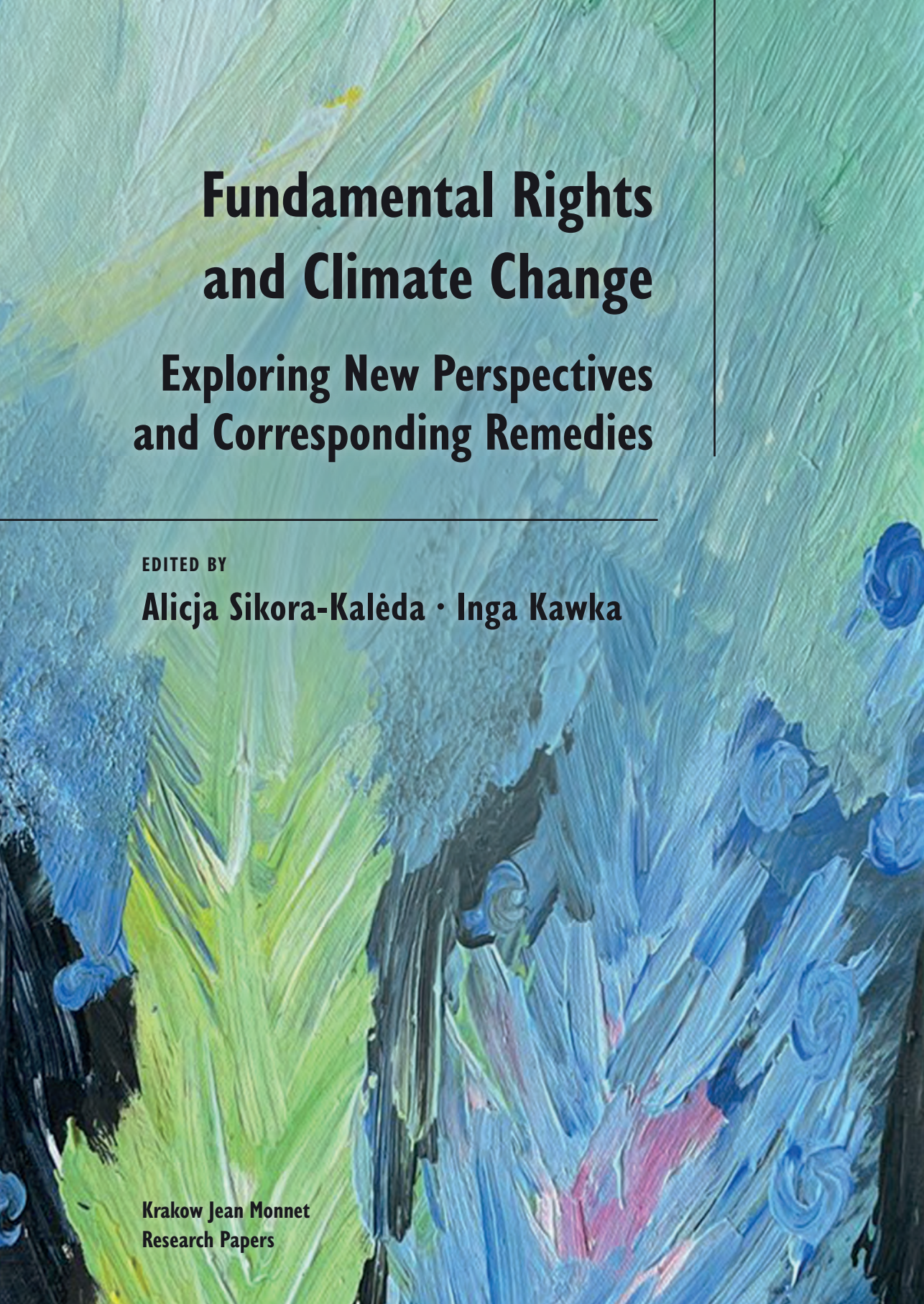

Fundamental Rights and Climate Change

Exploring New Perspectives and Corresponding Remedies

EDITED BY

Alicja Sikora-Kalėda · Inga Kawka

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Introduction

The environment is where we all meet;
where we all have a mutual interest;
it is the one thing all of us share.

Lady Bird Johnson

The monograph outlines the growing importance of fundamental rights in the European Union, particularly in the context of environmental protection and the fight against climate change. These rights have become a cornerstone in shaping policies that address ecological challenges while balancing economic and social aspects. The European Green Deal (EUGD), a landmark initiative, embodies the EU's commitment to transitioning into a climate-neutral, modern economy by 2050. This ambitious goal requires comprehensive legislative action and coherence in implementing policies across various sectors, ensuring that all measures align with and uphold fundamental rights as enshrined in the EU legal framework.

This monograph is the culmination of scholarly work inspired by discussions from the conference titled 'Fundamental Rights and Climate Change in EU Law and Beyond – Mapping Fundamental Rights, Nature's Rights, and Corresponding Legal Remedies,' organized in September 2023 as part of the Jean Monnet Module project, 'Sustainability and Climate Change in EU Law.' This academic event, hosted by the Chair of European Law at the Jagiellonian University, brought together experts from diverse fields to discuss and exchange perspectives on sustainability and the legal frameworks within the EU. The insights shared during the conference laid the foundation for the analyses presented in this book, highlighting the complex interplay between fundamental rights, environmental challenges, and legislative coherence.

The chapters of this book reflect a collective scholarly effort to explore diverse aspects of fundamental rights and their intersections with environmental law within the EU framework. The opening chapter, authored by Alicja Sikora-Kalėda investigates the limits of human rights as instruments to advocate for global climate action. It examines how climate litigation impacts human rights and evaluates the potential evolution of environmental rights in EU law. Ilona Przybojewska contributes with an analysis of how poor environmental conditions can lead to state liability, referencing a notable 2021 Polish Supreme Court resolution. Her work probes the extent to which environmental issues can be recognized as affecting personal rights and the broader implications of this recognition.

This monograph aims to serve as a comprehensive resource for legal practitioners, scholars, and policymakers, encouraging further dialogue on the integration of environmental and human rights within the EU legal system.

Alicja Sikora-Kalėda
Inga Kawka

Fundamental Rights and Climate Change – Exploring New Perspectives and Corresponding Remedies
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Diana Ionescu[1]

Environmental Public Interest Litigation in Romania

Recent Developments in Domestic Courts and the Implications of the CJEU Judgment in Case C-252/22

Abstract: Access to justice in environmental cases is an essential guarantee of the substantive right to a healthy environment. Nevertheless, the legal rules and their interpretation differ greatly. The Romanian legal framework on judicial review in environmental cases is focused on the private interest requirement. However, using the purposive method of statutory interpretation aimed at protecting the constitutional right to a healthy environment, the Cluj Court of Appeal, a court of appeal in the Western part of Romania, acknowledged that every person has the right to initiate public interest litigation in environmental cases. This judicial transition from the doctrine of the individual private interest to the objective criteria of protecting the law and collective rights specific to the environmental public interest was, however, blocked by the decision of another court of appeal and the CJEU judgment in case C-252/22. In this judgment, ruling on a preliminary reference submitted in a case first decided by the Cluj Court of Appeal, the CJEU decided that, as a rule, private interest is a legitimate requirement under Article 9 (3) of the Aarhus Convention. In this perspective, environmental non-governmental organizations are the only claimants who have the power to represent the public interest. Even if the CJEU promoted a restrictive interpretation of public interest under Article 9 (3), the Opinion of AG Laila Medina opened the way to a new perspective: the thesis that public interest litigation can be initiated not only by NGOs but also by individuals or other associations that genuinely want to protect the environment.

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Keywords: access to justice, environmental cases, public interest litigation, Article 9 (3) of the Aarhus Convention, CJEU

1. Introduction

A court judgment is 'a traditional tool for protecting the environment. However, to obtain such judgment, someone must go to court. From this perspective, the question of of 'who' – who has the capacity and standing to go to court? – becomes essential. The concept of 'legal standing' (i.e., locus standi) may be interpreted in two ways. First, it refers to a person's competence to appear in court as a claimant or a defendant. In this understanding, elements such as age and legal capacity must be considered. Secondly, it refers to an individual's ability to bring a case to court as a claimant due to a particular interest in the subject matter of the case. It is with this latter understanding that this contribution relates most.

