 24 October 2023, a pointed question was put to Lord Woolf, the retired judge whose career peaked as Master of the Rolls and as the Lord Chief Justice of England and Wales.[2] The question was whether Lord Woolf 'would' agree with the proposition that the 'administration under Boris Johnson', which lasted from 24 July 2019 until 6 September 2022, had shown 'a flagrant disregard for the rule of law.' Without any hesitation, Lord Woolf responded with just two words: 'I would.'[3] This was a damning assessment from one of the foremost jurists of his generation. Yet, it has been matched by so many others in a similar vein.

---

[1] © Klearchos A. Kyriakides, 7 November 2024. Acknowledgments: This chapter reproduces, refers to or otherwise contains the following: Crown Copyright material or other public sector information licenced under the Open Government Licence v3.0, website of the National Archives of the UK, Kew Gardens, Surrey, www.nationalarchives.gov.uk/doc/open-government-licence/version/3/ (accessed 11 March 2022); and UK Parliamentary Copyright material or other UK Parliamentary information licenced under the Open Parliament Licence, www.parliament.uk/site-information/copyright-parliament/open-parliament-licence/ (accessed 11 March 2022). The author thanks to all involved in the peer-review and publication of this chapter.

[2] Rt. Hon. Lord Woolf, CH, *An Uncommon Lawyer* (Oxford: Bloomsbury Publishing PLC, 2022), x.

[3] Interview conducted by Frances Gibb with Lord Woolf (at 34 minutes and 27 seconds into it), 'The Judges: Power, Politics and the People - Episode 1 - Lord Woolf', University of Law Youtube channel, 24 October 2023, www.youtube.com/watch?v=Nm60VKmbUv0 (accessed 10 March 2024).

According to Joshua Rosenberg KC (hon), 'Boris Johnson will go down in history as a prime minister who played fast and loose with the rule of law.'[4] Meanwhile, David Sanders has composed an academic article whose title speaks for itself: 'One Man's Damage: The Consequences of Boris Johnson's Assault on the British Political System'.[5] These are but two of many critiques forming part of an emerging yet credible consensus over the disdain ostensibly exhibited by Johnson for the Westminster model of parliamentary democracy[6] and other pre-eminent features of the uncodified UK constitution.[7]

Critical articles, such as those cited above, have been supplemented by an ever-expanding literature on the prime ministership of Johnson,[8] which was dominated by three major issues with profound implications for the rule of law in the United Kingdom of Great Britain and Northern Ireland ('UK'), the European Union ('EU') and the Member States of the EU: the exit of the UK from the EU ('Brexit'); the COVID-19 pandemic; and the invasion of Ukraine by Russia. Against this eventful background, the literature now includes the memoirs of Johnson, which are discussed later in this chapter, as well as the diaries, memoirs and communications of some of the ministers who served under him.[9] More light has been shed by publications of the unelected House of Lords, the elected House of Commons and other bodies such as the UK Covid-19 Inquiry.[10]

Given what has already entered the public domain, the primary purpose of this chapter is to explore whether and, if so, how the UK Government exhibited disdain for the rule of law during the first three months of Johnson's prime ministership which began on 24 July 2019. However, in order to

---

[4] Joshua Rosenberg KC (hon), 'Johnson's disrespect for the law: The PM repeatedly showed a cavalier attitude towards constitutional conventions', *The Critic*, August/September 2022, https://thecritic.co.uk/issues/august-september-2022/johnsons-disrespect-for-the-law/ (accessed 10 March 2024).

[5] David Sanders, 'One Man's Damage: The Consequences of Boris Johnson's Assault on the British Political System', *The Political Quarterly*, 94 (2), April/June 2023, 166-174, https://doi.org/10.1111/1467-923X.13250 (accessed 16 March 2024).

[6] On the Westminster model, see *inter alia* R.A.W. Rhodes, John Wanna & Patrick Weller, *Comparing Westminster* (Oxford: Oxford University Press, 2009).

[7] The classic books on the UK constitution include A. V. Dicey KC, *Introduction to the Study of the Law of the Constitution: Eighth Edition* (London: Macmillan & Co. Ltd, 1915) and A. W. Bradley, K. D. Ewing & Christopher Knight, *Constitutional and Administrative Law: Eighteenth Edition* (London: Pearson Education, 2022).

[8] See *inter alia* Inigo Bing, *Populism on Trial: What Happens When Trust in Law Breaks Down* (London: Biteback Publishing, 2020), Sebastian Payne, *The Fall of Boris Johnson* (London: Pan Macmillan, 2022) and Anthony Seldon & Raymond Newell, *Johnson at 10: The Inside Story* (London: Atlantic Books, 2023).

[9] See Matt Hancock with Isabel Oakeshott, *Pandemic Diaries: The Inside Story of Britain's Battle Against Covid* (London: Biteback Publishing, 2022) as well as the leaked WhatsApp messages published by the *Daily Telegraph* at www.telegraph.co.uk/authors/t/tf-tj/the-lockdown-files-team/ (accessed 31 March 2024).

[10] UK Covid-19 Inquiry, https://covid19.public-inquiry.uk/ and www.youtube.com/@UKCovid-19Inquiry/videos (accessed 2 April 2024).

place those turbulent months into their wider historical context and to suggest that the antics of Johnson did not emerge from thin air, the main body of this chapter begins by outlining some of the key events in the Brexit saga[11] as it unfolded from 23 June 2016, the date when the Brexit referendum was held, until 23 July 2019, the day before Johnson replaced Theresa May in 10 Downing Street.

Within this thematic and chronological framework, the author emphasises certain issues at the intersection between the rule of law and the Westminster model of parliamentary democracy, two of the cornerstones of the UK constitution. As such, the author essentially adopts a historico-legal methodological approach. Quite simply, he critically analyses what happened during a pivotal period during the Brexit saga, why it happened and what were the constitutional or legal implications. To these ends, the author draws upon a wealth of primary sources, including official publications, Hansard, i.e., the official published proceedings of the UK Parliament, court judgments and other public records. Nevertheless, the author has been unable to make use of any classified public records, including those due to be released via the National Archives of the UK ('National Archives') under the statutory '20 year rule'.[12] When those records are declassified, historians will be in a position to plug any gaps in this chapter.

In the meantime, what infuses this chapter is a thesis which rests on a solid evidential bedrock. Particularly but not solely during the three-month period commencing on 24 July 2019, elements of the UK Government appeared to conduct themselves in inappropriate ways which exhibited disdain for the rule law, the Westminster model of parliamentary democracy and the ethical standards which go hand in hand with the UK constitution. This disdain manifested itself time and again, especially on those occasions when Johnson did not have his way or when he reacted to any predicament by displaying a cavalier approach to the UK constitution, any underlying

[11] See *inter alia* Kevin O'Rourke, *A Short History of Brexit: From Brentry to Backstop* (London: Penguin, 2019), Nigel Walker, *Brexit timeline: events leading to the UK's exit from the European Union* (London: House of Commons Library Briefing Paper Number 7960, 6 January 2021), https://researchbriefings.files.parliament.uk/documents/CBP-7960/CBP-7960.pdf & https://commonslibrary.parliament.uk/research-briefings/cbp-7960/ and 'Timeline - The EU-UK withdrawal agreement', European Council / Council of the EU, www.consilium.europa.eu/en/policies/eu-relations-with-the-united-kingdom/the-eu-uk-withdrawal-agreement/timeline-eu-uk-withdrawal-agreement/ (accessed 1 April 2024).

[12] See *inter alia* 'Twenty-year rule on public records', Home Office, 17 April 2013, www.gov.uk/government/publications/twenty-year-rule-on-public-records, ''20-year rule', National Archives, www.nationalarchives.gov.uk/about/our-role/transparency/20-year-rule/ and Sir Alex Allan, *Records Review* (London: Cabinet Office, August 2014) www.gov.uk/government/publications/records-review-by-sir-alex-allan (accessed 3 July 2024).

constitutional principles or the legislation binding upon him. What went wrong appears to have been driven by several factors which likewise infuse this chapter but will be spelt out in the remainder of this Introduction.

One of these factors was an ostensible Johnsonian failure to appreciate that the constitutional order of the UK is founded upon what A. V. Dicey KC famously describes as 'three leading characteristics …… now generally designated as the Sovereignty of Parliament, the Rule of Law, and the Conventions of the Constitution',[13] the latter of which are defined by *The Cabinet Manual* as 'rules of constitutional practice that are regarded as binding in operation but not in law'.[14] Of these 'three leading characteristics', Dicey contends, '[t]he sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions.'[15] Dicey adds, albeit with Anglo-centric words reflecting the English origins of what is otherwise known as Parliamentary sovereignty:

> 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined [i.e., 'the King, the House of Lords, and the House of Commons'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'[16]

Parliamentary sovereignty is one of the cardinal reasons why the uncodified UK constitution may be distinguished from any codified constitution which curbs the legislative power of the legislature by empowering the judiciary to strike down any primary legislation deemed to be unconstitutional;[17] the UK constitution does not empower judges in that way. Of greater relevance to this chapter are some consequences of Parliamentary sovereignty which Johnson did not appear to respect at all material times during the Brexit saga, for the reasons presented in this chapter.

---

[13] Dicey, *Introduction to the Study of the Law of the Constitution*, xvii.
[14] *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government: 1st Edition* (London: The Cabinet Office, October 2011, 3 (paragraph 5), https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf and www.gov.uk/government/publications/cabinet-manual (accessed 27 December 2023)
[15] Dicey, *Introduction to the Study of the Law of the Constitution*, xviii.
[16] Ibid, 37-38.
[17] See *inter alia* John Bell & Marie-Luce Paris (eds.) *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Cheltenham: Edward Elgar Publishing, 2016).

One consequence is that, in common with other Ministers of the Crown, the Prime Minister is subject to the will of Parliament and, as Dicey puts it, 'the will of Parliament can be expressed only through an Act of Parliament.'[18] It follows that in the UK the legislative branch of government occupies a commanding position by comparison with the executive and judicial branches. It also follows, as Dicey maintains, that '[t]he sovereignty of Parliament as developed in England supports the supremacy of the law', that '[t]he supremacy of the law necessitates the exercise of Parliamentary sovereignty' and that '[b]y every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.'[19] What this chapter establishes is that during his first three months as Prime Minister Johnson came face to face with the will of Parliament, but he openly threatened to defy it, contrary to what Dicey called 'the supremacy of the law', otherwise known as the rule of law.

A related factor which infuses this chapter is an ostensible Johnsonian failure to grasp that, as Prime Minister, he was bound by the general principle identified by Lord Steyn in a case decided in 2004: 'In our Parliamentary democracy nobody is above the law.'[20] If that general principle is broadly in line with contemporary European approaches to the rule of law,[21] so, too, is the related idea that there is more to the rule of law than mere compliance with the law, whatever the law happens to be. To take one example, Dicey approaches the rule of law through 'three distinct though kindred conceptions',[22] one of which is that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals', this being an expression of 'the idea of legal equality'.[23] A second example is provided by the works of Lord Bingham of Cornhill, the pre-eminent British judge of his generation. Lord Bingham approaches the rule of law with reference to eight 'sub-rules'.[24] For instance, the fifth of

[18] Dicey, *Introduction to the Study of the Law of the Constitution*, 403.
[19] Ibid, 402, 406 and 409.
[20] *R v J* [2004] UKHL 42 [38] (Lord Steyn, with whom Lord Bingham of Cornhill agreed), www.bailii.org/uk/cases/UKHL/2004/42.html (accessed 5 April 2024).
[21] See *inter alia* Werner Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016).
[22] Dicey, *Introduction to the Study of the Law of the Constitution*, xxxvii-xlviii and 177-201 at 183.
[23] Ibid, 189.
[24] Lord Bingham, 'The rule of law', *Cambridge Law Journal*, 66 (1), March 2007, 67-85, https://doi.org/10.1017/S0008197307000037, Lord Bingham, 'The rule of law', the transcript of a lecture given in the University of Cambridge on 16 November 2006, www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RU

these is devoted to the proposition that '[m]inisters and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.'[25]

In this chapter, it suffices to assess the conduct of Johnson with reference to the general principle identified by Lord Steyn and the definition provided by Lord Bingham, the latter of which has been cited by a number of courts[26] and has been described by the European Commission for Democracy through Law (Venice Commission) as one which 'covers most appropriately the essential elements of the rule of law.'[27] According to the definition of Lord Bingham, at 'the core' of the rule of law is the idea that:

> '[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'[28]

Another factor which infuses this chapter has to do with the separation of powers doctrine. Johnson did not appear to understand that, in keeping with that doctrine, the rule of law affects the operation of all three branches of government, including the executive branch in which he was serving as Prime Minister. In the Supreme Court in 2017, before the start of Johnson's tenure in 10 Downing Street, Lord Reed explained some of the main reasons why that is the case:

> 'At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws

LE%20OF%20LAW%202006.pdf and www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law (accessed 26 March 2024) and Tom Bingham, *The Rule of Law* (London: Penguin, 2010).

[25] Bingham uses this form of words on page 23 of the transcript of his lecture in Cambridge and on page 78 of his related article published in the *Cambridge Law Journal*. By contrast, the word 'reasonably' is omitted from the equivalent form of words in Bingham, *The Rule of Law*, 60.

[26] Such courts include the Supreme Court. See *AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland)* [2011] UKSC 46 [118] (per Lord Reed, with whom Lords Kerr, Clarke, Dyson and other Justices agreed), www.supremecourt.uk/cases/uksc-2011-0108.html (accessed 4 July 2024).

[27] 'CDL-AD(2011)003rev-e Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)', 9, www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e and *The Rule of Law Checklist* (Strasbourg: Venice Commission, 2016), 10, www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf (accessed 16 March 2024).

[28] Bingham, *The Rule of Law*, 8.

> includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law.'[29]

No less alarmingly, at key stages of the Brexit saga, Johnson did not seem to realise that he was an elected Member of Parliament who had penetrated the executive branch of government rather than the other way round. Despite his range of roles in the executive branch – as Prime Minister, First Lord of the Treasury, Minister for the Civil Service, Minister for the Union and *ex officio* Chairman of the Cabinet – Johnson not only remained an MP but he was accountable to the Commons whose confidence he and his Cabinet colleagues had to retain in order to remain in office pending the outcome of the next Parliamentary General Election. This is the quintessence of the Westminster model of Parliamentary democracy. So, too, is the intimate relationship between the Cabinet and Parliament from which the Prime Minister and all Cabinet Ministers are drawn. As Walter Bagehot famously put it, the Cabinet is 'a committee of the legislative body selected to be the executive body' and 'a combining committee - a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state.'[30]

In addition to the thesis articulated above, this chapter is infused with a subthesis to do with ethics rather than with law *per se*. What comes across in this chapter is a recurring Johnsonian tendency to behave in ways which were difficult to reconcile with some of the ethical standards that he was expected to live up to under the Westminster model of parliamentary democracy – as an elected MP subject to the non-statutory *Commons Code of Conduct*,[31] as a Minister of the Crown subject to the non-statutory *Ministerial Code*[32] under which 'Ministers of the Crown are expected to

---

[29] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68] (Lord Reed with whom Lords Neuberger, Mance, Kerr, Wilson and Hughes agreed), www.supremecourt.uk/cases/uksc-2015-0233.html (accessed 19 April 2024).

[30] Walter Bagehot, *The English Constitution: Fifth Edition* (London: Kegan Paul, Trench & Co, 1888), 11, 13, 14 and 15.

[31] The version applicable during Johnson's first three months as Prime Minister was the *House of Commons Code of Conduct: Approved by the House of Commons on 12 March 2012, 17 March 2015 and 19 July 2018: Ordered by the House of Commons to be printed 24 July 2018: HC 1474* (London: House of Commons, 1 August 2018), https://publications.parliament.uk/pa/cm201719/cmcode/1474/1474.pdf Later editions and related texts are at 'House of Commons Code of Conduct and Guide to Rules', Parliament, www.parliament.uk/business/publications/commons/hoc-code-of-conduct/ (accessed 3 April 2024).

[32] The version applicable when Johnson entered 10 Downing Street on 24 July 2019 was *Ministerial Code* (London: Cabinet Office, January 2018), UK Government Web Archive, National Archives,

maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety'[33] and as a holder of public office under a non-statutory duty to adhere to the Seven Principles of Public Life, which embody 'the basis of the ethical standards expected of public office holders'[34] and are built into both the *Commons Code of Conduct* and the *Ministerial Code*.

A brief history of the Brexit saga between 23 June 2016 and 24 July 2019

Even though the origins of Brexit have deep roots,[35] the Brexit saga may be taken as having begun on 23 June 2016. On that date, a referendum was held in the UK and Gibraltar pursuant to the European Union Referendum Act 2015,[36] which had originated as a Government-moved bill. The referendum revolved around one question – whether the UK should 'remain' a member of the EU or whether it should 'leave' the EU. After David Cameron MP, the then Prime Minister, had campaigned for 'remain',[37] a majority of 51.9% of those who voted opted to 'leave'.[38] On 13 July 2016, having gambled and lost, Cameron was replaced as Prime Minister by his fellow Conservative, Theresa May MP.[39]

---

https://webarchive.nationalarchives.gov.uk/ukgwa/20180228163747/https://www.gov.uk/government/publications/ministerial-code, the version applicable from 23 August 2019 until 27 May 2022 was *Ministerial Code* (London: Cabinet Office, August 2019), UK Government Web Archive, National Archives, https://webarchive.nationalarchives.gov.uk/ukgwa/20190902141603/https://www.gov.uk/government/publications/ministerial-code (accessed 18 April 2024). The version in force at the time of writing is *Ministerial Code* (London: Cabinet Office, November 2024), www.gov.uk/government/publications/ministerial-code (accessed 7 November 2024).

