



Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change

Heather Colby

Juris Doctor Candidate, Sturm College of Law, University of Denver

hcolby21@law.du.edu

Ana Stella Ebbesmeyer

Law Student and Research Assistant, Faculty of Law, University of Copenhagen

stella.ebbesmeyer@jur.ku.dk

Lisa Marie Heim

Law Student, Faculty of Law, Freie Universität Berlin

lisa_heim@outlook.de

Marthe Kielland Røssaak

Law Student and Research Assistant, Norwegian Centre for Human Rights, University of Oslo

m.e.k.rossaak@nchr.uio.no

Abstract

This paper aims to determine what the proper role of the judiciary should be in developing climate change policy. It does so in light of the sometimes contentious relationship between ‘activist’ or ‘progressive’ judges and the doctrine of separation of powers. This relationship has a long history by which much of human rights law has been shaped. The paper analyses the court judgments in the cases of *Urgenda v Kingdom of the Netherlands*, *Juliana v United States*, and *Friends of the Irish Environment v Ireland* in order to identify how different legal systems view this relationship. The paper also considers the upcoming climate case in the Supreme Court of Norway. In particular, the question is asked whether the separation of powers in Europe and the United States is a doctrine mandating systems of power balance rather than of strict separation.

Drawing on the argumentation from the *Urgenda* judgment, the paper concludes that the protection and development of human rights should be the main concern in climate change litigation. The judiciary should accordingly take an important role in climate change policy-making in order for the state to comply with its duty to instigate emission limits.

Keywords

Judicial activism, climate change litigation, judiciary and climate change policy, *Urgenda v Kingdom of the Netherlands*, *Juliana v United States*, *Friends of the Irish Environment v Ireland*, fundamental rights

1. Introduction

In democratic states, courts play a powerful role. A particularly important aspect of their role is to protect individual rights and civil liberties.¹ A closely related aspect is to provide, as

1. Antonios E Kouroutakis, ‘Judges and Policy Making Authority in the United States and the European Union’ (2014) 8 *Vienna Journal on International Constitutional Law* 186, 197 <<https://doi.org/10.1515/icl-2014-0203>>.

one necessary branch of the state, checks and balances on the other branches.² For courts to maintain their authority, the other branches of the state, along with the public, must believe in the legitimacy of the judiciary and its decisions.³ In democratic societies, the legitimacy of the judiciary is found in the doctrine and system of separation of powers or *trias politica*.⁴ Separation of powers establishes that each branch of the state plays a separate role.⁵ Typically, there are legislative, executive, and judicial branches each serving different functions: to write the laws, enforce the laws, and adjudicate the laws, respectively. In order to adjudicate the laws properly, a court must be ‘an impartial guardian of the law.’⁶ Courts do more than resolve disputes between private parties; they also hold ‘special functions.’⁷ In particular, the courts ‘articulate constitutional values and ensure government compliance with the law.’⁸ Additionally, they may have a legitimate democratic role in defining and developing policy, but expanding this role may hinder the democratic process as well.⁹ The latter potential feeds ongoing controversies around the pros and cons of ‘judicial activism’ (defined in section 2.1 below).

This paper aims to evaluate the appropriate role of the judiciary in the fight against climate change. First, it looks at the traditional role of the judiciary in democratic states. It explores the advantages and disadvantages of judicial activism while maintaining the essential separation of powers. It then highlights instances when courts have established rights through exercising judicial activism. Next, the paper explores the rise of climate change debates entering the courts. It analyses the landmark cases of *Urgenda v The United Kingdom of the Netherlands*, *Friends of the Irish Environment v Ireland*, and *Juliana v the United States of America* where, in each case, the claimants asserted that governmental action against climate change is a fundamental human right and the lack of such government action a concomitant violation of that right. The analysis of the cases includes a look at the pending case before the Supreme Court of Norway. Following the analysis of the cases, we discuss the main arguments against judicial activism in the climate change field, namely the doctrine of separation of powers and judges’ lack of expertise in the field. Finally, we conclude that although the judiciary cannot create policy, it is still a powerful tool to spur the fight against climate change.

The cases presented are from both civil and common law systems. Norway and the Netherlands are instances of the former, while the US and Ireland are instances of the latter. In a civil law system, the role of the court is to apply the written law, and the courts use prior judicial decisions mainly for interpretation of the written texts.¹⁰ In a common law system, the body of rules essentially comes from judicial decisions and the decided cases are ‘at the very source’ of the law.¹¹ As such, one might expect a significant difference between the two

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2. Maartje De Visser, ‘A cautionary tale: some insights regarding judicial activism from the national experience’ in Mark Dawson, Bruno De Witte, and Elise Muir (eds), *Judicial Activism in the European Court of Justice* (Edward Elgar Publishing 2013) 191 <<https://dx.doi.org/10.2139/ssrn.1984639>>.
 3. F Andrew Hessick, ‘The Separation-of-Powers Theory of Standing’ (2017) 95 *North Carolina Law Review* 673, 695.
 4. Kouroutakis (n 1) 186.
 5. *Ibid.*
 6. *Bush v Gore* 531 US 98 (2000) 129 (dissenting opinion of J Stevens).
 7. Hessick (n 3) 690.
 8. *Ibid.*, referencing Richard H Fallon Jr and others, *Hart and Wechsler’s The Federal Courts and the Federal System* (6th edn, Foundation Press 2009) 73.
 9. Bradley C Canon, ‘Defining the Dimensions of Judicial Activism’ (1983) 66 *Judicature* 236, 238.
 10. Joseph Dainow, ‘The Civil Law and the Common Law: Some Points of Comparison’ (1966-1967) 15(3) *The American Journal of Comparative Law* 419, 426 <<https://doi.org/10.2307/838275>>.
 11. *Ibid.* 423.

systems in terms of the role of the judiciary in relation to climate change litigation. As shown in the following, despite a difference between the US case and the Dutch case, the differences in judgment seem not to stem solely from the differences in legal systems. The paper does not discuss the implications of the different systems further, but analyses and compares the individual cases to inform the discussion of the proper role of the judiciary in climate change litigation.

2. Judicial Activism and the Continued Legitimacy of the Courts

2.1 A Definition of Judicial Activism

The term ‘judicial activism’ has no clear, broadly agreed definition; it is defined in disparate ways by scholars and judges.¹² For the purposes of this paper, the most useful definition is provided by van Geel: ‘judges pushing the boundaries of existing law for political purposes’.¹³ This definition speaks to the concerns of the separation of powers and, more specifically, the fear of the judiciary becoming the legislators.

2.2 Disadvantages of Judicial Activism

The main argument that can be raised against such judicial involvement is majoritarianism.¹⁴ In most countries, the executive and legislature are elected whereas the judiciary is not.¹⁵ Ideally, because the executive and legislature are elected, each should represent the majority of the population.¹⁶ Therefore, if a court were to rule against the legislature, it would be going against the majority of the country.¹⁷ The court would thus create a counter-majoritarian regime.

