Climate Litigation and the Right to a Fair Trial

MÅRTEN SCHULTZ*

SCCL: A research centre at the heart of the action

25 years on the frontlines

The Stockholm Centre for Commercial Law (SCCL) is celebrating its 25th anniversary, a quarter of a century in which jurisprudential and legal dialogues have filled the Centre and spilled out into the wider legal community. One of the SCCL's key contributions to Swedish legal life during this time has been to serve as a vibrant forum for discussing matters at the forefront of commercial (and occasionally non-commercial) legal developments. In the interplay between academics and practitioners the SCCL has created a platform that has the ability to track fast-moving developments in real time and at the same time can put them into a broader context.

Sometimes these discussions have centred on a common European civil code, or banking crises, or what binds the Nordic legal systems together. These are themes that have anchored the jurisprudential and legal discourse in a wider social context. In recent times, there is one theme that is characterised by this more than any other. The climate issue. And especially so-called climate litigation.

1. The Aurora case

At the time of writing, Sweden's first major climate litigation is still in its infancy. The matter is called the Aurora case. An association of people involved in the climate issue, the so-called Aurora Group, has brought a

* Professor of private law, Faculty of Law, Stockholm University. Board member of the Stockholm Centre for Commercial Law. Affiliated researcher, Institute for Future Studies, Stockholm, since Fall 2021. Founder and chairman of The Swedish Law and Internet Institute (Institutet för Juridik och Internet).

class action against the State for what it claims is a failure to take sufficient action against climate change. Members of the group are children and young people.

The requests for relief are, primarily, that the Court should declare that the failure of the State to take certain specified measures to limit climate change constitutes a violation of the rights of the class members under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, secondly, that the Court should order the State to take those specified measures "in order to reduce the concentration of greenhouse gases in the atmosphere and limit the increase in the global average temperature to 1.5 degrees Celsius compared to pre-industrial levels".

As summarised by the District Court, the grounds for the request are:

- The Swedish State has an obligation to guarantee the claimant (and the class members) the rights and freedoms set out in the ECHR;
- The State has positive obligations to take sufficient and adequate procedural and substantive measures that can be expected to avoid a risk that the State knew or should have known about. These are to be interpreted in accordance with the precautionary principle and interpreted in the light of both relevant Swedish and international law, with the goal of limiting the increase in average temperature to 1.5 degrees; and
- That current climate science shows that there is a real risk of imminent adverse consequences as well as a real risk of far-reaching adverse consequences in the future.

A sub-issue has been referred to the Swedish Supreme Court, which has granted permission to appeal. The issue is whether the case can be adjudicated at all or whether it should be dismissed. At the time of sending this text to the editors of the anniversary publication in early 2025, the Swedish Supreme Court has not yet decided whether the Aurora Group is entitled to its day in court, but this matter will probably have been decided before the book goes to press.

I realise that this may thus seem an odd choice of topic. However, it is not the issue of whether Swedish procedural law allows for these types of class actions that is the focus of the present reflections – it is not procedural law that I am interested in at all. My reflections are of a more systematic and legal policy nature: is it desirable for Swedish law to provide legal remedies for this type of climate litigation?

2. Public interest litigation

The Aurora case is a type of action known as *public interest litigation*.[1] This is litigation *that aims to improve society*. This does not mean that it necessarily is beneficial to society, i.e. that it actually leads to results that are good for society.[2] Rather, the term is used for cases that are not primarily about the litigant winning, but rather about influencing society in some way.[3] Such influence can be achieved by winning the case, perhaps primarily by setting a precedent. But social impact can also arise due to the litigation itself, e.g. by a hearing attracting attention and thus influencing public opinion or politics. In the latter case, losing may, in some cases, have a greater impact than winning the case as such an outcome may convey the image that the legal system is unfair or contains "gaps".