[33] Ibid, paragraph 1.1 of all of the versions cited above except the last one where the words 'of the Crown' have been omitted.

[34] 'Guidance: The Seven Principles of Public Life', Committee on Standards in Public Life, 31 May 1995, www.gov.uk/government/publications/the-7-principles-of-public-life and Carl Baker, 'Seven Principles of Public Life', House of Commons Library Research Briefing, 24 August 2022, https://commonslibrary.parliament.uk/research-briefings/cdp-2022-0156/ (accessed 3 April 2024).

[35] See *inter alia* Chris Gifford, *The Making of Eurosceptic Britain: Identity and Economy in a Post-Imperial State* (Aldershot: Ashgate, 2008) and Menno Spiering, *A Cultural History of British Euroscepticism* (Basingstoke: Palgrave Macmillan, 2015).

[36] European Union Referendum Act 2015 c. 36, www.legislation.gov.uk/ukpga/2015/36/enacted (accessed 18 April 2024).

[37] See, for example, 'PM speech on the UK's strength and security in the EU: 9 May 2016', Prime Minister's Office, 9 May 2016, www.gov.uk/government/speeches/pm-speech-on-the-uks-strength-and-security-in-the-eu-9-may-2016 (accessed 1 April 2024).

[38] *The 2016 EU referendum: Report on the 23 June 2016 referendum on the UK's membership of the European Union* (London: Electoral Commission, September 2016), 6, www.electoralcommission.org.uk/sites/default/files/pdf_file/2016-EU-referendum-report.pdf and www.electoralcommission.org.uk/research-reports-and-data/our-reports-and-data-past-elections-and-referendums/report-23-june-2016-referendum-uks-membership-european-union (accessed 31 March 2024).

[39] 'David Cameron's departing words as Prime Minister', Prime Minister's Office, 13 July 2016, www.gov.uk/government/speeches/david-camerons-departing-words-as-prime-minister and 'Statement from the new

With May now at its helm, the UK Government sought to achieve Brexit by activating the provisions in Article 50 of the Treaty on European Union ('the TEU').[40] The UK Government originally envisaged serving notice on the European Council by exercising its powers under the royal prerogative, otherwise known as the Crown's prerogative, i.e., the residual non-statutory powers of the Crown recognised by common law.[41] However, the UK Government soon faced judicial review proceedings in the case now known as *Miller 1*.[42] On 3 November 2016, the High Court of England and Wales held that the Secretary of State for Exiting the EU ('the Brexit Secretary') did not have the power under the Crown's prerogative to give notice to the EU pursuant to Article 50 of the TEU.[43] In response, the UK Government appealed to the Supreme Court.

A majority of eight members of a panel of eleven Justices held that 'the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation' and that 'unless and until acted on by Parliament,' the 'force' of the referendum 'is political rather than legal.'[44] The eight Justices additionally held that 'the prerogative could not be invoked by ministers to justify giving Notice [of the intention of the UK to withdraw from the EU]: ministers require the authority of primary legislation before they can take that course.'[45]

At a much more fundamental level, the eight Justices in *Miller 1* did something else, albeit implicitly. In keeping with the rule of law, they affirmed that a Minister of the Crown is not above the law and that the UK Government must correspondingly comply with it. Moreover, the eight Justices effectively illustrated what Lord Mustill, a Law Lord, characterised in 1995 as 'the peculiarly British conception of the separation of powers' under which 'Parliament, the executive and the courts each have their distinct and largely exclusive domain.'[46]

Prime Minister Theresa May', Prime Minister's Office, 13 July 2016, www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may (accessed 5 April 2024).

[40] Consolidated version of the Treaty on European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT (accessed 5 November 2024).

[41] Maurice Sunkin & Sebastian Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999)

[42] *R (Miller & Anor) v The Secretary of State for Exiting the European Union (Rev 1)* [2016] EWHC 2768 (Admin), www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html (accessed 5 April 2024).

[43] Ibid, [111] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ).

[44] Ibid, [24].

[45] Ibid, [101].

[46] *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] UKHL 3 [26] (Lord Mustill).

On the very day when the Supreme Court handed down its Judgment in *Miller 1*, David Davis MP, the Brexit Secretary, appeared in the Commons to 'announce' that, in harmony with the Judgment, Ministers would 'shortly introduce legislation allowing the Government to move ahead with invoking article 50, which starts the formal process of withdrawing from the EU.' Davis matched this commitment with a confirmation that made 'clear that we believe in and value the independence of our judiciary, the foundation on which the rule of law is built. So, of course, it goes without saying that we will respect the judgment.'[47]

In due course, Parliament enacted the European Union (Notification of Withdrawal) Act 2017.[48] Duly empowered, Prime Minister May submitted a 6-page letter, dated 29 March 2017, to Donald Tusk, the President of the European Council. What soon followed was the Parliamentary General Election held in the UK on 8 June 2017. The outcome was a hung Parliament with the Conservatives gaining 317 of the 650 seats[49] and with May clinging on as Prime Minister in command of the confidence of an overall majority of MPs – thanks to an agreement securing the support of 10 Democratic Unionist Party MPs.[50]

In these circumstances, Parliament enacted the European Union (Withdrawal) Act 2018. Its primary purposes were 'to repeal the European Communities Act 1972', under which the UK had entered the then European Economic Community on 1 January 1973, and 'make other provision' in connection with Brexit.[51] On 9 July 2018, Johnson, who had been serving as Foreign and Commonwealth Secretary under May since 13 July 2016, abruptly resigned for reasons set out in his resignation letter.[52] Despite that setback, May soldiered on as Prime Minister and on 25

[47] Hansard, House of Commons Debates, Volume 620, 24 January 2017, columns 161-162, https://hansard.parliament.uk/commons/2017-01-24/debates/d423aee6-be36-4935-ad6a-5ca316582a9c/article50 (accessed 17 April 2024).

[48] European Union (Notification of Withdrawal) Act 2017 c.9, www.legislation.gov.uk/ukpga/2017/9/contents/enacted (accessed 31 March 2024).

[49] Vyara Apostolova *et al*, *General Election 2017: results and analysis: Second Edition* (London: House of Commons Library Briefing Paper Number CBP 7979, 29 January 2019), 6, https://researchbriefings.files.parliament.uk/documents/CBP-7979/CBP-7979.pdf and https://commonslibrary.parliament.uk/research-briefings/cbp-7979/ (accessed 1 April 2024).

[50] 'Conservative and DUP Agreement and UK Government financial support for Northern Ireland', Prime Minister's Office, 26 June 2017, UK Government Web Archive, National Archives, https://webarchive.nationalarchives.gov.uk/ukgwa/20170804104753/https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland (accessed 3 April 2024).

[51] European Union (Withdrawal) Act 2018 c. 16, Preamble, www.legislation.gov.uk/ukpga/2018/16/enacted (accessed 4 April 2024).

[52] 'Boris Johnson's resignation letter and May's reply in full', BBC News, 9 July 2018, www.bbc.com/news/uk-politics-44772804 (accessed 3 April 2024).

November 2018 Brexit came another significant step closer when it was announced that the UK Government and the EU had concluded a bilateral 584-page Withdrawal Agreement together with a related 26-page Political Agreement.[53]

Now, among other steps, the UK-EU Withdrawal Agreement had to be approved by Parliament and given legislative force. Nevertheless, given the parliamentary arithmetic in the Commons, that was easier said than done. Facing sustained gridlock in the Commons, escalating discontent within the Conservative Party and a restless Johnson on the Conservative backbenches, May buckled under the pressure. On 24 May 2019, she confirmed that she would step down as Prime Minister as soon as the Conservative and Unionist Party had elected a new leader.'[54] On 23 July 2019, after a leadership contest, Johnson was pronounced as the new Leader of that Party.[55] He had been elected on a policy platform which had included a pledge to bring the UK out of the EU on 31 October 2019 – 'Do or die. Come what may.'[56] As Johnson was not cut from the same cloth as May, the stage was well and truly set for the most intense phase in the Brexit saga.

The unequivocal assurances given by Johnson on 24 and 25 July 2019

On 24 July 2019, Theresa May visited Buckingham Palace to tender her formal resignation as Prime Minister and as First Lord of the Treasury. Minutes later, HM Queen Elizabeth II ('the Queen'), as Head of State, invited Johnson to form a new administration and thereby become Head of Government. Johnson accepted.[57] Minutes after leaving Buckingham Palace as the new Prime Minister, Johnson nailed his colours to the mast. Standing outside 10 Downing Street and using his booming voice, Johnson delivered a string of characteristically brash declarations which were

[53] 'Withdrawal Agreement and Political Declaration', Department for Exiting the EU, 25 November 2018, www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration (accessed 31 March 2024).
[54] 'Prime Minister's statement in Downing Street: 24 May 2019', Prime Minister's Office, 24 May 2019, www.gov.uk/government/speeches/prime-ministers-statement-in-downing-street-24-may-2019 (accessed 31 March 2024).
[55] Neil Johnston, *Leadership elections: Conservative Party* (London: House of Commons Library Research Briefing Number 01366, 25 October 2022), 14-16, https://researchbriefings.files.parliament.uk/documents/SN01366/SN01366.pdf and https://commonslibrary.parliament.uk/research-briefings/sn01366/ (accessed 10 March 2024).
[56] Rowena Mason & Peter Walker, 'Brexit: Johnson says Britain will leave EU on 31 October 'do or die'', 25 June 2019, www.theguardian.com/politics/2019/jun/25/brexit-boris-johnson-britain-will-leave-eu-31-october-do-or-die (accessed 4 November 2024).
[57] 'The Queen received in audience The Right Honourable Boris Johnson MP', Royal Household, 24 July 2019, www.royal.uk/queen-received-audience-right-honourable-boris-johnson-mp (accessed 1 April 2024).

laced with unequivocal but potentially unrealisable prime ministerial assurances. In one, Johnson amplified one of his pre-election pledges, declaring that:

> '[W]e are going to fulfil the repeated promises of parliament to the people and come out of the EU on October 31st [2019] no ifs or buts and we will do a new deal, a better deal that will maximise the opportunities of Brexit while allowing us to develop a new and exciting partnership with the rest of Europe based on free trade and mutual support …'.[58]

With these words, Johnson issued an unequivocal assurance which, in one way or another, he was to repeat and was seemingly determined to fulfil, 'no ifs or buts'. For instance, when Johnson appeared in the Commons for the first time as Prime Minister on 25 July 2019, he assured MPs that 'I and all Ministers are committed to leaving on this date [31 October], whatever the circumstances.'[59]

The European Union (Withdrawal) Act 2018 stipulated that '… "exit day" means 29 March 2019 at 11.00 p.m. …'.[60] However, by 24 July 2019, Parliament had already helped to engineer two successful prime ministerial requests to the European Council to extend exit day – from 29 March 2019 until 12 April 2019 and from 12 April until 31 October 2019 respectively.[61] It follows that when he assured the people that 'we are going to … come out of the EU on October 31st [2019] no ifs or buts' and when he told Parliament that the UK was to fulfil the promises it had given 'by coming out of the European Union, and by doing so on 31 October … whatever the circumstances', Johnson was reflecting the provisions of the Regulations cited above. It also follows that there was a real possibility that Parliament might compel Johnson – by means of an Act of Parliament or otherwise – to request the European Council to extend exit day yet again. As explained later, this is precisely what Parliament eventually did in early September 2019, thus provoking a defiant

---

[58] 'Boris Johnson's first speech as Prime Minister', Prime Minister's Office, 10 Downing Street, 24 July 2019, www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019 and 'Boris Johnson's first speech as Prime Minister | FULL SPEECH', BBC Youtube channel, 24 July 2019, www.youtube.com/watch?v=6jfSAWCHRts (accessed 10 March 2024).

[59] Hansard, House of Commons Debates, Volume 663, 25 July 2019, column 1458, https://hansard.parliament.uk/commons/2019-07-25/debates/D0290128-96D8-4AF9-ACFD-21D5D9CF328E/PrioritiesForGovernment (accessed 3 April 2024).

[60] European Union (Withdrawal) Act 2018, section 20(1).

[61] Graham Cowie, *Parliament and the three extensions of Article 50* (London: House of Commons Library Briefing Paper Number 8725, 31 October 2019), 10-14 and 15-17, https://researchbriefings.files.parliament.uk/documents/CBP-8725/CBP-8725.pdf and https://commonslibrary.parliament.uk/research-briefings/cbp-8725/ (accessed 10 March 2024).

prime ministerial backlash out of step with the requirements of the UK constitution and two of its hallmarks – parliamentary sovereignty and the rule of law. Indeed, such was Johnson's determination to take the UK out of the EU on 31 October that it almost ignited a seismic constitutional crisis with the rule of law at its epicentre.

The 'News story' published by the UK Government on 16 August 2019

At the close of play on 25 July 2019, the Commons rose for the annual summer recess with a scheduled return date of 3 September 2019.[62] So, too, did the Lords.[63] There was nothing odd in that. What was odd was the UK Government's subsequent exploitation of the summer recess. Two episodes exemplify this oddity, the second of which was so serious that it resulted in litigation.

The first episode dates back to 16 August 2019. The Brexit Secretary, Stephen Barclay MP, exercised the powers conferred on him by section 25(4) of the European Union (Withdrawal) Act 2018 to make the European Union (Withdrawal) Act 2018 (Commencement No. 4) Regulations 2019.[64] There was nothing wrong in that. Two days later, however, the Department for Exiting the EU sought to make political hay out of these Regulations by publishing a 'News story' with an eye-catching title: 'Brexit Secretary signs order to scrap 1972 Brussels Act', i.e., the European Communities Act 1972', 'ending all EU law in the UK'.[65] This was misleading or apt to mislead. After all, the Regulations did not provide for the 'ending' of 'all EU law in the UK'. The picture was much more nuanced than that. This was evidenced by the provisions on 'retained EU law' in the parent Act, the European Union (Withdrawal) Act 2018, to say nothing of the 174-page Protocol on Ireland/Northern Ireland in the then hitherto unapproved UK-EU Withdrawal Agreement which, at the time, envisaged the existence of special arrangements in certain spheres.[66]

---

[62] 'House of Commons rises for summer recess 2019', Parliament, 25 July 2019, www.parliament.uk/business/news/2019/july/house-of-commons-rises-for-summer-recess-2019/ (accessed 30 March 2024).

[63] 'Previous Lords recess dates', Parliament, www.parliament.uk/about/faqs/house-of-lords-faqs/lords-recess-dates/list-of-previous-lords-recess-dates/ (accessed 30 March 2024).

[64] The European Union (Withdrawal) Act 2018 (Commencement No. 4) Regulations 2019, 2019 No. 1198 (C.39), www.legislation.gov.uk/uksi/2019/1198/made (accessed 30 March 2024).

[65] 'Brexit Secretary signs order to scrap 1972 Brussels Act - ending all EU law in the UK', Department for Exiting the EU, 18 August 2019, www.gov.uk/government/news/brexit-secretary-signs-order-to-scrap-1972-brussels-act-ending-all-eu-law-in-the-uk (accessed 30 March 2024).

[66] On the anticipated post-Brexit status of EU Law in Northern Ireland, see *inter alia* the letter of Geoffrey Cox QC MP (as he then was), Attorney General of England and Wales, to Theresa May MP, 13 November 2018, as published on 12 March 2019, https://assets.publishing.service.gov.uk/media/5c07b81ae5274a6a6771996e/05_December-

Given the status of 'Honesty' as one the Seven Principles of Public of Life enshrined in both the *Commons Code of Conduct* and the *Ministerial Code*, Ministers of the Crown are under an enhanced moral if not legal duty to refrain from circulating or authorising the circulation of any information which is intentionally, knowingly or recklessly misleading. This duty is particularly important whenever any Minister or UK Government Department has to explain the effect of complex legislation by means of any statement or publication.

Many members of the public cannot afford to obtain legal advice with a view to comprehending such legislation. In consequence, they may rely on publications of the UK Government as a means of ordering their lives. That is not ideal, but it is a reality faced by many. Yet, if UK Government publications are misleading or apt to mislead, a citizen may end up misunderstanding the law as a prelude to breaking it. The UK Government should not be facilitating misunderstandings with texts such as the 'News story' cited above. Instead, in keeping with the rule of law but in the interests of legal certainty, the UK Government should be producing accurate communications which foster public understanding of the law and what the law requires.

The advice tendered by Johnson to the Queen on 27 or 28 August 2019

The second but the most controversial episode dates back to 27 or 28 August 2019. This was when Johnson exercised the Prime Minister's rather opaque prerogative power to advise the Queen,[67] thus triggering an astonishing chain of events which he was not constitutionally or legally obliged to trigger. In view of the lack of transparency surrounding the start of the episode, the precise date is not known. Nevertheless, what is known is that on 27 or 28 August, with the Withdrawal Agreement still unapproved, with Parliament still in recess but due to return on 4 September and with exit day still looming on 31 October 2019, Johnson advised the Queen to approve a proposed Prorogation of Parliament. There was nothing innately wrong with the notion of the Prime Minister

EU_Exit_Attorney_General_s_legal_advice_to_Cabinet_on_the_Withdrawal_Agreement_and_the_Protocol_on_Ireland-Northern_Ireland.pdf and 'Attorney General's statement on Joint Instrument and Unilateral Declaration', UK Parliament, 12 March 2019, www.parliament.uk/business/news/2019/march/attorney-generals-statement-on-joint-instrument-and-unilateral-declaration/ (accessed 18 April 2024).