Additionally, when the legislature enacts new policy, the legislators are held accountable to the public.¹⁸ Conversely, if a court were to develop policy, it would not be accountable to the public. As Ran Hirschl has stated, ‘[d]emocracy requires that the choice of substantive political values are made by elected representatives rather than by unelected judges. As such, substantive political choices should be left to elected and accountable officials.’¹⁹ When a court steps out of the perceived boundaries of its power, it can erode the legitimacy of the court.²⁰ Furthermore, the legislature is better equipped to make policy decisions because their expertise falls within policy-making.²¹ Therefore, the legislature would be a more appropriate forum for policy decisions.²² The legislative process allows for public participation with the opportunity for a broad array of arguments for and against particular poli-

12. Keenan D Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’ (2004) 92(5) *California Law Review* 1441, 1443 <<http://dx.doi.org/10.15779/Z38X71D>>.

13. Olivier van Geel, ‘Urgenda and Beyond: The past, present and future of climate change public interest litigation’ (2017) 57 *Maastricht University Journal of Sustainability Studies* 56, 58.

14. Canon (n 9) 239.

15. Kouroutakis (n 1) 187.

16. *Ibid.*

17. Leonardo Pierdominici, ‘Constitutional Adjudication and the Dimensions of Judicial Activism: Comparative Legal and Institutional Heuristics’ (2012) 3 *Transnational Legal Theory* 207, 216 <<https://doi.org/10.5235/20414005.3.3.207>>.

18. Ran Hirschl, ‘Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend’ (2002) 15 *Canadian Journal of Law and Jurisprudence* 191, 216 <<https://doi.org/10.1017/S0841820900003593>>.

19. *Ibid.*

20. Visser (n 2) 188.

21. Pierdominici (n 17) 230.

22. *Ibid.*

cies.²³ Conversely, the judicial process restricts who can participate which creates a limited scope for the legal arguments.²⁴

2.3 Advantages of Judicial Activism

Despite the disadvantages discussed above, judicial activism brings some advantages which do not threaten the legitimacy of the judiciary. For instance, there are occasions when the government violates the rights of a minority. Consequently, majoritarianism could not protect them because their participation in the representative process would be lost.²⁵ In these circumstances, the courts can offer protection and be a representative for such minorities.²⁶ As such, the judiciary is necessary to protect human rights and civil liberties for all members of a given population.²⁷ By keeping the other branches in check, the court is defending the constitution which enhances the overall legitimacy of the government.²⁸ As the Canadian Supreme Court unanimously held, it is the job of the judiciary to determine ‘whether an executive or legislative action violated the Constitution ... regardless of the political character of the controversy.’²⁹ Additionally, the legislature is not always a perfect representation of a country, as can be seen in the practice of gerrymandering in the US.³⁰ For example, the will of a small, yet wealthy, special interest group can have more power than the will of the majority. Wealth provides access to influential lobbying groups which can have more sway with legislators than the constituents of the legislators. Thus, many fear the ‘tyranny of the minority’ where a minority’s special interest overwhelms the majority.³¹ Proponents of judicial activism contend that constitutions contain both commands and prohibitions, and that ‘courts are obliged to enforce the former when other agencies cannot or will not.’³²

2.4 Rights Developed in the Courts

No matter whether the disadvantages of judicial activism outweigh the advantages or conversely, the courts have played an essential role in upholding human rights law. The creation of human rights has been a reaction to oppression and atrocities, for example, the adoption of the Universal Declaration of Human Rights and the European Convention on Human Rights in the aftermath of World War II, and subsequently the enactment of the US Civil Rights Act 1964 in reaction to hundreds of years of the oppression of minorities. Not only have courts enforced such laws on human rights, they have been involved with some of the most important policy shifts establishing rights.³³

In many countries, courts have made landmark decisions forcing a shift in legislation to reflect its interpretation of the country’s constitution. In the United States, the Supreme Court has forced this shift, for example, when it abolished segregation in schools because the

23. Ibid 231 referencing Dieter Grimm, ‘Comment’ in Christine Landfried (ed), *Constitutional Review and Legislation: An International Comparison* (Nomos 1988) 170.

24. Ibid.

25. William H Clune, ‘Courts and Legislatures as Arbitrators of Social Change’ (1984) 93 *Yale Law Journal* 763, 764; Pierdominici (n 17) 222.

26. Pierdominici (n 17) 222.

27. Kouroutakis (n 1) 197.

28. Pierdominici (n 17) 223.

29. *Operation Dismantle v The Queen* 1 SCR 441 (1985) 472.

30. Clune (n 25) 763.

31. Ibid 764.

32. Pierdominici (n 17) 227.

33. Pierdominici (n 17) 226.

practice violated equal protection of the law under the Fourteenth Amendment to the Bill of Rights,³⁴ established abortion as a personal liberty under the Due Process Clause³⁵ and as part of a woman's right to privacy based on the Ninth Amendment,³⁶ and protected the rights of an individual in a police interrogation under the Fifth Amendment.³⁷ In Hungary, the constitutional court abolished the death penalty with a case referred by a non-governmental organization (NGO) by ruling it violated the Hungarian Constitution.³⁸ This decision was in opposition to 'the overwhelming majority of the population and probably also of legislators'.³⁹ Although these are examples of court decisions that nowadays are largely celebrated as showcasing the benefits of courts upholding constitutional values in the face of long-established political or social policies, courts must still be cautious of the implications of such decisions. In the following, the role of the judiciary in cases involving policy on climate change is examined.

3. Review of Landmark Climate Change Litigation

3.1 Domestic Courts and International Climate Policy

A central issue that has recently reached the courts is that of climate change. Over the last few decades, climate change and the negative consequences thereof have gained increased attention in national and international legislative assemblies, courts, the mass media and public discourse generally. New institutions, such as the Intergovernmental Panel on Climate Change (IPCC)⁴⁰ and the Conference of the Parties (COP),⁴¹ have been developed to deal with issues surrounding climate change, including aspects of scientific research, international political negotiations, and development of law and policy to restrict and guide the international community on activities that negatively impact the climate. The IPCC has suggested that a failure to restrict temperature increase to 2 degrees Celsius above pre-industrial levels will lead to irrevocable and serious harm to the planet.⁴² The issue is central in political campaigns and debates globally, but many claim that national policies are still not tackling the dangers to a sufficient degree.⁴³

Thus, in recent years we have seen several occasions of the issue being lifted from the political battlefields and brought to judicial institutions. In 2015, a district court in the Netherlands found that the Dutch government had violated a duty of care towards the people and ordered more ambitious emission reduction targets.⁴⁴ Since then, climate change public interest litigation has emerged as an alternative method to push for climate

34. *Brown v Board of Education* 347 US 483 (1954) 495.

