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Procederende belangenorganisaties in de polder: een interdisciplinair perspectief op de toegang tot de rechter

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Summary

INTEREST GROUP LITIGATION IN THE DUTCH POLDER *An interdisciplinary perspective on access to the courts*

Interest groups play a crucial role within a democratic society. By aggregating, articulating and advocating interests, they serve as an essential link between society and politics. While their primary strategies for representing collective and public interests traditionally unfold in the political arena, interest groups are increasingly turning to the courts as arenas for social, political and legal change. In a landmark case, a climate organization called Urgenda, secured a legal victory against the Dutch state, arguing that the state's efforts to combat climate change were insufficient. In a groundbreaking ruling, the Dutch Supreme Court ordered the state to reduce its greenhouse gas emissions by 25% in 2020 compared to 1990. Urgenda's legal success highlighted the potential of courts as valuable allies in climate activism, inspiring similar legal actions by climate organizations worldwide. Also in other policy areas, interest groups have been the driving force behind many of the most notable lawsuits against Dutch government actors in recent years. Examples include the nitrogen cases initiated by environmental organizations, a lawsuit about the poor quality of emergency refugee shelter initiated by a refugee organization, and legal action taken by human rights organizations concerning the (il)legality of risk profiling by law enforcement agencies.

Interest group litigation in the Netherlands is not an isolated phenomenon, but is in line with a global trend in public interest litigation (PIL). Already in the first half of the twentieth century, interest groups in the United States (US) utilized legal proceedings to pursue their vision of a better and more just world. A notable example is the landmark ruling by the US Supreme Court in the case of *Brown v. Board of Education of Topeka*, declaring racial segregation in schools unconstitutional. This historic case was orchestrated, supported, and funded by the National Association for the Advancement of Colored People (NAACP). It inspired other interest groups to pursue legal strategies and became a driving force behind the American civil rights movement. While interest groups in the Netherlands have been navigating the administrative and civil courts since the 1970s (for example in cases opposing the establishment of nuclear plants), the past decade has witnessed a notable upswing in high-profile lawsuits initiated by or with the involvement of interest groups.

These lawsuits can be considered as (often successful) examples of strategic litigation, which I consider to be a subcategory of interest group litigation. These legal proceedings are not isolated or solely aimed at redress for a past grievance, but instead form part of a broader strategy aimed at creating political, social, or legal change beyond a specific or individual case.

While the prevalence of strategic litigation is not unique to the Netherlands, the distinctive Dutch political and legal system presents a unique combination of political and legal opportunity structures. Within the Dutch legal system, there is a combination of broad interest group standing on the one hand and (severely) limited possibilities for judicial review of legislation on the other hand. Additionally, the Dutch political culture, characterized by ‘polderen’ or consensus-building, features extensive and institutionalized participation by interest groups, but with access for privileged interest groups only. Dutch legal scholarship has primarily centred on the role of the courts, the interplay between the judiciary and the other branches, and the relevant (often human rights) legal framework. However, the role of the interest groups initiating these legal procedures is underemphasized and understudied within Dutch legal academia. This dissertation aims to address this gap, by placing interest groups at the forefront of the research. Since access to the courts can be considered an important part of the legal opportunity structures that can help explain the rise and effectiveness of strategic litigation, this study focuses on interest groups’ access to the courts. Whether interest groups have access to the courts or not, and if they do, under what conditions, has major implications for the different types of interests that can be represented through legal means, and as a result, on the legitimacy and effectiveness of interest group litigation. This dissertation sets out to answer the following research question:

How can the access of interest groups to the Dutch administrative and civil courts (when acting as residual courts) in proceedings against the government be assessed in terms of legitimacy and effectiveness?