[67] See David Torrance, *The royal prerogative and ministerial advice* (London: House of Commons Library Briefing Paper Number CBP9877, 24 October 2023), https://researchbriefings.files.parliament.uk/documents/CBP-9877/CBP-9877.pdf and https://commonslibrary.parliament.uk/research-briefings/cbp-9877/ (accessed 5 April 2024)

advising the Queen to authorise a Prorogation. Indeed, Johnson's advice would not have become the subject of litigation if, in line with the standard practice, he had advised the Queen to authorise a Prorogation period of, say, seven days. That was all that was necessary for the UK Government to compose its proposed legislative programme for insertion in the Queen's Speech and for preparations to be made for the State Opening of Parliament on which day that Speech is delivered. However, Johnson did not follow the standard practice.

On 28 August 2019, the Privy Council issued '[an] Order proroguing Parliament no earlier than Monday 9th September and no later than Thursday 12th September 2019 to Monday 14th October 2019, and directing the Lord High Chancellor of Great Britain to prepare a Commission accordingly.'[68] By envisaging a Prorogation period as long as four weeks or so, rather than the usual 'week or less',[69] the Order was highly unusual. Accordingly, a basic question arose amidst arguably the biggest constitutional upheaval to face the UK since the constitutional crisis over 'the People's Budget' from 1909-1911. Why did Johnson and the UK Government require such a long Prorogation period of a four weeks or so, contrary to the standard practice of one week? When the Prime Minister's Office issued a press release on 28 August 2019, it did not answer this question.[70]

On the same extraordinary day, i.e., 28 August 2019, BBC News reported the withering response of Jeremy Corbyn MP, the Leader of the Labour Party and *ex officio* Leader of HM Opposition: 'Suspending Parliament is not acceptable, it is not on. What the prime minister is doing is a smash and grab on our democracy to force through a no deal …'.[71] Leaving aside the legal question of whether or not the Prorogation was lawful, Corbyn was onto something.

---

[68] 'Orders approved at the Privy Council held by the Queen at Balmoral on 28th August 2019', Privy Council, https://privycouncil.independent.gov.uk/wp-content/uploads/2019/09/2019-08-28-List-of-Business.pdf and https://privycouncil.independent.gov.uk/meetings-and-orders/orders-in-council/?orderyear=2019 (accessed 9 March 2024). Underneath these Orders, the following 'Note' appears in square brackets having been added for the reasons given: '[Note: Following the decision of the Supreme Court on Tuesday 24th September 2019 the above Order was quashed]'.

[69] Graeme Cowie, *Prorogation of Parliament* (London: House of Commons Library Briefing Paper 8589, 11 June 2019), 7, https://researchbriefings.files.parliament.uk/documents/CBP-8589/CBP-8589.pdf (accessed 3 April 2024).

[70] 'Queen's Speech: invest in NHS, attack violent crime, cut the cost of living', Prime Minister's Office, 10 Downing Street, 28 August 2019, www.gov.uk/government/news/prime-minister-announces-plans-to-bring-forward-new-bold-and-ambitious-legislative-agenda (accessed 31 March 2024).

[71] 'Parliament suspension: Queen approves PM's plan', BBC News, 28 August 2019, www.bbc.co.uk/news/uk-politics-49493632 (accessed 4 November 2024).

Firstly, by advising the unelected Queen to authorise a Prorogation and, thus, what amounted to a shutdown of the elected Commons and unelected Lords for as many as four weeks or so in the crucial lead-up to a scheduled Brexit on 31 October 2019, Johnson had acted contrary to the idea of democracy. After all, the practical effects of prorogation were to put parliamentary democracy on ice for four weeks or so and to give the UK Government what amounted to a free hand to function in the absence of any effective checks and balances emanating from Parliament.

Secondly, the prime ministerial advice to the Queen appeared to have the aim or effect of facilitating what Corbyn termed a 'no deal', otherwise known as a 'no-deal Brexit'. This is a phenomenon which the author would define as the exit of a Member State from the EU pursuant to Article 50 of the TEU but in disorderly circumstances induced by the absence of any fully-approved bilateral withdrawal agreement, any agreement-related legislation and any other agreement-related legal instruments of a binding as well as enforceable nature. Any 'no-deal Brexit' would have had horrendously disruptive effects, not least upon the rights and freedoms of countless businesses, families and individual people.[72] Yet, on 31 July 2019, HM Treasury – the finance ministry of the UK – announced that it would 'turbo-charge no deal preparations'.[73] If this was a clear indication that Johnson and the UK Government had no qualms about stumbling into a 'no-deal Brexit', what followed were other announcements on preparations for precisely such a deleterious outcome.[74]

---

[72] In 2019, the author flagged up some of the less well-publicised dangers inherent in any 'no-deal Brexit' in *inter alia* three pieces of written evidence submitted to and published by the House of Commons Exiting the EU Committee: Klearchos A. Kyriakides, 'Written Evidence (NEG0033)', 22 February 2019 (published on 6 March 2019), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/written/97082.html, Klearchos A. Kyriakides, 'Written Evidence (NEG0034)', 22 March 2019 (published on 3 April 2019), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/written/98546.html and Klearchos A. Kyriakides, 'Written Evidence (NEG0048)', 14 October 2019 (published on 23 October 2019), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/written/106796.html (accessed 31 March 2024).

[73] 'Chancellor announces billions to turbo-charge no deal preparations: Chancellor Sajid Javid announces £2.1bn for no-deal Brexit preparation', HM Treasury, 31 July 2019, www.gov.uk/government/news/chancellor-announces-billions-to-turbo-charge-no-deal-preparations (accessed 24 April 2024).

[74] See, for example, Vaughne Miller, *A no-deal Brexit: the Johnson Government* (London: House of Commons Library Briefing Paper Number 8654, 6 September 2019), https://researchbriefings.files.parliament.uk/documents/CBP-8654/CBP-8654.pdf & https://commonslibrary.parliament.uk/research-briefings/cbp-8654/ and Fergal Davis (collator), *No-deal Brexit: A guide to Commons Library research* (London: House of Commons Library Briefing Paper Number 08682, 11 October 2019), https://researchbriefings.files.parliament.uk/documents/CBP-8682/CBP-8682.pdf & https://commonslibrary.parliament.uk/research-briefings/cbp-8682/ (accessed 24 April 2024).

The origins and enactment of the Benn Act, 3 – 9 September 2019

When Parliament reconvened on 3 September 2019, after the summer recess, it took a drastic step. After an 'Emergency debate', a majority of 328 MPs approved a motion moved by Sir Oliver Letwin MP, a Conservative backbencher. In the teeth of opposition from Johnson who was among the 301 MPs to vote against it, the primary purpose of the motion was to record:

> 'That this House has considered the matter of the need to take all necessary steps to ensure that the United Kingdom does not leave the European Union on 31 October 2019 without a withdrawal agreement and accordingly makes provision as set out in this order …'.[75]

Even though it had been approved by the Commons on 3 September 2019, the Letwin-moved order did not equate to legislation, but it paved the way towards legislation. On 4 September 2019, pursuant to the order, a majority of Parliamentarians in each House rushed through the European Union (Withdrawal) (No. 6) Bill ('the Benn Bill').[76] They did so after the Benn Bill had been presented in the Commons by Hilary Benn MP, a Labour backbencher as well as Chair of the Exiting the EU Committee of the Commons.[77] During the second reading on the same day, Benn identified the rationale behind it: 'The purpose of the Bill is simple: to ensure that the United Kingdom does not leave the European Union on 31 October [2019] without an agreement.'[78]

Among the Parliamentarians to endorse the Benn Bill on 4 September 2019 was Sir Keir Starmer QC MP (as he was then known during the reign of the Queen), the Shadow Brexit Secretary, who later became Prime Minister of the UK on 5 July 2024. To Starmer: 'The five-week Prorogation is to silence this House and frustrate attempts to prevent no deal, and any suggestion to the contrary from anyone, in my view, is disingenuous.'[79] What Starmer claimed must remain a matter for

---

[75] Hansard, House of Commons Debates, Volume 664, 3 September 2019, columns 81-139 at 81-84 and 132-139, https://hansard.parliament.uk/commons/2019-09-03/debates/C4B0BE00-2E57-4FA4-8958-CD6F37711635/EuropeanUnion(Withdrawal) (accessed 18 April 2024).

[76] The legislative history of the Benn Bill is outlined at 'European Union (Withdrawal) (No. 6) Bill proceeds to Royal Assent', Parliament, 9 September 2019, www.parliament.uk/business/news/2019/september/european-union-withdrawal-no6-bill-proceeds-to-royal-assent/ (accessed 2 April 2024).

[77] Hansard, House of Commons Debates, Volume 664, 4 September 2019, column 209, https://hansard.parliament.uk/commons/2019-09-04/debates/925955E9-B1E1-43AA-8904-08061227C0AD/PointOfOrder (accessed 9 March 2024).

[78] Hansard, House of Commons Debates, Volume 664, 4 September 2019, column 215, https://hansard.parliament.uk/commons/2019-09-04/debates/85267906-8A67-44A5-B31E-94C07B13FE1E/EuropeanUnion(Withdrawal)(No6)Bill (accessed 9 March 2024).

[79] Ibid, column 230.

conjecture pending the declassification of the relevant public records. What is not in any doubt is that in the Commons on the previous day Michael Gove MP, the Chancellor of the Duchy of Lancaster and member of the Cabinet, reinforced the suspicion that Johnson might be relishing the prospect of a 'no-deal Brexit': 'Now, our Prime Minister has made it clear that we must leave by 31 October, and so we must.'[80]

At the end of the second reading of the Benn Bill in the Commons on 4 September 2019, 329 MPs votes among the 'Ayes' in favour and 300 MPs voted among the 'Noes' against it.[81] Among the 'Ayes' were 21 Conservative MPs who had the Conservative whip withdrawn from them in consequence.[82] This inevitably worsened the parliamentary arithmetic from the perspective of Johnson. By 6 September, the Benn Bill had passed through all of the remaining stages in the Commons and Lords. Three days later, it became the European Union (Withdrawal) (No. 2) Act 2019.[83] Among the provisions of what was now known as the Benn Act was one imposing an unmistakable statutory duty on Johnson 'to obtain from the European Council an extension of the period under Article 50(3) of the Treaty on European Union ending at 11.00pm on 31 October 2019' – by sending a letter in the form dictated by Parliament.[84]

In response, Johnson did not appear to understand that in a democratic society resting on the rule of law, nobody is above the law, all political power must emanate from a source of law such as legislation and the head of government must act within the four corners of his power. On the contrary, Johnson cultivated the distinct impression that the Prime Minister was above the law, that he could defy the will of Parliament and that he could negate parliamentary sovereignty by wriggling out of the statutory duty imposed on him. One of the first traces of this impression came in West Yorkshire on 5 September 2019, one day after the Commons had approved the Benn Bill but four days before it metamorphosed into the Benn Act. Standing somewhat incongruously in front of two rows of people with the word 'POLICE' emblazoned on their uniforms, Johnson

[80] Hansard, House of Commons Debates, Volume 664, 3 September 2019, columns 49 and 51, https://hansard.parliament.uk/commons/2019-09-03/debates/866231D8-0194-4795-BC01-C685CA646845/LeavingTheEUPreparations (accessed 24 April 2024).
[81] Hansard, House of Commons Debates, Volume 664, 4 September 2019, columns 247-250.
[82] Sean Morrison, 'Tory whip removed: The 21 Conservative MPs who voted against Boris Johnson's government', *The Standard*, 4 September 2019, www.standard.co.uk/news/politics/tory-rebellion-the-21-conservative-mps-who-will-have-the-whip-withdrawn-after-voting-against-the-government-a4228391.html (accessed 9 March 2024).
[83] The European Union (Withdrawal) (No. 2) Act 2019, c. 26, www.legislation.gov.uk/ukpga/2019/26/enacted (accessed 9 March 2024).
[84] Ibid, section 1 (4)

fielded a pointed question from a journalist: 'Can you make a promise today to the British public that you will not go back to Brussels and ask for another delay to Brexit?' Johnson answered curtly: 'Yes, I can. I'd rather be dead in a ditch.'[85]

The obstreperous conduct of Johnson provoked a quite extraordinary reaction from Robert Buckland QC MP (as he then was), the Lord Chancellor as well as Secretary of State for Justice. On 8 September 2019, Buckland pronounced that:

> 'Speculation about my future is wide of the mark. I fully support the Prime Minister and will continue to serve in his Cabinet. We have spoken over the past 24 hours regarding the importance of the Rule of Law, which I as Lord Chancellor have taken an oath to uphold.'[86]

Carefully phrased though it was, the message of Buckland represented a very public rap on the knuckles of Johnson. This should not come as a surprise. Buckland was simply doing his job. He was an experienced barrister who was acutely aware of the need for the Lord Chancellor to act in a way which was audibly, visibly and otherwise unmistakably in accordance with the letter and the spirit of the Constitutional Reform Act 2005, one of whose provisions obliges every incoming Lord Chancellor to swear an oath to 'respect the rule of law' as well as to 'defend the independence of the judiciary'.[87] Buckland had himself given this very oath[88] which is underpinned by other statutory provisions.[89]

On 9 September 2019, one day after he had been obliquely rebuked in public by Buckland in his capacity as Lord Chancellor, Johnson moved a motion, under the Fixed-term Parliaments Act 2011, '[t]hat there shall be an early parliamentary general election'.[90] Amid rowdy scenes in the Commons on the very day when the Benn Act received Royal Assent, Johnson implicitly but unquestionably threatened to flout this new legislation – contrary to the will of Parliament,

---

[85] See the video clips at 'PM: I'd rather be dead in ditch than delay Brexit', BBC News, 5 September 2019, www.bbc.co.uk/news/uk-politics-49598118 and 'Boris Johnson's Yorkshire policing speech in full', The Sun Youtube channel, 5 September 2019, www.youtube.com/watch?v=5czEPvg89tQ

[86] Robert Buckland, 8 September 2019, https://twitter.com/RobertBuckland/status/1170653531076026368 (accessed 30 March 2024).

[87] Constitutional Reform Act 2005 c. 4, section 17, www.legislation.gov.uk/ukpga/2005/4 (accessed 15 March 2024).

[88] 'Lord Chancellor swearing-in speech: Robert Buckland QC', Ministry of Justice, 30 July 2019, www.gov.uk/government/speeches/lord-chancellor-swearing-in-speech-robert-buckland-qc (accessed 9 July 2024).

[89] Constitutional Reform Act 2005, sections 1, 3(1) *et al*.

[90] Hansard, House of Commons Debates, Volume 664, 9 September 2019, column 616, https://hansard.parliament.uk/commons/2019-09-09/debates/44BDF5ED-3C22-40B5-AAD8-1EA95DED732C/EarlyParliamentaryGeneralElection(No2) (accessed 30 March 2024).

Parliamentary sovereignty, the rule of law and other features of the UK constitution. Seemingly oblivious to the terrible impression that his words would inevitably create among the public, Johnson bellowed:

> 'I say again to everyone on the Opposition Benches: if you really want to delay Brexit beyond 31 October, which is what you seem to want to do, then vote for an election and let the people decide whether they want to delay or not. If you refuse to do that tonight, I will go to Brussels—our Government will go to Brussels—on 17 October and negotiate our departure on 31 October, hopefully with a deal, but without one if necessary. I will not ask for another delay.'[91]

By assuring the Commons that 'I will not ask for another delay' beyond 31 October 2019, Johnson displayed nothing but contempt for the Benn Act. Put another way, this exhibition of prime ministerial petulance was an unseemly affront to the constitutional order of the UK. No less provocatively, Johnson displayed contempt for the non-statutory *Ministerial Code* and its express reference to 'the overarching duty on Ministers to comply with the law and to protect the integrity of public life.'[92]

The 'overarching duty' was of undeniable relevance to Johnson. For a start, not only was he one of many Ministers in the UK Government. He was also the Prime Minister and, as such, the Head of Government under a heightened moral duty to lead by example and to conduct himself in a manner commensurate to his status as a senior member of what the author has characterised as 'a phalanx of guardians of the rule of law in the UK Government.'[93] Yet, what made Johnson's

---

[91] Hansard, House of Commons Debates, Volume 664, 9 September 2019, column 619, https://hansard.parliament.uk/commons/2019-09-09/debates/44BDF5ED-3C22-40B5-AAD8-1EA95DED732C/EarlyParliamentaryGeneralElection(No2) (accessed 30 March 2024).

[92] *Ministerial Code* (August 2019 edition), 1 (paragraph 1.3).

