

Urgenda vs. Juliana: Lessons for Future Climate Change Litigation Cases †

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Abstract

Climate change litigations have been increasing in recent years where the majority of these cases have failed to reach their stated objective that is forcing states through domestic court decisions to adopt measures combating global warming. Nonetheless, there are some rulings that are currently emerging globally signalling that the momentum is shifting in favour of climate change activists and organisations as the courts level. Among these rulings are the recent two cases in the Netherlands and the United States, Urgenda and Juliana. The former is considered as a great success given that the Dutch state was ordered to increase its Greenhouse Gas emissions reduction targets. The latter is considered as a case to build upon given that the judge in the United States has dismissed it. For this reason, this article is seeking to answer the following question: What lessons could be learned from the success of Urgenda and the failure of Juliana for future climate change litigation cases? The authors will highlight that two factors play a vital role in ensuring the success or failure of a climate change litigation case: the specificity of the measure the state is requested to pursue by the claimants and judicial activism affected by the types of demands made by the plaintiffs.

Keywords: Climate Change, Urgenda, Juliana, Litigation, Specific Measures, Judicial Activism

Introduction

Climate change litigation cases have been increasing in the last couple of decades due to the activism of different international and national organizations seeking to combat global warming. These actors and in the wake of the complexities surrounding global actions and the failure of global efforts, have sought filing lawsuits before domestic courts as a new strategy.¹

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¹ JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 1-27 (Cambridge University Press 2015); Hari M. Osofsky, *The Geography of Climate Change*

The objective is to have a ruling that obliges a given state to take concrete measures for combating global warming by for instance either applying already existing climate change rules, amending the regulations or adopting new laws to that end. The common purpose of all the lawsuits filed has been the long-term intentions of the claimants to create a shift in the society towards alternative energy sources, eliminating Greenhouse Gas (GHG) emissions and generally ensuring a clean environment while balancing human activities with the need to protect and preserve the planet.² The majority of climate change litigations in particular the first few years and until now have not been successful as judges refused to explicitly or implicitly provide any acknowledgement of the claimants rightful cause despite the existing scientific proof of the negative impact of global warming not only on the planet but on the population worldwide. Hence, the attempts that were made often resulted in the judges dismissing the cases.³ Nonetheless, a slow shift has started to occur in recent years where many judges due to their awareness of climate change and their activist role have begun providing rulings that acknowledge directly or indirectly the catastrophic impact of global warming.⁴

The degree to which a judge ruled in favour of climate change activists and the potential consequences emerging from such rulings depend upon the domestic legal system, society's acceptance of climate change and existing regulations as well as current legal doctrines and judicial jurisprudence and traditions. This was the case in the recent couple of judgements emanating from Dutch and United States (US) courts concerning claims made by climate activists and civil society organizations requesting the state to shift its policies on this matter and acknowledge the existence of a human right to a healthy climate. The decisions made in both cases reveal how judges ruled considering the specificities of each domestic legal system. The Dutch case (Urgenda) was as great success and a milestone in climate change litigations upon which future cases can build given that it was the first case in which a judge requests the government to step up its GHG emissions reduction targets. The US case (Juliana) despite the failure of the plaintiffs in their quest as the judge dismissed their claims also represents an achievement but to a lesser degree as the judge in this case had expressly acknowledged the severity of climate change, the role of US government in causing it and the need for actions.⁵ In this context, this article is seeking to answer the following question: What lessons could be learned from the success of Urgenda and the failure of Juliana for future climate change

Litigation: Implications for Transnational Regulatory Governance, 83(6) WASHINGTON UNIVERSITY LAW REVIEW. 1789-1855 (2005).

² Michael B. Gerrard & Joseph A. MacDougald, *An Introduction to Climate Change Liability Litigation and a View to the Future*, 20(1) CONNECTICUT INSURANCE LAW JOURNAL. 153-164 (2013); Andrew Long, *International Consensus and U.S. Climate Change Litigation*, 33(1) WILLIAM & MARY ENVIRONMENTAL LAW & POLICY LAW REVIEW. 177-218 (2008).

³ Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30(3) JOURNAL OF ENVIRONMENTAL LAW. 483-506 (2018).

⁴ David B. Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 357, 371-374 (William C. G. Burns & Hari M. Osofsky eds., Cambridge University Press, 2009).

⁵ Otto Spijkers, *The Urgenda Case: A successful Example of Public Interest Litigation for the Protection of the Environment?*, in COURTS AND THE ENVIRONMENT 305, 331- 343 (Christina Voigt & Zen Makuch eds., Edward Elgar Publishing 2018); Appeal from the United States District Court for the District of Oregon, Ann L. Aiken, District Judge, Presiding Argued and Submitted June 4, 2019 Portland, Oregon Filed January 17, 2020 Before: Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton,* District Judge. Opinion by Judge Hurwitz; Dissent by Judge Staton.

litigation cases? The article will highlight after comparing both cases two factors that led to different outcomes: the specificities of the claims made by the foundation Urgenda and the importance of judicial activism.

To that end, the article will analyse both cases to make the argument mentioned below. The authors will first provide an overview of the background and court decision in the Urgenda case while later on they will analyse the court's decision. Then, the authors will also examine the background and court decision in the Juliana case and then proceed to conducting similar analysis. The article after that will discuss the two findings observed as a result of analysing and comparing both cases: the implication of having a specific request made to the government and the importance of judicial activism. The authors will then conclude with the significance of both judgements to future climate change litigation cases.