Part I of the dissertation concerns the ‘status quo’. *Chapter 2* and *chapter 3* offer a comprehensive overview of the current legal procedural landscape in the Netherlands. Through a literature review and case law analysis, these chapters systematically outline the procedural possibilities and limitations that interest groups face when seeking access to the administrative and civil courts. Generally speaking, the possibilities for interest groups to establish legal standing before the administrative and civil courts are exceptionally broad. Both Article 1:2, paragraph 3, of the Dutch Administrative Law Act (GALA) and Article 3:305a of the Dutch Civil Code (CC) provide legal entities the unique opportunity to represent before the court the specific collective or general interests they espouse in their articles of association and as evidenced by their actual activities. In the Netherlands, interest group standing goes beyond merely consolidating the interests of a particular group of individually and directly

affected citizens; it also encompasses the general or public interests of society as a whole. In terms of effectiveness, these provisions make it possible for interest groups to represent before the court various types of interests that transcend the purely individual interest (like privacy interests or environmental interests). As a result, the Dutch legal system can be considered a global pioneer in the field of interest groups' access to the courts.

At the same, the broad possibilities under Article 1:2, paragraph 3, GALA and Article 3:305a CC often cannot be (fully) utilized. That is due to the fact that, in comparison to other Western legal systems, the Dutch legal system imposes considerable constraints on the types of government actions that can be contested in courts. In administrative law, Articles 8:1 and 8:3 GALA limit the type of government action which is subject to appeal to – mostly – individual government orders, such as individual fines, subsidies and permits. Article 8:3 GALA specifically precludes (direct) appeals against generally binding rules and policy rules. However, by their nature these rules typically affect group or societal interests and are therefore highly relevant to interest groups. With access to the administrative courts significantly limited by the type of government action that is open for appeal, it is not surprising that many of the most prominent legal cases initiated by interest groups against the government are brought before the civil courts as the residual courts, with cases ranging from climate policy and refugee accommodation to COVID-19 measures and fraud detection systems. In principle, proceedings before the civil court can be initiated against virtually all types of government action. However, to uphold legal consistency between the administrative courts and the civil courts, there is case law preventing interest groups from litigating about general rules before the civil courts, whenever there is an individual possibility to appeal the specific application of this rule before the administrative courts. In terms of effectiveness, these restrictions within administrative and civil law hinder interest groups from fully exercising their legal options, despite the broad standing granted by Article 1:2, paragraph 3, GALA and Article 3:305a CC.

Instead of direct access to the courts, interest groups may also seek indirect access by serving as legal representatives for individual parties. However, this does not provide a perfect substitute for direct access. The interest groups' ability to elevate the individual case to a collective or general level is contingent on several uncertain factors (e.g. the judge's inclination to issue a more principled ruling, the individual's circumstances and commitment to pursuing the case, and the order on the docket). Alternatively (or additionally), interest groups could participate as *amicus curiae* ('friend of the court') in (individual) cases brought before the court by others. However, the possibilities for *amicus* participation are severely restricted. For example, in administrative law, it is only available whenever the highest administrative court explicitly opens up this possibility in a specific case, which seldom occurs (since the introduction of *amicus* participation in Article 8:12b GALA in 2020, it happened only once).

The potential of amicus participation is further limited by the courts determining the question(s) to which interest groups might respond. Consequently, the effectiveness of the instrument is confined to cases in which the courts themselves recognize the potential broader societal implications and are willing to employ this tool to gather input from society. The effectiveness of the amicus curiae instrument is therefore limited, as it primarily functions as a top-down instrument in the hands of the courts, rather than a bottom-up instrument in the hands of interest groups.

In *chapter 4*, the focus shifts from the effectiveness to the legitimacy of interest groups' access to the courts. Through a literature review, this chapter offers an overview and analysis of the normative legal debate within Dutch constitutional, administrative and civil legal science. Generally, there is broad consensus on the legitimacy of bundling individually affected interests (referred to as collective or group interests) before the courts. In the administrative legal debate, the emphasis lies on the role of collective interest representatives in facilitating efficient legal protection, while in civil legal debate their contribution to effective legal protection is emphasized. Interest groups representing collective interests not only aggregate potentially numerous individual procedures, but also enable procedures that might not have been pursued on an individual basis. However, from a civil legal perspective, there is also attention to potential negative effects of collective actions, particularly concerning so-called 'claim cowboys'. Since mass damages can only be claimed before civil courts, this risk is less relevant within the administrative legal debate.

