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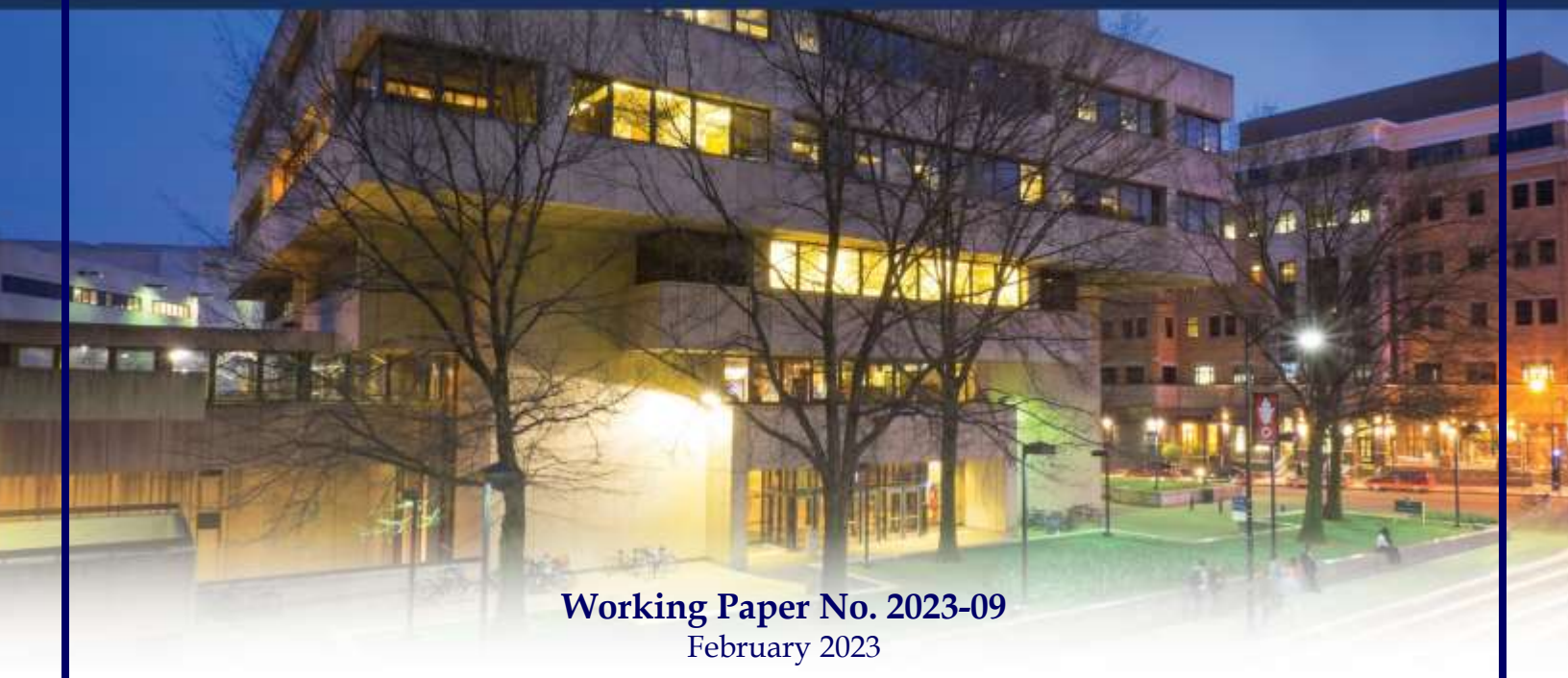

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Urgenda vs. Juliana: Lessons for Future Climate Change Litigation Cases

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ARTICLES

URGENDA VS. JULIANA: LESSONS FOR FUTURE CLIMATE CHANGE LITIGATION CASES

Paolo Davide Farah[*] & Imad Antoine Ibrahim[**]

ABSTRACT

In recent years, climate change litigation has increased but many of these cases have failed to achieve their stated objective(s) of legally coercing states to combat global warming. Nevertheless, more recent rulings have signaled a shifting momentum in favor of climate activists, gaining significant international attention.

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Among these rulings are two cases out of the Netherlands and the United States (U.S.)—Urgenda *and* Juliana. *The former is considered a great success, given the Dutch state's mandate to meet and increase its greenhouse gas emissions reduction targets. The latter is considered a case to build upon, given that the presiding U.S. judge dismissed the case. This article seeks to answer the following question: what lessons may be learned from the success of* Urgenda, *and the failure of* Juliana, *for future climate change litigation? The authors highlight two key factors that play vital roles in climate change litigation: the specificity to which the state is coerced to pursue strict environmental regulation and judicial activism affected by the types of demands made by the plaintiffs.*