A. Urgenda Case

1. Background and Court Decision

The Netherlands had a high GHG emissions for a small country that is mostly the result of Carbon Dioxide (CO₂) originated from the energy sector. The Netherlands which is a member of the European Union (EU) has the obligation of reducing its aggregate GHG emissions by 20% by 2020 where the basis for such reduction is the GHG emissions of 1990. The basis of this commitment is the Cancun Pledges and the Doha amendment to the Kyoto protocol. This was one of several commitments that were made by the EU and its member states. The Urgenda case addresses the commitments of reducing GHG emissions by 20% by 2020 and which must be conducted by the Dutch government. It does not tackle the GHG reduction commitments after 2020 under the Paris agreement and stipulated within the EUs Nationally Determined Contributions. The Netherlands after implementing a wide range of measures on the basis of European regulations and domestic ones was estimated to reduce its GHG emissions between 14 to 17% by 2020. Yet, such reduction occurred not from CO₂ emissions that remained at the same level of 1990s which prompted the Foundation Urgenda to take actions in particular as the government refused to increase their emissions reduction targets by 2020.⁶

The foundation Urgenda which is an independent platform that develop plans and policies to combat climate change has sent an official letter to the Dutch government asking it to commit to 40% GHG emissions reduction by 2020. The response was a vague one supporting the objectives of the foundation related to combating climate change but without setting any clear new targets. As a result, Urgenda filed a tort lawsuit on its behalf and on the behalf of hundreds of private individuals against the state of Netherlands, using the Dutch domestic law as a legal basis. The main argument was that the Dutch state is not doing enough to protect citizens against climate change. The legal basis for the argument was the international norms upon which states should reduce their GHG emissions between 25 to 40 % by 2020 taking the GHG emissions of 1990 as a margin of comparison. Accordingly, the state has violated this obligation by not increasing its reduction targets. Moreover, according to Urgenda, the state has violated some provisions of the European Convention on Human Rights (ECHR) namely

⁶ Benoit Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*, 8(1) TRANSNATIONAL ENVIRONMENTAL LAW. 167, 167-171 (2019).

the right to life and the right to an undisturbed private and family life. The state opposed these claims and attacked Urgenda's allegations where the main argument was that a court decision in favour of the foundation would affect the separation of powers as the judiciary would be intervening in the work of the government.⁷

After analysing the case, the Hague Court of First Instance rejected all the legal claims of Urgenda. For instance, the court stated that the Dutch state obligations related to climate change "are owed to other states, not to individuals or legal persons". It also interpreted the rights under ECHR on the basis of its Article 34 upon which only actual victims or potential victims of human rights violation can have access to the European Court of Human Rights (ECtHR) where neither Urgenda nor the private individuals claimed to be victims of human rights violation.⁸ However, the Hague Court of First Instance ruled that the:

sources of constitutional, European and international law help to determine the content of the duty of care that the State owes to society – including Urgenda – under a provision of the Dutch Civil Code and the doctrine of hazardous negligence.⁹

The court recognized the existence of a duty to take measures to tackle the dangerous effects of climate change in its tort law. It applied this duty to the case finding on the basis of scientific reports concerning climate change that the state "had to pursue a target of at least a 25% reduction in GHG emissions by 2020 from a 1990 basis" to prevent the rise of temperature below 2 degrees globally.¹⁰ Despite disagreeing with the judgement, the state agreed to comply but also to appeal the decision before the Court of Appeal of the Hague using again the claim that separation of powers prevents national courts from making such a decision.¹¹ The state said that any government policy must be discussed by the Parliament and not ruled by a court. The Court of Appeal rejected all the arguments made by the government including the one related to separation of powers using a bold and clear language.¹² The Court of Appeal confirmed the Court of First Instance decision stating that the state failed to take sufficient measures to combat climate change but using this time different legal grounds. The court found the measures as insufficient in accordance with Articles 2 (Right to life) and 8 (Right to respect for private and family life) of ECHR as the Dutch government failed to protect its citizens from the effect of climate change where the measures adopted has violated these provisions.¹³ According to the Court:

⁷ Evert F Stamhuis, *A Case of Judicial Intervention in Climate Policy: The Dutch Urgenda Ruling*, 23 COMPARATIVE LAW JOURNAL OF THE PACIFIC. 43, 44-45 (2017).

⁸ Mayer, *supra* note 6, at 172.

⁹ *Id.* at 172.

¹⁰ *Id.* at 172-173.

¹¹ Laura Burgers & Tim Staal, *Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2018: POPULISM AND INTERNATIONAL LAW 223, 223-244 (Janne E. Nijman & Wouter G. Werner eds., T.M.C. Asser Press 2019).

¹² Jonathan Verschuuren, *The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce its Greenhouse Gas Emissions*, 28(1) REVIEW OF EUROPEAN, COMPARATIVE & INTERNATIONAL ENVIRONMENTAL LAW. 94, 95 (2019).

¹³ Ingrid Leijten, *Human Rights v. Insufficient Climate Action: The Urgenda Case*, 37(2) NETHERLANDS QUARTERLY OF HUMAN RIGHTS. 112, 113 (2019).

Articles 2 and 8 include protection in environment-related situations affecting or threatening to affect the right to life, as well as against adverse effects on the home or private life reaching a minimum level of severity.¹⁴

There is a positive obligation under the framework of these rights to take concrete measures against potential future threats (duty of care) and precautionary measures when the threat and damage is certain to occur to reduce the harm as much as possible where climate change was considered as a real threat by the court affecting current and future generations. The court decided that the state must reduce its GHG emission of at least 25 % by 2020 to fulfil this duty of care under ECHR where the uncertainties surrounding this issue in fact is another motive for increasing emission reductions targets.¹⁵ The court ruled in favour of the claimants in a ground-breaking judgement ordering the state to increase its GHG emissions reduction targets.

2. A Brief Analysis of the Case

This case represents a new landmark for climate change litigation cases in particular as numerous similar cases have been filed globally and the actual impact of the Dutch court's decision on these cases is still to be seen.¹⁶ It represents the first case in Europe where citizens sued the government for the failure of taking sufficient actions for combating climate change and rather the first case in the world where a government is ordered by a court to take the necessary measures to limit GHG emission.¹⁷ Numerous legal implications could be found in the case where analysing each one of them would require an entire book. This section will focus on two main implications: the use of human rights in climate change litigation and the separation of powers.¹⁸ The case highlights a growing trends by climate change advocates and organizations to base their claims on human rights enriched within legal instruments which may signal a shift towards employing a human rights language in climate change litigation.¹⁹ What is more, Urgenda case has highlighted a novel approach that a court may use as the Dutch court has in practice assessed a government measure that is in general in the competence of the Parliament and not the court.²⁰

The Court of Appeal decision of using human rights was criticized by numerous scholars,²¹ where one of the objections was that the court based its decision of human rights violation on

¹⁴ *Id.* at 114.