Traditionally, the general rules on standing in judicial review rely on a subjective model in which individuals assert their rights or legitimate interests. This is legal standing based on a legitimate private interest and also applies to environmental litigation.

Over time, legal standing in environmental litigation was also recognized for non-governmental organizations (NGOs). In this evolution, the Aarhus Convention, as interpreted by the Court of Justice of the European Union (CJEU), had an essential contribution. Under Article 9(2) of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention), NGOs' standing relies also on a subjective model; however, unlike individuals, their private interest is legally presumed. Furthermore, in its case law under Articles 9 (2)[2] and (3),[3] CJEU ruled that the objective of NGOs is to defend the public interest. The question that motivated this contribution was whether, apart from NGOs, individual citizens might possess the power to initiate environmental judicial reviews solely in the interest of the general public rather than for their private interest.

This contribution explores the tension between the rights-based approach to environmental litigation and the protection of the environment as a public interest issue.

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[2] Court of Justice of the European Union, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, Judgment of the Court 12 May 2011, para. 46.

[3] Court of Justice of the European Union, C-664/15, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, Judgment of the Court 20 December 2017, para. 47.

It argues that Environmental Public Interest Litigation (EPIL)[4] can act as a transformative mechanism for communities in post-communist countries such as Romania, particularly against the backdrop of recent trends aimed at restricting the role of NGOs in administrative litigation.

The structure of the article is as follows: Section 2 outlines the Romanian legal framework governing environmental judicial review; Section 3 analyzes domestic case law recognizing the right of any individual to initiate EPIL, employing a purposive method of statutory interpretation that emphasizes the objective of safeguarding the substantive right to a healthy environment, as enshrined in Article 35 of the Romanian Constitution; Section 4 examines the judgment of the Court of Justice of the European Union (CJEU) in case C-252/22, which arose from a domestic case concerning public interest litigation; Section 5 discusses the broader implications of the CJEU judgment in case C-252/22; Section 6 concludes by summarizing the key findings and their significance.

2. The legal framework of environmental judicial review in Romania

Administrative litigation (i.e., judicial review) is part of public law in Romania. The statute regulating it represents the *ius commune* for any administrative litigation, including environmental cases. Specific rules are applicable only when they are provided in statutes regulating particular domains such as environmental protection, urban planning, and building permits. Therefore, this section outlines firstly the general rules on administrative litigation, followed by the specific regulations on environmental litigation.

2.1. Judicial review

In Romania, judicial review was regulated as a transplant from the French system in the middle of the 19th century. However, after the transplant was realized, the judicial review in Romania did not keep pace with the evolution of the France one. Thus, even if, at the beginning of the 20th century, France evolved towards the legal standing of associations,[5] Romania has long upheld the exclusive legal standing of individuals and the principle of subjective litigation.

[4] The concept of 'public interest litigation' is decsribed in A. Maglica, *Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe*, "Erasmus Law Review" 2023, no. 2, pp. 71-75.

[5] Conseil d'Etat, Decision No. 19167/1906 of 21 Decembre 1906, *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli*, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/1906-12-21/19167 (10.11.2024).

Furthermore, 'popular actions' that focus on public interest were constantly rejected in Romania. In 1930, the domestic literature stated: 'Judicial review is sought by harmed individuals. This is because judicial action in administrative cases, no matter its relationship to the social order, does not have the characteristics of a popular action. The individual acts as a control agent for the legality of administrative acts only to the extent they affect him.'[6] This literature is still referenced today in the judgments of the Constitutional Court and High Court of Cassation and Justice (HCCJ) when rejecting the idea of public interest litigation.

The communist regime eliminated judicial review in 1948 and reinstated it in a restrictive legal framework in 1967. Following the fall of the communist regime, Law No. 29/1990 was the first statute regulating administrative litigation. Under this law, legal standing was granted only to individuals who could demonstrate a violation of their rights. The second law on judicial review in post-communist times was Law No. 554/2004 regarding administrative litigation.[7] With further amendments, this is the law currently in force.

Adopted during the EU accession process, Law No. 554/2004 intended to protect individuals' rights and the public interest more. Thus, in its original form, public interest litigation was recognized in Romania, along with subjective litigation. Both NGOs and individuals could exercise it. This rule was also applicable in environmental cases. Public prosecutors could also initiate public interest litigation and were obliged to participate in any administrative case brought by individuals or NGOs.

Legitimate public interest, as defined in the original form of Law No. 554/2004, meant the fulfilment of fundamental rights exercised collectively or the fulfilment of public interest. The 'public interest' concept was defined as interests that uphold the legal order and constitutional democracy, safeguard citizens' rights, freedoms, and fundamental duties, address the community's needs, and enforce public authorities' duties.

After Romania joined the EU, the concept of public interest as a basis for legal standing under Law No. 554/2004 was gradually limited. The main argument justifying this process was that the public interest is defined and protected exclusively by the State and its agencies. Therefore, the involvement of individuals or NGOs in safeguarding public interest is not welcomed and must be restricted to a minimal

[6] C. Hamangiu, R. Hutschneker, G. Iuliu, *Recursul în casaţie şi contenciosul administrativ. Comentariul legilor Curţii de Casaţie şi a Contenciosului administrativ, după doctrină şi jurisprudenţă*, Bucureşti 1930, p. 467.

[7] Law no 554/2004 regarding administrative litigation, published in Romanian Official Journal (ROJ), No. 1154 of 7 December 2004.

framework. Following this line of argumentation, Law No. 262/2007[8] significantly amended Law No. 554/2004, particularly regarding litigation in the public interest.

First, the concept of 'legitimate public interest' as defined in the original Law No. 554/2004 has been repealed. The 2007 amendments erased the reference to rights exercised collectively, a fundamental concept in environmental cases. Secondly, the protection of 'public interest' was subordinated to the proof of existence of a private interest.

Under the new Article 8 (1^1), public interest may be used by individuals and NGOs as an alternative basis for legal standing; it can be a basis for legal standing only when a subjective right or a legitimate interest is primarily violated. This is the law in force today.

In 2009, the Constitutional Court ruled that the amended Article 8 (1^1) was in conformity with the Constitution.[9] The Court held that this subordination of the public interest to the proof of a subjective one was provided by the legislator 'in order to «stop» the so-called «popular actions» filed by some individuals or legal entities who, lacking arguments to demonstrate harm to their own rights or legitimate interest, initiate actions based exclusively on public interest.' The court also held that the protection of public interest is the responsibility of public authorities rather than individuals or private associations. In 2021, the court reaffirmed this position.[10]

The Constitutional Court's case law regarding public interest litigation demonstrates a key doctrine that significantly impacts the Romanian understanding of judicial review and the overall concepts of democracy and the rule of law.

First, citizens cannot defend the public interest through judicial litigation. They can protect the public interest only if a private interest is demonstrated, which is necessary for standing. As a rule, the responsibility for public interest lies with the State. This poses a significant vulnerability for Romania as a constitutional democracy, reinforcing the government's tendency towards illiberalism due to its exclusive power to define and protect the public interest.

Secondly, in the Constitutional Court's argumentation, the 'popular actions' are initiated because the private parties (i.e., individuals or private legal entities) cannot prove harm to a subjective right or a legitimate private interest. Consequently, these actions are considered wrong and must be 'stopped'. Although the Constitution provides the fundamental right to a healthy environment, the Court did not elaborate

[8] Law No. 262/2007 amending Law No. 554/2004, published in ROJ No. 510 of 30 July 2007.
[9] Constitutional Court, Decision No. 66/2009, published in ROJ No. 135 of 4 March 2009.
[10] Constitutional Court, Decision No. 461/2021, published in ROJ No. 1221 of 23 December 2021.

on collective rights or diffuse interests. It held only that actions motivated by public interest are often misguided, arguing that those who engage in such actions do so primarily because they cannot demonstrate a private interest.