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INTRODUCTION

Over the previous two decades, climate change litigation has increased as a result of national and international pressures brought forth by numerous organizations demanding intervention. In the wake of increasing complexities and the severity around climate change (such as the increasing frequency, intensity, and severity of extreme weather events), and the many failures that have accumulated from "attempting" to combat global warming, activists and organizations have begun filing domestic lawsuits against governments and private companies as a new strategy for real change.[1] This topic is novel and has emerged in the last few years as climate change negotiations fail to achieve the outcomes necessary to effectively fight against global warming. Even though the international community obtained some successful environmental and climate change commitments, the necessary implementation remains in the hands of national governments. At the global level, the number of environmental lawsuits addressing climate change adaptation and mitigation has exponentially increased in the national courts since the mid-2000s and in particular in the last decade.[2] These cases often arise from factors such as the construction or expansion of airports, challenges in transitioning to renewable energy sources, the failure to achieve net-zero carbon emissions, the ongoing reliance on coal-powered energy, and the detrimental effects of climate change on the habitats of endangered species.[3]

Such a strategy seeks legal coercion through which states must abide to concretely combat global warming, whether it would be through existing climate change laws or through new laws and regulations. From a broader perspective, these lawsuits all serve one main purpose: beginning the long-term processes of shifting society toward cleaner energy alternatives eliminating greenhouse gas emissions (GHG) and ensuring a cleaner environment that balances human activity with the

[1] JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 1–27 (Cambridge Univ. Press 2015); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L. REV. 1789–1855 (2005).

[2] Jacqueline Peel & Hari M. Osofsky, *Litigation as a Climate Regulatory Tool*, *in* INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT: QUESTIONS OF LEGITIMACY 311, 311–12 (Christina Voigt ed., 2019).

[3] Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, WIRES CLIMATE CHANGE May–June 2019, at 1.

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protection of the planet.[4] From the outset, until recently (though not always), a majority of high-profile climate change litigation cases have proved unfruitful, as judges have both implicitly and explicitly refused to legally acknowledge the claimant's rightful case despite existing scientific proof of the negative impact of global warming. Hence, previous attempts at litigation have often resulted in a case's dismissal.[5] In contrast, cases which seemed low-profile, less impactful in terms of the parties involved, the scale, location and dimensions, actually have had an important role at both local and national levels toward environmental activism.[6] Nonetheless, such a trend has begun to change, with, many judges now understanding their duties to take climate change arguments more seriously. Indeed, a judge's ruling has both a direct and an indirect impact on global warming, and the wrong ruling could result in nothing less than catastrophe.[7]

The degree to which a judge's ruling in favor of combatting climate change is effective depends on that society's inherent acceptance of climate change's severity. The impact of these decisions depends on the nature and the jurisprudence of the legal system in question, not to mention the existing regulations and doctrines to which a nation may be bound. Two of the most recent judgements emanating from the Netherlands and the United States (U.S.) can attest to such characteristics.[8] Arguments presented in front of each court were often rooted in *human rights as related to a healthy climate*, with climate activists often requesting that states shift their policies toward more sustainable paradigms for the betterment of humanity. In both cases, the decisions made revealed the specificities of each legal system. The Dutch case (*Urgenda*) has already set a precedent for climate change litigation worldwide. *Urgenda* was the first case in which a judge requested that the government increased its emissions reduction targets.[9] By contrast, the U.S. case—

[4] Michael B. Gerrard & Joseph A. MacDougald, *An Introduction to Climate Change Liability Litigation and a View to the Future*, 20 CONN. INS. L.J. 153, 153–64 (2013); Andrew Long, *International Consensus and U.S. Climate Change Litigation*, 33 WM. & MARY ENV'T L. & POL'Y L. REV. 177, 177–218 (2008).

[5] Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENV'T L. 483–506 (2018).

[6] PEEL & OSOFSKY, *supra* note 1, at 236.

[7] 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, 371–74 (William C.G. Burns & Hari M. Osofsky eds., 2009).

[8] *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); HR 20 December 2019, RvdW 2020, 19/00135 m.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.) [hereinafter The State of the Netherlands v. Stichting Urgenda].

[9] *See generally id.*

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Juliana—represents a seemingly insignificant achievement for judicially combatting climate change.[10] Even if the case was dismissed; the judge expressly acknowledged the severity of climate change, marking a first in the U.S. The judge also recognized the role of the U.S. government in contributing to climate change and emphasized the need for concrete actions.[11]

In light of both of these cases, this Article seeks to address the following question: what lessons, for future climate change litigation, may be learned from *Urgenda* and *Juliana*? Upon examining and comparing the two cases, the authors will highlight the two main factors that led to different outcomes: the *specificities* of the claims made by the Urgenda Foundation, and the importance of *judicial activism*.

To begin, we will provide an overview of the background and the court's decision in *Urgenda*, the court's decision being of primary focus. Later, we will focus on the *Juliana* case, proceeding to conduct similar analyses. After each case has been examined, we will compare and assess the findings. Conclusively, we will highlight the significance of both rulings, emphasizing the importance of their outcomes for future climate change litigation, the implications of the specific requests made to governments, and the centrality of judicial activism.