Public interest litigation involves using the courts to achieve political goals. This blurs the line between law and politics in these cases. Law is used as a means of influence. Historically, the American term "public interest litigation" has its roots in 1960s litigation in the United States, when organisations such as the American Civil Liberties Union (ACLU) sought through litigation to end segregation in the American South and create equal rights for all American citizens.[4]

1 An early orientating article is *The New Public Interest Lawyers*, 79 The Yale Law Journal, pp. 1069 *et seq*. (1970). Much has been written about the terminological difficulties of terms such as "public interest litigation" and "public interest law firms". For an interesting reflection on how a term previously seen as part of a social movement for equality has been hijacked by conservative organisations, see Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law*", 52 UCLA Law Review, pp. 1224 *et seq*. (2005).

2 In the legal debate, it has been argued that litigation is inherently beneficial to society, that filing lawsuits can help promote democratic values, see Alexandra Lahav, In praise of litigation, New York 2017.

3 This is a description that partly deviates from how public interest law is usually understood. An influential early account describes public interest law as an "activity as one: (1) undertaken by an organisation in the voluntary sector; (2) that primarily involves the use of legal tools such as litigation; and (3) that produces significant external benefits if it is successful in bringing about change". (Joel F. Handler, Betsy Ginsberg & Arthur Snow, *The Public Interest Law Industry*, in: Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar (eds.) Public Interest Law, Berkeley/Los Angeles 1978, p. 42.) This definition does not focus on the intention to achieve a certain result but rather on the fact that the action *actually* leads to a positive result.

4 See Scott L. Cummings, *Public Interest Litigation in a Comparative Perspective*, 26 Australian Journal of Human Rights, p. 184 *et seq*., at p. 185 (2020). Others have traced the historical roots of organisations that assisted newly arrived migrants in New York in

In Sweden, we have not had the same history of using the courts for political purposes.[5] There have certainly been elements of legal activism in popular movements, perhaps most notably the trade unions. But while the labour movement has relied on legal instruments, strategic litigation has not been its primary tool. However, there are other organisations that have used legal activism more extensively as a catalyst for change. The most successful is probably the Centre for Justice (Sw. C*entrum för Rättvisa*), which – inspired by American models – has used litigation co-ordinated with communication strategies to drive a development towards a stronger protection of rights and freedoms.[6] The Centre for Justice is a very successful endeavour. The organisation has won many cases in the Swedish Supreme Court and influenced legislation. Its founder is Sweden's current Minister of Justice. In addition to the Centre for Justice there have also been some recent initiatives, coming from the far-right, to use the law of defamation to influence society[7] as well as some examples coming from the other side of the political spectrum.[8]

Human rights and freedoms are often used as a tool for public interest litigation. As I will explore in more detail below, the protection of rights has been strengthened in Swedish law by the fact that rights violations can now constitute a basis for liability in tort law. This possibility is (so far) only codified for violations of the rights contained in Chapter 2 of the Swedish Instrument of Government and the European Convention on Human Rights, but the EU Charter can also have tort law effects.

3. Responsibility for the protection of human rights and freedoms

What I call public interest litigation is thus quite unusual in Sweden, although the Centre for Justice illustrates that such litigation can work here

the late 19th century, Olivia A. Houck, And Charity for All, 93 The Yale Law Journal, pp. 1419 *et seq.*, at pp. 1439 *et seq*. (1984).

5 This does not prevent some commentators from worrying about "commitment and identity lawyers", see Håkan Andersson, *Skiss till en essä om 1972 års lag och 1968 års idéer, i: Skadeståndslagen 50 år*, Uppsala 2022, p. 11 *et seq*., at p. 24 *et seq*.

6 See Karolina Stenlund, *Rättighetsargumentet i skadeståndsrätten*, Uppsala 2021, 4.9.2.

7 *Cf*. Karolina Stenlund, *En förändrad bestämmelse om hets mot folkgrupp*, SvJT 2023, p. 888 *et seq*., at p. 896 *et seq*.

8 See Leila Brännström, *Juridik som politik och behovet av kritik*, in Petra Hall & Lisa Pelling, *Rätten till rättvisa: Om utsatta människors rättigheter och tillgång till rättvisa*, Stockholm 2017, p. 70 *et seq*.

too. This brings me back to climate litigation. The Aurora case is also about the protection of human rights and freedoms. The case concerns whether a class action can be brought against *the State* because the State has not taken sufficient measures to counteract adverse climate development. In other countries where climate litigation grounded in allegations of human rights violations has occurred, it has sometimes been other actors who have been defendants, such as oil companies.[9] However, the most common, I think, is that the defendant belongs to the *public sector* – the central government, or, in federations, the states, or public authorities.