This approach was also followed by the HCCJ. In a mandatory interpretation of the law regarding NGOs' legal standing in administrative litigation, the HCCJ ruled that the private interest requirement applies to both individuals and NGOs.[11]

From the HCCJ perspective, NGOs and other associations, like labor unions, have subjective interests and do not have the power to represent the public interest directly. However, for NGOs, private interests should be defined by their founding documents rather than the impact of contested administrative acts on individual rights. The HCCJ also referred to the need to stop 'popular action', using the same argumentation as the Constitutional Court.

The HCCJ argumentation also had an indirect effect. Considering NGOs as parties with private interests led to skepticism about their credibility as advocates for the public interest. This created distrust toward NGOs, fueling political discussions that finally supported legislation which brought limitations to their power to take legal action in environmental cases.

In 2023, the deadlines for NGOs to contest building permits have been shortened to 30 days for internal review and 60 days for judicial review.[12] The deadline for individuals, as provided by Law No. 554/2004, remained six months. The Explanatory Memorandum of the draft amending law expressly reflected the distrust towards NGOs: 'Most of the time, such organizations (NGOs) are controlled by individuals who act in bad faith, who pursue completely different goals than those officially declared in the statutes or constitutive documents registered with the court and who take advantage of the ambiguity of the legal provisions to it diverted them from the original goals envisaged by the legislator.'[13]

The role of public prosecutors in exercising public interest litigation has also been limited. Regarding individual administrative acts (e.g., a building permit or an environmental permit based on an environmental impact assessment), the prosecutors must obtain the approval of the holder of the subjective rights before initiating a judicial review. In Romania, therefore, prosecutors cannot initiate judicial review of indi-

[11] HCCJ, Decision No. 8/2020 (appeal in the interest of the law), published in ROJ No. 580 of 2 July 2020.

[12] Law No. 50/1991 on the building permit, Article 12, as amended by Law No. 102/2023, published in ROJ No. 322 of 18 April 2023.

[13] Explanatory memorandum of draft Law No. 102/2013, amending Law No. 50/1991 on the building permit.

vidual administrative acts solely based on public interest. Prosecutors can initiate such litigation only when the contested administrative act is normative (e.g., a Ministry of Health Order regulating the distances between a landfill and residential areas).

2.2. Environmental judicial review

Following the fall of communism in December 1989, a substantive right to a healthy environment was provided by the first statute on environmental protection, Law No. 137/1995.[14] This law lacked specific rules for judicial review in environmental litigation, so the general framework for administrative litigation applied. The 1991 Constitution did not acknowledge a substantive right to a healthy environment.

In 2000, Romania ratified the Aarhus Convention.[15] Romania is a monist state where international treaties automatically integrate into domestic law after ratification. However, the ratification of the Aarhus Convention neither determined legislative amendments nor changed domestic case law.

The most critical changes to environmental litigation stem from EU accession.

In 2003, Article 35 of the amended Constitution[16] provided the substantive right to a healthy environment: '(1) The state acknowledges every person's right to a healthy and ecologically balanced environment. (2) The state provides a legal framework to support the exercise of this right. (3) Individuals and legal entities must protect and enhance the environment'. To date, in its case law, the Constitutional Court interpreted only the State's positive duty to establish a normative framework that effectively supports the right to a healthy environment.[17]

In 2005, a new legal framework for protecting the environment was adopted.

After its approval with amendments by Law No. 265/2006,[18] the Government Emergency Ordinance No. 195/2005 (GEO No. 195/2005)[19] provided that: 'the right to submit claims regarding environmental issues, either directly or through environmental protection organisations, to the appropriate administrative and/or judicial

[14] Law No. 137/1995 on protecting the environment, published in ROJ No. 304 of 30 December 1995.

[15] Law No. 86/2000 on ratifying the Aarhus Convention, published in ROJ No. 224 of 22 May 2000.

[16] Law No. 429/2003 on amending the Constitution, published in ROJ No. 758 of 29 October 2003.

[17] Constitutional Court, Decision No. 295/2022, paras 173-174, published in ROJ No. 568 of 10 June 2022.

[18] Law No. 265/2006 on approving GEO No. 195/2005, published in ROJ No. 586 of 6 July 2006.

[19] Government Emergency Ordinance No. 195/2005 on protecting the environment, published in ROJ No. 1196 of 30 December 2005.

authorities, as the case may be, regardless of whether or not damage has occurred' (Article 5 paragraph 1 letter d). Article 20 (1) referred to the duty of public authorities to enforce the right to information, public participation, and access to justice in conformity with the Aarhus Convention. Article 20 (5) provided that access to justice is governed by the legislation in force, while Article 20 (6) provided that environmental NGOs have the right to access justice and have legal standing as claimants in environmental litigation. This is the law in force today.

GEO No. 195/2005 lacks rules on litigation costs in environmental cases litigation. Therefore, the general rules, as provided in Article 451 of the Code of Civil Procedure,[20] are applicable. The courts may reduce litigation costs related to advocates' fees if they are disproportionate to the value or complexity of the case.

The cost of litigation significantly impacts the enforcement of the right to access justice. Environmental cases are lawsuits brought by individuals or NGOs against public authorities. In Romania, when public authorities cannot provide legal assistance through their in-house counsels, they are entitled to procure legal services from private practice lawyers. In this situation, public funds cover the advocates' fees, and no maximum limit is stipulated by law.[21] Public authorities often justify this decision by citing the complexity of environmental litigation. The law does not require public procurement for legal services.

In the domestic case in which the preliminary reference in C-252/22 was submitted, the Suceava County Council paid about 80,000 euros in public funds for lawyers' fees. In Romania, with a minimum gross salary of around 800 euros, individuals or NGOs cannot afford such costs. The use of public funds to pay lawyers' fees creates, therefore, a significant imbalance in environmental litigation between public authorities and private entities parties.

Public authorities consolidate this imbalance by threatening individuals or NGOs with high litigation costs, deterring them from pursuing environmental lawsuits. Empirical studies have identified this risk.[22] In interviews, Romanian NGO representatives indicated that the Environment Ministry uses the legal services of costly lawyers and the threat of litigation costs as an intimidation tactic to stop environmental litigation initiation.

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[20] Law No. 134/2010 on the Code of Civil Procedure, republished in ROJ No. 247 of 10 April 2015.

[21] GEO No. 26/2012 on measures to reduce public expenses and strengthen financial discipline, published in ROJ No. 392 of 12 June 2012, Article I (2) letter b).

[22] B. Neamțu, D. Dragoș, *Mimicking Environmental Transparency: The Implementation of the Aarhus Convention in Romania* [in:] *The Making of a New European Legal Culture: The Aarhus Convention*, R. Caranta, A. Gerbrandy, B. Müller (eds), Groningen 2018, p. 232.

3. Public interest litigation in the Cluj Court of Appeal's case law

Two cases regarding a landfill have determined the Cluj Court of Appeal's case law regarding EPIL. The landfill was built in Valea Putnei, a village in Suceava County, part of a commune named Pojorâta, northeastern Romania (historically known as Bukovina).

The characteristics of the landfill built in Valea Putnei by Suceava County Council, as presented in Section 3.1, created a specific context that highlighted the tension between rights-based judicial review and the protection of public interest. This tension led the court to acknowledge that every person can initiate a judicial review in environmental cases. To reach this decision, the Cluj Court of Appeal applied the teleologic method of statutory interpretation, as presented in Section 3.2.

3.1. The subject of the environmental cases concluding on EPIL

The landfill is located at 1,000 meters in the Eastern Carpathians, specifically in the mountain pass known as Mestecăniș. This pass connects the historic regions of Transylvania and Bukovina, which is why the landfill is referred to as the 'Mestecăniș landfill'. The landfill has been built on a mountain peak that was blasted sixteen meters deep to create space for the waste landfill.

Near the landfill, at distances of less than 1,000 meters, there are homes for residential living and buildings meant for tourism. Romanian legislation transposing Directive 1999/31 on the landfill of waste[23] requires a minimum distance of 1,000 meters from the landfill to residential areas to protect the health of the individuals living near the landfill.