I. *URGENDA*

A. Background and Court Decision

For a relatively small- and high-income country, the Netherlands had, at the time of the case, a high carbon footprint. Its carbon dioxide (CO_2) emissions exceeded those of comparable European Union (EU) countries.[12] As a member of the EU, the Netherlands was obliged to reduce its carbon emissions by 20% by 2020, in comparison with the levels in 1990. This commitment stems from the *Cancun Pledges* and the *Doha Amendment* to the Kyoto Protocol.[13] The Netherlands is not the only nation responsible for meeting emissions reductions goals; the EU and its member states are responsible for complying with numerous strict climate

[10] *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

[11] Otto Spijkers, *The* Urgenda *Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?*, *in* COURTS AND THE ENVIRONMENT 305, 331–43 (Christina Voigt & Zen Makuch eds., 2018); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

[12] Benoit Mayer, The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)*, 8 TRANSNAT'L ENV'T L. 167, 169 (2019).

[13] *Id.* at 169–70.

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commitments. However, the Netherlands specifically gained international attention because of its court's ruling on the *Urgenda* case, a decision highlighting its responsibility for reducing GHG emissions by 20% by 2020.[14] The Dutch government has been held accountable for the failure to meet this stated goal. The Netherlands, similarly to most of EU countries, is not tackling the GHG reduction commitments set forth under the Paris Agreement and stipulated within the EU's Intended Nationally Determined Contributions (INDC).[15] When the case was being deliberated and after implementing both national and international measures and regulations, the Netherlands was expected to reduce GHG emissions by around 14–17%, coming up short of the expected goal of 20%. Such reduction was not driven by a drastic reduction in CO_2 levels, which have remained at levels similar to those in the 1990s.[16] Accordingly, the Urgenda Foundation took legal action to hold the Dutch government accountable for its failure to reduce GHG levels by 2020.

The Urgenda Foundation, a nonprofit organization that develops plans and policies aimed at combatting climate change, formally addressed the Dutch government with a letter urging it to make a commitment by 2020 to reduce GHG emissions by 40%. The government's response was vague; it rhetorically supported the foundation's efforts, but it set no clear targets to accommodate such a goal.[17]

Due to the government's inaction, Urgenda took legal action by filing a tort lawsuit against the Netherlands. Urgenda sought a court order directing the State to reduce the emission of GHGs. The objective was to achieve a reduction, by the end of 2020, of 40%, and in any case by at least 25% from 1990s levels.[18]

The lawsuit argues that the Dutch government was not sufficiently protecting its citizens from the perils of climate change. The legal basis cited the Netherlands' international commitments to significantly reduce their CO_2 emissions by at least

[14] The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

[15] On the progress of EU and G20 see Jana Chovancová and Roman Vavrek, *On the Road to Affordable and Clean Energy: Assessing the Progress of European Countries Toward Meeting SDG 7*, 31 POL. J. ENV'T STUD. 1587 (2022); FRANK WENDLER, FRAMING CLIMATE CHANGE IN THE EU AND US AFTER THE PARIS AGREEMENT (2022); Leonardo Nascimento et al., *The G20 Emission Projections to 2030 Improved since the Paris Agreement, but Only Slightly*, 27 MITIGATION AND ADAPTATION STRATEGIES FOR GLOB. CHANGE 39 (2022).

[16] Mayer, *supra* note 12, at 171.

[17] Evert F. Stamhuis, *A Case of Judicial Intervention in Climate Policy: The Dutch* Urgenda *Ruling*, 23 COMPAR. L.J. PAC. 43, 44 (2017).

[18] The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

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25% by 2020 (namely between 25% and 40% taking the GHG emissions of 1990 as a margin of comparison).[19] Urgenda argued that the state failed its people and the international community by not meeting its obligation of a 20% reduction in emissions.[20] The nonprofit organization further argued that the Dutch government violated provisions of the European Convention on Human Rights (ECHR), namely the *right to life* and the *right to an undisturbed private and family life*.[21] The Dutch government opposed Urgenda's claims, downplaying the organization's allegations and stating that a judicial decision in favor of Urgenda would affect the separation of powers between the judiciary and the executive power.[22]

Urgenda made no initial progress on any of their legal claims, as the Hague District Court rejected all of their arguments.[23] The court clarified that the Dutch government's nonperformance and failure to meet its climate goals did not directly harm Dutch citizens nor other legal persons; rather, the failure to meet its goal is "owed to the other states."[24] The court also interpreted the rights under the European Convention on Human Rights (ECHR) in accordance with Article 34, citing that neither Urgenda nor private individuals could claim to be actual or potential victims of meaningful human rights violations. The Hague District Court acknowledged and ruled that the State's duty of care towards its citizens, which involves protecting them, is determined by a range of legal sources, including both domestic and EU laws. The court specifically identified a provision in the Dutch Civil Code and the doctrine of hazardous negligence as relevant legal foundations for establishing this duty of care.

The court ruled that the State failed its duty of care under the Dutch Civil Code. In doing so, the court considered the "United Nations and European Union climate agreements, along with international law principles and climate science, to define the scope of the State's duty of care with respect to climate change." It is worth mentioning that while using international and EU environmental law, the court based

[19] Stamhuis, *supra* note 17, at 44–45.