35. *Roe v Wade* 410 US 113 (1973) 154 (although recognizing that this right is not absolute).

36. *Ibid* 147-164.

37. *Miranda v Arizona* 384 US 436 (1966) 478.

38. Visser (n 2) 198; Hungarian Constitutional Court, Decision 23/1990 of 31 October 1990 (1990).

39. *Ibid* 190 referencing Christian Boulanger, 'Europeanisation Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and Hungary's 'Return to Europe'' in Wojciech Sadurski (ed), *Spreading Democracy and the Rule of Law* (Springer 2006) 272 <https://doi.org/10.1007/1-4020-3842-9_12>.

40. See <<https://www.ipcc.ch/>>.

41. See <<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>>.

42. IPCC (n 40).

43. John S Dryzek, Richard B Norgaard, and David Schlosberg, 'Climate Change and Society: Approaches and Responses' in John S Dryzek, Richard B Norgaard, and David Schlosberg (eds), *Oxford Handbook of Climate Change and Society* (Oxford University Press 2011) ch 1.

44. Dutch Court of First Instance The Hague, *Stichting Urgenda v Staat der Nederlanden* (ECLI:NL:RBDHA:2015:7145) (*Urgenda 2015*) (2015) paras 3.1 and 5.1.

policy goals and encourage social change.⁴⁵ Worldwide, more than one thousand cases have been filed regarding responsibility to mitigate and respond to the dangers of climate change, indicating an increasing appreciation of the need for a fundamental and constitutional right to a healthy environment.⁴⁶

In the following, key landmark cases in Europe and the US are discussed to inform the analysis of the proper role of the judiciary in climate change policy.

3.2 The Landmark Case of Urgenda

3.2.1 Urgenda v The United Kingdom of the Netherlands

The case of *Urgenda v The United Kingdom of the Netherlands* has become central to the discussion of the role of the judiciary in climate policy. In 2015, the NGO, Urgenda, sued the Dutch state for breaching its duty of care and violating the fundamental human rights of 886 individual plaintiffs.⁴⁷ The plaintiffs claimed that the Dutch state did not take sufficient measures to reduce greenhouse gas (GHG) emissions. The court accepted the prevailing claim of duty of care by the plaintiffs and found in favour of Urgenda. In December 2019, the Supreme Court of the Netherlands upheld the previous decisions by the Court of Appeal (2018)⁴⁸ and the District court (2015), in favour of Urgenda. It found that the state had violated its duty of care, and that the emission reduction targets were to be readjusted to at least 25 percent by 2020.⁴⁹ It became the first case in the world to establish a court-ordered duty to cut GHG emissions to a minimum threshold level in order to prevent dangerous climate change.⁵⁰

3.2.2 The Reasoning of the Courts

The reasoning of the three courts in *Urgenda* merits some discussion as it differs in some aspects from other notable climate cases. The prevailing claim that was initially accepted and confirmed by all court instances was that the state had a duty of care, while the approach in relation to fundamental human rights did not succeed.⁵¹ The court in the first instance found that Urgenda could not itself rely on Articles 2 and 8 of the European Convention of Human Rights (ECHR), and that it did not have sufficient information to assess the claims of the 886 individual complainants.⁵² Even though this court did not rely on the fundamental rights argument in this particular case, it did not explicitly reject it. Furthermore, references to the rights in the ECHR were still held relevant in relation to determine whether the duty of care was breached.⁵³

In the first instance, the court reinterpreted the national legal doctrine of hazardous negligence in the Dutch civil code, and found that climate change could fall within this doc-

45. Van Geel (n 13) 57.

46. Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55, 57 <<https://doi.org/10.1017/S2047102519000360>>.

47. *Urgenda 2015* (n 44); Van Geel (n 13).

48. Dutch Court of Appeal, The Hague, *The State of the Netherlands v Stichting Urgenda* (ECLI:NL:GHDHA:2018:2610) (*Urgenda 2018*) (2018).

49. Dutch Supreme Court, The Hague, *The State of the Netherlands v Stichting Urgenda* (ECLI:NL:HR:2019:2007) (*Urgenda 2019*) (2019).

50. Jaap Spier, 'The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment' (2020) 67 *Netherlands International Law Review* 319 <<https://doi.org/10.1007/s40802-020-00172-5>>.

51. *Urgenda 2015* (n 44); *Urgenda 2018* (n 48); *Urgenda 2019* (n 49).

52. *Urgenda 2015* (n 44) paras 4.36; 4.45; 4.89.

53. *Ibid* para 4.52.

trine.⁵⁴ Furthermore, the higher courts confirmed the district court in forming its judgment on the basis of open standards of due care, interpreting the Dutch civil code through climate science, international climate policy, and principles of international law.⁵⁵ Among these were the use of scientific findings reported in the IPCC Assessment Reports, which guided the final orders reached by the court. The state objected to the use of the IPCC Assessment Reports' maximum temperature increase as a legally binding threshold and claimed that even though the Netherlands had frequently recognised the necessity of staying under the 2 degrees Celsius threshold, this did not create a legally binding obligation.⁵⁶ All court instances disagreed.

3.3.3 Critique of Urgenda

The reasoning behind the judgments in all instances has been criticised on many points. The government of the Netherlands argued since the beginning that its reduction targets were in line with EU policy, and that the judicial interference therefore constituted a violation of the separation of powers.⁵⁷ Furthermore, it claimed that the targets should be negotiated through multilateral talks, and that a judgment in *Urgenda's* favour would weaken the Dutch government's negotiating power.⁵⁸ Subsequent critique of *Urgenda* in the first instance claimed that the lack of guidelines on how to decide on climate change cases should have led the judiciary to reserve their will to adjudicate.⁵⁹ By not reserving their will to adjudicate, the judges arguably chose judicial activism. The critique claims that this can serve to render the boundaries between the executive and the judiciary more diffuse, and threaten central values of democracy. Some also argue that such strategic litigation on climate change is misusing the legal system for political purposes.⁶⁰

Claims are also made that the judges in *Urgenda* did not sufficiently consider the potential backlash of making a precedent that could open the doors to social justice litigation and increase the possibilities of suing governments for policies they enact.⁶¹ This opposition to judicial interference in climate policy to some extent reflects the outcome in the Norwegian climate case pending before the Norwegian Supreme Court towards the end of 2020.⁶² The Norwegian case is discussed further in section 3.5.

54. Ibid.

55. Joana Setzer and Dennis van Berkel, 'Urgenda v State of the Netherlands: Lessons for international law and climate change litigants' (*Grantham Research Institute on Climate Change and the Environment of the London School of Economics and Political Science*, 10 December 2019) <<http://www.lse.ac.uk/GranthamInstitute/news/urgenda-v-state-of-the-netherlands-lessons-for-international-law-and-climate-change-litigants/>> (accessed 22 March 2020); Burgers (n 46) 57.