Liability for rights violations

In the discourse of responsibility for rights that has developed in Swedish *tort law* – which has been the basis of modern Swedish rights protection – responsibility for rights violations lies with the State, regions and municipalities.[10]

In a series of landmark rulings by the Swedish Supreme Court from 2005 onwards, fundamental rights, as expressed in the European Convention on Human Rights, were recognised as an independent basis for public liability.[11] In 2013, the Court extended this practice to include the rights provisions contained in the Swedish Instrument of Government.[12] Rights-based damages have since been regulated by a section in the Swedish Tort Liability

[9] A notable decision is Millieudefensie *et al.* v. Royal Dutch Shell, where the District Court of The Hague ruled against the oil company in a climate case (Judgment 26/5, 2021, case number C/09/571932 / HA ZA 19-379). The decision was reversed on appeal by the Hague Court of Appeals, 12/11, 2024, case number ECLI:NL:GHDHA:2024:2100 (English version).

[10] In other legal systems, it is not uncommon for responsibility to be placed instead on a public authority, such as a local police authority, but that is not possible in Swedish law.

[11] The most important judgments are case NJA 2005 p. 462, where the state was liable in damages directly based on the ECHR for failing to meet the requirements of a fair trial, and case NJA 2009 p. 463, where the Swedish Supreme Court found that a municipality can also incur liability on the basis of the Convention. There is no ruling concerning a region or a municipal association (*cf.* Chapter 3, Section 1, paragraph 2 of the Swedish Tort Liability Act), but there is no reason to believe that any different considerations apply to these legal persons than to municipalities. Convention liability in tort law does not, however, as will be discussed shortly below, cover private law legal entities – so-called direct horizontal effect, case NJA 2007 p. 747 and case NJA 2015 p. 899.

[12] Case NJA 2013 p. 323 and case NJA 2013 p. 332.

Act (Chapter 3, Section 4).[13] This topic has been widely discussed in legal literature and continues to produce new case law.[14] I will return to this below.

Human rights are not usually considered to have a direct binding effect in relations between *private legal entities* and thus cannot form the basis for tort liability for persons of companies. That is also the position of Swedish law. There is, to my knowledge, no legal system that gives *direct horizontal effect* to a catalogue of rights (so-called "Drittwirkung"), which means that no legal system uses human rights norms as a direct basis for holding a company or individual liable. However, they can have an indirect effect in private law relationships, for instance, in cases where the interpretation of other rules is influenced by human rights.[15]

[13] For comments on the legislation, see Bertil Bengtsson, *Skadestånd vid överträdelse av Europakonventionen – den nya lagstiftningen*, SvJT 2018 p. 93 *et seq*.

