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Public Interest Litigation in the Netherlands
A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts

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1. Introduction

Dutch civil courts have over the past few years found themselves confronted with a number of conspicuous public interest-related civil claims aimed at promoting environmental interests both at home and abroad. An example are the civil liability procedures against the multinational oil company Shell that were initiated in 2008 and 2009 by Nigerian farmers and the Dutch NGO *Milieudefensie* in order to address the harmful consequences of oil spills in the Nigerian Niger Delta. Another example are the civil actions brought by Dutch environmental organizations against local authorities with a view to enforcing measures for improving ambient air quality.[1] More recently, in November 2013, the Dutch NGO *Urgenda* filed a civil liability procedure against the Dutch Government for its alleged failure, in light of the international concern and debate over climate change and the international agreements reached in this respect, to implement adequate policies for reducing the Dutch level of CO2 emissions.[2]

The cases mentioned here were all initiated by (environmental) NGOs in an attempt to influence governmental policies and/or corporate practices that they considered to have a negative impact on the environment. Other features that these cases have in common include their future-oriented nature, the fact that they concern interests broader than the private interests of the parties involved, their focus on ideal (rather than material) interests and their strong orientation towards changing a societal status quo considered to be undesirable. This particular combination of features renders these cases clear contemporary examples of public interest litigation (or: public law litigation) before the Dutch courts.[3]

In this article, we will focus on environmental organizations using administrative or civil litigation as a strategy to promote public interests such as the protection of the environment. This topic is highly relevant in light of the Aarhus Convention and several EU Directives, such as Directive 85/337/EEC,

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1 District Court (*Rechtbank*, Rb.) Utrecht 22 November 2006, *AB* 2007/171, note Ch.W. Backes; Court of Appeal (*Gerechtshof*) Amsterdam, 9 December 2008, *NJF* 2009/91.

2 The complaint filed in this case is available in Dutch on the *Urgenda* website: <http://www.urgenda.nl/documents/DagvaardingKlimaatzaak19-11-13.pdf> (last visited 12 June 2014).

3 See, in more detail for example: A. Chayes, 'The role of the judge in public law litigation', 1976 *Harvard Law Review* 89, pp. 1281-1316; S.L. Cummings & D.L. Rhode, 'Public interest litigation: Insights from theory and practice', 2009 *Fordham Urban Law Journal* 36, pp. 603-651. See also, more recently: L. Enneking & E.R. De Jong, 'Regulering van onzekere risico's via *public interest litigation*?', 2014 *Nederlands Juristenblad*, no. 23, pp. 1542-1551.

which seek to guarantee broad access to justice in environmental matters, not only for individuals but also for special interest groups. In the *Trianel* case,[4] the European Court of Justice added fuel to the debate concerning the legal standing of environmental organizations by ruling that national legislation that does not permit environmental organizations to rely before the courts on an infringement of a rule protecting the interest of the general public only (and not the interests of individuals), is precluded.[5]

In the Netherlands, public interest organizations, including environmental pressure groups, have extensive access to justice, which makes the Dutch legal system an example for other Member States of the European Union in this respect. Still, also in the Netherlands the access to justice for NGOs remains a topic of ongoing debate, the question being not so much whether NGOs should have access to justice, but rather which court should have jurisdiction. The ECJ has ruled in the aforementioned *Trianel* case that 'it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction'. In the Netherlands, the administrative law system is traditionally seen as the area of the law which is best suited for dealing with public interest-related lawsuits. Public interest organizations, such as environmental pressure groups, in principle have wide access to the Dutch administrative courts in order to challenge administrative decisions.

However, over the past five years a number of developments in both legislation and case law have resulted in a more restricted access to administrative courts for environmental NGOs. It has been suggested that these developments may result in an increased reliance on public interest-related procedures before civil courts.[6] This raises the question of what position public interest-related claims such as the cases mentioned above currently have within the Dutch system of civil procedure. It also raises the question whether environmental NGOs, in view of the law as it currently stands, in practice do have the broad access to Dutch courts that is required by international obligations, and whether room for improvement should perhaps be sought in the civil law rather than the administrative law domain. These questions are particularly pertinent in view of the fact that due to globalization and the resultant enlargement of the impact radius of private actors and activities, public interest-related claims aimed at promoting international or foreign environmental interests and/or directed at corporate actors are likely to become more prevalent.

In order to address these questions, we will first discuss the possibilities and limitations of public interest litigation before the Dutch administrative courts (Section 2), followed by a discussion of the possibilities and limitations of this type of litigation before the Dutch civil courts (Section 3). Following that, we will seek to expose the bottlenecks, if any, when it comes to the access to Dutch courts for environmental NGOs seeking to bring public interest-related claims and indicate in what direction improvements may be sought (Section 4).

2. Public interest litigation before the Dutch administrative courts: possibilities and limitations

2.1. Conditions for admissibility

Administrative litigation aims at the judicial review of governmental decisions. Public interest litigation as such is not possible before the Dutch administrative courts in the sense that administrative litigation cannot be commenced merely on the initiative of the claimant. Still, public interest organizations do under certain conditions have access to administrative courts in cases where they seek to contest administrative decisions. The point of departure here is that an administrative action is only admissible if an administrative authority has published an order as defined in Article 1:3(1) *Algemene wet bestuursrecht* (General Administrative Law Act, GALA) that is subject to review by an administrative court (Article 8:1 GALA). If an interested party aims to challenge such an order, the administrative route is mandatory. If the decision does not qualify as an order, the administrative route is not available and a

4 Case C-115/09, *Trianel*, ECLI:EU:C:2011:289, Para. 43;ECJ 16 December 1976, Case 33/76, *Rewe*.

5 German legislation was considered to be incompatible with access to justice, guaranteed by the Aarhus Convention. As a consequence, the German Environmental Appeals Act has been changed.

6 See, for instance: E. Bauw, *Groene Serie Onrechtmatige Daad, regeling Boek 6 BW*, note 25 (last edited 31 March 2013).

tort action may be initiated before a civil court. Some types of administrative decisions, most notably generally binding regulations and policy rules, are specifically excluded from appeal to an administrative court.[7] In those cases, civil litigation may also be relied upon by those seeking to challenge the rule in question.