56. *Urgenda 2018* (n 48) para 67; *Urgenda 2019* (n 49) paras 2.2.3, 3.4, 6.2; Setzer and van Berkel (n 55).

57. See eg criticism of the first instance judgment by Van Geel (n 13) 61.

58. *Urgenda 2015* (n 44) para 4.100.

59. Nik de Boer, 'Trias Politica Niet Opofteren voor Ambitieuze Klimaatpolitiek' (2016) 73(1) *Socialisme en Democratie* 40.

60. See eg Goldberg P, 'Climate Change Lawsuits Are Ineffective Political Stunts' (*The Hill*, 1 March 2018) <<https://thehill.com/opinion/energy-environment/376307-climate-change-lawsuits-are-showy-ineffective-political-stunts>> (accessed 22 March 2020).

61. Lucas Bergkamp, 'A Dutch Court's "Revolutionary" Climate Policy Judgment' (2015) 12(3-4) *Journal for European Environmental & Planning Law* 241, 247 <<https://doi.org/10.1163/18760104-01204002>>.

62. Skjevestad, H. 'Tapte klimasøksmålet igjen – anker videre til Høyesterett' (*Advokatbladet.no*, 23 January 2020) <<https://www.advokatbladet.no/tapte-klimasoksmålet-igjen---anker-videre-til-hoyesterett/147076>> (accessed 22 March 2020).

3.2.4 In favour of Urgenda

Despite criticism, the landmark case helped to hold the Dutch government accountable to its international climate change commitments. Those in favour of the decision claim that even though the decision was progressive, it was still based on existing principles of law.⁶³ The Court of Appeal and the Supreme Court in *Urgenda* referred to their constitutional duty to apply provisions of the ECHR directly. As their finding largely relied on the IPCC Assessment Reports to interpret the state obligations, the judgment may encourage other tribunals to view these as authorities on climate justice. Furthermore, the judges did not consider all matters of climate policy to be within their competence, and left it to the government to determine how to implement the 25% target.⁶⁴ As emphasised by Burgers, '[t]he Dutch State has numerous options for achieving compliance, including reducing maximum speeds on highways, imposing a carbon tax, encouraging solar panel use or rooftop gardening, and improving energy efficiency.'⁶⁵ The plaintiffs simply argued that the correct interpretation of the law includes a minimum emission reduction target of 25%,⁶⁶ and this is what the courts confirmed.⁶⁷

3.2.5 Advancing Climate Policy Beyond Urgenda

Three years after the first decision in *Urgenda*, the UN Human Rights Committee confirmed that the right to life as enshrined in the International Covenant on Civil and Political Rights (ICCPR) also includes positive obligations for States to act against dangerous climate change.⁶⁸ As such, the claim of the plaintiffs in *Urgenda* now has an even stronger foundation than it did in 2015. Additionally, the rising number of climate cases in countries around the world⁶⁹ indicate a growing consensus that a healthy environment is a constitutional matter, and therefore a prerequisite for democracy.⁷⁰ Such climate cases may in fact secure the State's ability to provide public goods in the long term where the government has failed to sufficiently ensure this. Furthermore, by advocating for future generations, climate cases can protect those with no voice.⁷¹ As a response to the final *Urgenda* judgment, the UN High Commissioner for Human Rights published a press release noting that 'the decision confirms that the Government of the Netherlands, and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases.'⁷²

63. Aalt Willem Heringa, 'Rechter en politiek: verzaakt de politiek/wetgever of dient de rechter juist het belang van de wetgever?' (2016) 43(3) *Milieu & Recht* 203, 203.

64. *Urgenda 2015* (n 44) para 4.101; *Urgenda 2018* (n 48) para 68; *Urgenda 2019* (n 49) paras 8.2.4 – 8.2.7.

65. Burgers (n 46) 66.

66. *Ibid* 67.

67. Setzer and van Berkel (n 55).

68. United Nations Human Rights Committee, 'General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) CCPR/C/GC/36.

69. Setzer J and Byrnes R, 'Global trends in climate change litigation: 2019 snapshot' (Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy, Policy report July 2019) <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> (accessed 22 March 2020).

70. Burgers (n 46) 75.

71. Van Geel (n 13) 58.

72. United Nations Human Rights Office of the High Commissioner, 'Bachelet welcomes top court's landmark decision to protect human rights from climate change' (*OHCHR News*, 20 December 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E>> (accessed 22 March 2020).

3.3 The Landmark Climate Case Ireland

3.3.1 Friends of the Irish Environment v Ireland

Inspired by the success of the *Urgenda* case, individuals, NGOs and companies in other countries have taken legal action against governments and their environmental policies. On 22 January 2019, the environmental NGO ‘Friends of the Irish Environment’ brought a case to the Irish High Court to quash the country’s National Mitigation Plan.⁷³

The plaintiffs argued that the National Mitigation Plan violated Ireland’s Climate Action and Low Carbon Development Act, its Constitution, and Articles 2 and 8 of the ECHR. Their main claim was that the government had not taken sufficient action to ensure that emissions were reduced in the short- and medium-term to comply with international targets. The respondent claimed that the National Mitigation Plan is not subject to judicial review since it does not grant rights or impose obligations,⁷⁴ and that even if it was justiciable, the government acted within its prescribed margin of discretion.⁷⁵ Moreover, the respondent claimed that the plaintiff does not have legal standing.⁷⁶

On 19 September 2019, the Irish High Court delivered its verdict, in favour of the government.⁷⁷ It denied the NGO’s claim that the National Mitigation Plan was insufficient to achieve the short- and medium-term reduction emissions and held that the government exercised its due discretion.⁷⁸ The Court admitted that the NGO has legal standing,⁷⁹ however, it rejected the claim of violation of national and international law.⁸⁰

On appeal, however, the Irish Supreme Court reversed the first ruling and decided on 31 July 2020 to quash the National Mitigation Plan.⁸¹ The Supreme Court held that the Plan is insufficient to ensure that Ireland can achieve its 2050 climate goals.⁸² Contrary to the decision of the Dutch Court in *Urgenda*, however, the Irish Supreme Court held that the NGO lacked legal standing to bring claims under the ECHR or the Constitution.⁸³

This recent case demonstrates that the direction courts are taking so far, especially in the European context, is towards a more active judicial involvement in climate cases. It demonstrates again that legal action taken against the government and its environmental policies by individuals, NGOs, and companies can make a difference in the climate change regime.