[14] See Karolina Stenlund, *supra*, n. 6 and – more generally – Bertil Bengtsson, *Rättighetsansvar*, Stockholm 2022. See for some different authors' perspectives on European Convention liability, written at different times in the development of the law Håkan Andersson, *Ansvarsproblem i skadeståndsrätten*, Uppsala 2013, p. 544 *et seq*., and Percy Bratt and Jan Södergren, *Europakonventionens tillämpning i det inhemska systemet, ERT 2000*, p. 407 *et seq*., Ulf Bernitz, *Rättighetsskyddets genomslag i svensk rätt – konventionsrättsligt och unionsrättsligt*, JT 2010–11, p. 821 *et seq*., Iain Cameron, *Skadestånd och Europakonventionen för de mänskliga rättigheterna*, SvJT 2006, p. 553 *et seq*., Johanna Chamberlain, *Integritet och skadestånd*, Uppsala 2020, p. 171 *et seq*., Clarence Crafoord, *Inhemsk gottgörelse för kränkning av Europakonventionen*, ERT 2001, p. 519 *et seq*., Sandra Friberg, *Kränkningsersättning*, Uppsala 2010, p. 497 *et seq*., Stellan Gärde and Lisa Nyström, *Rättsgrunder för skadestånd vid kränkning*, Stockholm 2016, Sabina Hellborg, *Diskrimineringsansvar*, Uppsala2018, p. 63 *et seq*. 392 *et seq*., Jan Kleineman, *Europakonventionen och den svenska skadeståndsrättens utveckling*, JT 2008–09, p. 546 *et seq*., Philip Mielnicki, *Europakonventionen och skadeståndsrätten – till vägs ände?*, JT 2008–09, p. 357 *et seq*., Mårten Schultz, *Nya argumentationslinjer i förmögenhetsrätten: Rättighetsargument*, SvJT 2011, p. 989 *et seq*., Wiweka Warnling-Nerep, *Skadeståndstalan mot staten – en allt vanligare företeelse?*, JT 2004–05, p. 170 *et seq*., Karin Wistrand, *Statens utomobligatoriska skadeståndsansvar – några utvecklingslinjer*, SvJT 2019, p. 103 *et seq*., Karin Åhman, *Skadestånd p.g.a konventionsbrott – eller har HD blivit naturrättare?*, JT 2005–06, p. 424 *et seq*. See for some comments on the development regarding the Swedish Instrument of Government, Bertil Bengtsson, *Skadestånd vid brott mot regeringsformen?*, SvJT 2011 p. 605 *et seq*, *Högsta domstolen fortsätter omvandlingen av skadeståndsrätten*, SvJT 2014 p. 431 *et seq*., Clarence Crafoord, *Regeringsformens fri- och rättighetsskydd och skadestånd*, SvJT 2009 p. 1062 *et seq*. For comparisons, see also Martin Mörk and Magnus Hermansson, *En enhetlig skadeståndsordning vid överträdelser av grundläggande rättigheter*, SvJT 2014 p. 507 *et seq*.

[15] As regards the state's tortious liability, the theme of interpretation in conformity with the treaty is already addressed in one of the earliest judgments in the development of the law, case NJA 2007 p. 295. See for a commentary on the case, Mårten Schultz, *Skadeståndsrätten i de mänskliga rättigheternas tjänst*, JT 2007–08, p. 140 *et seq*. The Swedish Supreme

The role of the State in a system of rights

The protection of rights, both in theory and in several expressions of positive law, is primarily a normative protection against the restriction of freedoms. Accordingly, the State may not prevent or penalise someone for using their freedom of speech or for their religious expression, if there is not a sufficient overriding interest (for example, if the speech or religious expression would be harmful to someone else).

In contrast, the State has no general obligation to enable people to achieve the interests or positions they seek. A concrete example: the State may not restrict anyone from expressing a political opinion but does not have to provide the means for those who wish to express their political opinion to actually do so.

There are exceptions to this characteristic. In the European Conventions the right to a fair trial and the positive obligations of the state to protect people from violations of other people are exceptions. The Swedish constitutional acts protecting freedom of speech include far reaching rights to access information. And the UN Convention on the Rights of the Child is full of rights, or "rights", that aim to secure the achievement of certain goals. But these are, especially in the present context, exceptions.

This is often described as the core of rights protection being the protection of *negative* rights, but not generally including positive obligations.[16] This is the essence of the two most important catalogues of rights in Swedish law: Chapter 2 of the Swedish Instrument of Government and the European Convention on Human Rights. (However, as indicated above, this general characterisation does not apply to the Convention on the Rights of the Child, which has been incorporated into Swedish law).

Court takes up the theme in case NJA 2015 p. 899, which concerned the question of whether a trade union could be held liable in damages on the basis of the Convention. Karolina Stenlund calls this indirect effect of rights "the radiation effect" of rights, Karolina Stenlund, *supra*, n. 6, Chapter 9.

[16] See on the division based on the most important practical use in domestic law, tort liability, Karolina Stenlund, *supra*, n. 6, p. 64 *et seq*. In the political-philosophical debate, this distinction seems to have been somewhat in decline in recent decades, but see for a defence Ingvar Johansson, *Negativa och positiva mänskliga rättigheter: En begreppsutredning och ett begreppsförslag*, 23 Tidskrift för politisk filosofi 2019, p. 21 *et seq*.