Regarding the legitimacy of interest groups representing general or public interests before the courts, the opinions vary widely, both within and between the different legal disciplines. Reuniting or integrating these opinions is difficult to nigh on impossible. There appear to be major differences in the (often unarticulated) foundational principles or values which serve as the basis for the normative judgments. Additionally, there are differences in terminology within and between disciplines, leading to difficulties in overcoming normative differences. Also, key concepts are often interpreted in various, sometimes even contradictory, ways. The main point of debate is the way in which public interest representation before the courts should be considered a threat to or a protection of democratic values. Although often unarticulated, the main dividing factor can be found in different views on the nature of representative democracy. From a classical-liberal perspective on representative democracy, public interest representation by interest groups before the courts is usually perceived as undermining the primacy of the legislative (and executive) branch. From a democratic view that relies more on participatory or deliberative elements, public interest representation by interest groups can be considered as an alternative way to protect democratic (and constitutional) values. Bringing the Dutch normative debate further is also complicated by the various assumptions within the different disciplines about the nature and context of public interest representation, often without a strong theoretical or empirical

foundation. Nevertheless, important normative implications are attached to these assumptions, which underlines the importance of and need for theoretical and empirical enrichment of the Dutch legal debate.

Part II of the dissertation focuses on this 'enrichment'. Given that interest group litigation is at the intersection of politics and law, this part fleshes out theoretical and empirical aspects regarding the role that interest groups (should) play within both the political process and the legal process. Based on a literature review, *chapter 5* explores social scientific insights (from both political science and public administration) regarding the role of interest groups within the democratic political process, the nature of interest representation, and interest groups' strategies for influencing public policy. While legal scholars tend to concentrate on the institutional and constitutional aspects of the democratic process, social scientists broaden their perspective to encompass the societal context in which decision-making unfolds. Election outcomes define the composition of parliament, yet they do not prescribe specific policy outcomes for every issue. The delicate task of balancing different interests occurs not in isolation with solely democratically legitimized actors, but in dynamic interaction with both public and private stakeholders and civil society. In this intricate web, interest groups emerge as pivotal actors, providing much of the information (ranging from technical information to insights on societal support or impact) upon which policymakers (need to) rely.

To prevent biases in interest representation and, consequently, an imbalanced balancing of interests, it is imperative that the represented interests mirror the different interests and groups within society. However, social scientific research reveals that, for various reasons, not all interests enjoy equal access to the political decision-making process. For example, private interests can generally be mobilized more easily, more durably and more successfully than public or vulnerable interests. Additionally, unequal access is one of the key characteristics of the Dutch polder model. The extent to which the polder model contributes to legitimate decision-making is under pressure, due to factors such as diminishing representativeness of the privileged interest groups, a lack of transparency, and the rise of new subgroups within our depillarized, increasingly complex and highly regulated society. In addition, social scientific studies show that, in short, private interests are more easily mobilized than public interests or the interests of vulnerable groups within society. Un(der)represented interests can lead to unbalanced interest input and therefore run the risk of an unbalanced balancing of interests within the political process. Therefore, unequal access to the political and administrative decision-making process might provide both an explanation and a potential justification for (certain) interest groups seeking access to the courts as an alternative arena for interest representation. Access to the courts might be considered a way to ensure that potentially unheard or unknown interests within society can at least be brought to the attention of the courts and, if legally justified, receive legal protection.

In addition to representativeness at the level of interest representation in the political arena, social science literature also provides insights into the representativeness at the level of the individual interest group that litigates on behalf of an interest or group within society. This is where political theory on the nature and legitimacy of the representative democracy meets the legal debate on the nature and legitimacy of representative standing. A meaningful interpretation of representation must stem from the reasons for granting interest groups legal standing in the first place. Given that various reasons exist and interest groups may represent different types of interests, a one-size-fits-all approach to representation is not sufficient. Meaningful requirements for representation should, among others, align with the type of interest represented, the extent to which an interest can be determined independently, and the relative capacities of the interest groups as compared to the individuals it represents.