73. ‘Climate Case Ireland’ (*Climate Case Ireland*) <<https://www.climatecaseireland.ie/climate-case/#about-the-case>> (accessed 9 September 2020); Ireland Department of Communications, Climate Action & Environment, ‘National Mitigation Plan’ (July 2017) <<https://www.climatecaseireland.ie/wp-content/uploads/2018/04/National-Mitigation-Plan-2017.pdf>> (accessed 9 September 2020).

74. Irish High Court, *Friends of the Irish Environment CLG v the Government of Ireland, Ireland and the Attorney General* (IEHC 747), 19 September 2019 (2019) para 38 <<https://www.climatecaseireland.ie/wp-content/uploads/2019/11/Climate-case-approved-FIE-v-Government-of-Ireland-2019-IEHC-747.pdf>>.

75. *Ibid* para 41.

76. *Ibid* para 38.

77. *Ibid* para 145.

78. *Ibid* para 113.

79. *Ibid* para 132.

80. *Ibid* para 145.

81. Irish Supreme Court, *Friends of the Irish Environment CLG v the Government of Ireland, Ireland and the Attorney General* (Appeal No: 205/2019), 31 July 2020 (2020) para 6.48 <https://www.courts.ie/viewer/pdf/681b8633-3f57-41b5-9362-8cbc8e7d9215/2020_IESC_49.pdf/pdf?view=fitH>; ‘Friends of the Irish Environment v. Ireland’ (*Climate Case Chart*) <<http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/?cn-reloaded=1>> (accessed 9 September 2020).

82. *Ibid* paras 9.2-9.3.

83. *Ibid* paras 7.23-7.24.

3.4 The Landmark Case of Juliana

3.4.1 *Juliana v the United States of America*

The rise of climate litigation is, however, not only a European phenomenon. In the United States, more and more climate and environmental cases have surfaced over the past years. One of the most controversial cases in this regard is *Juliana v United States*. A group of young activists between the ages of eight and nineteen, an association of young environmental activists, and a ‘guardian for future generations’ filed an action against the US government in 2015.⁸⁴

The plaintiffs alleged that although the government has been aware of the negative impacts on the environment when burning fossil fuels, it has ignored this knowledge and thus ‘deliberately allow[s] atmospheric CO₂ concentrations to escalate to levels unprecedented in human history.’⁸⁵ The plaintiffs thus argued that the government violated their substantive due process rights (right to life, liberty, and property) and the public trust doctrine (under which certain natural resources must be protected for the citizens and future generations)-⁸⁶ They requested an order which prohibits the government from violating these rights and directs it to develop a plan to reduce emissions.⁸⁷ The US government, on the other hand, asserted that these claims should be dismissed due to lack of standing and a lack of jurisdiction, maintaining that this dispute contained a non-justiciable political question.

In 2016, Judge Aiken of the US District Court of Oregon ruled in favour of the plaintiffs, stating that this case does not contain a non-justiciable political question but, at its core, concerns the plaintiffs’ constitutional rights, an issue which ‘is squarely within the purview of the judiciary.’⁸⁸ Furthermore, Aiken held that the plaintiffs had standing since they demonstrated that (1) they suffered an injury in fact, (2) this injury was traceable to the defendant’s conduct, and (3) a court decision would redress this injury.⁸⁹ Judge Aiken’s decision thus sparked high hopes that *Juliana* would serve as a stepping stone for the US government to change its climate policy.⁹⁰

Nonetheless, after overcoming several procedural roadblocks,⁹¹ the case eventually ended up in the Ninth Circuit Court of Appeals. On 17 January 2020, it reversed Judge Aiken’s decision and dismissed the case due to a lack of standing.⁹² The Court held that the third requirement (redressability) was not fulfilled in this case. It argued that it is not in the court’s power to order a plan involving ‘complex policy decisions’, and, as a consequence, the Court decision would not redress the injury.⁹³ The issue in question, the Court argued, has to be solved within the executive branch.⁹⁴

84. US District Judge Ann Aiken, Opinion and Order in Case No 6:15-cv-01517-TC, 10 November 2016 (2016) 2; ‘Juliana v. United States’ (*Our Children’s Trust*) <<https://www.ourchildrenstrust.org/juliana-v-us>> (accessed 20 March 2020).

85. Aiken (n 84) 2.

86. Aiken (n 84) 2; Don C Smith, “‘No ordinary lawsuit’: will Juliana v United States put the judiciary at the centre of US climate change policy?” (2018) 36(3) *Journal of Energy & Natural Resources* 259, 260 <<https://doi.org/10.1080/02646811.2018.1482131>>.

87. Ibid.

88. Aiken (n 84) 16.

89. Ibid 18-28.

90. Melissa Powers, ‘Juliana v United States: The next frontier in US climate mitigation?’ (2018) 27 *RECIEL* 199, 199 <<https://doi.org/10.1111/reel.12248>>.

91. Amy Fudenberg, ‘Recent Developments in Environmental Law’ (2017) 21(1) *Tulane Environmental Law Journal* 149, 159.

92. US Circuit Judge Andrew D Hurwitz and US District Judge Josephine L Staton, Opinion and Dissent in Case No 18-36082 DC No 6:15-cv-01517-AA, 17 January 2020 (2020) 4.

93. Ibid 5.

94. Ibid.

However, Judge Stanton, in a dissenting opinion, stated that the plaintiffs presented sufficient claims under the Constitution and have standing because ‘a court order – even one that merely postpones the day when remedial measures become insufficiently effective – would likely have a real impact on preventing the impending cataclysm’ and would thus satisfy the redressability requirement.⁹⁵ As such, she would affirm the District Court’s decision.

3.4.2 Juliana and US Climate Policy

In sum, this case has demonstrated that US courts place a high value on the separation of powers, possibly a higher value than on the protection of the environment. Although the Ninth Circuit conceded in *Juliana* that ‘climate change is occurring at an increasingly rapid pace’⁹⁶ and that the other branches have ‘abdicated their responsibility to remediate the problem’,⁹⁷ it emphasised that this does not mean that power is conferred on courts to ‘step into their shoes’.⁹⁸ Thus, *Juliana* made clear that US courts lack the power (and perhaps also the desire) to order an effective remedy in environmental cases, even when such inaction compromises constitutional or human rights. Thus, it can only be hoped that the government sees this as a wake-up call to change its policy in order to protect not only the environment, but also the constitutional and fundamental rights of its citizens.