[20] *Id.*

[21] *Id.* at 45.

[22] *Id.* at 44–45.

[23] Mayer, *supra* note 12, at 172.

[24] *Id.*

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its judgment on the Dutch Civil Code.[25] In essence, the court reminded the Dutch government of its duty to protect its citizens from the dangerous effects of climate change, to fight back against climate change through dutiful measures, to keep the global average temperature increase well below 2°C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C.[26] The court based its decision on several international documents—mainly the Intergovernmental Panel on Climate Change (IPCC) Reports; the United Nations Framework Convention on Climate Change (UNFCCC) and climate conferences; the Paris Agreement; the United Nations Environment Programme (UNEP) reports of 2013 and 2017; and European climate policy.[27] Accordingly, "the EU as a whole would achieve an actual emissions reduction in 2020 of 26–27% compared to 1990."[28] As per the Dutch climate policy and the projected results it aimed to meet, "it was expected that the Netherlands would achieve a reduction of 23% in 2020, and taking into account a margin for uncertainty, of 19–27%."[29] Despite disagreeing with the judgement, the state had no choice but to comply with the court's decision. However, the state chose to appeal the decision before the Court of Appeals of the Hague, invoking the *separation of powers* as the basis for their defense.[30] The Netherlands claimed that government policies were to be discussed and enacted by Parliament, not by the courts.[31] Very decisively and clearly, the Court of Appeals responded by essentially dismissing all arguments made by the state, especially the argument regarding the separation of powers. The Court of Appeals, while confirming the District Court's decision regarding the government's failure to take adequate measures in combatting climate change, based its reasoning on different legal grounds. The court concluded that the government's insufficient response to fight climate change indeed violated

[25] Urgenda Foundation v. The State of the Netherlands, ENVT'L L. ALL. WORLDWIDE, https://elaw.org/nl.urgenda.15 [https://perma.cc/N8YJ-RPYW] (last visited May 17, 2022).

[26] Mayer, *supra* note 12, at 172–73; *see generally* The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

[27] *See generally* The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

[28] *See generally id.*

[29] *See generally id.*

[30] Laura Burgers & Tim Staal, *Climate Action as Positive Human Rights Obligation: The Appeals Judgment in* Urgenda v. The Netherlands, *in* NETHERLANDS YEARBOOK INT'L L. 2018: POPULISM AND INTERNATIONAL LAW 223, 223–44 (Janne E. Nijman & Wouter G. Werner eds., 2019).

[31] 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 REV. EUR., COMPAR. & INT'L ENV'T L. 94, 95 (2019).

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the rights of Dutch citizens, specifically their *right to life* (Article 2 ECHR) and the *right to private and family life* (Article 8 ECHR).[32] For the court, these articles encompass situations related to the environment that have an impact on or pose a threat to the right to life, as well as adverse effects on home or private life that reach a certain threshold of severity.[33]

Considering the rationale provided by the Court, there exists a positive obligation for the government to take concrete measures against potential future threats (duty of care) and precautionary measures against current damaging threats that affect both current and future generations.[34] The court determined that the state must achieve a minimum carbon reduction of at least 25% by 2020 so as to fulfill its commitment under ECHR.[35] The uncertainties related to the extension of the damages due to GHG emissions is another motive for increasing emission reduction targets. The court's decision was groundbreaking, holding the Dutch government accountable not only to Urgenda, but also to Dutch citizens.

B. Brief Analysis of the Case

The *Urgenda* case is nothing short of a landmark case for climate change litigation, as numerous cases have since been filed around the globe that are grounded in similar arguments.[36] *Urgenda* represents the first European case through which citizens sued their respective government for failing to take sufficient measures to combat climate change and is the first case in the world where a government has been court-ordered to do whatever is necessary to limit GHG emissions.[37] An entire book could be written analyzing the legal implications that such a ruling has for future climate change litigations. It is important to analyze two of the largest implications: the citing of *human rights* in climate change litigation,

[32] Ingrid Leijten, *Human Rights v. Insufficient Climate Action: The* Urgenda *Case*, 37 NETH. Q. HUM. RTS. 112, 113 (2019).

[33] *Id.* at 114.

[34] *Id.* at 114–15.

[35] *Id.* at 115.

[36] André Nollkaemper & Laura Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the* Urgenda *Case*, EJIL:TALK! (Jan. 6, 2020), https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/ [https://perma.cc/GJ8C-J2K6].

[37] Sanita van Wyk, The Impact of Climate Change Law on the Principle of State Sovereignty over Natural Resources (Mar. 2017) (LLD dissertation, Stellenbosch University).