The landfill was built next to the E58 road, a major European route from Central Europe to the east. The closest distance from the landfill to the E58 road is 40.9 meters, while the farthest is 66.5 meters. The daily traffic on this road, comprising Romanian and other European citizens, is approximately 7,000 vehicles. The area is a popular tourist destination, featuring the painted monasteries of Bukovina, which are recognized as a UNESCO World Heritage site. The environmental impact assessment effectuated for the construction permit indicated that 'The cumulative inhalation risk of 11 chemicals known or suspected to be carcinogenic was found to «at worst» persist up to 100 meters from the boundaries of the landfill'. The landfill and treated leachate discharge are also near a railway line where passenger trains run.

[23] When the building permit for the Valea Putnei landfill was issued, this rule was provided by Government Decision No. 349/2005 on the landfill of waste. Currently, this rule is provided by Government Ordinance No. 2/2021 on the landfill of waste, published in ROJ No. 749 on 18 August 2021.

The landfill's storage capacity is 390,000 tons, and its surface area is 5,45 hectares. The feasibility study revealed that the landfill could negatively impact tourism developments in Bukovina. It also identified a significant risk of flooding due to the site's steep slope and the degradation of the mountain landscape.

Although the landfill is not yet operational, the mountain landscape is significantly impacted, and flooding is already occurring. In 2003, Romania ratified the Carpathian Convention[24] and assumed the obligation to ensure specific protection for these mountain areas.[25]

The Pojorâta Local Council[26] was the public authority that allocated the site for the landfill's construction (Decision No. 64/2010) and decided on urban planning (Decision No. 69/2009). The Suceava County Council, the public authority responsible for governing the county,[27] was the beneficiary of these two administrative acts. The Suceava County Council issued the development consent (i.e., the building permit) for the landfill, even though the beneficiary was the same public authority (Development Consent No. 39/2012). Romanian legal rules allow a public authority to issue development consent and be also its beneficiary.

Another public authority, the Bacău Regional Environmental Agency, issued the environmental authorization after concluding an environmental impact assessment (Authorization No. 9/2009). Nonrefundable European funds ensured the funding of the landfill construction (European Commission Decision No. C (2011) 2035 of 30 March 2011). The Suceava County Council was also the recipient of European funds.

3.2. The judgments of the Cluj Court of Appeal

In 2014, eight citizens living in Valea Putnei and Iacobeni, a nearby village, brought judicial action against the Pojorata Local Council, asking the court to annul the decision allowing Suceava County Council to use the land for the landfill construction (Decision No. 64/2010). The claimants stated that the decision was made without public consultation and contradicted several legal regulations regarding landfills.

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[24] The Carpathian Convention is a regional treaty signed in 2003 by 7 states. Cf. http://www.carpathianconvention.org/ (20.11.2024).

[25] Law No. 389/2006 on the ratification of the Carpathian Convention, published in ROJ No. 879 of 27 October 2006.

[26] The local council is the local authority's deliberative assembly. Every commune and town has such a council.

[27] The county council is the county's deliberative assembly, which is responsible for public funds in the county, the county's economic, social, and environmental development, and the management of county property and certain public services. Every county has such a council.

As the first instance court, the Suceava Tribunal denied the claim as inadmissible because the claimants failed to demonstrate a legitimate interest necessary for legal standing in environmental cases.

The claimants appealed the judgment to the Suceava Court of Appeal and requested a transfer to a different court due to concerns about the impartiality of the local judges. The HCCJ granted this request, referring the case to the Cluj Court of Appeal. Cluj-Napoca is a city in Transylvania, a region in Western Romania formerly part of the Austro-Hungarian Empire.

By Decision no 182/2016, the Cluj Court of Appeal ruled that the claim was admissible and must be granted.[28] The court held that the Pojorâta Local Council decision must be annulled because the citizens were not informed about it, and there was no public debate before its adoption. Regarding the legal standing of claimants, the Cluj Court of Appeal held that they have a private interest in bringing environmental litigation. However, the Court held that this analysis is unnecessary because, in environmental litigation, any individual has the right to bring a case to court.

As a legal basis for recognizing EPIL exercised by every individual, the Cluj Court of Appeal identified Article 5 (1) letter d) of GEO No. 195/2005 and ruled: 'In other words, damage to the environment can be reported by any person without justifying damage other than the legal norms related to the protection of the environment. In this context, the law recognizes the objective protection of the environment independent of the infringement of a specific substantive right and the occurrence of damage. From this perspective, it can be stated that the administrative litigation initiated under Article 5 letter d) of GEO no. 195/2005 is an objective one, even if it is not initiated by a public authority expressly provided by law.'[29]

To reach this decision, the Cluj Court of Appeal used the purposive method of interpretation, with the right to a healthy environment, as provided by Article 35 of the Constitution, as an objective. This line of argumentation emphasizes the importance of legal recognition of the right to a healthy environment as a substantive right, a point further elaborated by Advocate General (AG) Laila Medina in her opinion in case C-252/22.

On the merits, in Decision No. 182/2016, the Cluj Court of Appeal ruled that a public debate was necessary before constructing the landfill. However, despite much of the landfill already being built, the Suceava County Council held a public debate in Valea Putnei only after this decision was pronounced. Citizens at the consultation

[28] Cluj Court of Appeal, Case No. 5737/86/2014, Decision No. 182/2016 of 28 January 2016.
[29] *Ibidem*, p. 19.

expressed disagreement, citing legal arguments about distances from the site to residential and recreation areas, proximity to the European road, flooding risks from the slope, and protection of nature and cultural heritage in Eastern Carpathians. The Suceava County Council argued that stopping the landfill construction posed a significant risk of having to return funds to the EU.

After the public consultation, Pojorâta Local Council adopted a second decision (Decision No. 80/2016) granting Suceava County permission to use the land to construct the landfill again.

Given the local tense atmosphere and Suceava County Council's power to overturn a final judicial decision, three lawyers from Cluj (comprising a law firm) decided to analyze the case and bring all necessary judicial actions. Two of these lawyers had family members in Pojorâta and frequently traveled there.

The decision to bring judicial proceedings was halted due to insufficient open-access information about the permits for landfill authorization. Following several refusals to communicate copies of such permits, under the law on access to public information, the law firm filed three lawsuits: the first one against Suceava County Council regarding the development consent,[30] the second one against Suceava Public Health Agency regarding the public health permit,[31] and the third one against Iași Railway Regional Agency regarding the permit for railway safety.[32] In all three litigations regarding access to environmental information, the Cluj courts decided that the law firm has legal standing (understood as both the capacity to stand justice and the right to bring judicial proceedings).

The documents obtained through these cases supported the judicial action in the administrative court. The judicial review referred to the zoning plan and the development consent. The law firm was the claimant, and the defendants were Pojorâta Local Council and Suceava County Council.[33]

The decision to submit a judicial review with the law firm as claimant was justified by those three final judgments acknowledging its capacity to stand justice as claimant[34] and by Decision No. 182/2016 stating that every person has the right to initiate judicial review in environmental cases. Regarding capacity and interest, the

[30] Cluj Tribunal, Judgment No. 317/2018 of 1 February 2018, final due to rejecting the Suceava County Council appeal by Cluj Court of Appeal, Decision No. 3333/2018 of 11 June 2018.

[31] Cluj Tribunal, Judgment No. 1038/2018 of 10 April 2018, final without appeal.

[32] Cluj Tribunal, Judgment No. 652/2018 of 27 February 2018, final without appeal.

[33] This is case no. 3655/117/2018, in which the preliminary reference in C-252/22 was formulated.

[34] See footnotes no. 30, 31 and 32.

Cluj Court of Appeal case law confirmed a law firm's legal standing in environmental litigation at that moment.

The judicial action was based primarily on protecting the public interest. Secondly, the private interests of the three lawyers comprising the law firm (two had family members living in Pojorata,[35] and the third was a tourist in the area) were presented. Private interests could also be argued because the law firm was an entity without a legal personality. Each lawyer has, therefore, maintained their legal personality, including the right to a healthy environment.

The Cluj Tribunal denied the claim as inadmissible.[36] The court held that public interest could be a basis for legal standing only in a subsidiary manner. Therefore, because the claimants failed to demonstrate a personal interest, their claim has to be denied. The claimant appealed the judgment before the Cluj Court of Appeal.