Access to the administrative courts is limited further by Article 8:1 GALA, which stipulates that only interested parties may appeal to an administrative court. As follows from Article 1:2(1) GALA, an 'interested party' means a person whose interests are directly affected by an administrative decision. Under Article 1:2(3) GALA, legal entities may qualify as an interested party if the general or collective interests that they particularly represent are affected by an administrative decision.[8] Accordingly, public interest organizations do have access to an administrative court when the interests they represent are directly affected by an administrative decision. The actual representation of general interests should appear from the statutory objectives and from the activities undertaken by the organization.

In 2008, the Council of State in a series of judgments tightened up the conditions for public interest organizations' access to administrative courts. It held that the general or collective interests set out in the statutory objectives of the organization should not be too vaguely defined. Furthermore, the Council also held that the public interest organization should undertake activities other than litigation to represent the general interest as defined in the statutory objectives (for example, conducting research or informing the public), and not focus only on litigation.[9] In a number of cases, the Council of State held that the statutory objectives of the organizations involved were so wide-ranging that they were insufficiently distinctive to constitute a 'directly affected interest' as required under Article 1:2(3) GALA. Looking at the functional and geographical restrictions of the organizations' statutory objectives, the Council held that the objectives and activities undertaken by an organization should be restricted to a particular geographical area. An objective such as 'the pursuit of a sustainable environment for all living creatures in the Netherlands and beyond', for example, was held to be insufficiently distinctive.[10]

Despite the limitations inherent in the administrative procedure (which is only open for actions seeking to challenge certain administrative decisions by interested parties) and the restrictions that have been set by the Council of State, the overall picture is that public interest organizations have wide access to Dutch administrative courts in order to challenge administrative decisions. Unlike in a number of other legal systems,[11] under the Dutch rules of administrative procedure they are not subject to strict requirements regarding, for instance, official registration, a minimum number of members or proven expertise. It is therefore perhaps no surprise that under the GALA environmental public interest litigation has increased tremendously in the Dutch administrative courts. One may safely say that environmental organizations use the Dutch administrative law system as a strategy to protect the environment. Environmental organizations have been allowed to challenge a wide variety of administrative decisions, including permits for activities affecting the environment, such as combustion plants or intensive cattle farming, route decisions for railways or motorways, and land use plans allowing industrial parks. Environmental organizations are not required to represent those living in the vicinity of the 'polluting' activities in order to have standing. It is sufficient to demonstrate that the environmental interests they represent according to their statutory objectives will be affected. However, since the codification of the relativity principle in Article 8:69a GALA, an additional condition is set: environmental organizations should make it plausible that the violated norm seeks to protect the environmental interests they represent. The relativity principle

7 See Art. 8:3(1) GALA: generally binding regulations or policy rules are not subject to review. For more information on the system of Dutch administrative litigation, see M. Van Hooijdonk & P. Eijsvoogel, *Litigation in the Netherlands. Civil procedure, arbitration administrative litigation*, 2012, Chapter 3.

8 Art. 1:2(3) GALA reads as follows: 'as regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities'.

9 Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, ABRS) 1 October 2008, *AB* 2008/348, note Michiels (*Stichting Openbare Ruimte*); Vz. ABRS 31 March 2011, *AB* 2011/160, note Damen (*Moordrechtse Milieuvereniging)*; ABRS 15 February 2012, *AB* 2012/81, note Damen *(De Woudreus)*.

10 ABRS 1 October 2008, *AB* 2008/348, note Michiels (*Stichting Openbare Ruimte*); ABRS 15 October 2008, *AB* 2008/349, note Michiels; See L.J.A. Damen et al., *Bestuursrecht 1*, 2013, no. 274-283.

11 See for instance ECJ C-263/08, ECLI:EU:C:2009:631.

will not restrict the organizational standing as such, but will constitute a restriction with regard to the grounds of appeal that may be invoked.[12]

The legislator has included organizational standing in Article 1:2(3) GALA in order to ascertain that all relevant interests are represented before the court.[13] Obviously, operators or inhabitants whose business interests and private interests are directly involved will be able to challenge an administrative decision. However, the competent authority should weigh all the relevant interests in the decision-making process, including voiceless natural interests and environmental interests.[14] Article 1:2(3) GALA enables environmental organizations to give voice to animals, nature and the natural environment in judicial review proceedings before administrative courts. As De Schutter noted: 'The absence of sufficiently directly and individually affected interests should not constitute an obstacle for the exercise of judicial review, as otherwise, the most widespread or diffuse violations (especially when they are hardly noticeable by individuals) would be the most immune from control by judiciary.'[15]

2.2. The right to submit a request for the enforcement of environmental regulations

The right to challenge administrative decisions provides environmental organizations with yet another possibility for 'defending' environmental interests, albeit in a more indirect way: the right to require the competent authority to act against violations of environmental regulations by others. An interested party has the right to submit a request for the enforcement of environmental regulations. The authorities are obliged to respond to the request for enforcement. If the competent authority grants the request, an administrative decision that enforcement action is to be taken will be adopted.[16] If the request is denied, the competent authority will take a negative decision, refusing to impose sanctions on the offender. An action against such a clear negative decision will also be admissible, opening the gates of administrative litigation to environmental organizations seeking to challenge the environmental impacts of the activities of others. There is one essential disadvantage, however: it is not the offender but the administrative authorities which are addressed, in order to persuade these authorities to exercise their powers. This is considered to be an indirect way of denouncing environmental violations.

In this respect it is interesting that the Environmental Liability Directive[17] explicitly codifies the right of NGOs to request action and invoke a legal review of inaction.[18] Non-governmental organizations promoting environmental protection have a right to require the competent authorities to act against operators of installations causing environmental damage. To this end, they have to submit to the authorities their observations with reasonable supporting evidence. The competent authorities are obliged to respond to the request for action. Should the authorities refuse to act, and should the individual or NGO concerned consider that this refusal is illegal, they can start judicial review proceedings before a court. If they are successful, the court will order the competent authorities to demand action from the offender. These provisions enable environmental organizations to be a thorn in the side of inactive administrative authorities. This role of environmental organizations is considered to be crucial to ensure compliance with environmental regulations.