Chapter 6 explores the role of interest groups in PIL in the US. It introduces approaches, insights and arguments that have been largely overlooked in the Dutch legal debate. Although American experiences may not directly apply to the Dutch situation due to substantial differences in political and legal systems, they do offer opportunities for critical reflection. Within PIL, the concept of underrepresentation plays a significant role, as politically underrepresented groups sought legal recourse. Also in the US, this sparked debate about whether PIL should be viewed as a circumvention of democratic decision-making or as safeguarding democratic and constitutional values. In addition to political underrepresentation, US literature is also focused on legal underrepresentation. Through PIL, public interest groups can compensate for inequalities in legal opportunities, especially in lawsuits against the government. Contrary to the Dutch situation, in the US the possibilities for interest groups to have legal standing to represent collective or public interests before the courts are very limited. However, despite these limitations, US federal procedural law provides various possibilities to make an individual case about more than 'just' the individual, like the class action (in which an individual can act as class representative) and the *amicus curiae* (which is extensively used by public interest groups in almost all cases before the US Supreme Court). The fact that the majority of PIL cases involve 'normal' individual cases supported by public interest groups, shows that interest group standing is not the only way to ensure effective access to the courts in cases concerning societal issues.

What does seem to be of great importance, for the effectiveness of PIL, is the possibility of broad judicial review of all kinds of government action. Many PIL cases, trying to fight institutional injustice, target legislation, policies, or implementation practices. In situations involving homogeneous groups, whose individual members are affected in a similar way by government action, the possibility of an individual procedure combined with judicial review can lead to legal precedent being beneficial to the entire group. However, in situations involving more heterogeneous groups, whose members are affected by the

same government policy in differentiated ways, a combination of broad judicial review and interest group standing can be more effective. By bundling these interests and experiences, interest groups can effectively litigate about structural issues in implementation practices or 'diffuse' interests such as privacy. It is especially in these kinds of cases that interest group standing for collective and public interests can be more effective than individual standing. The added value of interest group standing might not lie in creating a 'simple' sum of individuals, but in bringing together experiences regarding common government actions and exposing structural or systemic injustice.

Representation is an important aspect of PIL, which has implications for both the legitimacy and the effectiveness of interest groups using the courts as arenas for social, political or legal change. Compared to the Dutch legal debate, US literature is less concerned with the number of people supporting an interest group or the transparency of interest groups, and more with responsible representation of groups and interests within society. Whenever a group is less mobilized, larger in size or more heterogeneous, the representation of individuals transcends to interest representation, which has implications for the ways in which the representativeness of the interest group should be assessed. Finally, US experiences teach us that it is important not to idealize litigation, to be realistic about what can be achieved through legal means and to be aware of the risk of backlash. A legal victory does not necessarily lead to the desired social or political change. While some view the story of PIL as a 'myth of rights' and courts as 'hollow hope', others still see merit in PIL. Litigation should not be the only tool in an interest group's toolbox. Instead, interest groups should critically assess what combination of strategies leads to the most sustainable contribution to social change with minimal risk of backlash.

Finally, part III of the dissertation concerns a 'reappraisal'. *Chapter 7* concerns a synthesis and the conclusion. By synthesizing insights from various disciplines, the assumptions and arguments within the Dutch legal debate regarding the legitimacy and effectiveness of interest groups' access to the Dutch courts were supplemented, nuanced or put under pressure. In short, interest groups' access to the courts is assessed as an extension of the crucial role these groups play within society, and framed against the backdrop of equal access to the courts as an important element of a democratic society under the rule of law. The legitimacy of the access of interest groups to the court is to be found in the potential contribution of interest groups to efficient and, above all, effective legal protection. Interest group litigation can contribute to realizing equal access to the judiciary for all groups and interests within society. Interest groups can collectively overcome the financial, mental and social barriers that may deter individuals from initiating legal proceedings. In this way, interest groups can realize access to the courts in cases of collective injustice, even when individual proceedings pose too great a burden, and against powerful defendants like government actors. Additionally, interest

groups can broaden access to the judiciary by representing voiceless interests within society. By a lack of directly affected individuals, voiceless interests (like climate interests) rely heavily on interest groups to bring 'their' case to court. Furthermore, interest groups can realize legal protection at the collective level, by exposing structural, institutionalized, or standardized injustice. This is often very difficult for individual parties. Lastly, interest groups can enhance the equality of arms through their knowledge, resources and experiences, thereby contributing to effective legal protection. As repeat players, they can also contribute to a level playing field, by using legal proceedings and procedural law for structural and long-term change.