By Decision No. 1195/2019,[37] the Cluj Court of Appeal granted the appeal, annulled the judgment of the first instance court, and referred the case to the Cluj Tribunal for trial. The Court upheld its established case law regarding EPIL and ruled that the claimant had legal standing based on public interest.

In 2019, the Cluj Court of Appeal's argumentation of EPIL was more elaborate than in 2016. The court analyzed the domestic law on standing in environmental cases and its relation to the Aarhus Convention.

In analyzing domestic law, the court maintained the purposive interpretation of legal rules on standing with the aim of protecting the constitutional right to a healthy environment. In its own words, the Cluj Court of Appeal held: 'It can be concluded, without any doubt, that the legal nature of judicial review concerning administrative acts applying environmental legislation is one of objective litigation. It is so because objective litigation refers to a legal action initiated by a claimant to protect an objective right or a legitimate public interest. This means that the court is requested to verify whether rights of a general and impersonal nature have been violated and whether the law, in general, has been breached. In other words, objective litigation signifies wide openness to uphold legality, characterized by generality and impersonality. (…) From this perspective, it can be concluded that in the judicial review of an administrative act issued by a public authority related to environmental legislation, any individual or legal person can hold legal standing and proof of a violation of a subjective right or a legitimate private interest is not required. From the interpretation of the

35 The author of this contribution is one of those two lawyers.

36 Cluj Tribunal, Case No. 3655/117/2018, Judgment No. 250/2019 of 7 February 2019.

37 Cluj Court of Appeal, Case No. 3655/117/2018, Decision No. 1195/2019 of 26 September 2019.

legal regulation applicable in this area, access to justice in environmental litigation is granted to any individual based on public interest, without the requirement to assert a private interest.'

Through purposive interpretation aiming to protect the constitutional right to a healthy environment, the Cluj Court of Appeal marked the transition from the doctrine of the individual subjective right, traditionally focused on the harm produced directly to a personal interest, to the objective criteria of protecting the law and collective rights, specific to the environmental public interest. The evolution of Romanian case law is another proof that, usually, EPIL is not created by traditional legislative norms but rather by judicial decisions based on practical expedience.[38]

Under Article 20 of the Romanian Constitution, domestic regulations must be interpreted in conformity with international treaties regarding citizens' rights and freedoms. When inconsistencies arise between such treaties and domestic rules, international law takes precedence unless the Constitution or domestic laws have more favorable provisions.

Applying these rules, the Cluj Court of Appeal ruled: 'Even if the provisions of the Aarhus Convention regarding access to justice can be interpreted in a restrictive manner, indicating that proof of a legitimate private interest is necessary, as claimed by the first-instance court and the defendants, it is essential to recognize that domestic law on access to justice takes precedence. According to Article 20(2) of the Constitution, domestic law is more favorable and holds priority.'[39]

The Cluj Court of Appeal indicated that the Aarhus Convention, as ratified by the EU, has to be transposed through secondary legislation, such as Aarhus Regulation No. 1367/2006 or Directive 2011/92 and 2010/75. By referring to the European Commission's Communication on access to justice,[40] the Court noted that no secondary legislation regulates access to justice under Article 9 (3) of the Aarhus Convention. The Court emphasized that Article 9 (3) refers to the criteria established in the domestic law and that Article 3 (5) refers to the state's power to provide wider access to justice in environmental cases than the one required by the Convention.

Considering these arguments, the Court concluded: 'The Court observes while the Aarhus Convention may *in extremis* provide a legal basis restricting access to justice in environmental cases, such limitations cannot be imposed on the Romanian

[38] Ch. Schall, *Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?*, "Journal of Environmental Law" 2008, vol. 8, no. 3, p. 434.

[39] *Ibidem*, p. 12.

[40] Commission Notice on Access to Justice in Environmental Matters, published in OJ No. C275 of 18 August 2017.

courts. In this situation, Article 20 (2) of the Constitution applies, requiring the prevalence of domestic law as interpreted by court precedents. Even one could argue that the court's interpretation leads to the idea that the judicial action exercised by an individual or a legal entity in the application of GEO No. 195/2005 could qualify as *actio popularis*, the Constitution does not prohibit this type of action, and, therefore, *actio popularis* does not contradict the supremacy of fundamental law.'[41]

As for the capacity of the law firm to stand justice, the court ruled that an entity without legal personality, such as the claimant, has the capacity to stand justice according to civil procedural law (the general law applicable to judicial review). The Court argued that such an entity could be appreciated as a group of individuals, a category expressly recognized by the rules on administrative litigation.

At the final stage of the appeal hearing, the Suceava County Court submitted a claim asking the HCCJ to refer the case to another court of appeal. The defendant argued that the Cluj Court of Appeal had already decided on legal issues regarding the Valea Putnei landfill (in the case finalized with Decision No. 182/2016) and lacked impartiality to judge another case on the same project. Under Article 144 of the Code of Civil Procedure, in Romania, the HCCJ can decide on such claim even after the judgment becomes final.

The HCCJ granted the claim, annulled Cluj Court of Appeal's final Decision No. 1195/2019, and referred the case to the Târgu Mureș Court of Appeal. This court will refer the case to the CJEU in C-252/22. The High Court issued its ruling without reasoning, even though it annulled the final judgment of the Cluj Court of Appeal. Under Article 6 of ECHR (*res iudicata* principle and the requirement to motivate judgments), the claimant submitted a claim to the ECtHR. The application has been communicated to the parties and is at the stage of writing observations.[42]

4. Case C-252/22

4. 1. The preliminary reference

At the Târgu Mureș Court of Appeal, the claimant and the defendant, Suceava County Council, requested a reference to the CJEU on the issue of legal standing in environmental cases. The claimant also asked for a preliminary reference on the issue of

[41] Cluj Court of Appeal, Case No. 3655/117/2018, Decision No. 1195/2019 of 26 September 2019, p. 12.

[42] European Court of Human Rights, Application No. 39517/20.

litigation costs. This question was determined by the fact that, at that moment, Suceava County Council had already paid a lawyer fee of around 70,000 euros (another 15,000 euros will augment this as a lawyer fee for CJEU proceedings).

Concerning the legal standing, the referring court revised the claimant's proposal and requested the CJEU to rule on two issues: (a) the definition of the 'public' under Article 2(4) of the Aarhus Convention; (b) the conformity of the domestic legislation requiring the private interest as the legal basis for standing with Article 9 (3) of the Aarhus Convention, read in the light of the right to effective judicial protection under Article 47 of the Charter of the Fundamental Rights of the EU. Regarding litigation cost, the referring court maintained the claimant's proposal and asked the CJEU to interpret the rule that the judicial proceedings should not be prohibitively expensive, according to Article 9 (4) of the Aarhus Convention.

In the preliminary reference, the Târgu Mureș Court of Appeal presented the domestic legislation as having only one interpretation (i.e., subjective litigation based on private interest) without referring to the Cluj Court of Appeal case law. The law was presented assertively, suggesting that its interpretation was the only possible one.

When the preliminary reference in case C-252/22 was submitted to CJEU for ruling, the EU still did not have dedicated secondary legislation transposing Article 9 (3) of the Aarhus Convention concerning access to justice at the domestic level. As the literature indicates,[43] currently, a sectorial approach seems more plausible for such a transposition. Until then, however, it is for the CJEU to fill the gaps by interpreting Article 9 (3) of the Aarhus Convention as part of EU law.[44]

After consolidating the position of NGOs under Article 9 (2) of the Aarhus Convention,[45] CJEU decided to give them the same role under Article 9 (3).[46] CJUE ruled, therefore, that Article 9 (3) must be interpreted in such a way as to recognize the legal standing of NGOs.[47] In *Protect Nature*, the NGOs position as claimants in

[43] M. Eliantonio, J. Richelle, *Access to Justice in Environmental Matters in the EU Legal Order: The "Sectorial" Turn in Legislation and Its Pitfalls*, "European Papers" 2024, vol. 9, no. 1, p. 267.

[44] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie VLK*, Judgment of 8 March 2011, para. 43.