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and the *separation of powers*.[38] *Urgenda* exemplifies the current strategy, wherein activists and organizations base their claims on human rights so as to meaningfully hold governments accountable for combating climate change.[39] Perhaps more significantly, *Urgenda* denotes a novel approach taken by the judiciary, responding in a way that is typically expected from the legislature.[40]

The court's decision to rely on human rights as the foundation of its ruling has faced criticism from numerous scholars.[41] One of these objections even rebuts the court's use of scientific research so as to form a "binding legal norm" in citing human rights violations.[42] By contrast, others have applauded the court's approach for strategically maneuvering the legal system so as to hold the Dutch government accountable. Perhaps more radically, some demand that human rights be a part of all climate conversations, regardless of whether litigation is the end result.[43] Indeed, *human rights* have historically struggled to find traction in climate-related litigation, with courts having easily dismissed claims that human rights are being violated as a result of inadequate climate change responses. The *Urgenda* decision, however, marks a significant change in momentum.[44] The case's overall decision represents both the acknowledgement and the opportunity for considering human rights as part of the climate change framework (for litigation).[45] Before the decision, many scholars and experts widely accepted that human rights and climate change were invariably connected to one another. However, until recently, such reasoning has

[38] Tim Baxter, *Urgenda-Style Climate Litigation Has Promise in Australia*, 32 AUSTL. ENV'T REV. 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 Y.B. INT'L L. 71, 71–92 (2016).

[39] Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENV'T L. 37, 37–67 (2018); Jaap Spier, *There is No Future Without Addressing Climate Change*, 37 J. ENERGY & NAT. RES. L. 181, 181–204 (2019).

[40] Suryapratim Roy & Edwin Woerdman, *Situating* Urgenda v. The Netherlands *Within Comparative Climate Change Litigation*, 34 J. ENERGY & NAT. RES. L. 165, 177–80 (2016).

[41] Burgers & Staal, *supra* note 30.

[42] Verschuuren, *supra* note 31, at 95.

[43] Leijten, *supra* note 32, at 117.

[44] 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 MCGILL J. SUSTAINABLE DEV. L. 305, 323–24 (2017).

[45] Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENV'T L. & POL'Y REV. 525, 533–37 (2018).

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generally lacked authoritative recognition within the legal sphere.[46] It has long been recognized that, in the context of human rights, certain limitations arise from the tensions between individuals and the collectivity.[47]

Nations have historically denied their responsibility for contributing to climate change, claiming that such responsibility is hardly acceptable in light of the rest of the world's contributions.[48] *Urgenda*, however, has limited the possibility for states to shift blame onto other nations,[49] signaling the potential emergence of a new era where emissions reductions will soon be acknowledged as a fundamental human right.[50] The decision's impact far surpasses domestic boundaries. It points out how human rights and climate change are inextricably connected and intertwined. It emphasizes that this connection extends beyond states' obligations in the domestic context and encompasses the international legal role of domestic courts. Indeed, *Urgenda* is repositioning the role of domestic courts in climate change litigations. Questions surrounding the cross-border implications of climate-related human rights violations and the idea of climate reparations are, after *Urgenda*, increasingly being raised and discussed at both domestic and international levels.[51] *Urgenda*'s ruling, has resonated globally, also amplifying other climate conversations. The case changed the paradigm of international climate change law, especially as the ruling coincided with the lively climate discussion opened by the twenty-first session of the Conference of the Parties (COP 21) to the UNFCCC which resulted in the landmark signature of the Paris Agreement. *Human rights* found their way into the

[46] 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., 2019).

[47] Anne-Sophie Tabau & Christel Cournil, *New Perspectives for Climate Justice: District Court of The Hague, 24 June 2015, Urgenda Foundation Versus the Netherlands*, 12 J. FOR EUR., ENV'T & PLAN. L. 221, 228 (2018).

[48] Samvel Varvaštian, *Climate Change Litigation, Liability and Global Climate Governance—Can Judicial Policymaking Become a Game-changer?*, 2016 Berlin Conference "Transformative Glob. Climate Governance après Paris" 7 (May 2016).

[49] Randall S. Abate et al., *Recent Developments in Climate Justice*, 47 ENV'T L. REP. 11005, 11005–17 (2017).

[50] Katherine Dunn, *Climate Change Litigation Enters a New Era as Court Rules That Emissions Reduction is a Human Right*, FORTUNE (Dec. 20, 2019), https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/ [https://perma.cc/Y82J-UUDE].

[51] Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9 CLIMATE L. 224, 229 (2019).

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conversation at the Paris Climate Summit, just as they did in *Urgenda*.[52] Moreover, the ruling represents the first time a national court ordered a government to comply with the provisions agreed upon within an international climate change treaty—specifically, the Netherlands's obligation to reduce GHG emission by 2020, as a part of UNFCCC.[53]

Perhaps obviously, the largest controversy centers around the concept of *separation of powers*[54]—an issue of incredible divisiveness between scholars and experts. The argument lies in determining whether or not the court overstepped its boundaries.[55] The decision to increase emission reduction targets does not come without primary and secondary costs. By increasing the targets, funding available for education and housing policies, which are traditionally within the purview of Parliament's discretion, could be affected.[56] Many scholars argue that the Netherlands's "separation of powers" may be mainly rhetorical, insisting that the court's responsibility is to make the most "just" decisions regardless of the political consequences. Here, the separation of powers may be understood as more of a collaborative effort rather than a rigid and strict principle.[57] The court ruled that no power holds primacy over another, as the most important goal is to achieve a balance between all powers.[58] The role of the court is to confer legal protection and determine

[52] 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., 2016).