[93] Klearchos A. Kyriakides 'Written Evidence (RLC0009)', House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officers, 15 March 2022 (published on 23 March 2022), https://committees.parliament.uk/writtenevidence/107146/html/ and https://committees.parliament.uk/committee/172/constitution-committee/publications/written-evidence/, as quoted in *House of Lords Select Committee on the Constitution: 9th Report of Session 2022–23: The roles of the Lord Chancellor and the Law Officers: Ordered to be printed 14 December 2022 and published 18 January 2023HL Paper 118* (London: House of Lords, 18 January 2023), 31 (paragraph 90), https://committees.parliament.uk/publications/33487/documents/182015/default/ and https://committees.parliament.uk/work/6540/role-of-the-lord-chancellor-and-the-law-officers/publications/ (accessed 5 April 2024). Also see Klearchos A. Kyriakides 'Supplementary Written Evidence (RCL0015)', House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officers', 18 March 2022 (published on 23 March 2022), Parliament, https://committees.parliament.uk/writtenevidence/107320/html/ and

contempt for the 'overarching duty' hypocritical was that, as Prime Minister, he was the lynchpin of the *Ministerial Code* and the author of the 'Foreword' to its August 2019 edition in which, alluding to the Seven Principles of Public Life, he proclaimed that: 'The precious principles of public life enshrined in this document – integrity, objectivity, accountability, transparency, honesty and leadership in the public interest – must be honoured at all times …'.[94] This hypocrisy was compounded by what is arguably a fundamental flaw in the *Ministerial Code*. This is the provision which stipulates that the Prime Minister 'is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.'[95]

At a much more practical level, Johnson's conduct was dangerous. By threatening to flout the Benn Act, Johnson was effectively transmitting an exceptionally irresponsible message to the public – that the Prime Minister could break the law if he did not like it. That message was just one step away from the even more irresponsible claim that anybody could break the law if they did not like it. All of which flew in the face of at least three of the basic premises on which the rule of law rests – that nobody is above the law, that everybody must obey the law and that everybody is equal in the eyes of the law.

At the end of the debate held on 9 September 2019, Johnson's motion did not muster enough votes to trigger a Parliamentary General Election.[96] What followed later that day was the initiation of the parliamentary formalities resulting in Parliament being 'prorogued at 1.40 am' on the following morning[97] with a scheduled return date of 14 October 2019. Three days after the completion of these formalities, Dominic Grieve QC MP (as he then was) appeared on the France 24 television channel. Having served as Attorney General of England and Wales from 2010 until 2014, Grieve was now a principled critic of Brexit and one of the 21 Conservative MPs who had voted in favour

https://committees.parliament.uk/committee/172/constitution-committee/publications/written-evidence/ (accessed 4 October 2023).

[94] *Ministerial Code* (August 2019 edition), un-numbered second page.

[95] Ibid, paragraph 1.6.

[96]. Hansard, House of Commons Debates, Volume 664, 9 September 2019, columns 637-639.

[97] Hansard, House of Lords Debates, Volume 799, 9 September 2019, column 1404, https://hansard.parliament.uk/lords/2019-09-09/debates/1B7D044F-E3C6-4064-986B-D4DE951B8FAD/ProrogationHerMajesty'SSpeech and Hansard, House of Commons Debates, Volume 664, 9 September 2019, columns 647-650, https://hansard.parliament.uk/commons/2019-09-09/debates/207FE9D2-AB87-4EBF-86B4-B9965AE9BBDC/HerMajesty'SMostGraciousSpeech (accessed 31 March 2024).

of the Benn Bill but had seen the Conservative whip withdrawn from them in consequence.[98] After viewing a video clip showing Johnson issuing his threat quoted above – 'I will not ask for another delay' – Grieve expressed a view shared by many, irrespective of whether they supported Brexit:

> 'I don't think he [i.e., Johnson] will be in a position to break the law. So, I think this is a bit of froth. Ultimately, governments have to obey the law. If a prime minister tries to disobey the law an application will be made to the courts to get him to obey it and if he tried to disregard that [i.e., any court order requiring obedience to the law] the entire government system would collapse. All the civil service, the senior civil servants, would refuse to work with him. His colleagues, particularly those who are there to uphold the rule of law, like the Attorney General and the Lord Chancellor, would have to resign on the spot and the entire machinery of government would collapse. So, I just think that this is a fantasy and he doesn't seem to have grasped that a prime minister is not above the law and if the law says that the Prime Minister has to do something he's going to have to do it.'[99]

Grieve was right for two main reasons.

Firstly, in certain circumstances, a Minister of the Crown, of which Prime Minister is one, could become subject to a court order compelling him to comply with the law. In 1993, the Appellate Committee established this principle in a case[100] arising from 'the first time that a Minister of the Crown', the then Home Secretary, 'had been found to be in contempt by a court' for 'not complying with an injunction' granted by a judge in the High Court.[101]

Secondly, one of the functions of the judiciary is to enforce legislation. In the words of Lord Phillips, the President of the Supreme Court, in a case decided in 2011:

---

[98] Sean Morrison, 'Tory whip removed: The 21 Conservative MPs who voted against Boris Johnson's government', *The Standard*, 4 September 2019, www.standard.co.uk/news/politics/tory-rebellion-the-21-conservative-mps-who-will-have-the-whip-withdrawn-after-voting-against-the-government-a4228391.html (accessed 9 March 2024).
[99] 'EXCLUSIVE: Dominic Grieve says a prime minister is 'not above the law'', France 24 English Youtube channel, www.youtube.com/watch?v=wASuWvqHW_M (accessed 30 March 2024).
[100] *M v Home Office* [1993] UKHL 5, www.bailii.org/uk/cases/UKHL/1993/5.html (accessed 19 April 2024).
[101] Ibid [3] (Lord Woolf).

> 'The rule of law requires that the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive.'[102]

Miller/Cherry

In London on 11 September 2019, two days after the Benn Act had received Royal Assent, three High Court judges published their judgment in the case of *R (Miller) v The Prime Minister*:[103] They 'concluded that the decision of the Prime Minister [to advise the Queen to prorogue Parliament] was not justiciable. It is not a matter for the courts.'[104] In layman's terms, the Prime Minister had won on a procedural technicality. By contrast, in Edinburgh on 11 September 2019, in the case of *Joanna Cherry QC MP and Others v Advocate General*, three other judges ruled that the Prorogation was 'unlawful'.[105]

What happened next was the conjoining of the two cases in an appeal to the Supreme Court in a case with an correspondingly long name sub-divided into two.[106] For the sake of brevity, this is hereafter referred to as '*Miller/Cherry*', a case which turned on 'whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful.'[107]

For reasons set out in its Judgment, the Supreme Court held that the issue before it was justiciable and that 'the Prime Minister's advice to the Queen' was 'unlawful'. In reaching these and other related conclusions to the detriment of the Prime Minister, the Supreme Court emphasised that '[t]wo fundamental principles of our constitutional law' were 'relevant to the present case.' One

---

[102] *Cart v The Upper Tribunal (Rev 1)* [2011] UKSC 28 [64] (Lord Phillps P, with whom Lords Hope, Rodger, Brown and Dyson agreed), Supreme Court, www.supremecourt.uk/cases/uksc-2010-0176.html (accessed 5 April 2024).
[103] *R (Miller) v The Prime Minister* [2019] EWHC 2381 (QB) [1] (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Dame Victoria Sharp P), Courts & Tribunals Judiciary, www.judiciary.uk/wp-content/uploads/2019/09/Miller-No-FINAL-1.pdf and British & Irish Legal Information Institute ('BAILII'), www.bailii.org/ew/cases/EWHC/QB/2019/2381.html (accessed 9 March 2024).
[104] Ibid, [1].
[105] *Joanna Cherry QC MP and Others v Advocate General* [2019] CSIH 49 [58] and [60] (Lord Carloway, Lord President), www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih49.pdf (accessed 4 April 2024),
[106] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* and *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41, Supreme Court, www.supremecourt.uk/cases/uksc-2019-0192.html (accessed 10 March 2024).
[107] Ibid, [1] (Lady Hale and Lord Reed giving the Judgment of the Supreme Court, with whom Lords Kerr, Wilson, Carnwath, Hodge, Lloyd-Jones, Kitchin and Sales together with Ladies Black and Arden agreed).

was 'the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply.'[108] The second 'was that of Parliamentary accountability'[109] otherwise characterised by the Supreme Court as 'ministerial accountability to Parliament'.[110]

When deciding that the issue before it was justiciable, the Supreme Court reasoned *inter alia* that 'the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued.' In such circumstances, 'there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished.'[111]

As to why the advice of the Prime Minister to the Queen was held to be unlawful, the Supreme Court reasoned *inter alia* that parliamentary accountability 'is not placed in jeopardy if Parliament stands prorogued for the short period which is customary …'. However, the crux of the matter was that 'the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model. …'.[112] The Supreme Court concluded that Johnson had no reason 'to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October.' Consequently, the Supreme Court held that 'the decision was unlawful.'[113]

Having made 'a declaration that the advice given [by Johnson] to Her Majesty was unlawful'[114] the Supreme Court clarified that this was because the advice was 'outside the powers of the Prime Minister to give it.' As a result, the advice 'was null and of no effect …' and 'the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect' and had to 'be quashed.' As a further result, 'the actual prorogation' was likewise 'unlawful, null and of no effect.'[115]

[108] Ibid, [41].
[109] Ibid, [46] and [47].
[110] Ibid, [33].
[111] Ibid, [33].
[112] Ibid, [48].
[113] Ibid, [61].
[114] Ibid, [62].
[115] Ibid, [69] and [70].

The Judgment of the Supreme Court in *Miller/Cherry* is not beyond criticism.[116] Nor should it be, especially in view of the principles of judicial accountability, freedom of expression and academic freedom, not to mention the 'three key flaws' alleged to be inherent in the Judgment.[117] With that said, if the Judgment had not been handed down in the way that it was on 24 September 2019, Parliament would have remained prorogued for more than four weeks, from 9 September until 14 October 2019, a mere seventeen days before the then exit day. In reaching the conclusions it did amidst a febrile political atmosphere in Parliament, the Supreme Court prevented these adverse outcomes while displaying the moral courage which has frequently been the hallmark of the judiciary in the UK.[118] At the same time, the Supreme Court upheld the UK constitution and two of its 'fundamental principles' – parliamentary sovereignty and parliamentary accountability. Ironically, both sovereignty and accountability were at the crux of the case in favour of Brexit.[119]

The conduct of Johnson after *Miller/Cherry*

On the morning after the Supreme Court had handed down its Judgment in *Miller/Cherry*, pro-Brexit newspapers weighed in with a fresh barrage of excoriating front-page headlines. An example is the one on the front page of the *Daily Mail*:

> '**BORIS BLASTS: WHO RUNS BRITAIN?** … ...
>
> '… Rees-Mogg rages at 'constitutional coup' ...

[116] See *inter alia* Paul Daly, 'A Critical Analysis of the Case of Prorogations', *Canadian Journal of Comparative and Contemporary Law*, 7 (1), 2021, 256-292, www.cjccl.ca/wp-content/uploads/2021/05/9-Daly.pdf and www.cjccl.ca/posts/democratic-decay/ and Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context', *European Constitutional Law Review*, 16 (4), 2020, 625–646, https://doi.org/10.1017/S1574019620000401 (accessed 5 April 2024).

[117] Written evidence from Steven Spadijer (PIS 02) to the Public Administration and Constitutional Affairs Committee, October 2019, https://committees.parliament.uk/writtenevidence/105647/html/ (accessed 10 July 2024.)

[118] Lady Hale, President of the Supreme Court, 'Moral Courage in the Law', transcript of the Worcester Lecture 2019 given at Worcester Cathedral, 21 February 2019, Supreme Court, www.supremecourt.uk/docs/speech-190221.pdf (accessed 2 April 2024).

[119] See *inter alia* Sir Bill Cash MP, *Stop the EU, I want to get off: Questions about Europe* (London: European Foundation, March 2015), 13 *et al*, https://europeanfoundation.org/wp-content/uploads/2015/03/Stop-the-EU-I-want-to-get-off.pdf and Sir Bill Cash MP, *Behind Closed Doors: The Destruction of Accountability in the EU* (London: European Foundation, 2018), 2 *et al*, https://europeanfoundation.org/wp-content/uploads/2019/02/Behind-Closed-Doors.pdf (accessed 10 July 2024).

> 'BORIS Johnson declared war on the judiciary last night following a shock Supreme Court ruling that he broke the law. ...'.[120]

To his credit, Buckland, as Lord Chancellor, was quick to defend the independence of the judiciary and to try to prevent any erosion in public confidence in the proper administration of justice. He did so by publishing a reminder bolted onto a warning, something which Liz Truss MP controversially failed to do, as Lord Chancellor, after the High Court had handed down its Judgment in *Miller 1*.[121] To quote Buckland:

> 'We must all remember that our world-class judiciary always acts free from political motivation or influence and that the rule of law is the basis of our democracy, for all seasons. Personal attacks on judges from any quarter are completely unacceptable.'[122]

When the Commons re-convened on 25 September 2019, Rees-Mogg was twice asked to clarify the term 'constitutional coup', as attributed to him by the *Daily Mail*. If his first response was cryptic, his second response was even more so.[123] As for Johnson, he rose to make what he called 'a statement on yesterday's Supreme Court verdict and the way forward for this paralysed Parliament.'[124] According to Hansard, Johnson opined that: 'It is absolutely no disrespect to the judiciary to say that I think that the court was wrong to pronounce on what is essentially a political question, at a time – [*Interruption*.] …of great national controversy.'[125]

Notwithstanding the requirements of the rule of law, Johnson continued to insinuate that he might orchestrate a 'no-deal Brexit', contrary to the Benn Act and the principle of Parliamentary sovereignty which the Supreme Court had affirmed in both cases involving Gina Miller. On 3

---

[120] See the images of these and other front page at 'Front pages dominated by Supreme Court Brexit fallout', ITV News, 25 September 2019, www.itv.com/news/2019-09-25/front-pages-dominated-by-supreme-court-brexit-fallout (accessed 2 April 2024).
[121] 'Select Committee on the Constitution Corrected oral evidence: Oral evidence session with the Lord Chief Justice', 22 March 2017, 5-8, www.parliament.uk/globalassets/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf (accessed 9 July 2024).
[122] Robert Buckland, 25 September 2019, https://twitter.com/RobertBuckland/status/1176773809233436672 (accessed 1 April 2024).
[123] Hansard, House of Commons Debates, Volume 664, 25 September 2019, columns 830, 831 and 838-839, https://hansard.parliament.uk/commons/2019-09-25/debates/504160D3-B2D6-4820-89CE-355E6E87EAC2/BusinessOfTheHouse (accessed 3 April 2024).
[124] Ibid, column 774, https://hansard.parliament.uk/Commons/2019-09-25/debates/AD2A07E5-9741-4EBA-997A-97776F80AA38/PrimeMinisterSUpdate (accessed 9 March 2024).
[125] Ibid, column 774.

October 2019, by which time the UK and the EU remained locked in negotiations, Philip Davies MP asked Johnson 'whether what he has proposed is the final offer to the European Union' and whether he would 'confirm that, if the EU rejects his offer out of hand, it will be the policy of the Government to leave the European Union without a deal?' In reply, Johnson declared that '… I can certainly confirm to my hon. Friend that we will be leaving on 31 October, deal or no deal.'[126] This was a fresh affront to the Benn Act and, by extension, the will of Parliament, Parliamentary sovereignty, the UK constitution and the rule of law. Yet, it was one of a string of prime ministerial assurances in which Johnson had failed to lead by example.

On 5 October 2019, Johnson was at it again, giving the readers of *The Sun on Sunday* newspaper the following assurance: 'We will be packing our bags and walking out on October 31. The only question is whether Brussels cheerily waves us off with a mutually agreeable deal, or whether we will be forced to head off on our own.' For good measure, he added: 'There will be no more dither or delay. On October 31 we are going to get Brexit done.'[127] In what was arguably an instance of misleading by omission, Johnson did not expressly mention the Benn Act although an accompanying editorial of *The Sun on Sunday* did by branding it 'the Benn "Surrender Act".'[128]

Not for the first time, Buckland responded to Johnson by displaying respect for his statutory duties and for the oath he had sworn. On 8 October 2024, after Barry Shearman MP, a Labour backbencher, had asked whether '… his Government will obey the law, and not crash us out of the European Union against the law', Buckland did not beat about the bush. He opted to 'confirm that this Government, like their predecessors and, I hope, successors, will continue to respect and obey the law, and respect the rule of law.'[129]

In *Unleashed*, his memoirs published in October 2024, Johnson tries to justify his conduct with a torrent of claims.[130] It suffices to draw attention to his thesis on the issue at hand. Even though

---

[126] Hansard, House of Commons Debates, 3 October 2019, column 1391, https://hansard.parliament.uk/commons/2019-10-03/debates/585F872D-9372-4448-A32F-5CEC0FD49FB7/BrexitNegotiations (accessed 2 April 2024).
[127] Boris Johnson, 'Pack Eur bags, deal or no Brexit deal we are walking out of the European Union in 25 days', *The Sun on Sunday*, 5 October 2019, www.thesun.co.uk/news/10074279/boris-johnson-deal-no-deal-brexit-25-days/ (accessed 2 April 2024).
[128] 'The Sun on Sunday says' at ibid.
[129] Hansard, House of Commons Debates, Volume 664, 8 October 2019, column 1617, https://hansard.parliament.uk/commons/2019-10-08/debates/77A14277-1B4E-41D4-B94C-6128A62BB537/JudiciaryIndependence (accessed 5 April 2024).
[130] Boris Johnson, *Unleashed* (London: William Collins, 2024).