However, in the Netherlands, environmental organizations do not only have the right to require the administrative authority to enforce environmental regulations; they can also initiate a civil action directly against the offender. A violation of administrative regulations may under certain circumstances constitute a tort. The Supreme Court of the Netherlands has explicitly allowed environmental organizations to initiate tort actions in order to defend the interests they particularly represent according

12 See B. Schueler, 'Het gaat u om iets anders. Het relativiteitsvereiste toegepast', in A.A.J. de Gier et al. (eds.), *Goed verdedigbaar (Van Buuren-bundel)*, 2011, pp. 159-174.

13 M. Scheltema, 'Het beroepsrecht van organisaties die voor het algemeen belang opkomen. Wensen voor een goede vormgeving van deze zelfstandige actie', in A.A.J. de Gier et al. (eds.), *Goed verdedigbaar (Van Buuren-bundel)*, 2011, pp. 149-157.

14 Art. 3:2 GALA.

15 O. De Schutter, 'Public Interest litigation before the European Court of Justice', 2006 *Maastricht J. Euro. & Comp. L.*, no. 1, pp. 9-11.

16 Art. 5:24 GALA.

17 Directive 2004/35/EC 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, 30.04.2004, pp. 56-75.

18 G. Winter et al., 'Weighing up the EC Environmental Liability Directive', 2008 *Journal of Environmental Law* 20, no. 2, pp. 171-172.

to their statutory objectives.[19] Instead of or in addition to administrative litigation against the inactive competent authorities, environmental organizations may therefore use civil litigation as a strategy to address offenders directly.[20]

Still, it seems that public interest organizations prefer administrative litigation against administrative authorities over civil litigation against the private companies causing environmental damage. This can be explained by the characteristics of the Dutch system concerning administrative appeal procedures. In the GALA, appeal proceedings are designed to be quite accessible, guaranteeing all citizens affordable access to the administrative court. For instance, all parties are allowed to represent themselves and professional representation by an attorney is not mandatory. Although the time period for lodging an appeal is rather short, no strict demands are made on the contents of a notice of appeal. Furthermore, the court is supposed to be proactive in view of the public nature of the interests that are typically at stake, and to this end has broad investigatory powers.[21]

2.3. Limits to the possibilities of administrative litigation

Although the active use by environmental organizations of the possibilities offered by Dutch administrative law in order to promote environmental interests may be seen as an example of 'participatory democracy' and 'active citizenship', there are certain limits as to what can be achieved through administrative litigation.

Firstly, in administrative litigation, interested parties may in principle request the annulment of a contested order. In the field of environmental law, however, administrative authorities often have wide discretionary powers. The doctrine of separation of powers (*Trias Politica*) implies that courts should respect this discretion, meaning that the judicial review of the order is often limited by the principle of proportionality. Article 3:4(2) GALA stipulates that the adverse consequences of an order may not be disproportionate to the purposes to be served by the order. As a consequence, the court's review is often limited to the question whether the administrative authority could reasonably have reached the disputed decision. Furthermore, the doctrine of separation of powers also implies that the court is not entitled to order the national legislature to amend national legislation.

Secondly, it is doubtful whether foreign organizations have standing before the Dutch administrative courts. Although no additional requirements apply, it will be more difficult for foreign organizations to meet the conditions of Article 1:2(3) GALA. In particular the requirements that pertain to the functional and geographical restrictions of the statutory objectives will constitute an obstacle for foreign organizations. Thirdly, in the Dutch administrative law system, the scope of the appeal is limited to a judicial review of the disputed order.[22] Under the GALA legal protection is strongly focused on orders. Consequently, only issues arising from orders issued by administrative authorities may be submitted to the administrative court.[23] It is not possible to challenge acts of administrative authorities other than orders, or acts of other persons or legal entities. In those cases only civil litigation is available. It is not possible, for instance, to lodge an appeal against an order containing a generally binding regulation or a policy rule. It is important to note in this regard that, in Dutch environmental law, generally binding regulations addressing operators of installations directly are in many cases preferred over a system of licensing. Such generally binding regulations may set out a range of emission limit values, conditions under which an industrial activity may be carried out, or other requirements aimed at the prevention or reduction of the emission of polluting substances.

An example is the Environmental Activities Decree (*Activiteitenbesluit*), which is based on the Environmental Management Act (*Wet milieubeheer*) and contains requirements for a wide variety of activities conducted within installations.[24] Operators of installations are expected to comply with these generally binding rules, meaning also that the requirements incorporated in the Environmental Activities

19 Supreme Court (*Hoge Raad*, HR) 27 June 1986, *AB* 1987/743, NJ 1987/743; HR 18 December 1992, *AB* 1994/396, *NJ* 1994/139.
20 HR 17 September 1992, *NJ* 1983/278.
21 Y. Schuurmans, *Bewijslastverdeling in het bestuursrecht*, dissertation Leiden University, 2005, pp. 38-41.
22 Although a party may claim damages if the disputed decision is annulled (Art. 8.88 GALA).
23 T. Barkhuysen et al., 'The law on administrative procedures in the Netherlands', 2012 *NALL*, April-June, p. 15.
24 *Staatsblad* 2007, 415.

Decree are no longer included in an environmental permit. If an interested party wishes to challenge the requirements in the Environmental Activities Decree, the gates to administrative litigation are closed, since generally binding regulations are not subject to judicial review by an administrative court. Only civil action based on tort is available.

An environmental organization may be of the opinion that the emission limit values set out in the Environmental Activities Decree are not based on the Best Available Techniques, as required in Article 8.40 Environmental Management Act. In cases where emission limit values are included in an environmental permit, environmental organizations may appeal to the administrative court. In the past, they have indeed successfully challenged environmental permits, stating that the permit conditions were not based on the best available techniques.[25] However, in cases where an individual permit is no longer required, environmental organizations can now only initiate a tort action before a civil court in order to challenge the emission limit values set out in the Environmental Activities Decree.