4. Should climate litigation such as the Aurora case be able to be pursued in the Swedish courts

A starting point: Sweden is a constitutional state

Sweden is a *Rechtsstaat*, a constitutional state. This statement may seem banal, self-sufficient and pretentious at the same time. It is nevertheless true.[17] A constitutional state is – according to the Swedish Dictionary – a "form of society in which the organs of the state are considered to be obliged to follow the applicable rules themselves and in which there are guarantees against abuse of state power". With regard to the first part, it is impossible to seriously argue otherwise than that Sweden is characterised on the whole by the fact that the organs of the state are considered to be obliged to comply with the rules in force and that they also strive to do so. When they fail in this endeavour, it is virtually never due to corruption in the strict sense of the word, but rather due to carelessness or systemic error.

The effectiveness of the rule of law in various countries is regularly measured in various international surveys. The World Justice Index (WJI), for instance, measures how well states achieve a certain defined "rule of law" outcome.[18] "Rule of law" is not the same as the constitutional state, but the concepts are closely related. The index is based on four "universal principles": "accountability", "open government", "just law" and "accessible and impartial justice". In the overall ranking, Sweden is always among the top ten legal systems in the world.

In 2023, the Nordic countries (except Iceland, which is not ranked) were in the first four places. This time Sweden was in fourth place. We usually end up in third or fourth place, if you look at the surveys since 2015. Sweden scores high in the anti-corruption column. However, Sweden scores lower – significantly lower – in the categories "People can access and afford civil justice" and "Civil justice is not subject to unreasonable delay".

Restrictions on de facto access to justice in Sweden

In other words, Sweden is among the best countries in the world, according to the WJI index, when it comes to things like transparency and the absence of corruption, but seems to be less good at providing effective remedies for

[17] For a problematising approach, see Richard Sannerholm, *Rättsstaten Sverige*, Stockholm 2020.

[18] www.worldjusticeproject.org.

individuals. This is the result of a combination of factors that taken together limit practical access to justice. Some important points can be made here, with a particular focus on individuals considering going to court.[19]

As regards civil proceedings, the risk of incurring costs is a factor. It costs money to commence a civil action. Swedish home insurance policies often have legal expenses cover, but the compensation is often exhausted before the case is finalised. In the event the party is unsuccessful, the losing party must generally pay the other party's costs, and this risk can discourage litigation. It is legal actions such as in the Aurora case that drive the formation of law. However, the financial risks associated with these cases are disproportionate to the likelihood of success. In my view, there is a societal value in such cases being pursued and that basic legal assumptions – for instance on legal personhood, standing or responsibility, is challenged, but there is no financial incentive to pursue such cases or to invest in such litigation. Only costs and risks.

In Sweden, we have a tradition of primarily using lawyers who are members of the Swedish Bar Association as counsel – a tradition that has generally served the Swedish legal community well. Lawyers who are members of the Swedish Bar Association are not permitted to enter into agreements with their clients to charge a share of the profits if a case is successful (a contingency fee; in England: conditional fee). Such payment models are not without problems but can act as an incentive for lawyers to pursue matters for clients who cannot afford to take the cost risk themselves, if there is a possibility of making good profits in the event the litigation is successful.

There is another cost aspect that deserves particular attention. About ten years ago, the application fees for the courts were increased. For "ordinary" civil matters, the cost is SEK 2,800 and for simplified civil cases SEK 900. Especially for small claims procedures – where the risk of having to pay the

[19] In this section, I limit myself to some rather sweeping observations on the limitations of the real possibilities to turn to the courts in matters of perceived injustice. There are many other aspects that could be addressed. Thus – and in line with what the issue in this case is about – specific government functions that can assist a person seeking justice, such as the Swedish Discrimination Ombudsman or the Swedish Ombudsman for Children and Young People, are left out. Nor do I address the issue of legal aid. The following text focuses in particular on damages, which are often, but not always, the only effective remedy available to the victim of an injustice. *Cf.* the reasoning in case NJA 2005 p. 462. See, on the other hand, case NJA 2013, p. 842, at p. 16, where it is emphasised that redress should primarily be achieved by other means. Nevertheless, it is damages that have been at the centre of the lion's share of the cases of compensation directly based on the ECHR that have gone to the Swedish Supreme Court.

other party's costs is not as dissuasive – the increase, which was a doubling of the previous fee, is significant to private persons that seek to bring a case against a state or the municipality to court for principled reasons.