3.5 The Prospective Landmark Case in Norway

3.5.1 Greenpeace Nordic Ass’n v Ministry of Petroleum and Energy

Opposition to judicial interference in climate policy is to some extent reflected in the Norwegian climate case which has recently been appealed to the Norwegian Supreme Court.⁹⁹ A group of NGOs (Young Friends of the Earth, Greenpeace, Grandparents Climate Campaign, and Friends of the Earth Norway) filed a petition seeking a declaratory judgment against the Ministry of Petroleum and Energy of Norway for its decision to grant petroleum production licenses in the Arctic Barents Sea.¹⁰⁰

The claim forwarded by the NGOs is that the Norwegian government’s decision to licence searching and drilling for oil in the Arctic Barents Sea is illegal under Norwegian law.¹⁰¹ Specifically, they claim that the decision violates Article 112 of the Constitution.¹⁰² Article 112 states that ‘[e]very person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained’.¹⁰³ The plaintiffs also asserted that emissions from Norwegian oil abroad are relevant for the court’s assessment of whether Article 112 has been violated.¹⁰⁴ The government countered the plaintiff’s

95. Ibid 46.

96. Ibid 14.

97. Ibid 32.

98. Ibid; Aidun H and Libby M, ‘Juliana in the World: Comparing the Ninth Circuit’s Decision to Foreign Rights-Based Climate Litigation’ (*Climate Law Blog*, 13 March 2020) <<http://blogs.law.columbia.edu/climatechange/2020/03/13/juliana-in-the-world-comparing-the-ninth-circuits-decision-to-foreign-rights-based-climate-litigation/>> “more-6806” (accessed 20 March 2020).

99. Skjevestad (n 62).

100. Oslo Tingrett, *Natur og Ungdom, Greenpeace Norden v Staten v/Olje- og energidepartementet*, 16-166674TVI-OTIR/06 (4 January 2018) para 3.1.

101. Borgarting Lagmannsrett (Norwegian Court of Appeal), *Natur og Ungdom, Greenpeace Norden v Staten v/Olje- og energidepartementet* LB-2018-60499 (2020).

102. Oslo Tingrett (n 100) para 3.1.

103. The Norwegian Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2018, Article 112; official English translation <<https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>>.

104. Oslo Tingrett (n 100) para 3.1.

claim and argued that Article 112 is a collective right and thus bars an individual claim to the right to a healthy environment.¹⁰⁵ The government also claimed that it had made a valid environmental impact assessment and that emissions abroad should not be a factor in that assessment.¹⁰⁶

On 4 January 2018, the Oslo District Court found that Article 112 provided an individual right but that the state had not violated that right.¹⁰⁷ The District Court determined that the state had fulfilled its necessary duties before awarding the licence, proven by the fact that the Norwegian Parliament took into account the arguments for and against the new licenses before its final decision to award the license.¹⁰⁸ The District Court also ruled that emissions from exported oil and gas are irrelevant when assessing whether the licensing is a violation of the right to a healthy environment.¹⁰⁹

The NGOs appealed the decision to the Court of Appeals asserting that the District Court's interpretation of Article 112 was too restrictive.¹¹⁰ Although the Court of Appeals did not overturn the lower court ruling, it did provide insight into the direction of potential future litigation. On 22 January 2020, the Court ruled that the right to a healthy environment enshrined in the Constitution provided standing for the violations alleged.¹¹¹ Additionally, the Court rejected the District Court's ruling by declaring that Norway's obligation of the right to a healthy environment extends to the environmental harm of its exported oil.¹¹² Nonetheless, the Court held that the threshold for a violation of Article 112 is high and that courts should exercise restraint in reviewing decisions by political branches.¹¹³ Ultimately, the Court of Appeals affirmed the District Court's decision that the licenses were valid.¹¹⁴ Thereafter, the plaintiffs appealed the decision once more and the Norwegian Supreme Court granted leave on 20 April 2020.¹¹⁵ The case was heard in November 2020, and, although the Supreme Court has not set a judgment date, it could be declared as early as December 2020 or January 2021.¹¹⁶

3.6 Pending Climate Litigation

The NGOs in the Norwegian case aim to fight climate change and defend the right to a healthy environment through preventing further expansion of oil exploration.¹¹⁷ However, the stances of both the District Court and Court of Appeals reflect a conservative view of the

105. Oslo Tingrett (n 100) para 4.1.

106. Ibid.

107. Oslo Tingrett (n 100) para 5.2.1.

108. Oslo Tingrett (n 100) para 5.2.4.

109. Oslo Tingrett (n 100) para 5.2.2.

110. Borgarting Lagmannsrett (n 101).

111. Borgarting Lagmannsrett (n 101) Section III, para 2.2, p 18; Klimasøksmål 'Norwegian climate lawsuit accepted by Supreme Court' (*Klimasøksmål.no* 24 April 2020) <<https://www.xn--klimasoksmal-95a8t.no/en/2020/04/20/norwegian-climate-lawsuit-accepted-by-supreme-court/>> (accessed 18 October 2020).

112. Borgarting Lagmannsrett (n 101) para 5.3, p 41; Klimasøksmål (n 111); M Darby, 'Greenpeace takes Arctic Oil lawsuit to Norway's Supreme Court' (*Climate Change News* 21 April 2020) <<https://www.climatechange.news.com/2020/04/21/greenpeace-takes-arctic-oil-lawsuit-norways-supreme-court/>> (accessed 18 October 2020).

113. Borgarting Lagmannsrett (n 101) para 2.3, p 20; Burgers (n 46) 58.

114. Borgarting Lagmannsrett (n 101) para 5.4.

115. *Natur og Ungdom, Greenpeace Norden v Staten v/Olje- og energidepartementet*, 20-051052SIV-HRET (20 April 2020).

116. 'Norwegian Supreme Court set to rule in climate case' (*Greenpeace International* 13 November 2020) <<https://www.greenpeace.org/international/press-release/45643/norwegian-supreme-court-set-to-rule-in-climate-case/>> (accessed 27 November 2020).

117. Bergkamp (n 61) 247.

judiciary's role in climate change litigation. The Supreme Court judgment could be of great importance to the future of climate change litigation, and to great inspiration for climate activists across the globe. The fact that all of Norway's 19 Supreme Court justices will preside over the case¹¹⁸ demonstrates the importance of this decision.

Another case which can be mentioned in this regard is currently pending before the European Court of Human Rights (ECtHR), namely the 'Youth4ClimateJustice' case.¹¹⁹ In this case, the plaintiffs (six children and young adults) are hoping that the Court will hand down a judgment requiring 33 governments to take action in order to stop the climate crisis.¹²⁰ Similar to *Urgenda*, and, as they state, 'build[ing] on the truly historic precedent set by the *Urgenda* decision', they are arguing that the current policies of the accused states violate their right to life, their right to respect for private and family life, and their right to be protected from discrimination.¹²¹ The application was filed in September 2020 and was communicated to the relevant States in November 2020,¹²² so it might take considerable time before we see whether the ECtHR will follow the *Urgenda* ruling or take a different route.