An example of such a tort action is the case where an environmental organization tried to force the local government to take appropriate measures in order to improve the ambient air quality in Utrecht. The environmental organization stated that the measures the municipality had adopted in the Air Quality Plan were insufficient to attain the limit values set out in Directive 1999/30/EC.[26] The district court ruled that individuals may indeed enforce compliance with these air quality standards by initiating a tort action before a civil court. In this specific case, however, local authorities had already established action plans, including measures aimed at achieving the European air quality standards. Since authorities have a wide discretion in the choice of measures, the district court ruled that the municipality could reasonably be considered to have adopted adequate measures.[27] However, the discretion with regard to the content of an Air Quality Plan is not unlimited. A general condition is that the selected measures must be effective and the implementation of the measures must be guaranteed.[28]

On appeal, the environmental organization claimed that the adopted action plans were not effective and that the proposed measures were not implemented adequately. The Court of Appeal of Amsterdam required the municipality to provide information on the actual reduction of the emissions of polluting substances.[29] Backes has pointed out that in this case, the court eventually required an expert report. Unfortunately, the expenses of such an expert report forced the environmental organization to withdraw.[30]

2.4. From administrative to civil litigation?

The developments and examples described here raise the question whether civil litigation may under certain circumstances be an appropriate (or sometimes even a necessary) way to resolve disputes over the protection of environmental interests that are in many cases in essence administrative disputes. However, in comparison to administrative proceedings, which are designed to guarantee all citizens easy and affordable access to the administrative courts, civil proceedings are generally considered to be quite lengthy, expensive and burdensome. At the same time, the civil procedure is traditionally seen as bipolar, focused on resolving disputes between the private – financially valuable – interests of the two private parties involved, and as such is not particularly suitable for dealing with cases aimed at protecting public interests. Still, the (increasing) restrictions inherent in the administrative procedure and thus in the access to administrative courts for environmental organizations seeking to promote environmental interests through public interest-related claims, in combination with the (increasing?) incidence of similar claims before the Dutch civil courts, warrant a further look at the place that such litigation may have within the Dutch system of civil procedure.

25 See for instance ABRS 21 December 2007, *AB* 2008/240; ABRS 27 August 2008, no. 200707487/1.

26 Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.06.1999, pp. 41-60, replaced by Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.06.2008, pp. 1-44.

27 Rb. Utrecht 22 November 2006, *AB* 2007/171, note Ch.W. Backes. See also ECJ 25 July 2008, Case C-237/07, *Janecek*.

28 See M. Boeve & G.M. van den Broek, 'The Programmatic Approach: A Flexible and Complex Tool to Achieve Environmental Quality Standards', 2012 *Utrecht Law Review* 8, no. 3, pp. 74-85.

29 *Gerechtshof* Amsterdam, 9 December 2008, *NJF* 2009/91.

30 Ch.W. Backes, 'Als wij maar een goede plan hebben! De programmatische aanpak in het omgevingsrecht – verhoging van de efficiëntie van het beleid of uitkleding van de rechtsbescherming?', in A.A.J. de Gier et al. (eds.), *Goed verdedigbaar (Van Buuren-bundel)*, 2011, pp. 223-242.

3. Public interest litigation before the Dutch civil courts: possibilities and limitations

3.1. Public interest-related civil claims

In the literature on Dutch civil procedural law, it has been recognized that one of the most important tendencies over the past century has been the increase in 'collective actions' pursued before the Dutch civil courts by a growing number of private law and public law interest groups in the Netherlands.[31] These collective actions encompass two related but distinct types of actions: group actions and public interest actions (the latter are sometimes referred to as '*algemeenbelangacties*'). In group actions, the persons whose interests are sought to be promoted can be individualized. In public interest actions, by contrast, this is not possible since the interests at stake are of such a general nature that they concern many or potentially all members of society.[32] It is these public interest actions that fall within the category of cases that are described in this article as public interest litigation, or, more specifically, public interest-related claims aimed at protecting environmental interests.

Over the past few decades, Dutch civil courts have on various occasions been confronted with public interest actions. A well-known example is a case in which a number of environmental organizations sued the city council of Amsterdam in pursuit of a judicial prohibition of the unlicensed dumping of (polluted) dredging from the Amsterdam canals into a nature reserve outside Amsterdam.[33] Another famous example is an action against the Dutch Government by a Dutch foundation that in its pursuit of a ban on cruise missiles sought, among other things, an injunction prohibiting the placement of such missiles on Dutch territory.[34]A further high-profile public interest action was brought against the Dutch Government by a number of Dutch women's rights organizations in relation to the fact that one of the religion-oriented Dutch political parties did not allow women to obtain full membership rights.[35]

Public interest actions have been pursued before the Dutch civil courts not only against public bodies, but also against private defendants, usually corporations. An example of a public interest-related civil procedure that targeted a private corporation is the aforementioned case against Shell brought by Nigerian farmers and the Dutch NGO *Milieudefensie*. Another example is the civil action by two animal welfare organizations against a well-known Dutch snack producer in pursuit of an injunction prohibiting the sale of snacks containing the meat of castrated pigs.[36] Similarly, the Dutch Consumers' Association (*Consumentenbond*) has on various occasions sought to initiate public interest actions against corporate actors in order to promote consumers' rights.[37]

It should be noted that although the great majority of the public interest actions pursued before the Dutch civil courts so far have involved the promotion of national public interests, these actions may also revolve around the protection of international or foreign interests. This is exemplified by cases like the action filed by *Urgenda* against the Dutch Government in relation to climate change and the aforementioned case against Shell, in which the interests sought to be protected were located partly (in the climate change case) or entirely (in the *Dutch Shell Nigeria* case) outside of the Netherlands. It should be noted in this respect that The Hague District Court explicitly held in its judgment in the *Dutch Shell* case that the fact that a public interest action involves a 'purely local' interest (i.e., an interest that is entirely located outside of the Netherlands) does not mean that it cannot be pursued before a Dutch civil court.[38]

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31 See: H.J. Snijders et al., *Nederlands Burgerlijk Procesrecht*, 2007, pp. 2, 81-82; W. Hugenholz & W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, 2012, p. 33; *Groene Serie Vermogensrecht, artikel 305a Boek 3 BW* (hereinafter: *GS 3:305a BW*), Para. 2.