Broad access to the courts for interest groups does not inherently pose a threat to democracy. In their strategies for protecting constitutional values, interest group litigation can be viewed as an expression of crucial democratic values and the protection of equal opportunities for all groups and interests within society. Interest groups should not be regarded as improper advocates of the general interest, and thus a threat to the primacy of the legislative and executive branch, but as entities that unilaterally represent specific (public or private) sub-interests. This makes them indispensable in a democratic society, where election results provide limited guidance for representatives and policymakers, who in turn depend on the knowledge and input from interest groups. Unequal access of interest groups to the political and administrative decision-making process carries the risk that the rights or interests of certain groups are insufficiently known and considered. Unequal access to the political process underscores the importance of equal access to the legal process. Otherwise, the types of groups and interests that are most vulnerable in the political process will be equally vulnerable in the legal process. Particularly concerning vulnerable, unpopular and voiceless interests and groups within society, individual access to the courts can be insufficient. Interest group standing provides the opportunity to effectively counterbalance the legislature and the executive through the courts. Especially in our modern, increasingly complex, and highly regulated society, there is a need for a counterbalancing power against a powerful government, especially at the collective and the structural level.

To enable interest groups to effectively fulfill this role, it is essential to them to have effective access to the courts. Although Article 1:2, third paragraph, GALA, and Article 3:305a Civil Code (CC) provide broad access in principle, this is subsequently limited by the individual focus within Dutch procedural law, the focus on individual government orders in administrative law, and the limited possibilities for judicial review of general rules at both the administrative and the civil courts. To allow interest groups to realize their potential contribution to efficient and effective legal protection in proceedings against the government, it is of primary importance to introduce the possibility of judicial review of all kinds of government actions. Ideally, interest groups should be able to litigate not just about general rules, but also about policies

and implementation practices. After all, it is these types of government action that particularly affect the interests of large, open groups of citizens or even society as a whole. A legal system in which interest groups are confronted with limited access to the courts and complex jurisdictional issues between the administrative and the civil courts, especially concerning these types of government action, can be considered at least partially ineffective.

A representativity requirement, such as was introduced in Article 3:305 CC, should not only prevent improper use but, more importantly, contribute to the quality of interest representation by interest groups. The first experiences with this requirement before the civil courts show that a representativity requirement developed for actions concerning mass damages is not automatically suitable for other types of collective and public interest actions. A representativity requirement that contributes to efficient and effective legal protection requires a flexible evaluation framework, including both quantitative and qualitative indicators for representativity. The relative weight assigned to the different indicators must be adjusted based on the type of interest being represented, the extent to which the group (members) can be consulted, the extent to which the interest can be determined independently, and the relative capacities of the interest group compared to the individual members of the group. It is also recommended to make the *amicus curiae* a robust figure within Dutch administrative and civil procedural law. To serve both legal development and legal protection, the possibility for *amicus* participation should be expanded not only through court initiation (top-down), but also at the initiative of interest groups (bottom-up). In this way, interest groups can inform the courts about the broader implications of individual procedures, and use their expertise, knowledge and experience to contribute to socially effective jurisprudence.

By focusing on interest groups' access to the courts, this dissertation provides a starting point for critically rethinking the legitimacy and effectiveness of supra-individual procedures in general. In addition to the role of interest groups, more research is needed on the role of the judge, the intensity of and standards for review, the applicable legal framework (which often involves the interpretation of European or international norms), the different remedies that are suitable for these kinds of cases, and their long-term impact. Each of these aspects of collective and public interest actions against government actors requires further consideration and research. This is not only important because it will provide more insight into their mutual interaction, but also because interest group litigation is an undeniable socio-legal reality which is expected to increase in size.