¹⁵ *Id.* at 115.

¹⁶ André Nollkaemper & Laura Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case* (Blog of the European Journal of International Law, January, 6, 2020), available at <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> (Accessed 17 January 2020).

¹⁷ Sanita van Wyk, *THE IMPACT OF CLIMATE CHANGE LAW ON THE PRINCIPLE OF STATE SOVEREIGNTY OVER NATURAL RESOURCES* 328-329 (Nomos Verlagsgesellschaft Mbh & Co 2017).

¹⁸ Tim Baxter, *Urgenda-Style Climate Litigation has Promise in Australia*, 32(3) AUSTRALIAN ENVIRONMENT REVIEW. 70, 70 (2017); Pau de Vilchez Moragues, *Broadening the Scope: The Urgenda Case, the Oslo Principles and the Role of National Courts in Advancing Environmental Protection Concerning Climate Change*, 20 SPANISH YEARBOOK OF INTERNATIONAL LAW. 71, 71-92 (2016).

¹⁹ Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7(1) TRANSNATIONAL ENVIRONMENTAL LAW. 37, 37-67 (2018); Jaap Spier, *'There is no Future Without Addressing Climate Change'*, 37(2) JOURNAL OF ENERGY & NATURAL RESOURCES LAW. 181, 181-204 (2019).

²⁰ Suryapratim Roy & Edwin Woerdman Dr, *Situating Urgenda V, The Netherlands within Comparative Climate Change Litigation*, 34(2) JOURNAL OF ENERGY & NATURAL RESOURCES LAW. 165, 177-180 (2016).

²¹ Burgers & Staal, *supra* note 11, at 223-244.

scientific studies “elevating scientific research findings to a legally binding legal norm”.²² Others have applauded the approach used by the Dutch court in particular environmentalists worldwide. Moreover, there are calls for considering human rights in every climate change matter regardless of whether the matter has reached a litigation stage or not.²³ The importance of the human right dimension is that before Urgenda, courts used to dismiss the claims related to human rights that are being violated because of the absence of measures addressing climate change. Numerous courts after the Urgenda judgment began following this reasoning.²⁴ The decision of the Court of Appeal represents a relief and a push simultaneously for those seeking to make climate change claims on the basis of human rights violation.²⁵ This judgement has again pushed the boundaries of what was considered acceptable as before the judgement, there was only a recognition that climate change has an impact on human rights but without having any legal implication.²⁶ Traditionally,

there are limitations to the contribution of human rights that arise due to antagonism between the rights of individuals and collective interest.²⁷

Stakeholders like states used to deny their responsibility for climate change or that such responsibility is negligible when compared with the rest of the world.²⁸ Urgenda changed the status-quo by linking environmental law in this case climate change to human rights,²⁹ resulting in the emergence of new era in which emissions reduction can be considered as a human right according to the court.³⁰ The decision opened the door widely for considering the debate concerning the human right dimension of climate change that is not only related to states obligation in the domestic context and the role of domestic courts. Questions associated with the “transboundary nature of climate-related human rights violations” and reparation have emerged despite not being addressed in the Urgenda case.³¹ Moreover, the decision of Urgenda along with other similar climate litigation cases that were filed in parallel is said to have influenced international climate change law as they were tackled at a similar period during

²² Verschuuren, *supra* note 12, at 95.

²³ Leijten, *supra* note 13, at 112–118.

²⁴ Eleanor Stein & Alex Geert Castermans, *Case Comment—Urgenda v. The State of the Netherlands: The “Reflex Effect” — Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*, 13(2) MCGILL JOURNAL OF SUSTAINABLE DEVELOPMENT LAW. 305, 323-324 (2017).

²⁵ Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42(2) WILLIAM & MARY ENVIRONMENTAL LAW AND POLICY REVIEW. 525, 533-537 (2018).

²⁶ Florentina Simlinger & Benoit Mayer, *Legal Responses to Climate Change Induced Loss and Damage*, in LOSS AND DAMAGE FROM CLIMATE CHANGE 179, 179-203 (Reinhard Mechler et al eds., Springer 2019).

²⁷ Anne-Sophie Tabau & Christel Cournil, *New Perspectives for Climate Justice: District Court of The Hague, 24 June 2015, Urgenda Foundation versus the Netherlands*, 12(3/4) JOURNAL FOR EUROPEAN, ENVIRONMENTAL & PLANNING LAW. 221, 228 (2015).

²⁸ Samvel Varvaštian, *Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-Making Become a Game-changer?* 7 (Berlin Conference “Transformative Global Climate Governance après Paris”, May, 2016).

²⁹ Randall S. Abate et al., *Recent Developments in Climate Justice*, 47(12) ENVIRONMENTAL LAW REPORTER. 11005, 11005- 11017 (2017).

³⁰ Katherine Dunn, *Climate Change Litigation Enters a New Era as Court Rules That Emissions Reduction is a Human Right* (Fortune, December, 20. 2019), available at <https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/> (Accessed 17 January 2020).

³¹ Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9(3) CLIMATE LAW. 224, 229 (2019).

which the Paris agreement was negotiated where the importance of human rights in the context of climate change was acknowledged.³²

Concerning separation of powers, the entire discussion over this issue has also divided scholars over whether the court's approach was wise in particular as it has been stated that the court has overstepped its competences directly or indirectly.³³ Opponents of the court's decision argue that even in the case the judgement is legally correct, the court should have not stated that the state violated the law or even refused to examine the case on the basis of the principle of separation of powers.³⁴ The decision of increasing emission reduction targets would lead to new costs that affect other areas such as education or housing without the approval of the government that is supposed to take the decision concerning these matters.³⁵ In this regard, it has been pointed out that there is no strict separation of powers in the Netherlands as many scholars are claiming while the court cannot simply decide to not make a judgment over a given case because of potential political consequences.³⁶ The court ruled that no authority has primacy over another one as the importance is to achieve balance between all the authorities emanating from the Dutch state,³⁷ and as

the role of the court is to confer legal protection and determine disputes between parties, 'which it must do if requested to do so.'³⁸

In particular, the court's reasoning is that such political consequences are unavoidable given that this case concerns individuals seeking protection against the state³⁹ and given the "extraordinary nature of the climate change threat".⁴⁰ In that sense, judicial intervention is required as legal rights of individuals are at stake as

the adjudication of disputes concerning constitutional or human rights falls squarely within the powers of the judicial branch.⁴¹

This reasoning may provide the necessary legal support for individuals and organizations elsewhere. Such protection is also provided for future generations as the main objective of the

³² Jennifer Huang & Maria Antonia Tigre, *Trends in Climate Justice Litigation: The Dutch Case and Global Repercussions*, in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 571, 595 (Randall Abate ed., Environmental Law Institute 2016).