32 See: *GS 3:305a BW*, supra note 31, Para. 8.

33 HR 17 June 1986, *NJ* 1987/743 (*De Nieuwe Meer*).

34 HR 10 March 1989, *NJ* 1991/248.

35 *Gerechtshof* Den Haag 20 December 2007, *NJ* 2008/133.

36 Rb. Breda 15 August 2012, *NJF* 2012/451 (*Stichting Varkens in Nood, Stichting Dierenrecht/Ad van Geloven BV*).

37 For instance: HR 2 September 1994, *NJ* 1995/369 (*Nuts*); Rb. Utrecht (pres.) 31 March 2001, *KG* 2001/154 (*Consumentenbond c.s./ VVMC*); Rb. Alkmaar 12 December 2002, *NJ* 2003/68 (*Legionella*) (claim not admissible).

38 Rb. The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9845 (*re oil spill near Goi*), Para. 4.13, ECLI:NL:RBDHA:2013:BY9850 (*re oil spill near Oruma*), ECLI:NL:RBDHA:2013:BY9854 (*re oil spills near Ikot Ada Udo*).

3.2. Conditions for admissibility

In response to the increasing popularity of collective actions and a growing need for clarity surrounding the conditions under which such actions could be brought before the Dutch civil courts, in 1994 a separate provision was introduced into the Dutch Civil Code (DCC) (*Burgerlijk Wetboek*) dealing with collective actions (including both group and public interest actions): Article 3:305a DCC. This provision, which incorporated the admissibility criteria for such actions developed in the case law prior to 1994, grants a right of action to certain foundations or associations that seek to promote the comparable interests of other persons through civil law claims.[39] As such, it forms the access gateway that largely determines the feasibility of bringing public interest-related civil claims before the Dutch courts. The provision's main objectives are to ensure a more effective or a more efficient legal protection of the collective interests involved as well as a reduction in the number of claims being brought before the courts.[40]

According to Article 3:305a DCC, there are three basic conditions that need to be met in order for a collective action (or, more specifically: a public interest action) to be admissible. Firstly, the organization initiating the action has to be a foundation or association with full legal capacity. Secondly, it must be clear from the articles of the foundation or the constitution of the association and from the activities it employs that (part of) its institutional objective is the promotion of the interests it seeks to further through the collective action. It should be noted that civil courts will generally be lenient when interpreting organizations' articles of association in this context, particularly if the pursuit of the action is likely to further the provision's main objectives of more effective and efficient legal protection and a reduction of claims.[41] And, thirdly, the interests sought to be promoted must be analogous so as to be suitable for promotion through the collective action.[42]

In addition to these basic conditions, there are a number of other conditions that shape the collective action procedure in Dutch civil law. First of all, the provision inherently entails that the interests sought to be furthered by the organization initiating the action should be those of others rather than those of the organization itself. The interests involved can be financial or, as is typically the case in public interest actions, more idealistic (non-financial) in nature; they may be interests that directly affect certain (groups of) persons, but may also be interests that certain (groups of) persons concern themselves with as part of their beliefs or convictions. The fact that others in society may attach different values to the interests involved or that those interests may conflict with the beliefs and views of other groups in society does not mean that the action is not admissible, although it may have consequences for the possibility of the claim being upheld.[43]

Another condition for admissibility is the requirement that prior to resorting to legal action, the organization initiating the collective action has, in light of the circumstances involved, put sufficient effort in trying to achieve its objective through consultation with the defendant. An additional requirement is that the organization has to be capable of adequately promoting, through the collective action it seeks to pursue, the interests of those it represents.[44] This latter requirement was recently added in response to concerns over the strong increase over the past decade in collective actions initiated by ad hoc claim foundations seeking to represent the victims of events causing mass damage, in some cases with the sole purpose of maximizing gains not for the victims but for those running the organizations themselves (entrepreneurial lawyering). It allows the court to declare inadmissible a collective action by an organization with questionable motives in pursuing such an action, something that seems less likely to occur in relation to public interest actions (as those typically involve not just financial but often also idealistic objectives).[45]

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39 Art. 3:305a DCC.
40 *Kamerstukken II* 1991/92, 22486, no. 3 (MvT).
41 *GS 3:305a BW*, supra note 31, Para. 14.
42 See Art. 3:305a(1) DCC.
43 *Kamerstukken II* 1991/92, 22486, no. 3, p. 22.
44 See Art. 3:305a(2) DCC.
45 In such cases, the court may look at the extent to which the persons whose interests are sought to be promoted will actually benefit if the claim is upheld, and at the extent to which the organization has the knowledge and capabilities necessary to successfully pursue the action. See, in more detail: *Kamerstukken II* 2011/12, 33126, no. 3, pp. 4-6, 12-14.

3.3. Possible claims

The Dutch civil courts will only hear actions that fall within their subject-matter jurisdiction. In principle, this criterion is easily met; the court will assume competency over a public interest action if the claim brought before it relates to (a dispute over) private rights and interests.[46] Matters may be more complicated, however, where public interest-related civil claims against state actors (or, in administrative law terms: administrative bodies) are concerned, since a civil court will declare a claim inadmissible if it may also be brought before an administrative court (or a criminal court).[47] As a result, the admissibility of such claims is also determined by the question whether the subject matter in dispute qualifies for settlement by an administrative court, or, in other words, whether the governmental decisions and/or policies sought to be challenged through the action are suitable for administrative review according to the requirements set out in the Dutch General Administrative Law Act.

As has been discussed in Section 2, however, the Dutch administrative law system is not all-encompassing, in the sense that it leaves a number of issues that in essence fall within the public law domain to be decided by the civil courts. Examples are challenges to generally binding regulations and policy rules, an important category as there is a tendency to lay down what are essentially administrative decisions in such general rules that are not subject to appeal before an administrative court. Other important examples are challenges to actions and especially also inactions by governmental agencies that cannot be traced back to any type of administrative decision. The aforementioned *Urgenda* case, which concerned a civil claim relating to the alleged failure by the Dutch Government to take adequate regulatory measures in view of the risks of climate change, is a case in point. So is the aforementioned *Dutch Shell* case, which is concerned with the promotion of foreign environmental interests, which would in principle not fall within the ambit of decisions by Dutch administrative bodies, as those are in principle limited to activities and interests within Dutch territory.