There are also other factors that adversely affect access to justice. One factor is that Swedish law does not provide incentives in the form of punitive damages or similar compensation solutions, which would allow a successful claimant to receive more compensation than the damage suffered.[20]

In addition to economic and legal aspects, cultural factors also influence practical access to justice. It has historically been rare for private individuals to go to court, with the exception of certain types of matters (primarily family matters).

Conclusions

Sweden is a constitutional state, but even in constitutional states there are areas that can be improved. Access to justice is, I believe, clearly one such area. There are several factors that militate against a real opportunity to have a case heard: costs aspects, the design of the liability law systems and legal cultural aspects. From a societal point of view, there is thus an argument that inadmissibility rules *in dubio* should be interpreted restrictively. It is still difficult for people who are not wealthy to obtain redress if they consider that their rights have been violated. This is particularly true in cases involving human rights and freedoms.

5. Climate litigation around the world

In Sweden, Swedish rules and principles apply, unless any adjustments are required to fulfil our obligations, primarily under the European Convention on Human Rights and the Convention on the Rights of the Child – which have been incorporated into Swedish law – or otherwise follow from international agreements. Nevertheless, it may be of interest in this context to look at what is happening in other countries. Court decisions from other countries do not, of course, bind the Swedish courts – not even as *soft law*. But

[20] See on the theme from a Swedish perspective, Karolina Stenlund, *Perspektiv på problemen med punitiva skadestånd, i: Skadeståndslagen 50 år*, Uppsala 2022, p. 257 *et seq*. See also Mårten Schultz, *Bestraffande skadestånd, i Ord och rätt*, Festskrift to HG Axberger, Stockholm 2020, p. 535 *et seq*.

climate litigation is a comparative law phenomenon, and has a background in an international development.[21]

The United Nations (UN) has published a report on climate change litigation around the world.[22] The first part of the report describes climate litigation as an important part of the fight against climate degradation. Undoubtably the world's best-known case, Urgenda v. The Netherlands, is quoted as a source of inspiration for climate activism in other countries.[23] The Urgenda case ended in a victory for the climate movement in the Hoge Raad (the country's highest court) in 2019.

The report notes that, from an international perspective, the number of climate litigation cases has increased significantly in recent years. Most cases are reported from the United States, but it is very much a global phenomenon.[24] Litigation is taking place in international, regional and national fora.

The Aurora case, Sweden's first climate case, must be seen in this context, as part of a global movement supported by the international community – or at least by the UN Environment Programme. Sweden has the world's eyes on it when it comes to this case, and interest in the matter is fuelled by the fact that Greta Thunberg, the world's most influential climate activist, is part of the Aurora group.

The Affaire Verein Klimaseniorinnen Schweiz *et al.* (Climate Senior Women's Association *et al.*) v. Switzerland

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) decided the case of Affaire Verein Klimaseniorinnen Schweiz *et al.* v. Switzerland (53600/20). The judgment was one of three climate judgments delivered by the ECHR on the same day. Two of these were dismissed – one because the applicant had not exhausted domestic remedies and one because the applicant did not have victim standing – but the Swiss case was decided on the merits. The complainants were a group of women who

[21] An anthology on the topic is Ivano Alogna, Christine Bakker and Jean-Pierre Gauci, Climate Change Litigation: Global Perspectives, British Institute of International and Comparative Law, Leiden 2021.

[22] United Nations Environment Programme, Global Climate Litigation Report: 2023 Status Review, Nairobi 2023, co-produced with the Sabin Center for Climate Change Law, Columbia University, New York.

[23] The Netherlands v. Urgenda Foundation, Supreme Court of the Netherlands, 20/12 2019, in case 19/00135.