[45] Court of Justice of the European Union, C-263/08, *Djurgården*, Judgment of 15 October 2009; Court of Justice of the European Union, C- 115/09, *Bund*, Judgment of 12 May 2011.

[46] For detailed research on the role of NGOs in environmental judicial review, see B. Iwańska, M. Baran, *Access of an Environmental Organisation to Court in Light of the EU Standard Set by the Principle of Effective Legal (Judicial) Protection*, "European Energy and Environmental Law Review" 2019, pp. 47-66; C. Warin, *Individual Rights and Collective Interests in EU Law: Three Approaches to a Still Volatile Relationship*, "Common Market Law Review" 2019, vol. 56, no. 2, pp. 466-469.

[47] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie…*, paras 51-52.

environmental litigation has been clarified. According to CJEU judgment, 'the public concerned', such as environmental organizations that satisfy the requirements of Article 2 (5) of the Aarhus Convention, must have the right to bring proceedings set out in Article 9 (3).[48] This is due to the fact that the objective of NGOs is to defend the public interest.[49]

In C-252/22, CJUE continued, therefore, the interpretation of Article 9 (3) by answering the questions of private interest requirement and the role of protection of public interest. Briefly, it answered that other organizations, besides NGOs, may be submitted to such a requirement. Therefore, protecting the public interest remains solely within the scope of environmental organizations. Still, the intention to protect the public interest must be considered when deciding on litigation costs, including when the judicial review is denied because of the lack of private interest.

4.2. Opinion of AG Laila Medina

In her opinion, AG Laila Medina argued that: (1) a law firm can be considered a member of 'the public' within the meaning of Articles 2(4) and 9 (3) of the Aarhus Convention; (2) Article 9 (3) of the Aarhus Convention and Article 47 of the Charter, do not preclude domestic law which imposes to a law firm partnership to prove private interest to initiate judicial review; (3) Article 9 (3), (4) and (5) of the Aarhus Convention and Article 47 of the Charter, does not presuppose specific rules or criteria to limit litigation costs.[50]

AG Medina's conclusions have been accompanied by a reference to the Aarhus Convention's objective of ensuring wide access to justice and to the duty of courts to interpret domestic law to ensure this objective, also considering the predominance of public interest in environmental litigation. The duty of domestic courts to apply a purposive interpretation to ensure wide access to justice and the predominance of public interest are arguments that run through AG Medina's entire opinion. However, the CJEU followed this approach only concerning the third question.

In her reasoning, AG Medina highlighted additional arguments that supported a purposive interpretation of Article 9 (3) of the Aarhus Convention.

Firstly, AG Medina referred to Article 3 (4) of the Aarhus Convention and argued that effective judicial protection in environmental matters also applies to other categories of members of the public, including, in particular, associations, organizations,

48 Court of Justice of the European Union, C-664/15…, para. 46.
49 *Ibidem*, para. 47.
50 Court of Justice of the European Union, C-252/22, Opinion of A.G. Medina, para. 79.

or groups genuinely promoting environmental protection even if they do not (yet) formally qualify as environmental organizations within the meaning of Article 2(5).

Furthermore, she held that Article 9 (3) does not indicate that NGOs should be privileged over individuals.[51] From this perspective, other organizations (not only NGOs) could be recognized as claimants in EPIL.

Secondly, AG Medina emphasized that the Court has already recognized that citizens should play an active role in protecting the environment.[52] From this perspective, she referred to the opinion presented by AG Kokott in *Edwards*: 'The recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally'. In such cases, 'as the environment cannot defend itself before a court [it] needs to be represented by active citizens or non-governmental organizations.'[53]

Thirdly, AG Medina emphasized the fact that, in the process of interpreting the national law, taking into account the predominance of public interest in environmental litigation and in conformity with the objective of wide access to justice (by including, in particular, organizations, associations or groups genuinely promoting environmental protection), the domestic court has to consider the relevance, for the interpretation of the rules on standing, of the recognition, in national law, of the right to every person to a 'safe and ecologically balanced environment.'[54]

Considering the objective of ensuring wide access to justice, AG Medina also addressed the need to impose limitations: 'However, this does not imply an unqualified standing to anyone. The Compliance Committee has held, indeed, that «the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment». Member States retain the discretion to apply criteria in order to determine the conditions under which members of the public can act to defend the environment. As pointed out, essentially, by the Commission and Ireland, streamlining environmental litigation is a legitimate objective to avoid a situation that could prove difficult to manage for the courts.'[55] AG Medina's reasoning on limitations allows for two counterarguments.

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51 *Ibidem*, para. 55.
52 *Ibidem*, para. 58.
53 Court of Justice of the European Union, C-260/11, Opinion of A. G. Kokott, para. 42.
54 Court of Justice of the European Union, C-252/22…, para. 63.
55 *Ibidem*, para. 61.

Concern about *actio popularis* leading to numerous cases is a common argument in discussions regarding legal standing in environmental litigation. However, it is worth noting that no empirical data sustains this assertion. It remains a doctrinal argument.

The risk of burdening the courts can be empirically assessed in countries where *actio popularis* is regulated. When arguing about this risk, the Portuguese *actio popularis*, for instance, cannot be ignored. Therefore, the concern of overloading courts (as a doctrinal argument) can be researched (using empirical quantitative data) in a concrete reality, namely the judicial system of Portugal.

In 1976, after the revolution that ended the fascist regime in Portugal, Article 66 (1) of the Constitution stated: 'Everyone has the right to a healthy and ecologically balanced human living environment and the duty to defend it.'[56] In 1989, the Constitution acknowledged *actio popularis* in environmental cases, and in 1995, Parliament enacted the law regulating its legal regime.[57] Under Article 2 of this statute, legal standing is granted to anyone, 'regardless of whether they do or do not have a direct interest in the claim'.

Even if the rules on legal standing are so generous, in practice, the Portuguese courts did not experience many environmental cases based on *actio popularis*. On the contrary, their numbers were low, as presented by Alexandra Aragão: 'The cases that have been heard using the *actio popularis* provision have been mainly instigated by non-governmental organisations and less frequently by citizens and companies. Even though litigants are not subjected to court fees, *actio popularis* cases still occur infrequently.'[58]

Secondly, even if the Aarhus Compliance Committee has held that the state parties are not obliged to regulate *actio popularis*, it also did not forbid the adoption of such action either through specific regulation or by purposive interpretation of existing regulations. States can accept such action if they appreciate that EPIL is an appropriate instrument due to historical, social, and political circumstances. States that have already regulated such action, like Portugal, cannot be obliged to renounce it.

During the pleadings in C-252/22, the claimant also argued that the amended Aarhus Regulation should be considered when interpreting Article 9 (3) of the Aarhus Convention. However, neither AG Medina nor the Court addressed this issue.

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[56] The Portuguese regulations on *action popularis* in environmental cases are presented in A. Aragão, *Environmental Standards in the Portuguese Constitution* [in:] *Environmental Rights: The Development of Standards*, S.J. Turner, D.L. Shelton, J. Razzaque, O. McIntyre, J.R. May (eds), Cambridge 2019, pp. 247-264.

[57] Law No. 83/95 of 13 August 1995, last amended 2015, presented in A. Aragão, *Environmental Standards…*, p. 261.

[58] *Ibidem*, p. 262.

Article 11 of the Aarhus Regulation,[59] as amended in 2021,[60] came into force on 29 April 2023. Considering the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, the EU acknowledged that the right to request an internal review of administrative acts adopted at the EU level belongs to: (a) members of the public having a legitimate interest under the rights-based model; (b) NGOs and (c) individuals acting in the public interest. In the latter case, the individuals must demonstrate sufficient public interest and that the request is supported by at least 4,000 individuals residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States. The members of the public who requested an internal review may institute proceedings before CJEU if the EU institution does not respond within the specified timeframe.