It is important to note that the fact that a public interest-related civil claim meets the criteria for admissibility as set out above does not automatically mean that the claim will also be upheld. Accordingly, the feasibility of such claims is also to a large extent determined by the conditions connected to the substantive legal basis upon which they are brought.

The most popular basis for public interest actions before the Dutch civil courts has so far been the Dutch Civil Code's general provision on non-contractual liability (*onrechtmatige daad*), Article 6:162 DCC.[48] This provision lays down a rule of fault liability on the basis of which both natural and legal persons can be held liable for their own intentional or negligent conduct. The requirements for tortious liability on this basis include a wrongful act or omission, imputability, causation and damage. The wrongful conduct may consist of the (impending) violation of a right and/or an (impending) act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct (i.e., a duty of care).[49] Article 6:163 DCC adds the condition of 'relativity', which requires that the standard (under threat of being) breached serves to protect against damage such as that suffered by the person sustaining the loss.[50]

The general wording of Article 6:162 DCC allows the plaintiffs in public interest-related civil claims to ask the court to review perceived violations, whether past or impending, of a wide array of written and unwritten norms. The exact way in which the claim is given shape is of course dependent on the circumstances of each case, and in particular the question of what corporate practices or governmental policies those bringing the claim seek to address and/or influence. It is important to note in this respect that courts are likely to be more reticent when assessing, on this basis, the alleged unlawfulness of acts and omissions by governmental rather than by corporate (private) actors. At the same time, however, when assessing whether or not a governmental actor has acted with due care, they will in some cases apply higher standards than would be the case in claims against private actors.[51]

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46 Compare, for instance: *GS 3:305a BW*, supra note 31, Para. 10, Snijders et al. 2007, supra note 31, pp. 96-97.
47 See, in more detail and with further references, for instance: Snijders et al. 2007, supra note 31, pp. 97-98.
48 The text in this section is based partly on: L.F.H. Enneking, *Foreign direct liability and beyond*, 2012, pp. 229-230.
49 See Art. 6:162 DCC. See, in more detail: *Asser/Hartkamp&Sieburgh 6-IV**, 2011.
50 See Art. 6:163 DCC. Compare *Asser/Hartkamp&Sieburgh 6-IV**, 2008, pp. 130-131.
51 See, for instance: *Asser/Hartkamp&Sieburgh 6-IV**, 2011, Para. 344.

An important restriction inherent in the Dutch collective action procedure of Article 3:305a DCC is the fact that because it involves legal actions by organizations representing the interests of others, it cannot be used to claim monetary compensation for the harm suffered.[52] This does not necessarily exclude all types of financial claims, however; an example is a claim for the recovery of costs that the organization itself has incurred in order to prevent or reduce (further) harm from occurring, as would be the case for instance when an environmental organization takes action to save sea birds following an oil spill. Also, the restriction leaves open the possibility of filing other types of claims seeking, for instance, declaratory judgments or injunctions ordering the defendant to take action or to cease certain activities, like illegal dumping of waste materials.[53] It should be noted in this respect that a parliamentary motion seeking to lift the ban on monetary compensation in a collective action on the basis of Article 3:305a DCC was accepted in 2011 and is now being converted into a legal bill proposing an amendment to this article that will make it possible to claim monetary compensation in future collective actions.[54]

Pending this amendment, environmental NGOs seeking to bring public interest-related claims before civil courts remain limited to claims seeking declaratory judgments holding that another actor is liable for environmental harm that has resulted from a particular activity (potentially followed by separate proceedings for the determination of damages) and/or claims seeking mandatory or prohibitory injunctions for imminent or ongoing polluting activities.[55] As the aforementioned *Dutch Shell* case illustrates, such actions by environmental NGOs requesting declaratory judgments and/or mandatory or prohibitory injunctions may also be directed at Dutch companies undertaking activities that have adverse impacts on environmental interests abroad. Of course, such actions can only be brought if the articles of association and activities of the NGO in question show that it is (also) aimed at protecting environmental interests abroad.

Similar actions may also be brought against the Government, especially where it does not live up to international (including European) obligations of environmental protection or acts in contravention of its own national rules in that area. It should be noted, however, that this type of civil claims against the Government is limited in two ways on the basis of separation of powers (*Trias Politica*) concerns. Firstly, a court cannot order the Government to sign (or refrain from signing) an international agreement or to come up with (a particular form of) generally binding regulations.[56]And, secondly, as was also mentioned above, the court's assessment of the (in)actions of public actors, as opposed to private actors, will necessarily take the form of a marginal review. This means that the court will only test whether the public actor involved could reasonably have come to the course of (in)action that it has come to, and will not amount to a full review of the conduct in question, as it would have had a private actor been involved. Recent case law shows that when it comes to civil liability claims against the Dutch Government, the Dutch Supreme Court likes to leave the Government with a broad discretionary margin, also in cases concerning environmental interests.[57]

3.4. Practical and procedural circumstances

Apart from the factors mentioned here, which may all to a certain extent be manipulated by shaping the claim so as to fit the mould, Dutch civil procedure also involves a number of procedural and practical restraints that may be less easy to steer clear of for those seeking to bring a public interest-related civil claim before a Dutch court.[58] These include, among other things, the costs of the procedure, the length of the procedure and the difficulties that may be involved in the collection of evidence.