³³ Roy & Woerdman Dr, *supra* note 20, at 177-178.

³⁴ Burgers & Staal, *supra* note 11, at 223-244.

³⁵ Ingrid Leijten, *The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease* (*Verfassungsblog on Matters Constitutional*, October, 19. 2018), available at <https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/> (Accessed 17 January 2020).

³⁶ Ceri Warnock, *The Urgenda Decision: Balanced Constitutionalism in the Face of Climate Change?* (OUPblog, July, 22. 2015), available at <https://blog.oup.com/2015/07/urgenda-netherlands-climate-change/> (Accessed 17 January 2020).

³⁷ Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation V The State Of The Netherlands*, 34(2) JOURNAL OF ENERGY & NATURAL RESOURCES LAW. 143, 143-163 (2016).

³⁸ Jolene Lin, *The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 5(1) Climate Law. 65, 80 (2015).

³⁹ Stamhuis, *supra* note 7, at 54.

⁴⁰ James Fowkes, *Rare, or Under-Cooked? The Appeal Ruling in the Urgenda Climate Change Case* (I.Connect, December, 19. 2018), available at <http://www.icconnectblog.com/2018/12/rare-or-under-cooked-the-appeal-ruling-in-the-urgenda-climate-change-case/> (Accessed 17 January 2020).

⁴¹ UN Environment, *The Status of Climate Change Litigation: A Global Review* 30 (United Nations Environment Programme, May 2017).

foundation is the development of a more sustainable society.⁴² Still, there are fears that the court's move may backfire in the long term as politicians would think twice before making commitments under future agreements. Indeed, before Urgenda, politicians had only obligations originating from climate change treaties while after Urgenda, organizations and private individuals may now sue the government for the violation of their obligations.⁴³ This last argument remains to be proved in practice as the Urgenda case was the first successful one where such claims were taken seriously by a court.

B. Juliana Case

1. Background and Court Decision

The case concerns a group of young people who filed a lawsuit during the Obama era in 2015 against the US and its agencies. Children filing the lawsuit claimed that their fundamental rights have been violated because of the absence of a healthy climate system. The children claimed that the federal government has an obligation to ensure that such fundamental rights are protected using legal concepts such as the public trust doctrines and political claims. They were looking for a declaration of the existence of a fundamental right to a healthy climate which is their main objective.⁴⁴ Children are seeking to compel the federal government to address climate change by “implementing a national, science-based, climate recovery plan designed to reduce atmospheric CO2 concentrations below 350 ppm by the year 2100”.⁴⁵ During the course of the case, the Trump administration became defendant and the fossil fuel industry became interveners. The US as defendant demanded through a motion the dismissal of all the questions raised by the children.⁴⁶ In substance, the children stated that the

federal government has acted with “deliberate indifference” through its “promotion, subsidization, authorization of the fossil fuel industry”, and ... that the government’s deliberate indifference is directly causing, and will further cause, substantial impairment to the climate system.⁴⁷

The children also stated that the government’s subsidies for fossil fuels is the reason for which this source of energy is the mostly used as it is cheaper than other alternative sources of energy. This economic support by the government is affecting future generations given the great costs of such support in particular “the costs of pollution on human health and costs of present and future climate disruption”. The children further argued that the government knew

⁴² Marc (M.A.) Loth, *Climate Change Liability After All: A Dutch Landmark Case*, 21(1) TILBURG LAW REVIEW. 5, 21-23 (2016).

⁴³ Hannah Versteeg, Yannick Venekamp & Bob Bakker, *Urgenda: International law, Dutch Policies and the Separation of Powers* (Medium, December, 16. 2016), available at <https://medium.com/@b.o.j.bakker/urgenda-international-law-dutch-policies-and-the-separation-of-powers-ee8277735d0a> (Accessed 17 January 2020).

⁴⁴ Bronson J. Pace, *The Children’s Climate Lawsuit: A Critique of the Substance and Science of the Preeminent Atmospheric Trust Litigation Case, Juliana V. United States*, 55(2) IDAHO LAW REVIEW. 85, 85-86 (2019); Erin Ryan et al., *Juliana V. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate*, 45(1) FLORIDA STATE UNIVERSITY LAW REVIEW. 1-41 (2018).

⁴⁵ *Id.* at 86.

⁴⁶ *Id.* at 88.

⁴⁷ *Id.* at 88-89.

about the impact of fossil fuels on climate change since decades. On the basis of these arguments, the children made the demands mentioned below in addition to other requests.⁴⁸

Judge Ann Aiken of the federal court rejected on November 10, 2016 the demand to dismiss the case filed by the defendants and requested the continuing of the case to trial. In particular, Judge Aiken wrote in its decision of rejecting the demand to dismiss the case that this lawsuit is not an ordinary one.⁴⁹

The Juliana district court further concluded that the pleadings alleged sufficient factual specificity to survive a motion to dismiss, and in so doing, offered dicta that gestured to the merits of the substantive due process and public trust claims.⁵⁰

The defendants used several means to attempt and block the trial over the course of the following months through for instance petitions that were denied several times by the Ninth Circuit and the Supreme Court.⁵¹ During this period, the trial date has been appointed and then changed because of the government's attempts mentioned below. Indeed, the US administration employed these kinds of tactics for numerous months following Judge Aiken's decision where the administration tried to delay the trial filing motions after motions and where the attorneys of children had to respond to the motion.⁵² There was also great support for the case through amicus briefs filed on behalf of numerous supporting communities such as legal scholars.⁵³ Finally, the hearing date was set on June 4, 2019 where the arguing on behalf of both parties took place before three judges. An order from the Ninth Circuit Court was issued just recently on January 17, 2020.⁵⁴ The court has made a decision that went against the wishes of the children that were seeking to make a real change in US climate change policy and regulations after numerous years of efforts and patience starting in 2015.⁵⁵ In the wake of the recent judgement and even during the course of the five years during which the case was filed, numerous speculations are being made and debates are taking place regarding the future of climate change litigation in the US in particular concerning the rights of citizens to a healthy

⁴⁸ *Id.* at 89.