4. The Judiciary and Climate Change

4.1 The Contemporary Role of the Judiciary in Climate Cases

The following sections consider whether the global judicial system has the structural ability to act on behalf of national legislators, and whether it should. The cooperation between the national legislative power and the judicial system is particularly relevant in the case of climate change policies, as climate change narratives grow in importance in the legislative debate, both nationally and internationally.¹²³ As demonstrated above, the judicial system in the US is currently reluctant to interfere with the legislature in cases regarding climate change policies.¹²⁴ This contrasts with Europe where the courts so far have encouraged the legislature to tackle climate change in a more aggressive way and even bring human rights violations into the discussion.

4.1.1 Shaping Jurisprudence to Tackle Climate Change

The plaintiffs' lack of standing in *Juliana* is not to be understood as a lack of judicial power regarding climate change policies. Although the judicial system lacks legislative power in the traditional sense, judges do have the ability to shape jurisprudence so that it accommodates a certain climate change narrative, and in this way act on behalf of legislators. We see this exemplified in 2007, when the Massachusetts Supreme Court ruled that under § 202 of the Clean Air Act, the US Environmental Protection Agency (EPA) had the authority to regulate the emission of GHG.¹²⁵ The legislative role the court is able to exercise through its jurisprudence is limited to where the court finds basis in existing national or international law.¹²⁶

118. Darby (n 112).

119. 'The Case' (GLAN: Global Legal Action Network) <<https://youth4climatejustice.org/the-case.html>> (accessed 10 November 2020).

120. Ibid.

121. Ibid.

122. *Duarte Agostinho and Others v Portugal and Others* (App No 39371/20) (communicated on 13 November 2020).

123. B Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2(2) *Chinese Journal of Environmental Law* 131, 131-132 <<https://doi.org/10.1163/24686042-12340030>>.

124. Hurwitz and Staton (n 92).

125. *Massachusetts v EPA* 549 US 497 (2007).

126. Ibid.

The judicial system is unable to invent new rights, or make new laws, without the necessary legal basis in already existing law. However, as the judicial system has the exclusive right to interpret applicable law, it has the power to influence the application of the law in the way the judiciary finds most appropriate.¹²⁷

The courts' inability to advance climate policy without a legal basis became apparent in *American Electric Power v Connecticut*. In this case, the US Supreme Court ruled that private corporations cannot be sued for emissions of GHG, under current applicable law in the United States.¹²⁸ The reasoning was that the Clean Air Act already delegated the management of GHG emissions to the EPA, which, as mentioned above, had been given the authority to regulate the emission of GHG.¹²⁹

As demonstrated in the above cases, and arguably in the case of *Urgenda*, the courts do not have the power to directly change applicable law. However, a wide function has been given to the courts in their role of interpreting the law. In that role, the courts have the possibility to shape jurisprudence in a way that can be conducive to progressive climate policies, as shown in *Urgenda*.

4.1.2 Separation of Powers

The main argument brought forward against the judiciary's involvement in climate change policies is clearly the separation of powers, which raises questions about the legitimacy of courts in tackling those matters. As climate change issue resolutions must take into account complex harms and broad ecological and economic considerations affecting an entire society, it is questionable whether a court is capable of deciding on a proper solution.¹³⁰ It is imperative that courts are not 'assigned with tasks that are more properly accomplished by other branches'.¹³¹

For example, the judgement in the *Urgenda* case demonstrates how a court is limited to interpret existing law, and changing that law is outside of its powers. If *Urgenda* is indicative, the ability of a court is limited to controlling the degree to which the actions of the legislative and administrative branches conform with the existing law. The judiciary has no legal basis to issue climate change policies, especially in light of the separation of powers.

Yet, as seen in the *Climate Case Ireland*, it is possible for a court to make the legislature aware that its legal obligations in prevailing climate change policies are not fulfilled. When comparing *Juliana*, *Urgenda* and the *Climate Case Ireland*, it is necessary to highlight that the separation of powers is interpreted differently across jurisdictions. As already mentioned, the US has a more rigid interpretation of the separation of powers than the Netherlands for example.¹³² The relation between the *trias politica* in the Netherlands is not a strict separation of powers but rather a balanced system in which the judiciary reviews the legality of governmental actions in individual cases.¹³³

127. Ibid.

128. *American Electric Power Co v Connecticut* 564 US 410 (2011).

129. *Massachusetts* (n 125).

130. *Mistretta v United States* 488 US 361 (1989); Donald G Gifford, 'Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines' (2011) 62 *South Carolina Law Review* 201, 230.

131. Ibid 383.

132. Josephine van Zeben, 'Establishing A Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law* 339, 354 <<https://doi.org/10.1017/S2047102515000199>>.

133. Ibid 354.

If the selected cases in this paper are indicative, the different interpretations of the separation of powers shows that US courts may be more inclined to let the political question doctrine stop them from being more progressive. By contrast, in the selected European judgments, the judiciary overcomes such obstacles with progressive judgments. And, as shown in *Urgenda* and the *Climate Case Ireland*, there may be more room for judicial branches in Europe to demand compliance from the legislative power to follow emission goals.

4.1.3 Courts' Lack of Expertise on Climate Change

Other concerns over the judiciary ordering the legislative and executive branches on what to do are based on the courts' lack of expertise in the field of regulating GHG emissions. This was evident in the US Supreme Court's decision in *American Electric Power v Connecticut*. The question dominating that case was whether the judiciary has the tools to regulate GHG emissions using tort litigation.¹³⁴ In the Court's opinion, 'judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.'¹³⁵ Rather, the Court views the EPA as appropriately responsible for regulating GHG emissions.¹³⁶

The US Supreme Court has also made it clear that determining appropriate GHG emissions, along with the economic and national security implications of curtailing these emissions,¹³⁷ is 'consigned to the political branches, not the judiciary.'¹³⁸ Furthermore, the trial court in *American Electric Power v Connecticut* stated that the issue of regulating GHG emissions clearly needs non-judicial discretion.¹³⁹

In response to the decision commentators highlighted a range of other factors that, in their opinion, call for less judicial involvement in GHG emissions regulation. First, they pointed out that different emission limits should be set for different companies or industries as a general emission limit, applicable to everyone, would be unreasonable.¹⁴⁰ Secondly, worries arise that GHG emission regulation by the judiciary would have a significant financial impact on consumers and businesses. Such regulation would increase the costs of generating electricity, thereby curtailing energy output, and energy producers would be tempted to relocate operations outside of the reach of the relevant GHG regulation.¹⁴¹ It has also been suggested that the US Congress should mindfully figure out reforms that set GHG emission limits and goals while simultaneously ensuring inexpensive energy supply.¹⁴² Additionally, it is claimed that courts would not consider the impact of their judgments on government assistance programs, such as the Low-Income Home Energy Assistance Program.¹⁴³ Finally, the fact that courts are likely to choose GHG emission limits that are not suitable for every company or industry would, it is claimed, lead to non-compliance by some utilities which could in turn lead to significant energy shortages.¹⁴⁴

134. *American Electric Power Co* (n 128) 425-29.