Firstly, there are the costs of civil litigation in the Netherlands, which encompass court and bailiffs' fees, legal counsel's fees and other expenses such as the costs of hearing (expert) witnesses. These costs, which on the one hand reflect the true costs of civil proceedings but on the other hand are also meant

52 See Art. 3:305a(3) DCC.
53 *GS 3:305a BW*, supra note 31, Para. 23.
54 See the Parliamentary Motion by Dijksma that was passed in 2011 (*Kamerstukken II* 2011/12, 33000 XIII, no. 14).
55 See Art. 3:296 DCC.
56 See, in more detail and with further references, E. Bauw, *Groene Serie Onrechtmatige Daad, 26 Vorderingen door of tegen milieuorganisaties bij Burgerlijk Wetboek boek 6*. See also, for a recent and detailed study: G. Boogaard, *Het wetgevingsbevel*, 2013.
57 See, with further references, Enneking & De Jong 2014, supra note 3.
58 The text in this section is based partly on Enneking 2012, supra note 48, pp. 256-265.

to prevent the unrestricted pursuit of (potentially frivolous) civil claims, may act as a barrier to bringing civil claims.[59] Public interest-related civil claims may be relatively complex and will therefore require not only the hearing of expert witnesses but also adequate legal representation; the latter is likely to be mandatory in these cases.[60] Lawyers' fees will usually be calculated on an hourly basis, as contingency fee arrangements are not yet generally accepted in the Netherlands.[61] Furthermore, the losing party in a civil lawsuit brought before a Dutch court is usually ordered to bear the costs of the winning party, which includes (part of) the costs incurred by the other party on legal assistance as well as on expert witnesses, which of course imposes a further threshold for those seeking to bring this type of claim.[62]

This cost-related bar to civil litigation in the Netherlands is counterbalanced to some extent by the fact that procedures before the Dutch civil courts are relatively compact, if not when compared to procedures before Dutch administrative courts then at least when compared to civil procedures in countries such as the US. Still, the time it may take for a case to make it from the filing of the initial complaint to a judgment on the merits by a court of first instance will generally be a matter of years rather than months. Another potentially problematic threshold for those seeking to bring public interest actions before the Dutch civil courts is the fact that the Dutch system of evidence gathering in civil procedures is relatively restrictive. Under Dutch civil procedural law, the party relying on the legal consequences of certain facts and/or rights is the one who has to prove the existence and content of those facts and/or rights, unless there are reasons for a different division of the evidentiary burden, as may result from substantive rules of tort law, for example. A *non liquet* situation will arise if the host country plaintiffs are not able to meet their evidentiary burden, which means that the law will assume that (and proceed as if) the facts and circumstances in question do not exist.[63]

Unlike in criminal procedures, there are few restrictions on the modes of proof that parties in a civil procedure before a Dutch court may seek to rely on in order to substantiate their claims;[64] the assessment of the evidence furnished is in principle left to the court's discretion.[65] At the same time, however, the means to discover relevant facts and circumstances that the parties to a civil dispute have at their disposal are far more limited than those that public prosecutors, backed up by public investigation departments entrusted with broad public entitlements, can avail themselves of in a criminal procedure. Dutch civil procedural law does provide a number of instruments that the parties to a civil dispute may rely on to obtain relevant information from their opponents or from third parties, like the provision on document disclosure that is currently laid down in Article 843a of the Dutch Code of Civil Procedure. Dutch courts tend to interpret this provision restrictively, however, in order to prevent so-called 'fishing expeditions', that is, requests for all kinds of documents put forward without any clearly defined plan or purpose in the hope of discovering information that may somehow be used to substantiate a civil liability claim.[66]

As a result, the options for those bringing public interest-related claims before civil courts when it comes to collecting any evidence necessary to substantiate their claims that is not in their own hands, remain relatively limited. This, in combination with the potential complexity of this type of case, the fact that expensive expert witnesses may have to be consulted by both parties to the dispute, the risk of having to bear the other party's costs if the case is lost, the restrictions when it comes to hiring a lawyer on a contingency fee basis instead of on an hourly basis, and the relatively high costs in general of civil litigation in the Netherlands, means that in reality the feasibility of public interest-related civil claims before a Dutch court may, after all, be more limited than it seems.

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59 See, for a more concrete overview of the costs of litigating in the Netherlands, in a comparative perspective, M. Faure & R. Moerland, *Een vergelijkende beschrijving van griffierechten- en vergelijkbare stelsels in een aantal landen van de Europese Unie*, WODC 2006, from which it can be gleaned that litigants in the Netherlands are faced with court fees that are significantly higher than those in other European countries (see in particular pp. 54-56).

60 Art. 79(2) Dutch Code of Civil Procedure (DCCP) (*Wetboek van Burgerlijke Rechtsvordering*).

61 See, for instance: Snijders et al. 2007, supra note 31, pp. 124-125.

62 See, for instance: Snijders et al. 2007, supra note 31, pp. 128-135.

63 Art. 150 DCCP.

64 See Art. 152(1) DCCP, which expressly states that all forms of evidence are admissible. The main modes of proof that are mentioned in the Dutch Code of Civil Procedure include not only documents, deeds and judgments, but also witness statements, expert statements and judicial site visits. See Arts. 156-160, 163-185, 193-200 and 201 DCCP, respectively.

65 See Art. 152(2) DCCP.

66 See, in more detail and with further references: L.F.H. Enneking, 'Multinationals and Transparency in Foreign Direct Liability Cases', 2013 *The Dovenschmidt Quarterly* 2, no. 3, p. 134.

4. A future for public interest litigation before the Dutch civil courts?

All in all, it can safely be stated that when it comes to the protection or promotion of public interests, the primacy in the Netherlands still lies with the Government as the guardian of broader societal interests that go beyond the (aggregate) private interests of individuals within that society, and with administrative procedures as the avenue through which concrete appraisals by public agencies of the relative weight of those interests can be contested by the private parties concerned. Consequently, administrative courts, unlike civil courts, are very used to dealing with cases in which they are asked to weigh up public interests against the private interests of a diversity of stakeholders. Especially in the field of environmental law, NGOs seeking to promote broader environmental interests regularly initiate judicial procedures before administrative courts in order to challenge land-use plans, environmental permits and other types of public orders that may have adverse impacts on local natural habitats and/or the environment more generally.

Still, there are a number of developments currently taking place within the field of Dutch administrative law that seem to qualify its basic tenet of easy access to administrative courts for individual citizens and/or public interest groups seeking to challenge public orders. An example is the growing tendency, particularly in the field of environmental law, to couch material norms and policy choices in regulatory instruments that are *not* open to an administrative appeal, like non-appealable public orders, policy rules and generally binding rules. Other examples include the codification of the relativity principle in the Dutch General Administrative Law Act and the increasingly strict requirements with respect to the range of public interest groups that have standing to initiate proceedings before an administrative court.