⁴⁹ Carolyn Kelly, ESQ, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 NEW YORK ENVIRONMENTAL LAW JOURNAL. 183, 186 (2019).

⁵⁰ Nathaniel Levy, *Juliana and the Political Generativity of Climate Litigation*, 43 HARVARD ENVIRONMENTAL LAW REVIEW. 479, 501 (2019).

⁵¹ *Id.* at 502-503. Bradford C. Mank, *Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?: Juliana v. United States*, 52 UNIVERSITY OF CALIFORNIA, DAVIS LAW REVIEW. 855, 885-889 (2018).

⁵² Our Children's Trust, *Juliana V. United States Youth Climate Lawsuit*, available at <https://www.ourchildrenstrust.org/juliana-v-us> (Accessed 17 January 2020).

⁵³ Our Children's Trust, *Amicus Curiae ("Friend of the Court") Briefs*, available at <https://www.ourchildrenstrust.org/lawlibrary> (Accessed 17 January 2020).

⁵⁴ Our Children's Trust, *supra* note 52.

⁵⁵ John Schwartz, *Court Quashes Youth Climate Change Case Against Government* (The New York Times, January, 17. 2010), available at <https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html> (Accessed 17 January 2020); Aylin Woodward, *A Landmark Lawsuit in Which Kids Sued The US Government Over Its Contribution To Climate Change Has Been Dismissed After A 5-Year Fight* (Business Insider, January, 17. 2010), available at <https://www.businessinsider.com/juliana-vs-united-states-kids-climate-change-case-dismissed-2020-1> (Accessed 17 January 2020).

climate and the role of domestic US laws.⁵⁶ This does not mean that the case did not yield also positive results. Indeed, the court has acknowledged the severity of climate change and most importantly the role of the government in causing this phenomenon. According to the Court:

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions.⁵⁷

In fact, the court expressly stated that its decision was made reluctantly. Moreover, the court also stated that tackling this issue can be either made by the political branch or even by changing the political system through citizens vote. According to the court,

the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.⁵⁸

After assessing whether the case falls within its juridical powers, the court found after applying the conditions for which such case can be covered that these conditions are absent in the present case. For this reason, the plaintiffs are unable to pursue constitutional claims before the court.⁵⁹ Despite finding that the plaintiffs claims are not covered within its judicial power as mentioned below, and despite the focus on the procedure rather the substantial claim given the decision made, one can notice that the judgement still constitutes an express acknowledgement of the severity of climate change, responsibility of the government and would indeed constitute an important legal support for future climate litigation cases.

2. A Brief Analysis of the Case

As in the Urgenda case, there are several points that deserve analysis. This section will only focus on two that constituted the main arguments of the plaintiffs: the separation of powers and climate change as a constitutional right. As mentioned earlier, the real achievement of this case is the express acknowledgement by the court of the severity of climate change and the role of the government which was mentioned multiple times in the decision. Indeed, “the experience of a lawsuit in one forum can inform strategies or arguments to be deployed in other legal or political fora⁶⁰.” It is worth mentioning in this context that this is not the first time that a case

⁵⁶ Madeleine Carlisle, *A Federal Court Threw Out A High Profile Climate Lawsuit. Here's What It Might Mean For The Future of Climate Litigation* (TIME, January, 19. 2020), <https://time.com/5767438/climate-lawsuit-kids/> (Accessed 17 January 2020); Julia Rosen, *Is It Our Constitutional Right to Live in a World Safe from Climate Change* (Los Angeles Times, June, 3. 2019), available at <https://www.latimes.com/science/la-sci-youth-climate-trial-juliana-20190603-story.html> (Accessed 17 January 2020).

⁵⁷ Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 32.

⁵⁸ *Id.* at 32.

⁵⁹ *Id.* at 5.

⁶⁰ Levy, *supra* note 50, at 498.

related to climate change has been filed before US courts.⁶¹ In this regard, the court in *Juliana vs. United States*, expressly stated that:

the record left little basis for denying that climate change was occurring at an increasingly rapid pace; copious expert evidence established that the unprecedented rise in atmospheric carbon dioxide levels stemmed from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked; the record conclusively established that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions; and the record established that the government's contribution to climate change was not simply a result of inaction.⁶²

Concerning separation of powers, the decision of the court reveals a compliance with this theory by the tribunal as the court found it impossible to realise the demands of the plaintiffs, which is why the case was dismissed by the court for not fulfilling all the conditions in the context of Article III. According to this provision: “(1) the plaintiffs must suffer an actual injury, (2) the injury must be caused by the defendant, and (3) the courts must be able to provide a remedy for that injury”.⁶³ The court found

that it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.⁶⁴

The separation of powers concept has been examined by scholars and academics since the filing of the case in 2015 where some of them called for pushing the boundaries while others called for a strict application of the concept.⁶⁵ For instance, Lisa Heinzerling argued that the US courts employ double standards as there are other cases where the plaintiffs were “trying to force action or redress on climate change” where the courts did not find that separation of powers applies and did not ask the plaintiffs to seek an appropriate institutions for their demands.⁶⁶ Others are wondering whether the court would indeed violate the separation of powers in such cases if it decides to provide remedy as the whole objective of separation of powers is controlling whether a branch of the government is failing in securing citizens rights and liberties.⁶⁷ The decision of the court reflects the reluctance of domestic tribunals globally to fill gaps that are left by the legislative and executive authorities using the concept of separation of powers as a reason for not doing so.⁶⁸ Under this principle, US executive agencies

⁶¹ Lisa Heinzerling, *Climate Change in the Supreme Court*, 38(1) ENVIRONMENTAL LAW. 1, 1-18 (2008).