[24] For a list of cases from different countries, see United Nations Environment Programme, Global Climate Litigation Report: 2023 Status Review, Nairobi 2023, p. 17.

claimed that the Swiss state's failure to take further action on climate change violated their rights under the ECHR.[25] The complaint to the ECtHR was brought by the women both as individuals and as a group, organised in an association.

The ECtHR found by a clear majority – 16 judges supported the majority decision and only one dissented – that the complaint brought by the women as individuals should be dismissed. However, the Court found that the association was entitled to have the matter adjudicated and that the adjudication should take place under Article 8 (Protection of Private and Family Life). In relation to this article, the Court found that there had been a violation.

The case also involved complaints under Article 6 (Right to a Fair Trial) and Article 13 (Right to an Effective Remedy). As regards Article 6, the ECtHR found that the individual complainants' right to a fair trial should be dismissed, but that the association's right to a fair trial had been violated and that it was, accordingly, entitled to a remedy.

Finally, with regard to Article 13, the individual complaints were dismissed and with regard to the association, the Strasbourg Court found that it was not necessary to conduct a separate adjudication under this Article.

6. Climate litigation in Sweden

The Aurora case breaks new ground. The summons application addresses issues of the State's responsibility for combating climate change in a way not previously addressed in Swedish law. At the same time, the case does not rest on entirely new legal arguments. It is based on a legal development that began in the Supreme Court in 2005 and that has led to a breakthrough for human rights as a legal argument with practical and concrete implications. This class action is not *per se* a tort case, but the development of damages for human rights violations can be seen as part of a larger rights development. In case NJA 2012 p. 464 the Swedish Supreme Court put it this way: "From *the rights perspective that has increasingly come to characterise the view of the legal system*, including in the law of tort, the given starting point is that everyone's freedom is valued equally."[26]

[25] There was also a question as to whether the son of one of the women who initiated the proceedings had the right to intervene after the death of his mother – he did have such a right – but I will ignore that here.

[26] P. 11 (emphasis added). I wrote favourably about the formulation in a commentary, *Frihetsberövande, ersättning och rättigheter*, JT 2012–13, p. 438 *et seq*., at p. 441. Håkan

Sweden is a constitutional state with various types of protection for human rights. Nevertheless, there are significant obstacles in the legal system as regards the possibility of having a case adjudicated. It is questionable whether the legal system sufficiently fulfils the requirements of the principle of access to justice in relation to alleged rights violations. When this is published, we will already have an answer to how the Swedish Supreme Court views the matter in the Aurora case, but this will not be the last word in the discussion.

7. Public interest litigation and climate activism – concluding reflections

Climate litigation is a global phenomenon. Around the world, organisations and individuals are bringing cases against, primarily, public entities, but occasionally also against companies. Climate litigation can be seen as a corollary of the idea of public interest litigation, that civil actions can be used to advance political or social objectives. Such cases have existed to varying degrees in many jurisdictions, often underpinned by rules on human rights and freedoms. They are most commonly associated with the United States, where the civil rights movement and consumer activists have used the law to reshape society. Strategic litigation of this kind has also occurred in Sweden, albeit on a more limited scale.

However, today's climate litigation is partly different than before. Climate change is increasingly perceived by many as an existential threat, which has spurred action and perhaps affected judicial attitudes.[27] But these litigations are also different because they increasingly have the backing of the international community. The UN is, in a sense, encouraging citizens of member states to take their own states to court. In this article, I have discussed how the Swedish legal system can and should relate to climate litigation, using the Aurora case as a starting point. I have argued that there are legal policy reasons why a case of this kind should be adjudicated before the Swedish courts. This is a discussion that will continue. Not least in the seminar room at the Stockholm Centre for Commercial Law, as it enters its second quarter century.

Andersson was not as impressed, see *Stegvis nedtoning av avvägningsmöjligheterna vid frihetsberövandeersättning – men ändå öppning för framtida händelseutveckling*, JT 2014–15, p. 895 *et seq*., especially p. 906 *et seq*. See also Karolina Stenlund, *supra*, n. 6, p. 451 *et seq*.

[27] When I write "perceived as", it should not be read as implying that I have a different view, but merely as a caveat that I am writing about something that is beyond my expertise.