[53] Nollkaemper & Burgers, *supra* note 36; Joana Setzer & Dennis van Berkel, Urgenda v. State of the Netherlands*: Lessons for International Law and Climate Change Litigants*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV'T (Dec. 10, 2019), http://www.lse.ac.uk/granthaminstitute/news/urgenda-v-state-of-the-netherlands-lessons-for-international-law-and-climate-change-litigants/ [https://perma.cc/Q832-4EZ9]; Oksana Lutak, *The* Urgenda *Decision: The Landmark Dutch Climate Change Case*, LEIDEN L. BLOG (Jan. 27, 2020), https://leidenlawblog.nl/articles/the-urgenda-decision-the-landmark-dutch-climate-change-case [https://perma.cc/GP7W-2KS6].

[54] Roy & Woerdman, *supra* note 40, at 177–78.

[55] Burgers & Staal, *supra* note 30.

[56] Ingrid Leijten, *The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease*, VERFASSUNGSBLOG (Oct. 19, 2018), https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/ [https://perma.cc/BHR2-5ANB].

[57] Ceri Warnock, *The* Urgenda *Decision: Balanced Constitutionalism in the Face of Climate Change?*, OUPBLOG (July 22, 2015), https://blog.oup.com/2015/07/urgenda-netherlands-climate-change/ [https://perma.cc/XU37-6YSM].

[58] Roger Cox, *A Climate Change Litigation Precedent:* Urgenda Foundation v. The State of the Netherlands, 34 J. ENERGY & NAT. RES. L. 143, 143–63 (2016).

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disputes between parties, "*if requested to do so*."[59] Thus, in the *Urgenda* case, there can be no accusation of judicial overreach, as the court's actions were within the scope of its power.

Overall, the court strongly believed that political consequences should not supersede the protections of individuals. In light of the "extraordinary nature of the climate change threat[,]"[60] it is difficult to avoid the possibility of political consequences, such as budget reductions in other policy areas, when individuals seek protection from their own government.[61] In this sense, swift judicial intervention is unavoidable since the protection of individual rights is the fundamental basis of the argument.[62]

One could infer that this case provides the framework for protecting the rights of future generations, as the main objective of this ruling is to ensure, in the medium and long term, a more sustainable and just society. Such an examination parallels the idea that the court's role in protecting individual rights could be changing as well.[63] Still, concerns persist that judicial activism could slow down the commitments made at the international level. This is because politicians may become more hesitant and reluctant to make commitments that could be enforced by domestic courts. Before *Urgenda*, it was the sole responsibility of politicians to officially take climate change matters into their own hands and implement international commitments coming from climate change agreements. After *Urgenda*, individuals and private citizens may now theoretically hold politicians accountable for their ignored international climate responsibilities and sue the government.[64] However, we should exercise caution as

[59] 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 CLIMATE L. 65, 80 (2015).

[60] James Fowkes, *Rare, or Under-Cooked? The Appeal Ruling in the Urgenda Climate Change Case*, ICONNECT (Dec. 19, 2018), http://www.iconnectblog.com/2018/12/rare-or-under-cooked-the-appeal-ruling-in-the-urgenda-climate-change-case/ [https://perma.cc/L648-6UR2].

[61] Stamhuis, *supra* note 17, at 54.

[62] U.N. ENV'T PROGRAMME, *The Status of Climate Change Litigation: A Global Review*, at 30, U.N. Doc. 17-02953/100 (2017).

[63] Marc (M.A.) Loth, *Climate Change Liability After All: A Dutch Landmark Case*, 21 TILBURG L. REV. 5, 21–23 (2016).

[64] Hannah Versteeg et al., Urgenda*: International Law, Dutch Policies and the Separation of Powers*, MEDIUM (Dec. 16, 2016), https://medium.com/@b.o.j.bakker/urgenda-international-law-dutch-policies-and-the-separation-of-powers-ee8277735d0a [https://perma.cc/VY24-C6YZ].

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Urgenda was only the first case to take climate change litigation seriously, but its long-term impact is still to be fully proven and established.