Johnson asserts that he 'did not want' any 'no-deal exit', he confesses that the negotiations with the EU required the British 'to be able to bluff' and 'to show that we were at least willing to do a no-deal Brexit.' With evident glee, Johnson notes that 'our partners' in the EU 'thought that I might actually be mad enough to do it' and they 'listened to my 'do or die' rhetoric.' Johnson then reiterates his thesis: 'In reality, I wasn't going to do any such thing', i.e., bring about a 'no-deal Brexit', yet 'I needed them to believe that I might well …'.[131] This may help to explain why Johnson vilifies the Benn Act as '[t]he Surrender Act' and as an 'extraordinary piece of legislation' which 'wounded' him 'politically' and 'probably fatally' while 'destroying our ability to negotiate properly on behalf of the British people.'[132]

Elsewhere in *Unleashed*, Johnson makes another confession of relevance to this chapter. In response to Cabinet colleagues who had insisted that 'the law must be obeyed', Johnson adopted an Orwellian stance in the sense that he resorted 'doublethink'; he embraced two different but contradictory beliefs at the same time.[133] As Johnson recalls: 'Of course I would obey, the law, I said, and struck ever more crazily to my line that we would leave on October 31.' Why was this so? 'Inwardly,' Johnson avers, 'I really wasn't sure what to do.' Johnson adds that he even began 'pondering various manoeuvres' to circumvent the duty to send a letter to the European Council, as required by the Benn Act. Among other ideas, Johnson wondered whether he 'could nullify the letter's effect' by writing it 'in Greek hexameters' or by writing two letters, 'one contradicting the other', but none of this 'cut much ice with the lawyers.'[134] Accordingly, Johnson had to obey the law.

In the light of the confessions made in *Unleashed*, at least one thing is now clear about the events of September 2019. Some of the criticisms hurled at Johnson were spot on. A pertinent example is the criticism voiced by Ian Blackford MP, the Westminster Leader of the Scottish National Party, in the Commons on 4 September 2019, on the very day when MPs were considering the then Benn

[131] Ibid, 43 and 44.
[132] Ibid, 44 and 45.
[133] George Orwell, *Nineteen eighty-four: A novel* (London: Secker & Warburg, 1949), 32 *et al* and Mike W. Martin, 'Demystifying Doublethink: Self-Deception, Truth, and Freedom in 1984', *Social Theory and Practice*, 10 (3), Fall 1964, 319-331, www.jstor.org/stable/23556569 (accessed 7 November 2024).
[134] Johnson, *Unleashed*, 52.

Bill: 'It is clear for all to see that the Prime Minister is playing a game of bluff and bluster. He does not care about stopping a no-deal Brexit. His strategy, as his lead adviser put it, is a sham.'[135]

For reasons which will no doubt emerge upon the declassification of the relevant documents, including the correspondence between Johnson and Buckland, what followed was an extraordinary chain of events. There was a sudden breakthrough in the UK-EU negotiations, a U-turn and a legislative landmark. On 19 October 2019, the breakthrough was confirmed when the Department for Exiting the EU published a policy paper with a title which was misleading or apt to mislead: 'New Withdrawal Agreement and Political Declaration'. Accompanying this paper was not a 'New' pair of texts but '[t]he revised Withdrawal Agreement and Political Declaration' which had been 'considered and agreed at European Council on 17 October 2019'.[136] To be sure, the former contained certain 'new provisions' but it was not a 'new' Agreement *per se*.[137]

The U-turn came to light on 20 October 2019. Contrary to the assurances repeatedly given by Johnson, he did precisely what the Benn Act compelled him to do. He sought 'a further extension to the period provided under Article 50(3)' of the TEU and proposed 'that this period should end at 11.00pm GMT on 31 January 2020 …'.[138] In the nick of time, therefore, Johnson adhered to the rule of law, just as the political winds were starting to blow in his favour.

On 22 October 2019, Johnson appeared in the Commons to move the second reading of the European Union (Withdrawal Agreement) Bill. Yet, in keeping with a pre-existing pattern of conduct which appeared to be misleading or apt to mislead, Johnson referred to the 'revised'

---

[135] Hansard, House of Commons Debates, Volume 664, 4 September 2019, column 168, https://hansard.parliament.uk/Commons/2019-09-04/debates/2FA82982-EB2F-44B7-856F-3EC361593F13/PrimeMinister (accessed 3 November 2024).

[136] 'New Withdrawal Agreement and Political Declaration', Department for Exiting the EU, 19 October 2019, www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration and the Conclusions published at 'Special meeting of the European Council (Art. 50) (17 October 2019) – Conclusions', Brussels, 17 October 2019, www.consilium.europa.eu/media/41087/17-10-euco-art50-conclusions-en.pdf and www.consilium.europa.eu/en/meetings/european-council/2019/10/17-18/ (accessed 3 April 2024).

[137] *House of Lords European Union Committee: 1st Report of Session 2019–20: Brexit: the revised Withdrawal Agreement and Political Declaration: HL Paper 4* (London: House of Lords, 10 January 2020), 19 (footnote 68), 31 (paragraph 129) and 44 (paragraph 188), https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/4/4.pdf

[138] 'Letters sent from the UK to the EU Council', Prime Minister's Office, 10 Downing Street, 20 October 2019, www.gov.uk/government/publications/letters-from-the-uk-to-the-eu-council-19-october-2019 (accessed 9 March 2024).

documentation as 'our new deal', 'this new deal' and 'a new deal'.[139] When the Commons divided, a majority of 329 MPs, including Johnson, voted as 'Ayes'. A minority of 299 voted as 'Noes'.[140] With the Bill carried, the prospect of a no-deal Brexit was averted.

Over the next few months, Johnson enjoyed his prime ministerial heyday. At the Parliamentary General Election held on 12 December 2019, after the Brexit Party led by Nigel Farage did not put forward any candidates in the 317 constituencies won by the Conservatives in 2017,[141] the Johnson-led Conservatives secured a thumping overall majority[142] with 365 of the 650 seats in the Commons.[143] That paved the way for the enactment of the necessary legislation and the taking of other steps. Consequently, Brexit was achieved in accordance with the rule of law in two phases, effected at 23:00 GMT on 31 January and 31 December 2020, subject to strings. These strings were attached to agreements[144] as well as Acts of Parliament[145] including the European Union (Withdrawal Agreement) Act 2020[146] and the European Union (Future Relationship) Act 2020.[147]

In the fulness of time, the antics of Johnson during the Brexit saga were followed by other even more shocking antics as his tenure in 10 Downing Street unfolded, not least during the 'Partygate' scandal. Indeed, that well-publicised scandal led to his ignominious downfall as the Prime Minister on 6 September 2022 and his similarly ignominious downfall as the MP for Uxbridge & South

---

[139] Hansard, House of Commons Debates, Volume 666, 22 October 2019, columns 825, 830 *et al*, https://hansard.parliament.uk/commons/2019-10-22/debates/277C5A20-456D-469B-A415-D04AFFD83248/EuropeanUnion(WithdrawalAgreement)Bill (accessed 3 April 2024).

[140] Ibid, columns 917-920.

[141] 'General election 2019: Brexit Party will not stand in Tory seats', BBC News, 11 November 2019, www.bbc.com/news/election-2019-50377396 (accessed 5 July 2024).

[142] For details, see 'Report overview: 2019 UK Parliamentary general election', www.electoralcommission.org.uk/research-reports-and-data/our-reports-and-data-past-elections-and-referendums/report-overview-2019-uk-parliamentary-general-election (accessed 3 April 2024).

[143] Elise Uberoi *et al*, *General Election 2019: results and analysis: Second edition* (London: House of Commons Library Briefing Paper Number CBP 8749, 28 January 2020), 88, https://researchbriefings.files.parliament.uk/documents/CBP-8749/CBP-8749.pdf and https://commonslibrary.parliament.uk/research-briefings/cbp-8749/ (accessed 1 April 2024).

[144] 'Post-Brexit agreements', European Council / Council of the EU, www.consilium.europa.eu/en/policies/eu-relations-with-the-united-kingdom/post-brexit-agreements/ (accessed 1 April 2024).

[145] See *inter alia* Nikki Sutherland, 'Brexit legislation: What has passed and what is yet to come?', House of Commons Library Insight, Parliament, 9 June 2020, https://commonslibrary.parliament.uk/brexit-legislation-what-has-passed/ (accessed 2 April 2024).

[146] European Union (Withdrawal Agreement) Act 2020 c.1, www.legislation.gov.uk/ukpga/2020/1/enacted/data.htm (accessed 2 April 2024).

[147] European Union (Future Relationship) Act 2020 c. 39, www.legislation.gov.uk/ukpga/2020/29 (accessed 2 April 2024).

Ruislip on 12 June 2023. The details are well documented,[148] but outside the scope of this chapter. What should not go unremarked is that the conduct of Johnson appeared to contribute to a disturbing corrosion of public confidence in some of the pillars of the UK constitution and its system of parliamentary democracy.[149]

Conclusions

In the interview he gave on 24 October 2023, Lord Woolf was right to agree with the proposition that 'the … administration under Boris Johnson' had shown 'a flagrant disregard for the rule of law'. As demonstrated in this chapter, the warning signs were there for all to see in Johnson's first three months as Prime Minister. The empty promises he made, the unequivocal but unrealisable assurances he gave, the demagogy he deployed, the bluster he emitted, his threats to evade his statutory duties and his other modes of conduct were not conducive to compliance with the UK constitution, the rule of law and the other constitutional principles upon which it rests. Nor were they conducive to the upholding of each and every one of the Seven Principles of Public Life.

Can any lessons be learned from the picture painted in this chapter? A few stand out. They are particularly relevant to the UK and any other sovereign states which subscribe to the rule of law, the Westminster model of parliamentary democracy or any variation of it.

An obvious lesson has to do with the rule of law. As it is fragile, it is at risk when treated with disdain by any prime minister or other head of government who acts or threatens to act as if above the law. Based on the evidence adduced in this chapter, such disdain may take various forms.

---

[148] *Findings of Second Permanent Secretary's Investigation into alleged gatherings on government premises During Covid Restrictions* (London: Cabinet Office, 25 May 2022), www.gov.uk/government/publications/findings-of-the-second-permanent-secretarys-investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions and *House of Commons Committee of Privileges: Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report: Fifth Report of Session 2022–23: HC 564* (London: House of Commons, 15 June 2023), https://committees.parliament.uk/publications/40412/documents/197897/default/ and https://publications.parliament.uk/pa/cm5803/cmselect/cmprivi/564/summary.html (accessed 24 April 2024).

[149] Alan Renwick, Ben Lauderdale, and Meg Russell, *The Future of Democracy in the UK: Public Attitudes and Policy Responses: Final Report of the Democracy in the UK after Brexit Project* (London: Constitution Unit, University College, London, November 2023), www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/dukb_report_4_digital.pdf and Russell Taylor, 'In focus: Parliamentary democracy and standards in public life in 2023', House of Lords Library, 21 December 2023, https://lordslibrary.parliament.uk/parliamentary-democracy-and-standards-in-public-life-in-2023/#ref-13 (accessed 24 April 2024).

A separate lesson is that in a democratic society a prime minister or other head of government must go beyond obeying the strict letter of the law, as laid down in the constitution, legislation, case law or other source of law. A prime minister or other head of government must additionally act in line with constitutional principles enforceable in a court of law while respecting constitutional conventions, rules, traditions and customs which are not so enforceable but nonetheless pivotal to the operation of any constitution in practice.[150] What is more, a prime minister or other head of government must obey any binding codes, rules or standards of ethical conduct which are not capable of being enforced by the courts but, instead, by the legislative or executive branches of government.

A further lesson is that a prime minister or other head of government must not issue unequivocal undertakings or other unqualified assurances which are incapable of being fulfilled. No less importantly, all holders of public office must not say, write or authorise the publication of anything which is recklessly, intentionally or deliberately misleading.

One last lesson is that anybody who observes any suspected unlawfulness, misconduct or other wrongdoing must not look the other way. Silence is not a viable option. Nor is inaction.

[150] See *inter alia* Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1986).

Locus Standi Challenges in Climate Litigation in a European Rule of Law Context

Henrik Andersen*

Abstract: Climate change has a negative effect on the life and health of human beings, animals, and the environment. The anthropogenic character of climate change has led individuals, and NGOs to use the courts to get governments to improve their climate policies. This article addresses the rule of law with particular focus on access to justice and locus standi. The article discusses the locus standi challenges in climate litigation in a European context and highlights new locus standi issues due to the special nature of climate change.

Introduction

Climate change is a new reality. From a legal perspective, 'climate change' can be defined as:

"a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods"[1]

This article concerns the anthropogenic climate change. It is caused by human activities, and it causes extreme weather phenomena which affect all parts of life: the lives of human beings, animal lives, the biota of rivers, fields, the oceans, forests etc. However, the scientific data are clear. Urgent actions are needed at all levels of society. Otherwise, the rising temperatures will ultimately end with islands swallowed by the sea and areas of the earth will be inhabitable due to extremely high temperatures and their effect on the environment. We move towards climate tipping points, which are "*critical threshold beyond which a system reorganizes, often abruptly and/or irreversibly".*[2] It has difficult policy dimensions as governments must regulate 1) the reduction of

* Associate professor Henrik Andersen, Copenhagen Business School, Department of Business Humanities and Law, CBS Law, ha.bhl@cbs.dk. Thanks to judge Matthias Keller, President of the Aachen Administrative Court; Professor Alberto De Franceschi, University of Ferrara; Professor William Boyd, University of California, Los Angeles, Co-Director of the Emmet Institute on Climate Change and the Environment, and my colleagues at CBS Law for the many locus standi and climate change discussions.

[1] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), Art. 1(2)

[2] Intergovernmental Panel on Climate Change (IPCC), AR6 Synthesis Report, Climate Change 2023, Summary for Policy Makers, B.3.2, p. 18.

greenhouse gas (GHG) emissions, and 2) the protection of 'sinks', which absorb CO2, e.g. trees, oceans.[3]

The problems with climate change have led to an increase in climate litigation at national and international level. The claimants refer inter alia to the negative consequences of harm to the environment or impairment of human rights as basis for the legal claims. The claims go against both governments and corporations for their insufficient climate policies and conduct.

The cases before national and international courts are complex. The legal questions overlap into political questions, and political and legal theories develop around 'climate justice' and the disproportionate effect of climate change related to structural inequality (e.g. women, minority groups based on race or people with disabilities are hit harder by climate change), socioeconomic inequality (e.g. low-income countries have a more difficult time finding resources to make adaption or mitigation policies to cope with climate change), and intergenerational inequality (e.g. future generations will suffer the consequences of our current policies).[4] Environmental harm has an inherent place within the concept of climate justice: 'climate change' and 'environmental change' affect each other. For example, trees are important as they absorb CO2. If a wildfire caused by extreme weather, which is caused by climate change, destroys a forest, it also eliminates important sinks.[5]

Climate justice combines climate policy, economics, and law: it concerns inter alia allocation of risks,[6] the allocation of global resources,[7] the right to life for current and future generations, and the inherent environmental problems caused by climate change that alters the economic landscape and threatens the rights to a healthy environment and property of the individual.[8] The question is

[3] A 'sink' is defined as: "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere." UNFCCC (n 1), Art. 1(8).
[4] United Nations Development Programme (UNDP), Climate change is a matter of justice – here's why (UNDP, 30 June 2023) https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why#:~:text=Climate%20justice%20means%20putting%20equity,relation%20to%20the%20climate%20crisis. (Accessed on 17 August 2024)
[5] See definition in UNFCCC, Art. 1(8). (n 2).
[6] E.g. if the population in a small island state loses their property due to flooding, which is caused by climate change, should states with high GHG emissions, and/or specific companies in high climate impact sectors, like the energy sector, also have risks of the loses of the islanders' property?
[7] E.g. least-developed countries might lose more than developed countries as they do not have resources to combat climate change.
[8] E.g. the sea might affect the fisherman's income as the higher sea temperatures may cause reduction of specific types of fish that need to emigrate from their traditional territory of the sea. It causes further 'fight' over sea territories by

whether the courts are the right forum to handle these issues. However, while governments and industries are in the process of creating laws, regulations, standards, technologies, and methods to overcome the climate challenges—and not always with a sufficiently fast pace—NGOs and individuals involve the courts and leave them no choice: they are bound to handle the *legal issues* before them.

This article discusses the interrelationship between climate change law and the rule of law from a European legal perspective with focus on *access to justice in climate litigation*. More specifically, the article addresses the overall *locus standi* issues in climate litigation. Courts address locus standi at the initial stage of a trial. It concerns *the 'who'* has access to/before the courts. This article only concerns the claimants, not the defendants.

As mentioned below, the questions related to locus standi will often revolve around whether the claimant is directly and individually affected by the potentially harmful conduct/omission by the defendant, and whether there is a potential legal basis for the claim against the defendant. Already at the locus standi stage, the courts get an opportunity to dismiss a case if the claim is of political character instead of legal. Besides the overall locus standi challenges in climate litigation, the article highlights two locus standi challenges related to climate change: 1) Non-governmental organizationss' (NGOs) access to the courts to protect the environment due to insufficient climate policies by governmental institutions. 2) Locus standi in cases with claims concerning the protection of future generations where there is no actual harm or current impairment of a right towards an existing natural person.

The article uses case law from the Court of Justice of the European Union (CJEU), i.e. the European Court of Justice (ECJ) and the General Court, as well as case law from the European Court of Human Rights (ECtHR) as well as case law from national courts to demonstrate some of the locus standi problems—and how the courts approach them. It only addresses locus standi in cases brought against states. The reason for this delimitation lies in the different types of obligations that states have compared to companies in climate cases.[9]

different types of fishes. Furthermore, the increased temperatures may cause people to become 'climate refugees' if their land becomes inhabitable.

[9] Even though locus standi as such concerns the accessibility to the court of the person making the claim, and as such not the role of the defendant, there can nevertheless be standing issues concerning the role of the defendant if, for

The article proceeds as follows: First, it provides the basis of locus standi in the context of the rule of law. Secondly, it discusses the overall rule of law problems between law, science, and politics which may be addressed at the locus standi stage. Thirdly, it provides an overall framework of locus standi deriving from the ECHR and from EU law. Fourth, the article addresses two specific locus standi problems: NGO access to protect the environment, and the access to protect future generations.