135. *Ibid.*

136. *Massachusetts* (n 125) 532.

137. *American Electric Power Co* (n 128) 272.

138. *Ibid* 274.

139. *Ibid.*

140. Victor E Schwartz, Phil Goldberg, Appel Christopher, 'Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?' (2012) 46 *Valparaiso University Law Review* 369, 389.

141. *Ibid* 404.

142. *Ibid.*

143. *Ibid* 405.

144. *Ibid.*

As the same commentators have pointed out, the United States focuses on use of energy sources capable of large-scale production, which are comparably inexpensive, namely fossil fuels such as coal, oil and natural gas.¹⁴⁵ This can lead to difficulties in compliance with emission limits set by courts as the technology for reducing fossil fuel emissions may not be available or economically feasible within the deadline set by a court.¹⁴⁶

In conclusion, the separation of powers and the incapability of courts to handle broad and complex climate change policy questions dominate the argument that the judiciary should avoid ordering legislative and executive branches what to do.

4.2 The Evolving Role of the Judiciary on Climate Change

4.2.1 The Creation of a Fundamental Right

In the course of a few decades, the international legal regime on climate change has developed as a slow-paced revolution. The increasing focus on climate change strengthens policies aimed at protecting the lives of future generations and biodiversity, building up to the creation of a right to a healthy environment. The role of the judiciary within this process is rapidly evolving. As the number of cases concerning climate change litigation increases, alongside the growing popular concern for the environment, we may likely see more courts pronouncing a healthy environment as a fundamental right. This increased focus can clearly be seen in the media and public discourse in the US and Europe, but more initiatives are taking root within the legal sphere and outside the Western hemisphere. A strong example of this is the case of *Leghari*.

4.2.2 The case of Leghari

The same year the district court heard the *Urgenda* case, a similar case was being heard in Pakistan. In *Ashgar Leghari v Pakistan*, a farmer sued the Pakistani government for its failure to carry out the National Climate Change Policy (NCCP) that had been adopted three years earlier, as well as the Framework for Implementation of Climate Change Policy. The Lahore High Court found that the delay in implementing the Framework offended the ‘fundamental rights of the citizens’, and that these need to be safeguarded.¹⁴⁷ In furtherance of this, it ordered the government to take numerous specific actions to remedy the offence. These included, among other measures, to create a Climate Change Commission and monitor the implementation of the NCCP, as well as ordering relevant public institutions to prepare a list of adaptation action points that could be achieved by the end of the year 2015.¹⁴⁸ The Pakistani judgment in *Leghari* is seen by some to have been even more progressive than the *Urgenda* case, although this may be due to the wider acceptance of public interest litigation in Pakistan.¹⁴⁹

145. Ibid 372.

146. Ibid 401.

147. Pakistan Lahore High Court, *Ashgar Leghari v Federation of Pakistan* WP No 25501/2015 (2015) para 8.

148. Ibid 7.

149. Van Geel (n 13) 63.

4.2.3 The Oslo Principles

Jaap Spier, Advocate General for the Supreme Court of the Netherlands, has claimed that such lawsuits may be ‘the only way to break through the political indifference regarding climate change’.¹⁵⁰ After the first judgment in the *Urgenda* case, and in the same year as the *Leghari* case, further climate change related legal initiatives developed. A group of legal experts initiated the Oslo Principles on Global Climate Change Obligations.¹⁵¹ The principles point out the various legal avenues for compelling governments to take measures on climate change. They are also meant for politicians who want to push for progress on climate policy. The principles contain legal arguments that are, to some extent, in line with the arguments used in the *Urgenda* case.¹⁵² The group behind the Oslo Principles claim that there is a permissible quantum of emissions per capita that will not threaten a 2 degrees Celsius increase, and that this can be used to define and quantify the obligations upon states in relation to climate measures.¹⁵³

As such, we see a rise of legal experts and prominent scholars supporting the judiciary in adjudicating on cases concerning climate change policy.¹⁵⁴ As climate regulations solidify into international and national law, it may increase the possibilities to overcome collective action problems and develop the right to a healthy environment into a fundamental right.

5. Conclusion

This paper has demonstrated that the proper role of the judiciary on climate change litigation is still to be found. In a myriad of climate cases, a few are breaking ground with progressive judges pushing for the creation of a fundamental right to a healthy environment. When comparing the *Climate Change Ireland* and *Urgenda* cases with the case of *Juliana*, it may seem as though the European judiciary is allowing more judicial involvement than the US system. However, it is still too early to discern stable patterns, and as climate cases increase across the globe, clearer trends may become evident in the longer term. The right to a healthy climate might be on a path to crystallising into a fundamental human right, thereby pressuring judges to enforce this over other conflicting laws. It may also be enforced against conflicting government-issued policies, as demonstrated in *Urgenda*.

The rising number of climate litigation cases provides hope that applicable law will be changed to ensure a healthy environment for future generations. As seen in *Urgenda*, even if courts decide on compliance with GHG emission limits, the question of how to implement the set target is left to the government. Therefore, the courts are able to ensure that the limitation of pollution takes place but leave more complex questions, such as implementation of

150. Joop Bouma and Anne Grithe Franssen, ‘Zo dwing je de overheid tot effectief klimaatbeleid’ (*Trouw* 8 April 2015) <<http://www.trouw.nl/tr/nl/13110/Klimaatverandering/article/detail/3946337/2015/04/08/Inzetrecht-om-klimaatpolitiek-af-te-dwingen.dhtml>> (an informal translation prepared by the Urgenda Foundation is available at: <https://www.urgenda.nl/wp-content/uploads/Informal_translation_-_Trouw_-_8_April_2015_-_Judges_to_force_adoption_of_climate_poli.pdf> (accessed 30 March 2020)).

151. Columbia University Faculty of Law, ‘Legal Experts Release Oslo Principles on Climate Change Obligations’ (Press release published 30 March 2015) <https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_principles_launch_-_press_release_final_150323.pdf> (accessed 30 November 2020).

152. Ibid.

153. Julia Powles and Tessa Khan, ‘Climate change: at last a breakthrough to our catastrophic political impasse?’ (*The Guardian* 20 March 2015) <<https://www.theguardian.com/commentisfree/2015/mar/30/climate-change-paris-talks-oslo-principles-legal-obligations>> (accessed 30 March 2020).

154. Patrick Toussaint, ‘Loss and damage and climate litigation: The case for greater interlinkage’ (2020) *Review of European, Comparative & International Environmental Law*, 1, 13 <<https://doi.org/10.1111/reel.12335>>.

measures, to the legislative and administrative branches. Climate change litigation cannot solve the global issue of climate change on its own, but it may raise awareness, increase social mobilisation, and encourage policymakers to act. These are perhaps the most significant elements when refocusing the priorities of society.

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