It is not unlikely that these developments in the field of Dutch administrative law may have or are perhaps already having repercussions for the prevalence of public interest-related procedures before the Dutch civil courts. The two fields of law are communicating vessels in this subject-matter area, which means that blocking one route is likely to lead to a more intensive use of the alternative route. The route to the civil courts will probably be of particular importance in claims pertaining to administrative orders that are not open to appeal, claims against private (corporate) actors and claims seeking to promote foreign or international interests. Claims such as the ones recently filed by *Urgenda* against the Dutch Government for its alleged failure to implement adequate policies on CO2 emissions, by *Milieudefensie* against Shell for its alleged failure to prevent oil spills in the Niger Delta, and by Dutch environmental organizations against local authorities with a view to enforcing measures for improving ambient air quality, raise the question whether and to what extent public interest litigation has a place within the Dutch legal system and within the Dutch system of civil procedure in particular.

It is clear from what has been discussed here that public interest-related civil claims such as the ones mentioned here are not a new phenomenon in the Netherlands; similar claims have over the past few decades turned up every now and then before the Dutch civil courts. Still, the more recent cases do have a number of novel aspects that seem to set them apart from their predecessors. One of those aspects is the fact that the main objective of cases such as the *Dutch Shell Nigeria* case and the *Urgenda* case is not (just) the promotion of public interests within Dutch society, but rather the promotion of foreign and/or international interests. In other words, the idea of societal interests that may be sought to be promoted through legal procedures before Dutch civil courts has broadened to encompass the interests of those in other societies that are somehow (potentially) impacted by the activities of our corporate actors and by the consequences of our governmental policies. This is an interesting development, as it challenges us to see the notion of 'public interest' as well as its reflection in the Dutch legal system (and in other legal systems) in a different perspective.

Another possible novel aspect, which becomes apparent especially when one measures the contemporary socio-legal trend towards foreign direct liability cases, is the fact that recent claims more than before seem to target not just state actors but also corporate actors. The objective in doing so seems to be the regulation of corporate behaviour in a more 'direct' way that does not require governmental policymaking procedures. This aspect may be closely related to the aforementioned internationalization aspect, in the sense that in today's globalized world, the economic activities of internationally operating

business enterprises tend to have an impact on the interests of a wide variety of stakeholders around the world. Our international legal order, however, is still largely based on the traditional notions of territoriality, state sovereignty and national interests, and is as such ill-equipped to adequately deal with the contemporary economic realities. This means that it makes sense for those seeking to address any detrimental consequences that the transboundary activities of multinational corporations are having on people and planet abroad, to do so through transnational public interest-related civil claims against the corporate actors involved.[67]

This raises the question whether public interest-related civil claims are a real alternative to their administrative law counterparts. After all, the civil procedure is likely to pose some real challenges for those seeking to bring such claims that the administrative procedure does not, especially when it comes to the costs of the procedure and the collection of evidence.

It is important to note in this respect that the organizations bringing these claims are showing a remarkable inventiveness when it comes to circumventing the hurdles that they encounter in their attempts to improve society and the world one case at a time. An example is the phenomenon of 'crowd pleading', which was introduced by *Urgenda* in the run-up to the start of the procedure; hundreds of interested persons from all around the Netherlands conveyed pieces of knowledge and expertise, which were all used to draft the final complaint.[68]And although the Netherlands does not have a tradition of civil public interest litigation, lessons may be learned from countries that do, like the US, which features a wide variety of legal advocacy practice sites specifically geared to promoting, facilitating and/or initiating public interest claims on the basis of funds derived from both public and private sources. It is not impossible that some aspects of this public interest litigation infrastructure, like legal services lawyers, pro bono lawyers and law firm pro bono programmes, private public interest law firms, law school clinics and public interest legal organizations, may over time find their way across the Atlantic.[69]

Interestingly, it seems as if this is already happening, as the first half of 2014 has witnessed the establishment of a (privately funded) public interest fund by the Dutch Section of the International Commission of Jurists, and of a legal platform called 'We the People' that seeks to strengthen the 'claim making capacity' of citizens and public interest organizations. The almost simultaneous emergence of two of these initiatives is perhaps not at all that surprising at a time when the decline of 'big government' in the Netherlands, like in other Western societies, results in a growing role for active (activist) citizens, a role that also translates into the increasingly direct ways in which citizens seek to influence the development of government policies and take responsibility for the protection and promotion of public interests.

As mentioned before, in the Dutch legal system public interest-related lawsuits are traditionally seen as falling within the realm of administrative law. The Dutch administrative procedure is open to individuals or groups seeking to challenge public orders (regulations, plans, policy rules or individual decisions) taken by Dutch administrative authorities. It is organized with a view specifically to allowing citizens to exercise influence over (the outcomes and practical consequences of) public policymaking, even though it does not in principle allow challenges to primary legislation enacted at central government level.[70] This is exemplified, among other things, by the ample room it leaves for consultation exercises, the comprehensive public preparatory procedure provided for in the Dutch General Administrative Law Act, the low threshold set for those seeking to judicially challenge public orders affecting their private interests, and the broad investigatory powers bestowed on administrative courts in order to further a proactive attitude towards the promotion of the public interests involved.

In this sense, it seems clear that although the Dutch system of civil procedure offers a useful and in some cases necessary safety net for those public interest-related procedures that for some reason cannot

67 See, in more detail: Enneking 2012, supra note 48. See also: L. Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', 2014 *Utrecht Law Review* 10, no. 1, pp. 44-55.

68 A special website was set up with information regarding the case: <http://www.wijwillenactie.nl/?p=950> (last visited 12 June 2014).

69 See in more detail on this public interest litigation infrastructure: Cummings & Rhode 2009, supra note 3, p. 603. See also: Enneking 2012, supra note 48, pp. 191-192.

70 See in more detail on the law on administrative procedures in the Netherlands: Barkhuysen et al. 2012, supra note 23.

be brought before an administrative court, it does not (yet) provide an equivalent alternative. Especially in light of some of the developments described here, which have narrowed the access to administrative procedures for environmental NGOs (and also for others), this raises the question whether legal or policy adjustments may be warranted in order to ensure that those seeking to promote the public interest – our greatest common good – are not in practice denied access to a court that is willing and able to hear their claim. ¶