Locus Standi as a Sub-Element of the Rule of Law

The 'rule of law' has been subject of discussions concerning content and definitions in political philosophy,[10] economics,[11] etc. as well as an instrument to promote climate justice.[12] In academic debates, 'rule of law' is often categorized as either formal or substantive.[13] Raz provides 8 elements of a formal rule of law, which according to Raz is value neutral. The 8 elements are: 1) all laws should be prospective, open, and clear, 2) laws should be relatively stable, 3) the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules, 4) the independence of the judiciary must be guaranteed, 5) the principles of natural justice must be observed, 6) the courts should have review powers over the implementation of the other principles, 7) the courts should be easily accessible, and 8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[14] In contrast to a formal rule of law, a substantive

example, it is clear beyond any doubt that the defendant has no relation to the case, like if there is no legal obligations of any kind that can be related to the defendant. In that respect, there can be differences between civil and state responsibilities and liabilities where some rules only address states and cannot impose any obligations on civil parties.

[10] See e.g. John Rawls, *A Theory of Justice* (2nd ed, The Belknap Press of Harvard University Press, 1999).

[11] See e.g. Friedrich A. Hayek, *The Road to Serfdom* (B. Caldwell, Ed, first published in 1944, The definitive edition, Chicago University Press, 2007)

[12] International Development Law Organization (IDLO), 'Climate Justice – A Rule of Law Approach to Transformative Climate Action', (IDLO, 2021), https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf (accessed on 17 August 2024)

[13] Discussions concern in particular whether the rule of law only contains formal elements or if it also is substantial and can be used to assess legislation and legal practice. See for different positions: Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' *Public Law*, Autumn [1997] 467, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (8th reprint by Liberty Fund, Indianapolis, 1915); Jospeh Raz, The Rule of Law and its Virtue, in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 210 (2nd ed. Oxford University Press 2009); R. Peerenboom, *Varieties of Rule of Law in Asian Discourses of Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the US*, 1 (R. Peerenboom ed., RoutledgeCurzon, 2004) 1; Friedrich A. Hayek (n 11) 112-123; John Rawls (n 10) 53 and 206-213; Kaarlo Tuori, *Ratio and Voluntas – The Tension between Reason and Will in Law*, (Ashgate, 2011) 207-239; Brian Z. Tamanaha, Functions of the Rule of Law. *Washington University in St. Louis Legal Studies Research Paper Series*, Paper No. 18-01-01 [2018].

[14] Jospeh Raz (n 13)

rule of law is value-added. Apart from containing the formal rule of law it makes judgment of law based on inter alia human rights and democracy norms as inherent elements of the rule of law.[15] The article does not engage in the theoretical and/or ethical discussion of the legal character of the rule of law, nor the discussion about its either formal or substantive character. The focal point is *access to justice*, which is one of the elements suggested by Raz, but it has sufficient legal basis, as discussed below, to give it a legally binding character on governments. As this writer has argued elsewhere, even the most formal rule of law cannot exist without certain substantive traits as the rule of law otherwise could be undermined.[16] For example, if a legal system eliminated the access to justice through a legislative process, the political system would cease to exist as a rule of law-based system as it would take the role of the court out of the equation, and thereby eliminating the function of the court as a guarantor and protector of the supremacy of the law.

'Access to justice' has several processual aspects. For example, it can be the access of citizens to the political process concerning climate change. Citizen access to the political process concerning regulation of climate change has a legal basis in international law. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[17] provides that citizens *shall* have access in the decision-making in environmental matters and have access to environmental information.[18] The principles of the Aarhus Convention are also relevant in cases concerning climate change.[19] Furthermore, the UNFCCC provides in Art. 6(a)(i)-(iii) that the Parties shall promote public participation concerning climate change and develop adequate responses.[20] The article does not address that public engagement dimension of 'access to justice'.

The article only addresses *locus standi*: one central aspect of getting access to justice is the right to appear before the court with a climate-related claim. There is not a general, clear, authoritative

[15] Brian Z. Tamanaha (n 13).
[16] Henrik Andersen "Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?" in G. Martinico & X. Wu (eds.), *A Legal Analysis of the Belt and Road Initiative - Towards a New Silk Road?* (Cham: Palgrave Macmillan 2020) 107.
[17] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention)
[18] Art. 3-8 of the Aarhus Convention (n 17)
[19] See e.g. the European Court of Human Rights (ECtHR) in *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024), paras. 494, 602.
[20] Art. 6(a)(iii) of the UNFCCC (n 1)

definition of locus standi. To cite the United Nations Environment Programme (UNDP), May 2017, The Status of Climate Change Litigation – A Global Review:

"In essence, [locus standi] refers to the criteria one must satisfy in order to be a party to a legal proceeding. These criteria are typically aimed at ensuring that the parties have a sufficient stake in the outcome of the case and that the claims brought by the parties are capable of judicial resolution."

To access a court, the claimant must pass the locus standi thresholds. What it contains is different in the respective jurisdictions. Some jurisdictions have clear locus standi limits, while others have more flexible locus standi limits. On a general level, courts seem to address—in different shapes—three overall locus standi categories; directly affected, individually affected, and legal concern. That is explained further below. Around the locus standi categories are two issues of particular interest in climate litigation: 1) the connection between government climate policies and impairment of rights, and 2) the line between law and politics.

The climate change problem and the difficult line between law, science, and politics

One of the issues concerning climate change and access to justice is the nature of climate change and its impact: it does not easily translate into a 'legal' problem with clear legal bases. As further elaborated below, locus standi requires the claimant to demonstrate a minimum level of legal problem before access to the court can be granted.

Science and the Causal Link between Government Climate Policy and Harm

First, there is the legal assessment of a potential causal link between action/inaction by government in its climate policies and the impairment of rights or harm to people or to the environment. Climate change is a global problem with many actors involved in the GHG emissions. Greenhouse gasses accumulate in the atmosphere and 'block' the exit of heat with the resulting increase in the temperature. These increases create extreme weather phenomena which then result in higher probabilities of wildfires, flooding etc.

However, these facts must connect to the law where science gets an important role. In 1988, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental Panel on Climate Change (IPCC). The role of the IPCC

is to act neutrally and to assess the risk and impacts of anthropogenic climate change.[21] Based on these assessments, the lPCC makes reports on the status of climate change. In its latest report, it provides about the anthropogenic climate change:

"Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected"[22]

These scientific facts and estimates from the IPCC lead individuals, NGOs, and affected, vulnerable states to demand governments to act to prevent further damage in the courts. For example, through the promotion by the government of Vanuatu, the UN General Assembly has asked the International Court of Justice (ICJ) for an advisory opinion concerning inter alia the adverse effects of climate change on small island developing states.[23]

The IPCC reports also provide scientific assessment of the future impact where the message is clear. If we continue with GHG emissions, there will be an increase in the global warming.[24] Thus, according to the IPCC, we must reduce the GHG emissions and protect sinks. Furthermore, some future negative changes cannot be avoided, but "limited by deep, rapid, and sustained global greenhouse gas emissions reduction."[25] National and international courts refer to the IPCC as a main source of facts of climate change.[26]

The causal link can be addressed at the locus standi level: if the claimant cannot demonstrate beyond a minimum causal threshold that the government climate policies have an impact on the rights of the individual or harm to the environment, a case might be rejected at that stage.[27]

---

[21] IPCC, PRINCIPLES GOVERNING IPCC WORK, Approved at the Fourteenth Session (Vienna, 1-3 October 1998) on 1 October 1998, amended at the Twenty-First Session (Vienna, 3 and 6-7 November 2003), the Twenty-Fifth Session (Mauritius, 26-28 April 2006), the Thirty-Fifth Session (Geneva, 6-9 June 2012) and the Thirty-Seventh Session (Batumi, 14-18 October 2013)
[22] Ibid, A.2, p. 5.
[23] Request for Advisory Opinion on *Obligations of States in Respect of Climate Change*, transmitted to the International Court of Justice pursuant to General Assembly resolution 77/276 of 29 March 2023
[24] IPCC, AR6 Synthesis Report, Climate Change 2023, Summary for Policy Makers, B 1, p. 12
[25] Ibid, B. 3, p. 18
[26] See e.g. *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024)
[27] See more below.

Separation between Law and Politics

The second challenge concerns the separation between law and politics. The vaguer the text of a regulation or a principle of law, the less likely it can serve as a sole legal basis for responsibility and/or liability of governments to improve their climate change policies. That is not to suggest that law cannot contain a discretionary space. It is important in various fields of law, like administrative law, that there is a discretionary space for the authorities before it grants a permission to, for example, a construction project with negative climate impact. The law provides the outer limit of the discretionary space which must be defined and secured by the courts. However, even though we have legal instruments which to some extent can hold governments, corporations etc. accountable, responsible, and/or liable for either insufficient activities in protecting the climate or for causing environmental harm or impairing individual rights, the outer limit of the law related to climate change is not easy to define. That has led to discussions of whether courts overstep the separation of powers and become legislator instead of judiciaries,[28] where the courts must observe the constitutional limits of their function.[29]

However, it must also be observed that climate change problems fall within a complex of climate law, constitutional law, procedural law, administrative law, environmental law, and human rights. Their interrelation cannot be understood solely from a linear approach. There is a multilevel dimension where the line between law and politics are different depending on the particular type of court and legal culture. Such differences can be misunderstood as activism in cases where courts do establish that a legislator has not acted with sufficient due diligence in its climate change policies, in particular if the application and interpretation of international law differs among jurisdictions. For example, the Paris Agreement provides that it "*will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*."[30] In combination with the obligation of states to

[28] Henrik Lando, "Should Courts Decide Climate Policies? A Critical Perspective on Climate Litigation in Light of the Urgenda Verdict" [2024] Rev. Law Econ 1.
[29] See for example the arguments by the Constitutional Court of Austria in *Children of Austria*, 123/2023-12, June 27, 2023, where the Court held that it cannot repeal an Act if the repeal implies that new meaning is given to the provisions of the Act and the Court thus has taken a legislative function. See also from the ECtHR *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024), para. 484.
[30] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79, Art. 2.2 of the Paris Agreement.

make their own Nationally Determined Contributions and mitigation polices,[31] the text provides a wide discretionary space for states to implement the Paris Agreement and to give meaning to the legal concepts of the Paris Agreement. The implication is that the application of specific legal concepts of the Paris Agreement can be different in different jurisdictions while the different meanings may all be compatible with the Paris Agreement. These differences have been reflected in practice: courts in different jurisdictions apply the Paris Agreement differently, and thus become part of shaping international climate change law as flexible legal instruments.[32] The multilevel dimension of climate change law requires comparative approaches to fully comprehend the wide scope of the law.[33] However, it also means that an individual might not have locus standi if the claimant only relies on flexible principles of the Paris Agreement that are within the legislative, and not the judicial, sphere.

At the locus standi stage, courts might reject a case if there is a risk of overstepping the line between law and politics, in particular if the court step into the role of the legislator. Furthermore, courts may refer to *actio popularis*, i.e. a claimant "cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly."[34] This will often be used if an individual target legislation where—in light of the principle of the separation of powers—the right forum for changes of legislation is the legislator, not the court.

The European Overall Rule of Law and Locus Standi Frameworks

The laws on locus standi are placed in national constitutional and procedural law. There will often be general rules on access to the court as well as special rules in specific sectors of law where rules on locus standi are specified. However, most European states are bound by the rules and principles of the European Convention on Human Rights (ECHR).[35] The next sub-part gives a brief overview of the locus standi standards of the ECHR based on case law from the ECtHR. Furthermore, there

[31] Art. 4.2 of the Paris Agreement (n 31).
[32] See Anna-Julia Saiger, "Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach" [2020] Transnational Environmental Law (9) 1, 37
[33] Ibid.
[34] *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği,* App no 37857/14, (ECtHR 7 December 2021) para. 41
[35] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

are also locus standi rules and principles under EU law. The overall locus standi rules and principles of EU law is discussed below.

The article does not address the relationship between EU law and the ECHR. It suffices for this article to mention that the EU is bound to accede the ECHR,[36] but that accession has not taken place yet. It follows from case law of the ECJ that as long as the EU has not acceded the ECHR, it does not form a legal instrument incorporated into EU law.[37] Nevertheless, the principles deriving from the ECHR are principles of EU law, and the *"rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR.*"[38] The ECJ has also generally referred to case law of the European Court of Human Rights (ECtHR).[39]

The ECHR and Locus Standi

The ECHR refers in its preamble to the "*common heritage of political traditions, ideals, freedom and the rule of law*" of the European countries which the ECtHR also refers to as context in its interpretation of the ECHR.[40] The ECHR expresses the abovementioned rule of law principles, like, for example, the principle of legality,[41] non-retroactive criminal law,[42] and due process in the public administration.[43]

'Access to justice' is enshrined in Art. 6 of the ECHR. It contains the rules and principles on 'the right to a fair trial'. That 'right' entails the entitlement of everyone to "*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". Thus, Art.

[36] Art. 6(3) of the Treaty on European Union (TEU).
[37] See e.g. Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v Commission*, [2015] EU:C:2015:535, para. 45; Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, [2018] EU:C:2018:335, para. 40.
[38] Art. 52(3) of the Charter of the EU; Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v Commission,* [2015] EU:C:2015:535, para. 45; Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, [2018] EU:C:2018:335, para. 40.
[39]See for example Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others,* [2018] EU:C:2018:335, para. 45.
[40] See e.g. *The United Macedonian Organisation Ilinden Pirin and Others V. Bulgaria,* App no 59489/00 (ECtHR 11 January 2018), para.191
[41] ECHR Art. 7
[42] ECHR Art. 7
[43] The ECtHR has developed a jurisprudence where it assesses procedural and administrative aspects of governmental institutions' exercise of authority towards individuals. See for example about procedural issues in environmental cases concerning Art. 8 (Right to respect for private and family life) *Udovičić v. Croatia*, App no. 27310/09 (ECtHR 24 April 2014) para. 151; and *Fadeyeva v. Russia*, 2005, App no. 55723/00, (ECtHR, 9 June 2005) para. 105.

6 contains several rule of law elements. It has also been applied in several cases concerning locus standi when individuals have asserted that national courts would not grant them access to make a claim against government. In ECtHR case law, the locus standi analysis comes down to whether the individual has 'victim status'.

Locus standi was one of the core issues in the recent climate case: *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*.[44] Four elderly women and an NGO filed a complaint against the Swiss' government's climate policies. The 4 women were all members of the NGO. They were rejected locus standi in the national system. The ECtHR referred to its case law and stated that in order for Art. 6 of the ECHR to apply, the claimants must have victim status.[45] Art. 6 does not guarantee access to a court with aim of overriding national legislation by the legislature, i.e. there are no rights of *actio popularis* where an individual or organization makes a claim against national measures that apply to everybody.[46] According to the ECtHR, there must 1) exist a civil right, 2) there must be a genuine and serious dispute concerning an alleged violation of the civil right, and 3) the outcome of the proceedings must be directly decisive for the claimant's rights.[47] In environmental cases, the ECtHR has accepted NGOs own civil rights or their representation of members' rights if they are directly affected by the national measure.[48] However, it is necessary to consider the specific aspects of climate change which is different from general environmental problems. Due to the nature of climate change, NGOs have a new special place in ECtHR case law. The 4 individuals did not have locus standi under Art. 6 of the ECHR as an outcome of a civil dispute would not be directly decisive for their civil rights. In that respect, a change in the national policies on climate change would not have an imminent effect on their civil rights, although the 4 individuals met the first 2 locus standi conditions. The NGO, on the other side, met the 3 locus standi conditions under Art. 6 of the ECHR:

"the applicant association has demonstrated that it had an actual and sufficiently close connection to the matter complained of and to the individuals seeking protection against the adverse effects of climate change on their lives, health and quality of life. (…) It acted as a means through which

[44] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR, 9 April 2024), paras 590-640.
[45] Para. 590.
[46] Paras. 594-596.
[47] Para. 595.
[48] *Gorraiz Lizarraga and Others,* App no. 62543/00 (ECtHR 27 April 2004), paras 38-39.

the rights of those affected by climate change could be defended and through which they could seek to obtain an adequate corrective action for the State's failure to effectively implement mitigation measures under the existing law"[49]

That change in locus standi approach—which applies only to climate cases—must be seen in light of the ECtHR assessment of access to the ECtHR under Art. 34 of the ECHR. The ECtHR had in the same case established a very high threshold for individuals to have locus standi before the ECtHR in climate cases. An individual must meet two conditions: 1) the individual must be "subject to a high intensity of exposure to the adverse effects of climate change,"[50] and 2) "there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm."[51] For NGOs, the threshold is lower. An NGO has locus standi if three conditions are met, The NGO must be: 1) lawfully established or have standing rights in the state, 2) it must have the defence of human rights "of its members or other affected individuals within the jurisdiction concerned" as an objective, and 3) it must demonstrate that it is "genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being"[52]

It is particularly worth noticing that under Art. 34 of the ECHR an NGO—in contrast to Art. 6 of the ECHR—does not have to represent its members, but it suffices if it acts on behalf of 'other affected individuals within the jurisdiction'. Nevertheless, even though Art. 6 does not automatically imply that NGOs have locus standi at national level in climate cases, the ECtHR has lowered the standards in climate cases if the NGO has a sufficient close connection to those individuals, who are adversely affected by climate change, it represents, and there is a sufficient link between these adverse impacts and the rights of those individuals.