⁶² Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 4-5.

⁶³ Jacqueline Peel & Hari M. Osofsky, *CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY* 266-309 (Cambridge University Press 2015)

⁶⁴ Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 5.

⁶⁵ Ryan et al., *supra* note 44, at 1-41.

⁶⁶ Lisa Heinzerling, *A Meditation on Juliana v. United States* 1-32 (June. 12, 2019).

⁶⁷ Carolyn Kormann, *The Right to a Stable Climate is the Constitutional Question of the Twenty-First Century* (The New Yorker, June. 15, 2019), available at <https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century> (Accessed 17 January 2020).

⁶⁸ Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENVIRONMENTAL LAW REPORTER. 47, 48 (2017).

have the competence to enforce environmental laws and regulations and provide remedies and not the courts that “should limit their role in environmental and energy cases to reviewing the administrative actions of executive agencies to determine their compliance with the law”.⁶⁹ This principle represents a guarantee of democratic government but limits the courts role,⁷⁰ that cannot address matters that are under the competences of other branches of the state⁷¹. As such, there is a need to navigate between the need to ensure separation of powers and the protection of citizens rights breached as a result of climate change.⁷²

When it comes to considering the protection of citizens against climate change a constitutional right and despite the fact that the court did not tackle this point as the court dismissed the case on other grounds, this point deserves analysis. According to the plaintiffs:

the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a “climate system capable of sustaining human life.”⁷³

To that end, they wanted “the government to implement a plan to phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].⁷⁴” At the district Court level, this right was defined as

one to be free from catastrophic climate change that “will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.”⁷⁵

It would have been interesting to examine the court’s reasoning on this point if it did not dismiss the case on other grounds. It is well known in this context that the American constitutional system includes a huge amount of doctrinal conservatism which resists the introduction of new rights and considering them as part of the system.⁷⁶ The US constitution does not provide an explicit protection to the environment while US courts did not for the time being state the existence of an indirect right to a clean environment within the US constitution.⁷⁷ The demands of creating a new constitutional right related to climate change falls in the range of similar demands that were made in the last decades which judges and scholars had to address and debate.⁷⁸ Still, the adoption and enforcement of constitutional rights is a challenging task

⁶⁹ Mank, *supra* note 51, at 902-903.

⁷⁰ Peel & Osofsky, *supra* note 63, at 266-309.

⁷¹ Henry Lininger, *Is climate litigation too 'political'?* (Yale Climate Connections, June. 27, 2017), available at <https://www.yaleclimateconnections.org/2017/06/is-climate-litigation-too-political/> (Accessed 17 January 2020).

⁷² Dino Grandoni, *The Energy 202: Youth Climate Lawsuit Dismissal Shows Challenge of Using Courts to Tackle Climate Change* (The Washington post, January. 21, 2020), available at <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2020/01/21/the-energy-202-youth-climate-lawsuit-dismissal-shows-challenge-of-using-courts-to-tackle-climate-change/5e25e86388e0fa6ea99d0d4d/> (Accessed 17 January 2020).

⁷³ Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 11.

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 12.

⁷⁶ Nathan Chael, *Two Environments of Rights: A Comparative Examination of Contemporary Rights-Based Climate Lawsuits in the Netherlands and the United States*, 15(1) JOURNAL OF SCIENCE POLICY & GOVERNANCE. (2019).

⁷⁷ Banda & Fulton, *supra* note 68, at 10124.

⁷⁸ Mank, *supra* note 51, at 855-903.

generally.⁷⁹ It is in this context that the acknowledgement by the court of the responsibility of the government in combatting climate change can be used as an advantage in future cases.⁸⁰ For now, in the conflict between climate change and US constitution, the latter has won. Only time will tell whether the Juliana case will be used to build a stronger case on the basis of which climate change would indeed become a constitutional right with all the implications that may arise out of that.⁸¹ In particular, the relevance of this case lies within the calls to establish constitutional rights for future generations concerning climate change where current generation is called for striving for the establishment of such right.⁸²

C. Lesson for Future Climate Change Litigation Cases

This section will address two factors that the authors believe were the main elements that led to different results when comparing the Urgenda and the Juliana cases. These factors played a vital role in the success of the claimants in the Netherlands and their failure in the US and are likely going to play similar role in future climate change litigation cases.

1. The Specificity of the Request Made to the Government

Both cases had similar ambitions as the plaintiffs were concerned about the impact of climate change on their rights to enjoy a healthy life, the rights of future generations and the need to shift government policies to combat global warming. Their lawsuits stem from a belief of the need to change the system by holding governments accountable for their actions or inactions, changing the rules in place and providing remedies to current and future victims of climate change. The central claim in both cases is that citizens have a right to be protected from the impacts of climate change. However, the strategies used to reach this objective led to different results despite the fact that the plaintiffs in both cases had similar central objectives.⁸³

In the Urgenda case, the general focus of the foundation was on combatting climate change and shifting towards alternative energy sources which would entail a big change in the economic system of the Dutch state. Nonetheless, the foundation in its lawsuit requested the state to increase its GHG emissions reduction targets which were about to reach between 14 to 17% by 2020.⁸⁴ Having this specific request by the foundation in the lawsuit instead of demanding the change of the entire state policies and rules while providing the state of a margin of liberty through which it can decide the ways it can increase these targets made the demands realistic and achievable. This is why, even if the Court of First Instance and the Court of Appeal had different reasoning according to which their final judgments were reached, both courts requested the state to increase its GHG emissions reduction targets.⁸⁵ In the Juliana case, the

⁷⁹ Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17(2) INTERNATIONAL JOURNAL OF PEACE STUDIES. 71, 73 (2012).

⁸⁰ Levy, *supra* note 50, at 502.

⁸¹ See for instance, Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25(4) THE ENVIRONMENTAL FORUM. 50-63 (2008); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50(3) ARIZONA LAW REVIEW. 879, 879-924 (2008).

⁸² Ylam Nguyen, *Constitutional Protection for Future Generations from Climate Change*, 23(1) HASTINGS ENVIRONMENTAL LAW JOURNAL. 183, 202-203 (2017).