II. *JULIANA*

A. Background and Court Decision

In 2015, a group of youth, during the Obama administration, filed a lawsuit against the U.S. government for its failure to meet its responsibilities in fighting climate change.[65] The plaintiffs argued that their *fundamental rights* were violated as a result of the absence of a healthy climate system.[66] They claimed that the federal government has an obligation to ensure that such *constitutional rights* are protected via legal concepts, such as public trust doctrines and political claims.[67] Here, the main objective was simple: the declaration that constitutional rights and a healthy climate are inseparable from one another.[68] In addition, the right to a healthy environment or to a healthy and stable climate is essential and instrumental to enjoy all other constitutional rights, freedoms and liberties. The plaintiffs were seeking to coerce the federal government to address climate change by "implement[ing] a national, science-based, climate recovery plan designed to reduce atmospheric CO_2 concentrations below 350 ppm by the year 2100."[69] Hence, the case included a specific request for the government to implement a plan for the reduction of CO_2 emissions.[70] Once President Donald Trump assumed office in 2016, his administration vigorously opposed climate change reduction targets also due to the strong influence of the fossil fuel industry.[71] The new administration demanded the complete dismissal of the raised claims.[72] The plaintiffs argued that the "federal government has acted with 'deliberate indifference' through its 'promotion,

[65] 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 IDAHO L. REV. 85, 88 (2019).

[66] *Id.* at 89.

[67] *Id.* at 90.

[68] *Id.* at 85–114; *see generally* Erin Ryan et al., Juliana v. United States*: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate*, 45 FLA. STATE U. L. REV. 1 (2018).

[69] Pace, *supra* note 65, at 86.

[70] Matt Lifson et al., *Redressability of Climate Change Injuries after* Juliana, LEGAL PLANET (June 12, 2020), https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/ [https://perma.cc/Z4DW-DYCN].

[71] Pace, *supra* note 65, at 85–86.

[72] *Id.* at 88.

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subsidization, and authorization of the fossil fuel industry . . .' and that for this reason the government is directly causing, and will further cause, substantial impairment to the climate system."[73]

They cited fossil fuel subsidies[74] as being one of the main reasons of climate change and fossil fuels remain so much cheaper than alternative sources of energy. The plaintiffs further argued that this kind of governmental support was surely affecting (and ruining) future generations and their right to a healthy climate.[75] They also claimed that the government, for decades, has been aware of the detrimental link between fossil fuel consumption and the climate.[76]

On November 10, 2016, the case appeared to hold some promise—Judge Ann Aiken rejected the government's motion to dismiss, instead forcing the case forward to trial.[77] Through her denial, Judge Aiken noted the case's peculiarity,[78] saying that the "pleadings alleged sufficient factual specificity to survive a motion to dismiss, and in so doing, offered dicta [truth] that gestured to the merits of the substantive due process and public trust claims."[79]

Again, the government used several means to block the trial via instant petitions that were denied several times by the Ninth Circuit and even the Supreme Court.[80] The government was trying to use any instrument to jeopardize the process with requests of rescheduling and changing the dates of the hearings.[81] After the

[73] *Id.* at 88–89.

[74] P.D. Farah & E. Cima, *World Trade Organization, Renewable Energy Subsidies and the Case of Feed-in Tariffs: Time for Reform Toward Sustainable Development?*, 27 GEO. INT'L ENV'T L. REV. 515 (2015); *see also* P.D. Farah & E. Cima, *Energy Trade and the WTO: Implications for Renewable Energy and OPEC Cartel*, 16 J. INT'L ECON. L. 707 (2013).

[75] Pace, *supra* note 65, at 89.

[76] *Id.*

[77] Carolyn Kelly, *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 N.Y. ENV'T L.J. 183, 186 (2019).

[78] *Id.*

[79] Nathaniel Levy, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 501 (2019).

[80] *Id.* at 502–03; 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 U. C. DAVIS L. REV. 855, 885–89 (2018).

[81] Levy, *supra* note 79, at 502–03.

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administration intentionally delayed trial motions, the plaintiffs were forced to respond.[82] In response, a community of legal scholars actively engaged with the case by filing *amicus briefs* to bring additional issues before the court that were not previously mentioned.[83] Finally, the date was set for June 4, 2019, where both parties would present their arguments before a panel of three judges.[84] On January 17, 2020,[85] the court delivered its ruling; after years of effort,[86] the court decided against the plaintiff, who had hoped for modifications to U.S. climate change policy.

At the time of the decision, numerous predictions and observations were being made[87] about the disappointing ruling and the possible developments for U.S. climate policy (and individual rights in accordance with such). In addition, the future of climate change litigation in the U.S., as well as the rights of citizens to a healthy climate and the role of domestic laws and courts, were extensively discussed. However, the case yielded some positive results. The court officially acknowledged the severity of climate change and, most importantly, the government's role in contributing to this phenomenon.[88] 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

[82] Juliana v. United States, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/MDU5-6W3E] (last visited Jan. 17, 2020).

[83] Juliana v. United States *Amicus Curiae ("Friend of the Court") Briefs*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/lawlibrary [https://perma.cc/NQ9U-KY6R] (last visited Jan. 17, 2020).

[84] *Id.*

[85] *Id.*

[86] John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html [https://perma.cc/ZBR6-L4M5]; 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*, BUS. INSIDER (Jan. 17, 2020), https://www.businessinsider.com/juliana-vs-united-states-kids-climate-change-case-dismissed-2020-1 [https://perma.cc/7FL9-M37L].