The EU and 'Access to Justice'

At EU level, the 'rule of law' was already recognized by the ECJ long before the concept made its way into EU treaty law. In *Fédération charbonnière de Belgique v High Authority* from 1956, the

[49] Para. 621.
[50] Para 487.
[51] Para 487.
[52] Para 502.

ECJ referred to a "generally-accepted rule of law" emphasising proportionality in the EU institutions' responses to illegal activities.[53] It was in particular in *Les Verts v. Parliament* that the ECJ emphasised the importance of the rule of law as a pillar of EU law,[54] and the ECJ has consistently protected various rule of law elements in its case law where most elements, which now have treaty basis in the Charter of the EU, have legal status as general or fundamental principles of EU law, like e.g. the principle of legality and the principle of protection of legal expectations,[55] law or measures must not be retroactive,[56] non-restrictive interpretation of fundamental rights,[57] protection against arbitrary or disproportionate intervention by government,[58] principles of due process must be followed by the executive;[59] effective judicial protection.[60] With the progression of EU treaty law, the rule of law has now treaty basis in the Treaty on European Union (TEU), Art. 2.

In *Associação Sindical dos Juízes Portugueses,* the ECJ used the rule of law elements of Art. 2 TEU as context for the interpretation of Art. 19(1) TEU concerning 'effective legal protection' and stated that Art. 19(1) TEU gives "concrete expression to the value of the rule of law stated in Art. 2 TEU."[61] In *Hungary v. European Parliament and Council* and *Poland v. European Parliament and Council,* the ECJ clarified that Art. 2 of the TEU is binding law, and thus the rule of law is a legally binding principle of EU treaty law.[62]

---

[53] Case 8/55 1956, *Fédération charbonnière de Belgique v High Authority* [1956] ECLI:EU:C:1956:11, p. 299.
[54] Case 294/83, *Parti écologiste "Les Verts" v European Parliament.*. European Court Reports [1986] ECLI:EU:C:1986:166, para. 23
[55] See e.g. Case C-352/09 P, *ThyssenKrupp Nirosta v Commission* [2011] ECLI:EU:C:2011:191, para. 80; Case C-623/22, *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister* [2024] ECLI:EU:C:2024:639, paras 35-36.
[56] See e.g. Case 63/83 *Regina v Kent Kirk* [1984] ECLI:EU:C:1984:255, paras 21-22. An exception is the application of more lenient criminal law (lex mitior) retroactively: Case C-107/23 PPU, *Criminal proceedings against C.I. and Others* [2023] ECLI:EU:C:2023:606, para. 103.
[57] Case 6/60 *Humblet v Belgian State*, [1960], ECLI:EU:C:1960:48, p. 572. However, rights, which are not absolute, may be limited by law—subject to the principle of proportionality—after Art. 52 of the Charter of the EU. See also Case C-311/18 *Facebook Ireland and Schrems* [2020] ECLI:EU:C:2020:559 paras. 172-174.
[58] See e.g. Joined cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECLI:EU:C:1989:337, para. 19; Joined Cases C-245/19 and C-246/19, *État luxembourgeois v B and Others* [2020] ECLI:EU:C:2020:795, para. 57.
[59] See e.g. Case C-269/90 *Technische Universität München*. [1991] ECLI:EU:C:1991:438, para. 14; Case C-337/09 P, *Council v Zhejiang Xinan Chemical Industrial Group* [2012] ECLI:EU:C:2012:471, para. 107; Case C-259/22 P *Arysta LifeScience Great Britain Ltd v Commission* [2023] ECLI:EU:C:2023:513, para. 46.
[60] Case 222/84 *Johnston* [1986] ECLI:EU:C:1986:206, para. 18; Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para. 32.
[61] Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para. 32.
[62] Case C-156/21, *Hungary v. European Parliament and Council*, [2022] ECLI:EU:C:2022:97, paras. 231-235; Case C-157/21*Poland v. European Parliament and Council* [2022], ECLI:EU:C:2022:98, paras. 265 and 283.

The EU legislative institutions gave further clarity to the content of the rule of law. In Regulation 2020/2092,[63] the Parliament and the Council have specified:

"The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected.[64]

These rule of law elements conform with the formal rule of law, as mentioned above, although it also includes substantive dimensions as human rights and democracy form the legal context for the EU rule of law. 'Access to justice' is an inherent part of EU law. It is guaranteed in Art. 47 of the EU Charter, and Art. 19 of TEU and is a fundamental value of EU law.[65] Art. 267 of the Treaty of the Functioning of the European Union (TFEU) provides access to justice for individuals through the national courts where the individual can make claims against governments or other individuals for violations of EU law, and the ECJ provides a preliminary ruling.[66] In some Art. 267 cases, the question of locus standi of the claimant in the national court has been addressed. These questions will sometimes be settled under 'direct applicability and direct effect' of a particular EU secondary act if the national court has been uncertain whether a claim can be brought

[63] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1–10 (2020/2092 Regulation). It provides measures relating to the EU budget that the EU institutions may apply against Member States that violate the rule of law principles.

[64] Recital 3. See also Art. 2 of the 2020/2092 Regulation.

[65] Case C-185/95 P. *Baustahlgewebe GmbH v Commission* [1998] ECLI:EU:C:1998:608 para. 21; Joined Cases C-245/19 and C-246/19, *État luxembourgeois v B and Others* [2020] ECLI:EU:C:2020:795, paras 47 and 66; Case C-205/21 *Criminal proceedings against V.S*. [2023] ECLI:EU:C:2023:49, paras 87-88; Case C-119/23, *Virgilijus Valančius v Lietuvos Republikos Vyriausybė.* [2024] ECLI:EU:C:2024:653, paras 46-47.

[66] The CJEU contains both the General Court and the ECJ. From 1 October 2024, the General Court has jurisdiction to handle preliminary cases concerning the common system of value added tax; excise duties; the Customs Code; the tariff classification of goods under the Combined Nomenclature; compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services; the system for greenhouse gas emission allowance trading, cf. Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, PE/85/2023/REV/2, OJ L, 2024/2019, 12.8.2024

against another individual or national institution.[67] Other Art. 267 cases concern the general access of a person to make claims before the national courts. The ECJ leaves wide locus standi discretion to the national courts.[68] The limit of that discretion follows from Art. 47 of the Charter as well as a member state's obligations under Art. 288 of the TFEU if an individual makes a claim against a state for violating EU secondary law.[69]

Furthermore, Art. 263(4) of the TFEU gives access to justice before the CJEU for unprivileged applicants, i.e. persons who are not any of the EU institutions or member states, concerning EU secondary law if the secondary law is of *direct and individual concern for the person*, unless a person is the addressee of the EU act. It has been extraordinarily difficult for individuals to demonstrate to the satisfaction of the ECJ and the General Court that they meet the individual concern requirement,[70] and scholars have debated and criticized the *locus standi* requirements of direct and individual concern under Art. 263(4) of the TFEU.[71] Climate change cases are receiving no different treatment which the *Carvalho case*[72] fully demonstrates. The ECJ rejected *locus standi* under art. 263(4) of the TFEU for individuals from a number of member states as well from third countries in their claim that the EU climate package was unlawful (i.e. insufficient) under EU law. According to the ECJ, the plaintiffs were not individually concerned. However, it would not have denied the possibility of the plaintiffs to apply the procedure under Art. 267.[73] It can be difficult

[67] See for example Case C-277/22, *lobal NRG Kereskedelmi és Tanácsadó Zrt. v Magyar Energetikai és Közmű-szabályozási Hivatal* [2024] ECLI:EU:C:2024:78.
[68] Case C-311/18, *Facebook Ireland and Schrems* [2020] ECLI:EU:C:2020:559, para. 73
[69] C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others* [2019] ECLI:EU:C:2019:824, paras 30-46; C-72/95, *Kraaijeveld and Others* [1996] EU:C:1996:404, para. 56
[70] See the 'Plaumann standards' by the ECJ from Case 25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17. The Plaumann standards have been consistently applied by the ECJ, see e.g. Case C-284/21 P. *Commission v Anthony Braesch and Others* [2023] ECLI:EU:C:2023:58 para. 51. In *Seat of the European Medicines Agency*, C-106/19 and C-232/19, EU:C:2022:568, the ECJ accepted individuality as the institution making the claim against a Regulation had been mentioned expressly during the legislative procedure, cf. paras 68-71.
[71] See e.g. Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), p. 550; Ami Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' [1974] C.M.L.Rev. 191; Hjalte Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' [1980] ELRev 112; Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' [2003] The Cambridge Law Journal 72; Matthijs van Wolferen, 'The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework' [2016} Journal of Contemporary European Research 914; Alexander Kornezov, 'Shaping the new architecture of the EU system of judicial remedies: comment on Inuit' [2014] E.L.Rev. 251.
[72] Case C-565/19 P, *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252.
[73] Case-321/95, *Greenpeace v Commission*, [1998] ECLI:EU:C:1998:153, para. 33. See also Case 101/76, *Koninklijke Scholten Honig NV v Council and Commission*, [1977] ECLI:EU:C:1977:70, where admission under Art. 263(4) was rejected due to the general nature of the EU act (a Regulation, not a decision). The applicant made a successful case

for an individual to assess whether a case should be brought under Art. 263(4) or Art. 267 of the TFEU. If an individual makes a claim under Art. 267 concerning annulment of an EU act, and where the individual undoubtedly is directly and individually affected by the EU secondary law, the ECJ will dismiss the case under Art. 267 as it should have been brought under Art. 263.[74] The problem can be if the time-limit for making a complaint under Art 263(4) has passed.

As mentioned above,[75] 'access to justice' is part of the EU requirement of 'effective judicial protection' and is a fundamental pillar of the EU legal system. Within that 'access' lie some complex questions of locus standi. But even with the limits under Art. 263(4) for individuals to access the CJEU to review EU secondary acts, there is an opening under Art. 267. Furthermore, the member states must ensure locus standi in compliance with the minimum guarantees of access to justice under Art. 47 of the Charter.

Climate Litigation and the problem of locus standi for environmental harm and future generations

After the Dutch Urgenda case,[76] where the State of the Netherlands was found to breach the law by insufficient climate change policies, there has been a big rise in climate litigation. Individuals and NGOs make cases against states and corporations in various fields of law in relation to impact from climate change. The cases can roughly be divided into three types of claims: 1) the tort-based claims: state and/or company conduct—either lawful or unlawful—has resulted in harm to property or the environment, 2) rights-based claims: individual rights and freedoms related to a sustainable climate have been violated. 3) Greenwashing claims: companies make their products 'greener' in their marketing and sales than the products are.

Based on the types of climate problems that courts in general address at the locus standi stage, there seems to be three overall types of locus standi thresholds:

- The claimant is *directly affected*: The conduct/omission by the defendant must directly affect the claimant. This criterion connects on an initial stage the conduct/omission of the

under Art. 267 in Joined cases 103/77 and 145/77, *Royal Scholten-Honig v Intervention Board for Agricultural Products*, [1978] ECLI:EU:C:1978:186.

[74] See e.g. Case C-708/19, *Von Aschenbach & Voss GmbH v Hauptzollamt Duisburg* [2021] ECLI:EU:C:2021:190

[75] See case law in (n 65).

[76] The Dutch Urgenda case *(The State of the Netherlands v Urgenda*, Hoge Raad, 19/00135 [2020])

defendant to the harm suffered by the claimant or to the impairment of rights of the claimant. That includes, for example, whether legislative acts, that potentially can be at odds with an aim of a sustainable climate, directly affect the claimant.[77] There can inter alia be thresholds concerning:

- the existence of harm or risk of harm suffered by a person or by nature (represented by an NGO) or impairment of rights. For example, it can be any adverse effects to the physical environment or biota, including changes in the ecosystems and reduction of biodiversity.[78]
- *likely causation* between the conduct/omission and the harm. It is important to note that at the locus standi stage, the court only decides on a likely causation for the sake of locus standi,[79] i.e. it is not a final decision on causation.

- The claimant is *individually affected* by the conduct/omission of the defendant. In some jurisdictions, it will rule out a challenge of conduct/omission that affect everyone in the same manner, like for example the challenge of a piece of legislation which have an impact on the public as a whole.[80] There are particularly two issues:
  - The relationship between legislator/government and fundamental rights. There is an increased number of climate cases where claimants refer to fundamental rights as basis for a claim against government. The claim will usually revolve around

[77] See e.g. Decision by the Constitutional Court of Austria, *Greenpeace et al. v. Austria*, G 144-145/2020-13, V 332/2020-13, 30. September 2020, where the Constitutional Court of Austria rejected standing of individuals, who travelled by rail, over preferential tax treatment of airlines which cause big GHG emissions, as the tax advantages for the airlines did not concern the rail passengers.

[78] See e.g. *Notre Affaire à Tous and Others v. France*, Administrative Court of Paris, N° 1901967, 1904968, 1904972, 1904976/4-1, decision of October 14, 2021.

[79] See e.g. from the Federal Constitutional Court of Germany, *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (24 March 2021). See also in respect of civil case law from the Supreme Court of New Zealand: S*mith v Fonterra Co-Operative Group Ltd*, SC 149/2021 [2024] NZSC 5, paras 153-171, where the Supreme Court states that even though common law has not dealt with such type of global crisis of existential character, it has nevertheless dealt with other existential crises at smaller scale, and if the common law was flawed, it could be corrected by the legislature. Furthermore, the Supreme Court stated that in various pollution cases with several potential polluters to a public good: "a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others", para. 164.

[80] See e.g. *Crash 2000 OOD and Others v. Bulgaria* App no 49893/07 (ECtHR 17 December 2013) paras 83-85. See also in EU law, the strict individuality test (Plaumann test) by the ECJ in cases under Art. 263(4) TFEU (n 70). See also in respect of civil case law from the Supreme Court of New Zealand: *Smith v Fonterra Co-Operative Group Ltd*, SC 149/2021 [2024] NZSC 5, paras 148-152, concerning the locus standi rule of 'special damage' which concerns whether the damage suffered by the claimant is different from damage suffered by the general population.

either the legislative effort is insufficient to combat climate change,[81] or that the authorities have granted a permission to a company to engage in a construction project or drilling activity to the detriment of the climate affecting the fundamental rights of the claimant.[82]

- NGOs making claims on behalf of the broader part of the population with reference to individual human rights or protection of the environment or the climate. Some jurisdictions do not accept *actio popularis*, i.e. the representation of a public interest, for example concerning the protection of the environment.[83] When a case concerns human rights, it can be questioned whether a representation by an NGO is *jus tertii,*[84] i.e. "the right of the third party."[85] Some jurisdictions accept locus standi for NGOs in human rights cases,[86] while others reject such access.[87] In respect of the ECtHR, NGOs have generally not locus standi. As mentioned above, it is a long-established practice by the ECtHR that a claimant must have victim status before the ECHR can apply which generally rules out NGOs.[88] As also mentioned above, the ECtHR has nevertheless accepted locus standi of NGOs in environmental cases, and based on the recent ECtHR case, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* granted NGOs wider locus standi in climate cases.[89]

- The action/inaction of government conduct must be of *legal concern for the claimant*: The claimant must demonstrate that the claim can relate to a legal basis. It may also be necessary for the claimant to demonstrate that the legal basis concerns the claimant directly

[81] See rejection in EU case law: Case C-565/19 P, *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252.
[82] See e.g. from EU case law Case C-535/18 *Land Nordrhein-Westfalen* [2020] ECLI:EU:C:2020:391 EU:C:2020:391,
[83] See e.g. Notre Affaire à Tous and Others v. France, Administrative Court of Paris, N° 1901967, 1904968, 1904972, 1904976/4-1, decision of October 14, 2021
[84] See e.g. an argument made, but dismissed by the court, in *Friends of the Irish Environment v the Government of Ireland*, judgment of 31st July 2020 (Appeal No: 205/19).
[85] Oxford – A dictionary of Law, 10th edition, Jonathan Law (ed) 2022
[86] See e.g. from the Federal Constitutional Court of Germany, *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (24 March 2021)
[87] See e.g. from Ireland, *Friends of the Irish Environment v the Government of Ireland*, judgment of 31st July 2020 (Appeal No: 205/19).
[88] Art. 34 of the ECHR
[89] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024), para. 502.

in light of the claim.[90] The requirement of 'legal concern' at the locus standi stage eliminates pure political cases from the court.

This categorization of locus standi requirements is only made for the sake of providing an overview. The categories may overlap. Furthermore, they do not demonstrate the various standards that court may apply to establish the direct, individual, or legal connection to the case. For example, as mentioned above, the ECtHR has provided conditions concerning NGOs locus standi in climate cases that—if met—implies that an NGO has locus standi before the ECtHR. These conditions make the NGO 'directly and individually' affected through its lawful establishment, its human rights and climate related objectives, and qualification to represent those individuals affected by climate change.

The following sub-parts discuss some of the locus standi challenges that are specific for climate change litigation. One about the protection of the environment against the negative impact from climate change. The problem is that the environment can only be protected through representation by a human voice. The other is about the protection of future generations. The problem is that future generations do not exist and may not have rights.