⁸³ Mayer, *supra* note 6, at 167-192; Stadhuis, *supra* note 7, at 43-60; Pace, *supra* note 44, at 85-114; Ryan et al., *supra* note 44, at 1-41.

⁸⁴ Mayer, *supra* note 6, at 167-171.

⁸⁵ *Id.* at 172-173; Leijten, *supra* note 13, at 112-118; Nollkaemper & Burgers, *supra* note 16.

plaintiffs had similar focus as to the Urgenda foundation, nonetheless in their lawsuit, the plaintiffs did not request the state to take very specific measures for combating climate change. This is not say that the claimants did not have particular demands as indeed they asked the federal government to “to implement a plan to phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]”.⁸⁶ The demand made by the plaintiffs despite sounding a specific one is in reality a very broad request entailing great consequences for the US economy and requires debates within the other branches of the federal government to decide whether this is feasible and the implications of such change on the entire US system, the economy, the society and all the related aspects.⁸⁷ It is not the judge responsibility to decide the future policies and directions of the country in this case when it comes to environmental matters and climate change despite the constant evolution of the judge’s role. Such discussions are usually held by other branches of the government that have the competences of adopting laws and regulations generally while the tasks of the judge are the interpretation of the laws, ensuring their applications or demand a change in the rules or the measures taken when valid reasons exist or when there are proofs that the measures have negatively affected the rights of citizens explicitly and implicitly.⁸⁸

Another element in this context that led to the success of Urgenda and the failure of Juliana is that the foundation not only had a specific request but that also this request was related to a government regulation or policy in place. The Dutch government had already adopted measures to have GHG emission reductions by 2020 which means that Urgenda was not asking the Dutch state to adopt a new approach to this matter. The foundation was rather stating that the measures taken by the state on this issue are not sufficient and there is a need to further increase GHG emissions reduction target.⁸⁹ It is easier for a judge in this context to examine a regulation or a policy adopted by a government and interpret it as the other branches of governments have already fulfilled their tasks. In contrast, the plaintiffs in the Juliana case were requesting a shift in government’s policies and approaches to this issue which is a divisive matter in the US where there is a lack of consensus among the different parties. The plaintiffs were not asking the judge to interpret an already existing government policy addressing this matter but rather asking the judge to order the government to establish rules and regulations tackling climate change.⁹⁰ Perhaps, the outcome would have been different if the plaintiffs tackled a particular federal regulation that has direct or indirect impact on climate change as potentially the judges would have at least addressed the substance of the case even if they would have still ruled in favour of the government. Future cases filed before the US federal courts need to address specific regulations that the federal government has adopted, and which may explicitly or implicitly affect climate change.

⁸⁶ Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 11-12.

⁸⁷ Kelly, *supra* note 49, at 183-239; Levy, *supra* note 50, at 479-506.

⁸⁸ Roger Hanson, *The Changing Role of a Judge and Its Implications*, 38(4) COURT REVIEW. 10, 10-16 (2002); Lord Mance, *The Role of Judges in a Representative Democracy* Lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, 24 February 2017; Seon Bong Yu, *The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries*, 2(2) International Area Studies Review. (1999).

⁸⁹ Roy & Woerdman, *supra* note 15, at 165-189.

⁹⁰ Appeal from the United States District Court for the District of Oregon, *supra* note 5.

In fact, future climate change litigation cases globally must learn this lesson from the success of Urgenda and the failure of the Juliana case and file lawsuits addressing existing government measures addressing climate change instead of attempting to change the entire system on the basis of which a state's legitimacy is based. In that sense, climate change is one of the many concerns that a state may have among many other important concerns such as economic growth and trade. Pushing a state via a lawsuit to change the system does not make sense as the state would have then to navigate between the different concerns and where in some cases it may give priority to other issues while the judge will be extremely reluctant to address the claims of the plaintiffs for the reasons mentioned below.⁹¹ In contrast, addressing particular government regulations may as the Urgenda case shows be much more effective as there would be more chances that the judge addresses the actual claims and potentially changes to the regulation or government approach may occur.

2. The Importance of the Judicial Activism

Despite the specific measures sought by the foundation Urgenda, it was the judge who provided the necessary legal support on the basis of which the state was held accountable. Whether at the Court of First Instance or at the Court of Appeal, the judicial activism proved to be the most important factor that led to the positive outcome in the case. Indeed, the claims made by the Dutch government in this case were similar to the ones made by the US federal government in the Juliana case where the concept of separation of powers was stated as the main reason for which a judge should not rule over such case. Still, it was the judge benefiting from the particularities of the Dutch legal system, the specific demand made by Urgenda and the existing legal support originating from international and EU law that ruled in favour of Urgenda in a landmark case. Not only that but the Hague Court of Appeal even went further and reversed the decision of Court of First Instance and provided a stronger legal basis for Urgenda's claims by considering states inaction as a breach of certain human rights stipulated with the ECHR.⁹² The Dutch judge in this case played in fact the role of a climate activist where the case was used to build a legal precedence not only for future Dutch cases but also as a model for climate change litigations globally. This is why, current articles and studies are making comparison between the Dutch case and other climate litigation cases.⁹³

In contrast, the activism of the Judges in the Juliana case was limited for several reasons. Firstly, it is important to mention the important activism of judge Ann Aiken of the federal court that refused to dismiss the case upon the request of the defendants stating that this case is not ordinary. It is also important to mention the activism of the dissenting judge from the Ninth

⁹¹ See for instance on this matter, Paolo Davide Farah & Elena Cima eds, *CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW* (Routledge 2016); Denis Barthélemy & Martino Nieddu, *Non-Trade Concerns in Agricultural and Environmental Economics: How J.R. Commons and Karl Polanyi Can Help Us*, 41(2) *JOURNAL OF ECONOMIC ISSUES*. 519-527 (2007).

⁹² Mayer, *supra* note 6, at 167-192; Stamhuis, *supra* note 7, at 43-60; Burgers & Staal, *supra* note 11, at 223-244; Verschuuren, *supra* note 12; Leijten, *supra* note 13, at 112-118.