This may raise questions about the applicability of the uniformity principle, as indicated by the CJEU in the *Slovak Brown Bears* case.[61] The amended Aarhus Regulation now accepts, under several requirements, the public interest litigation exercised by NGOs and individuals. At the same time, at the domestic level, Article 9 (3), as interpreted by the CJEU, admits only the public interest litigation exercised by NGOs. Where a provision can apply both to situations failing into the scope of national law and within the scope of national law, such as Article 9 (3), it is in the interest of EU law that that provision should be interpreted uniformly.

As for the interpretation of Article 9 (4) on the issue of litigation costs, AG Medina referred to the existing CJEU case law.[62] She argued that: (a) Article 9 (4), which regulates the not prohibitively expensive rule, applies to the procedures referred to in Article 9 (3); (b) the private interest, but also the general interest to defend the environment, are criteria for the assessment of the costs; (c) the possible lack of standing of the claimant does not preclude the application of Article 9 (4); (d) courts must interpret domestic procedural law in a way that is consistent with the objectives laid down in Article 9(3) and (4) to the fullest extent possible so that judicial procedures as a whole are not prohibitively expensive.

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[59] 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 Community institutions and bodies, OJ No. L264 of 25 September 2006, p. 13.

[60] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021, OJ No. L 356 of 8 October 2021, p. 1.

[61] Court of Justice of the European Union, C-240/09, *Lesoochranárske zoskupenie…*, para. 42.

[62] Court of Justice of the European Union, C-470/16, *North East Pylon Pressure Campaign Limited and Maura Sheehy*, Judgment of 15 March 2018.

4.3. The CJEU judgment

In case C-252/22, CJEU delivered its judgment on 11 January 2024. The Court held: (1) Article 9 (3) of the Aarhus Convention must be interpreted as not precluding national legislation under which a legal entity, other than a non-governmental organization for the protection of the environment, is recognized as having standing to bring proceedings against an administrative measure of which it is not the addressee only where it claims that there has been a failure to observe a legitimate private interest or an interest connected to a legal situation which is directly related to the object of that entity; (2) Article 9 (4) and (5) of the Aarhus Convention, read in the light of Article 47 of the Charter, must be interpreted as meaning that, in order to ensure compliance with the requirement that judicial proceedings not be prohibitively expensive, a court called upon to make an order for costs against an unsuccessful party in an environmental dispute must take into account all the circumstances of the case, including that party's interest and the public interest in the protection of the environment.[63]

Regarding Article 9 (3), the CJEU judgment presented several differences from AG Medina's opinion. First, the Court united the first two questions and ruled on the interpretation of Article 9 (3) on legal standing. Secondly, the Court did not refer to the duty of the national court to interpret the domestic law to ensure wide access to justice and protection of public interest, as to include in the category of members of the public, in particular the organizations who genuinely intended to protect the environment.

In justifying its decision on the interpretation of Article 9 (3), the Court did not refer to AG Medina's arguments, such as the eighteenth recital of the Convention or Article 3 (4). AG Medina presented all these arguments to justify the domestic court's duty to apply the purposive method of interpretation and to include entities that genuinely wanted to protect the environment in the category of claimants in the public interest.

As indicated, the Court decided not to follow this path of reason. Instead, it connected Article 9 (3) to Article 9 (2) to justify limiting Article 9 (3) to NGOs and individuals with legitimate private interests.

The Court observed that 'Article 9 (3) is broader in scope because it covers a wider category of measures and decisions and is addressed to members of the «public» in general. On the other hand, that provision confers a greater discretion on the Member

[63] Court of Justice of the European Union, C-252/22, *Societatea Civilă de Avocați AB&CD*, Judgment of 11 January 2024.

States when they lay down the criteria for determining, among all members of the public, who has the right to bring the action provided for in that provision.'[64]

This idea is further elaborated by linking the scope *ratione personae* of Article 9 (2) to Article 9 (3). The Court observed that in the context of Article 11 of Directive 2011/92/EU, which implements Article 9(2), it is open to the national legislature to restrict the rights that, when they are not observed, may be relied on by an individual to be able to bring judicial proceedings under Article 11 solely to individual rights.[65]

Under an argumentation *a fortiori*, the Court ruled that the limitation to subjective litigation also applies to Article 9 (3).[66] Under this interpretation, 'the need to establish a legitimate private interest means only that actions brought by persons who have no specific connection to the administrative measure that they wish to challenge are inadmissible. Thus, the Romanian legislature avoided giving rise to a popular action without unduly restricting access to justice.'[67]

However, Article 9 (3) permits also an argumentation *e contrario*. Unlike Article 9 (2), Article 9 (3) refers to members of the public rather than the concerned public. If legitimate private interest is a limitation in conformity with Article 9 (3), we must conclude that there is no distinction between Article 9 (2) and Article 9 (3) regarding the criteria of *ratione personae*. Both of them include only the concerned public and NGOs.

As the Court stated, Article 9 (3) has a broader scope as it encompasses members of the 'public' without further qualifications. There must be 'something' to distinguish *ratione personae* in the category of claimants under Articles 9 (2) and (3). Otherwise, the distinction between the public and the concerned public makes no sense.

The solution proposed by AG Medina involves including those who genuinely intend to protect the environment in Article 9 (3). This approach could be a key factor distinguishing Article 9 (2) from Article 9 (3). Even if the Court did not accept this argument, the Opinion of AG Medina in case C-252/22 opened a pathway that may be followed in future cases.

Similar to AG Medina, the Court referenced the concept in the Implementation Guide to the Aarhus Convention, which states that parties to the convention are not required to create a system of *actio popularis* in their national laws.[68] The counterarguments presented in the AG opinion section are also relevant here.

64 *Ibidem*, para. 53.
65 *Ibidem*, para. 59.
66 *Ibidem*, para. 60.
67 *Ibidem*, para. 58.
68 *Ibidem*, para. 55.

As for the question relating to reasonable costs in judicial proceedings, the CJEU maintained its previous case law[69] and agreed with AG Medina. The Court referred to the duty of the courts to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objective laid down in Article 9 (4) of the Aarhus Convention so that judicial procedures are not prohibitively expensive.[70] The non-prohibitive costs rule also applies when the judicial action is dismissed as inadmissible due to a lack of standing.[71]

It is worth noting that the Court made reference to 'the public interest in the protection of the environment' and to the fact that 'members of the public and associations are naturally required to play an active role in defending the environment'.

5. Implications of the CJEU judgment in C-252/22

The CJUE judgment in case C-252/22 has implications for the domestic case that referred the preliminary reference and other cases from Romania or any other Member State. Additionally, it may shape national policies on environmental litigation and legal standing.

5.1. Consequences on legal standing

Applying the CJEU judgment in C-252/22, the Târgu Mureș Court of Appeal denied the judicial review due to the lack of legal standing in both components, lack of capacity, and lack of interest.[72] The court did not have to decide on the issue of costs because the Suceava County Council, the main defendant in the trial, opted for a distinct civil litigation based on tort law.

As for legal capacity to initiate judicial proceedings, the Târgu Mureș Court of Appeal applied Article 196 (3) of the Statute of the profession of lawyer ('For disputes arising from the performance of a professional activity, the partnership may take legal action as an applicant or defendant, even if it does not have legal personality'). It did not discuss the relation between this rule and Article 56 of the Code of Civil Procedure (the legal rule that gives entities without legal personality the capacity to be claimants or defendants without limitations). The Court held that its

[69] Court of Justice of the European Union, C-470/16, *North East Pylon Pressure Campaign and Sheehy*; Court of Justice of the European Union, C-470/16, Judgment of 15 March 2018; Court of Justice of the European Union, C-260/11, *Edwards and Pallikaropoulos*, Judgment of 11 April 2013.

[70] Court of Justice of the European Union, C-252/22…, para. 82.

[71] *Ibidem*, para. 71.

[72] Târgu Mureș Court of Appeal, Case No. 3655/117/2018, Decision No. 191/2024 of 4 April 2024.

decision would have been different only if the Aarhus Convention expressly regulated the *actio popularis* as a mandatory duty on the state parties.[73]

As for the interest to initiate judicial proceedings (the issue that this contribution treated as legal standing), the court applied the CJEU judgment, which it cited extensively. The Târgu-Mureș Court of Appeal held that the Romanian legislation, which requires a legitimate private interest, is in conformity with EU law. Therefore, the claim has to be denied because the claimant did not prove a legitimate private interest.