Locus standi and the environment

Climate change has severe impact on the environment. For example, there are changes in rainfall patterns which affect the availability of fresh water with resulting changes in human access to fresh water as well as changes in the habitats for animals. As mentioned above, the IPCC makes the connection between climate change and the impact on the environment. The challenge is to give access to justice for the environment. It cannot speak by itself in court. It needs representation through human beings. Animals or plants are not 'legal subjects' in the sense human beings are legal subjects, and they do not have locus standi. It does not imply that animals, plants etc. do not have protection in law. For example, the Berne Convention on the Conservation of European Wildlife and Natural Habitats "aims (…) to conserve wild flora and fauna and their natural habitats,

[90] See e.g. Decision by the Constitutional Court of Austria, *Greenpeace et al. v. Austria*, G 144-145/2020-13, V 332/2020-13, 30. September 2020, where the Constitutional Court of Austria rejected standing of individuals, who travelled by rail, over preferential tax treatment of airlines which cause big GHG emissions, as the tax advantages for the airlines did not concern the rail passengers.

especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation."[91]

As animals and plants do not have access—or their own voice—to make claims before the courts, their protection can come indirectly from individuals' human rights to a sustainable environment. Thus, individuals can be one protector of the environment. An individual's right to life or private life and family life is impaired by climate policies of government or by corporations. The individual has a right to a healthy environment and climate change harms biodiversity which causes environmental risks for the individual. The individual may on that basis seek access to the courts.

The environment can also be protected by government agencies who are tasked under public environmental law to protect the environment. Environmental law exists on international, EU, and national level, and several agencies have an obligation under these laws to protect the environment. Such agencies will under these laws often have right to standing in court against private parties or other public parties. The problem may be if such an agency is closely related to the government, it may be a government agency and may not pursue the environmental interest in respect of government action/inaction in combatting climate change.

NGOs are also protectors of the environment. The problem with NGOs from the perspective of locus standi is that an NGO is often not individually or directly affected by harmful conduct or have rights impaired: it only represents the climate/environment and/or generally human rights. Locus standi for NGOs in environmental cases is to some extent regulated by international treaty law in the Aarhus Convention. It provides that NGOs have standing in cases concerning environmental decisions by government. The EU and all its member states are parties to the Aarhus Convention. It is implemented at EU level in the 'Aarhus' Regulation.[92] It covers access to justice for NGOs if they meet the following conditions:

[91] Berne Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) ETS No. 104

[92] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Union institutions and bodies with amendments.

> "A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:
>
> (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
>
> (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
>
> (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
>
> (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities. "[93]

NGOs have locus standi before the courts in situations where a governmental body has at a request of the NGO failed in providing an internal review of a decision concerning access to information or public participation. However, the scope of the Aarhus Regulation is limited to public access to environmental information and public participation in planning of matters related to the environment. It does not cover the broader access to the ECJ to review EU secondary law where—as mentioned above—there is a strict and limited approach under Art. 263(4) of the TFEU.[94]

The locus standi access in respect of the environment for NGOs follows also from other EU secondary law. For example, NGOs have standing under the Environmental Liability Directive

[93] Art. 11.1.

[94] See above (n 70). The Aarhus Regulation provides only access to the courts in situations where 'internal reviews' of administrative decisions by EU institutions are insufficient. But it does not extend to 'legislative acts' by EU's legislative institutions. Art. 10 (1) of the Aarhus Regulation provides: "Any non-governmental organisation which meets the criteria set out in Art. 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act." The lawfulness of Art. 10(1), in light of the broader formulation under the Aarhus Convention, which could be interpreted to include legislative acts, has been tested by the CJEU. In *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, the General Court found that Art. 10(1) violated the Aarhus Convention and should be invalidated in order to encompass legislative acts. The ECJ overruled the General Court as the specific provision of the Aarhus Convention lacked sufficient clarity and was not unconditional in order to be directly applicable as basis for reviewing the Aarhus Regulation: Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, [2015] ECLI:EU:C:2015:5.

(ELD).[95] The ELD is limited in scope. It applies to environmental damage caused by activities under an exhaustive list of activities, and to harm to protected species and natural habitats caused by activities not mentioned in the list.[96] The ELD does "not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages."[97] The ELD recognizes the problems of protecting the environment. The preamble provides:

> *"Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Non-governmental organisations promoting environmental protection should therefore also be given the opportunity to properly contribute to the effective implementation of this Directive."*[98]

It follows from the ELD that any natural or legal person has locus standi provided they are "(a) affected or likely to be affected by environmental damage or (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition"[99] The locus standi requirements are that the claimant has 'sufficient interest in environmental decision-making' or there is 'impairment of rights'. NGOs have rights to standing in both situations.

The question is whether the locus standi elements of the directive is applicable to climate change. The ELD does not apply to damage caused by "a natural phenomenon of exceptional, inevitable and irresistible character".[100] That has led some commentators to suggest that the actual damage related to climate change is a result of the extreme weather phenomena, i.e. a natural phenomenon, whereas the trigger of the extreme weather phenomena is caused by anthropogenic GHG emissions.[101] However, some fields concerning climate change are covered by the ELD. The

[95] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143, 30.4.2004, p. 56–75
[96] Art. 3.1 of the ELD
[97] Recital 14 of the Preamble.
[98] Recital 25 of the Preamble
[99] Art. 12
[100] Art. 4.1(b).
[101] See e.g. Vanesa Vujanić 'Climate Change Litigation and EU Environmental Liability Directive' [2011] Zbornik radova Pravnog fakulteta u Splitu, god. 48, 1/2011. 135-164, 150.

preamble of one of the amendment directives which also introduces the rules the geological storage of carbon dioxide directive, provides:[102]

> "Provisions are required concerning liability for damage to the local environment and the climate, resulting from any failure of permanent containment of CO2."[103]

That recital seems to suggest that – at least in respect of containment of CO2 – that the ELD applies to damage caused by storage facilities of CO2. In that respect, it can be argued that the locus standi rules of the ELD applies also to claims against such storage facilities. However, the recital is limited to the liability of storage facilities. It does not concern more general aspect of climate harm, like the GHG emissions from producers or the measures taken by governments to mitigate and adapt to the climate problem. Other EU secondary law also makes a connection between 'environmental protection' and 'climate protection',[104] which from a systemic approach should imply that the locus standi rights of NGOs in environmental cases should be extended to general harm of the environment caused by anthropogenic GHG emissions.

It is noteworthy that 'rights'-based claims to a clean environment are not covered by these EU secondary laws. There have been several cases at national level where NGOs have made human rights claims. Some jurisdictions do not allow locus standi for NGOs concerning either constitutional rights or rights under the ECHR. Such rejection can be based on law or constitutional limitations,[105] whereas other jurisdictions provide standing for rights-based claims of NGOs, including—as mentioned above—the ECtHR.[106] A human rights-based claim may indirectly protect the environment if a state must improve its climate policies. Furthermore, some environmental harm caused by climate change may also impact on the rights of the individual. For

[102] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ L 140, 5.6.2009, p. 114–135

[103] Recital 30.

[104] See e.g. Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC OJ L 197, 24.7.2012, p. 1–37, which includes substances that also can be categorized as GHG.

[105] See e.g. rejection of standing for Friends of the Irish Environment by the Irish Supreme Court in *Friends of the Irish Environment v the Government of Ireland,* judgment of 31st July 2020 (Appeal No: 205/19).

[106] See e.g. the successful claim against the state by the Urgenda Foundation in *The State of the Netherlands v. Urenda,* judgment of the Hoge Raad (Supreme Court) of 20th December 2019, (19/00135). For the ECtHR: *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024)

example, a wildfire causing severe environmental damage may force human beings to migrate from the affected areas and may be an impairment of the right to private and family life. Thus, the environment may get an indirect voice through human rights where NGOs may act in court on behalf of potentially affected individuals.

Locus standi and future generations

Climate change has a forward price to be paid in the future. Governments' current climate policies can be measured up against scientific estimates of climate harm. These future estimates become also central in climate litigation. For example, in the Austrian case, *Children of Austria*, the claimants, who consisted of present, younger generations, claimed that the burden of climate change would impact them harder in the future. Thus, there would not be equality under the law, as younger (and for the sake of argument for this article: future) generations would have to carry the burden of stronger legal restrictions to cope with climate change compared to present time. The Constitutional Court of Austria dismissed the case as the scope of the motion was too narrow.[107] Similarly in the German case *Neubauer et al. v Germany*,[108] the claimants, who were all very young, did not make a claim of rights of future generations, but one about the price of climate change for them in the future. The case also addressed locus standi. The Court stated:

> "The described risk of future restrictions on freedom gives rise to fundamental rights being presently affected because this risk is built into the current legislation (…) Since future impairments of fundamental rights could potentially be set into irreversible motion today, and given that lodging a constitutional complaint to address the ensuing restrictions on freedom might be futile by the time the impairments have arisen, the complainants already have standing to lodge a constitutional complaint at the present time."[109]

Where these cases concerned a living generation, the question is whether future generations have rights under climate change law. There is scientific support for the intergenerational, socio-economic challenges in the future: The IPCC predicts: "Climate change is a threat to human well-being and planetary health (very high confidence)."[110] Furthermore, the IPCC has stated:

[107] Decision by the Constitutional Court of Austria, *Children of Austria*, 123/2023-12, June 27, 2023.
[108] *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (24 March 2021).
[109] Para. 130
[110] IPCC, AR6 Synthesis Report, Climate Change 2023, Summary for Policy Makers, C.1, p. 24.

> "Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and wellbeing of current and future generations (high confidence)."[111]

In *Neubauer et al. v Germany,*[112] the Court expressed some concerns about future generations: The locus standi issues in respect of claims of future concerns must be seen in context of the German Supreme Court's substantial analysis of 'rights' under German constitutional law. The Court stated in that respect:

> "The state's duty of protection (…)is also oriented towards the future (…). The duty to afford protection against risks to life and health can also establish a duty to protect future generations (…). This is all the more applicable where irreversible processes are at stake. However, this duty to afford intergenerational protection has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present"[113]

The Court states that future generations do not have fundamental rights yet. However, there is 'a duty to protect future generations.' That 'duty' has some support in international law. The Universal Declaration of Human Rights provides in the preamble:[114]

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"

There is debate in literature whether the inherent dignity (…) of all members of the human family' has an intergenerational dimension of rights. Not only from a moral perspective, but also from legal perspective.[115] There is at UN level progress towards a Declaration on Future Generations

[111] Ibid, C.1.3, p. 24
[112] *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (24 March 2021).
[113] Para. 146.
[114] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
[115] Anthony D'Amato 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' [1990] The American Journal of International Law 190; Lothar Gündling 'Our Responsibility to Future Generations' [1990] The American Journal of International Law 207; Edith Brown Weiss 'Our Rights and Obligations to Future Generations for the Environment' [1990] The American Journal of International Law 198.

by the UN General Assembly.[116] In its current (unfinished) draft, the Declaration provides inter alia that the States:

> "Recognizing that the decisions, actions, and inactions of present generations, have an intergenerational multiplier effect, and therefore resolving to ensure that present generations act with responsibility towards safeguarding the needs and interests of future generations"[117]

In international climate change treaty law, Art. 3(1) of the UNFCCC provides:

> "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."

The Paris Agreement provides in the preamble:

> "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights (…)and intergenerational equity,"

Thus, there are traces in the legal landscape of international law of rights of future generations *in abstracto.* In EU climate law, there are also potential openings to have legal basis to take account of future generations. The Climate Law provides in the preamble: "*The existential threat posed by climate change requires enhanced ambition and increased climate action by the Union and the Member States.*"[118] The Climate Law further provides temporal aspects: "*The Union should continue its climate action and international climate leadership after 2050, in order to protect people and the planet against the threat of dangerous climate change*".[119] The Deforestation Regulation also has a temporal dimension. It provides in the preamble: "*Climate change,*

[116] A/77/L.109, Seventy-seventh session, Agenda item 126, Strengthening of the United Nations system, Draft decision submitted by the President of the General Assembly, Scope of the Summit of the Future, 30 August 2023
[117] Draft UN Declaration on Future Generations Rev. 3: https://www.un.org/sites/un2.un.org/files/sotf-declaration-on-future-generations-rev3.pdf
[118] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, p. 1–17, recital 1.
[119] Recital 17.

biodiversity loss and deforestation are concerns of the highest global importance, affecting the survival of humanity and sustained living conditions on Earth."[120] However, these openings of concern of future generations are only vague and may not pass the locus standi test of 'legal concern' which requires a connection between the claimant and a potential legal right or obligation where a vague legal language may only be aspirational and not legally binding.

The law related to future generations does not answer the question of locus standi and representation. Can a potential parent have standing for a potential future child? Or can an NGO have locus standi to represent future generations? Can they meet locus standi conditions? As mentioned above, there are different locus standi requirements in that respect, and it can be asked: is a non-existing person directly affected by governmental climate polices?

However, some guidance may be taken from the ECtHR. In *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*,[121] the ECtHR addressed issues of future generations. In line with its case law, it stated that the ECHR applies to "individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party". However, it then moved into issues related to future generations in the context of climate change:

> "[i]t is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (…) and that (… they have no possibility of participating in the relevant current decision-making processes. (…) In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes,(…) adding justification for the possibility of judicial review."[122]

The ECtHR further stated:

> "Moreover, in order for [effective climate measures] to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and

[120] Recital 6
[121] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR 9 April 2024), paras 590-640.
[122] Para. 420

> adequate intermediate reduction goals must be set for the period leading to net neutrality."[123]

These impacts on future generations make climate change cases different from traditional cases. Thus, even though a non-existing individual cannot claim rights directly under the ECHR, the burden carried by future generations resulting from climate change must be considered in the national climate policies. It is also in these lines, that the ECtHR accepts a wider access of NGOs to claim justice due to "the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context."[124]

With the above-mentioned locus standi conditions for NGOs under Art. 34 of the ECHR, there can be representation of *current and future generations* in cases concerning human rights before the ECtHR.. Similarly, cases under Art. 6 can provide basis for NGOs to make claims about insufficient governmental climate policies affecting current and future generations.

It is more problematic for a potential future parent to have locus standi for a potential future child. Following the case law of the ECtHR, the access of individuals has a high threshold of high intensity concerning the exposure to climate change and a pressing need of securing the protection of the individual. These conditions must be met by the 'potential parent'. The protection of a future child can only be indirect as the potential future child is not exposed to climate change at the time of the case. However, the question is how will the ECtHR approach the question if the case concerns a pregnant woman, where there is a fetus? Will the fetus in that respect have rights (legal concern) in relation to climate change that can be presented by the pregnant woman independently of the pregnant woman's own rights? That question has not been addressed, and it opens a range of legal and ethical questions. However, the ECtHR has stated that under Art. 2 of the ECHR, an unborn child is not a person directly protected by Art. 2 and that "*if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child*."[125] The question is whether future impact of climate change can be seen as such circumstances. And the ECtHR will have to clarify its locus standi approach if the

[123] Para. 549.
[124] Para. 499
[125] *VO v France* App no 53924/00 (ECtHR 8 July 2004) para. 80

pregnant woman represents the unborn child, and not herself. Would that lower the locus standi requirements as the threat is not imminent but may harm the unborn child in the future?

Concluding remarks

The rule of law is essential in climate litigation. When governments do not act with sufficient diligence and pace with effective climate policies to combat climate change, individuals and NGOs resort to the courts. Individuals and NGOs make claims under human rights law, public law, constitutional law etc. The courts find themselves with questions about the link between a government's climate policies and the harm or impairment of rights following these policies. Science plays a crucial role in that respect. In addition, the courts must draw the line between law and politics, and not step into the role of legislator. Some of these questions form overall considerations for the specific locus standi elements where courts ask whether the claimant is directly affected, and/or individually affected, and whether there is a potential legal basis. These questions are naturally important from a rule of law perspective: the court is there to protect the supremacy of law which also implies that the protection by the law is afforded to governments. The potential legal basis must be present and there must be the potential connection to harm or impairment of rights of the claimant. Therefore, courts in general do not allow locus standi for claims that are *actio popularis*.

With the recent case law of the ECtHR, the legal basis has been clarified: the ECHR applies to situations where governments have insufficient climate policies. The implication for locus standi is that courts in Europe cannot dismiss human rights claim with reference to lack of legal basis in the ECHR unless the claimant refers to a provision of the ECHR that—from an initial locus standi assessment—is completely unrelated to climate change. A dismissal may instead come from the lack of direct and individual concern of the claimant. However, the ECtHR has clarified that the locus standi of NGOs have become easier in climate cases, and that the threshold of the individuals is high. It is not clear what effect the locus standi approach by the ECtHR in climate cases will have in the EU. However, the ECJ applies the principles of the ECHR and interprets the Charter of the EU in that light. That might also affect locus standi questions related to climate change in the EU—at least in respect of cases under Art. 267 of the TFEU. The ECJ has continued the strict locus standi approach after Art. 263(4) of the TFEU in respect of claims by individuals against the EU climate policies.

As climate change has opened for various groups new legal issues, the article addresses two special locus standi issues in relation to climate change. The first challenge concerns the impact on the environment from climate change. The ’environment’ needs a voice to make its case where NGOs can play an important role. NGOs have already some locus standi rights under international and EU law. However, that requires that the climate change problems can be connected to environmental harm. That is where science—as mentioned above—has an important role, and it can be argued that NGOs should have locus standi in some environmental cases where there is risk of, or actual, climate harm to the environment.

The second challenge concerns the effect of climate change to future generations. They do not have direct rights under the law. However, several international law instruments refer to the protection of future generations, and if NGOs act on behalf of future generations, the ECtHR and some national courts include the protection of future generations in their assessments. Based on scientific estimates, if governments do not act with urgency in their climate policies, future generations will be directly affected in the future. When NGOs make cases on behalf of living generations, assuming they meet the locus standi conditions, they indirectly protect future generations. It remains unclear how the situation is for an unborn child and whether a pregnant woman has locus standi to represent the unborn child. The question of ‘who’ can have access to justice due to climate change is complex and will continue to put pressure on courts in future climate cases.