⁹³ Danny Nooman, *Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia*, 37(2) *THE UNIVERSITY OF TASMANIA LAW REVIEW*. 25-69 (2018); Berthy van den Broek & Liesbeth Enneking, *Public Interest Litigation in the Netherlands A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts*, 10(3) *UTRECHT LAW REVIEW*. 77-90 (2014).

Circuit Court that issued the judgement. The language used in the dissenting opinion is very strong and supportive of the plaintiffs' claims and the opinion is even longer than the entire judgement.⁹⁴ According to the district judge Josephine L. Staton:

Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?⁹⁵

The main reason for the limited activism of the Ninth Circuit Court is indeed the broad demand made by the plaintiffs which requires as expected a decision stating that such measures must be made to the other branches of the state in addition to the conservative nature of US constitution when it comes to establishing new rights.⁹⁶ Perhaps one important limitation and which is not mentioned in the judgement but one can assumed it was in the judges mind is the current composition of the US Supreme Court as if this case reaches the Supreme Court, the votes would be against the plaintiffs given that five out of nine Supreme Court judges are currently republicans.⁹⁷ As such, one may assume that the judges at the Ninth Circuit Court have considered this reality before issuing their judgement and the potential negative consequences from a negative Supreme Court decision concerning this topic where this case may be used as an example to set the pace for future domestic climate change litigation cases.

Judicial activism is extremely important to surpass the political interests of the different branches of governments as well as the short-term benefits that may emerge from not adopting climate friendly policies and regulations.⁹⁸ Such activism is needed due to the governance gap left by the other branches of the government by not addressing the issue of climate change,⁹⁹ and as the international efforts for fighting climate change has led to disappointments. Domestic courts are seen as new battlefields where "litigation plays an important governance gap-filling role in jurisdictions without comprehensive national-level climate change policies".¹⁰⁰ Such activism is needed despite the fact that in many cases, the judges do not reach the desired results as they still are able to reach a new milestone in their judgements providing further legal support for climate change activists as shown in the Juliana case. In fact, even if

⁹⁴ Appeal from the United States District Court for the District of Oregon, *supra* note 5, at 4-32.

⁹⁵ *Id.* at 64.

⁹⁶ Kelly, *supra* note 49, at 183-239; Levy, *supra* note 50, at 479-506; Chael, *supra* note 76.

⁹⁷ US Supreme Court, Current members, available at <https://www.supremecourt.gov/about/biographies.aspx> (Accessed 17 January 2020). See on this point, David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79(3) UNIVERSITY OF PITTSBURGH LAW REVIEW. 411-435 (2018); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY. 133-214 (2009).

⁹⁸ Ingrid Leijten, *Climate Change and the Oslo Principles: Judicial Activism or the Problem with Politics?* (Leiden Law Blog, April. 26, 2015), available at <https://leidenlawblog.nl/articles/climate-change-judicial-activism-environmental-law-oslo-principles> (Accessed 17 January 2020).

⁹⁹ Inura Fernando, *Litigating Climate Change – Of Politics and Political Questions: A Comparative Analysis of Justiciability of Climate Change in the United States and Canada*, 49(3) VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW. 315, 316 (2018).

¹⁰⁰ Lisa Vanhala, *The Comparative Politics of Courts and Climate Change*, 22(3) ENVIRONMENTAL POLITICS. 447-474 (2013).

negative results are expected through the decisions, the mere acknowledgement of climate change in the judgments provides further pressure on governments and corporations to shift their regulations.¹⁰¹ The cases highlighted above and the role of the judges in this context led scholars such as As Inura Fernando to state that the “the vital purpose of justiciability is to give courts a mechanism by which to avoid awkward cases”.¹⁰² This is vital as despite the important role the judge may play in the context of climate change litigation cases, the judge cannot be the authority that determines the climate policy of a given state.¹⁰³ Yet, the judge needs to also make a decision that navigates the different existing interests, competences and concerns as any decision must have consequences to future climate change cases and not only the individual case before him while the role of the other government branches must be respected.¹⁰⁴ Judicial activism despite its importance cannot be relied upon as a long term solution to climate change issues as it stems from “the persona and commitment of individual judges” which why changes in the regulations and policies by the other government branches are required,¹⁰⁵ in particular as decisions related to environmental matters including climate change involve “complex prognoses and specific expertise” that may lacking at the judicial level.¹⁰⁶

Conclusion

The findings emerging from analysing both cases should serve as lessons for future climate change organizations and activists seeking to file climate change litigation cases before domestic courts. The Urgenda case provides guidelines on how to file lawsuits addressing specific state measures related directly or indirectly to climate change allowing the judge the opportunity and the possibility to exercise its margin of appreciation and interpret the rules in favour of the claimants. The Juliana case provides lessons concerning the need to ensure that the demands made before the courts are realistic, achievable without trying to change the entire system of a particular country through one case filed before the judge. In that context, the judge cannot support through its activism the plaintiffs as the demands made require intervention from other branches of the state mainly the executive and legislative authorities as the judge’s responsibility is to interpret the rules not adopting them. Future climate change cases need to carefully learn the lessons of the Urgenda and the Juliana cases to ensure at least that their cases have good chances of being ruled in their favour by the judge taking into consideration the particularities of each domestic legal system and the political position of the state and parties concerning climate change.

¹⁰¹ Don C. Smith, *Landmark Climate Change-Related Judicial Decisions Handed Down in the Netherlands and Australia: A Preview of What’s to Come?*, 37(2) JOURNAL OF ENERGY & NATURAL RESOURCES LAW. 145, 146-147 (2019).

¹⁰² Fernando, *supra* note 99, at 316.

¹⁰³ Matthew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 CHAPMAN LAW REVIEW. 265, 267 (2010).

¹⁰⁴ *Id.* at 268.

¹⁰⁵ Nupur Chowdhury & Els Reynaers, *Introduction to the JGLR Special Issue on Environmental Governance*, 6(1) JINDAL GLOBAL LAW. 1, 6 (2015).

¹⁰⁶ NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATIONS IN CANADA, GERMANY AND SOUTH AFRICA* 32 (Cambridge University Press 2017).