Using a textual interpretation method, the Târgu-Mureș Court of Appeal held that Article 35 of the Constitution does not regulate legal standing. Therefore, it rejected the claimant's argument concerning the purposive interpretation of the law based on the constitutional right to a healthy environment.

Secondly, it relied only on Article 20 (5) and (6) of GEO No. 195/2005 (' Public access to justice shall be based on the legislation in force; NGOs promoting the protection of the environment shall have the right to take legal action in environmental matters and have standing in disputes concerning the protection of the environment'). Contrary to the Cluj Court of Appeal, the Court of Appeal of Târgu Mureș did not assess Article 5 (1) letter d) of GEO No. 195/2005 ('the right to apply, directly or through environmental protection organizations, to the administrative and/or judicial authorities, as the case may be, in environmental matters, irrespective of whether or not damage has occurred') in the process of interpretation and application of legal norms on standing.

The Târgu Mureș Court of Appeal applied the CJEU judgment based on EU law priority. It held: 'Considering the priority of EU law, as stated in Article 148 (2) of the Constitution, and noting that the case law of the CJEU is part of the binding EU regulations, the Târgu Mureș Court of Appeal dismisses the claimant's motion regarding the application in the present case of the reasoning presented in a judgment issued by the Cluj Court of Appeal, namely Decision no. 182/28 January 2016, which asserted the objective character of environmental litigation, in consideration of the CJEU judgment of 11 January 2024, delivered in case C-252/22'.

In Romania, a post-communist Civil law jurisdiction, case law has only a persuasive force; court judgments are not a primary source of law. Only two exceptions are recognized: the judgments of Constitutional Courts and the judgments of the HCCJ in interpreting the law. However, the principle of legal certainty requires consistency in the case law of a civil law jurisdiction. Even if this doctrine does not carry the same authority as the doctrine of precedents in common law jurisdictions, it has practical effects, especially in the same court of appeal jurisdiction.

[73] *Ibidem*, p. 38.

In this context, Decision No. 182/2016 of the Cluj Court of Appeal, which recognized the existence of EPIL in Romania, held only persuasive authority. However, the Târgu Mureș Court of Appeal limited its argumentation to directly applying the CJUE judgment in C-252/22 and did not provide arguments against it.

This line of argumentation reveals a question about the limits of the CJEU judgment and its binding force. As discussed earlier, the CJEU concluded that the Romanian legislation, which mandates proof of a legitimate interest for organizations other than NGOs, complies with EU law. The CJEU also emphasized the referring court's responsibility to provide the domestic law, noting that its findings are subject to further checks by that court on the domestic law and facts.

The CJEU's ruling determines the limits on its binding force. Thus, the CJEU decided that the domestic law, as provided by the referring court, is in line with EU law. The CJEU did not hold that EPIL exercised by every person is contrary to EU law. Lacking a directive transposing Article 9 (3) of the Aarhus Convention, the Court has no competence to reach such a conclusion. There is no legal basis for it.

Within these limits, the other Romanian courts retain the power to answer the question, 'What is the domestic law?' Using alternative interpretation methods, such as the purposive method, domestic courts other than the Târgu Mureș Court of Appeal can reach different conclusions. This does not breach the binding force of the CJEU judgment, which has to be conferred to its limits.

This conclusion also applies to domestic courts from other EU Member States. Lacking a directive transposing Article 9 (3) of the Aarhus Convention, Member States still have their margin of appreciation in its implementation. Domestic courts still have their own space for the interpretation of domestic law. Furthermore, Article 3 (5) expressly provides that the Aarhus Convention is only a minimum standard in the area of access to justice.

Regarding public policies for access to justice in environmental litigation, the CJEU judgment in case C-252/22 undoubtedly holds persuasive authority. The Court ruled that the litigation model based on subjective disputes conforms with EU law, providing a strong argument for this type of litigation and limiting the public interest as legal basis for standing.

5.2. Consequences on litigation costs

As previously noted, the Suceava County Council, the main defendant in the trial, opted for a distinct civil litigation based on tort law. At the time of writing, this litigation has started, but it is in first stages of written observations.

In this litigation the domestic court will need to take into account the CJEU judgment in case C-252/22. The Court has established a mandatory duty for judges to use a purposive method of interpretation aimed at protecting claimants from excessive costs. In this regard, the CJEU judgment is legally binding on the domestic court handling the separate civil litigation, as well as on other Romanian courts and courts in other Member States when addressing the issue of litigation costs in environmental cases.

Therefore, the impact of the CJEU judgment depends on the courts applying the duty to interpret domestic law purposively and protect the claimant from excessive costs. In another case, the Cluj Court of Appeal has already decided to apply the CJEU judgment regarding litigation costs. In a recent case, it reduced litigation costs from around 80,000 euros claimed by a private company, beneficiary of a mining license whose prolonging has been challenged in judicial review and the action has been denied, to 4,000 euros.[74] It remains to be seen whether courts from other regions of Romania will follow the same direction.

6. Conclusion

This contribution outlined recent Romanian judicial developments in environmental litigation case law and the implications of the CJEU judgment in case C-252/22. Within this framework, three solutions regarding access to justice have been presented.

First, the Cluj Court of Appeal ruled that domestic laws, interpreted to protect the substantive right to a healthy environment, support the right of any individual to initiate judicial reviews in environmental cases. The court moved away from the individualistic doctrine of legal standing in favor of a new public interest doctrine through purposive interpretation.

Secondly, AG Medina elaborated on the thesis that NGOs but also other organizations and individuals who genuinely want to protect the environment can have legal standing in environmental cases by invoking the public interest. She also decided to move away from the individualistic doctrine of legal standing and to present a new middle way between a rights-based approach and *action popularis*. Until case C-252/22, the middle way the Advocates General presented to the CJEU was the NGOs as the only representatives of the public interest.[75]

[74] Cluj Court of Appeal, Case No. 432/33/2024, Judgment No. 321/2024 of 17 September 2024 (not final).

[75] Court of Justice of the European Union, C-664/15..., Opinion of AG Eleonor Sharpston, par. 81.

Finally, the CJEU held that domestic legislation requiring other organizations besides environmental NGOs to meet the private interest requirement conforms with Article 9 (3) of the Aarhus Convention. The referring court, the Târgu Mureș Court of Appeal, strictly applied the CJEU judgment and returned to the individualistic doctrine of legal standing.

The same facts determined three solutions on legal standing. In the end, however, the CJEU judgment prevailed, and the judicial action against the zonal planning and building permit of the landfill was denied.

The landfill from Valea Putnei is currently waiting for the final environmental authorization to become operational. It determined litigation that reached two supranational European courts. A lot of time and arguments have been dedicated to the legal cases. In the meantime, the landscape of the Eastern Carpathians has been destroyed, the once-green mountain peak is now a 5-hectare landfill, and the flooding of the area is ongoing. At the end of the day, what did we humans accomplish through these cases? If Nature could speak, she would probably say that we accomplished nothing.

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For many years legal thought and practice focused on the general concept of environmental rights as a legal tool meant to enforce the human right to a healthy and sustainable environment. Whilst there is an undeniable link between human rights and climate change, as illustrated notably by the global phenomenon of the climate change litigation, this monograph focuses on the growing role of potential, sectoral fundamental rights and tailored remedies available in the EU legal order in absence of a substantive fundamental right to a healthy environment in EU law. Against the background of the European Green Deal and its ambitious climate-neutrality goal by 2050, the book echoes the sustainability-based approach and its limits.

Contributors analyse two interrelated perspectives. On the one hand, authors explore the procedural dimension by discussing the climate litigation and the limits of the concept of human environmental rights, state liability for loss and damage caused to individuals as a result of breaches of EU law, national remedies available in case of bad condition of the environment as well as the limits of the public interest litigation and challenges related to climate claims against private actors in national law. On the other hand, contributors discuss substantive aspects from a global perspective of food insecurity, soil monitoring and resilience as well as digitalisation, green skills and climate-induced migration. With insights from leading experts, this work highlights the evolving tensions and expectations within the EU legal framework.

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