[87] 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, Jan. 19, 2020; Julia Rosen, *Is it Our Constitutional Right to Live in a World Safe from Climate Change?*, L.A. TIMES (June 3, 2019), https://www.latimes.com/science/la-sci-youth-climate-trial-juliana-20190603-story.html [https://perma.cc/ZL7P-KAN5].

[88] Juliana v. United States, 947 F.3d 1159, 1167 (9th Cir. 2020).

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> 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.[89]

In fact, the court explicitly stated that its decision was one made with great reluctance.[90] The case's response greatly differs from that of *Urgenda*; the court, recognizing its own fundamental powers, provided routes that U.S. citizens may take in combatting climate change—a political branch may take action against climate change, or citizens may voice their disproval of the government's actions or nonactions via voting.[91] 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.[92]

Unfortunately, elections have highlighted limitations, even the most progressive presidents, governors and representatives who have taken important steps to protect the environment, sustainable development, and biodiversity have failed to keep up with the speed and impacts of climate change. However, it is important to highlight that during President Biden's administration, we have witnessed important and impactful initiatives towards environmental rights and justice.[93]

In conclusion, the court clearly understood its role within the existing federal system, adhering to a strict separation of powers, and found that the circumstances presented in the case did not warrant its direct intervention. As a result, the plaintiffs were unable to pursue constitutional claims.[94] This said, the court's response should not cloud the process and the considerations that may ultimately yield future

[89] *Id.* at 1175.

[90] *Id.* at 1165.

[91] *Id.* at 1168.

[92] *Id.* at 1175.

[93] *See, e.g.*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 1818 (2021); Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

[94] *Juliana*, 947 F.3d at 1165.

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implications for climate litigation in the U.S. Indeed, the courts have implicitly recognized the federal government's responsibility to combat climate change, and also acknowledged its role in contributing to the climate crisis.

B. Brief Analysis of the Case

Juliana is a case that deserves careful analysis. This section primarily focuses on the two main arguments of the plaintiffs: the *separation of powers*, and the *right to a healthy climate as a constitutional right*. As previously mentioned, the case's silver lining rests in the court's recognition of the severity of climate change and the contribution of the U.S. government in exacerbating the climate crisis. The insights gained from a lawsuit can provide valuable and useful strategies to be used in other context to boost environmental protection.[95] In this sense, *Juliana* is not the first case filed in the U.S. related to climate change.[96] In this regard, the court, in *Juliana v. United States*, expressly stated that:

> The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. . . . Copious expert evidence establishes that this unprecedented rise [in atmospheric carbon dioxide levels] stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. . . . The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions . . . [and] that the government's contribution to climate change is not simply a result of inaction.[97]

As is the case with *Urgenda*, the concept of *separation of powers* comes into sharp focus. Per usual with the U.S. legal system, the courts leaned towards a more traditional and conservative approach in their ruling.[98] The court could not fulfill the requests as demanded by the plaintiffs because of the strict adherence to the standing doctrine in Article III of the U.S. Constitution.[99] According to this doctrine: "(1) the

[95] Levy, *supra* note 79, at 498.

[96] Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENV'T L. 1, 1–18 (2008).

[97] *Juliana*, 947 F.3d at 1166–67.

[98] The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

[99] U.S. CONST. art. III.

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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."[100]

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.[101]

Based on historical precedents, scholars and experts correctly predicted that the case would come down to the very premise of the separation of powers, where some wanted to maintain the *status quo* as compared to others who pushed for a more utilitarian approach.[102] Lisa Heinzerling, for example, was quick to indicate the courts complex hypocrisy; she cited the fact that courts adhere to double standards when it comes to combatting climate change—instances where the courts did not pass the buck to other branches of government and actually provided suggestions for reparation.[103] Others similarly argue that court-originated action would actually only solidify the separation of powers, insisting that it is the court's responsibility to provide remedy where other branches have failed to do so, in this case in securing citizens' rights and liberties.[104] Indeed, the decision of the court seeks to maintain a commitment to the *status quo*; the decision, perhaps, inherently bucks against the trends of globalization and seeks to reinforce the domestic (and international) paradigm for what a true *separation of powers* means. However, gaps are left unfulfilled where it then becomes the responsibility of U.S. agencies to enforce climate protection.[105] Under this principle, executive agencies have the authority to both enforce environmental regulations and provide remedies, only reaffirming that the courts "should limit their role in environmental and energy cases to reviewing

[100] PEEL & OSOFSKY, *supra* note 1, at 266, 271.

[101] *Juliana*, 947 F.3d at 1171.

[102] Ryan et al., *supra* note 68.

[103] Lisa Heinzerling, A Meditation on Juliana v. United States (June 12, 2019) (unpublished essay).

[104] Carolyn Kormann, *The Right to a Stable Climate is the Constitutional Question of the Twenty-First Century*, THE NEW YORKER (June 15, 2019).

[105] Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENV'T L. REP. 10121, 10122 (2017).

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the administrative actions of executive agencies to determine their compliance with the law."[106] This principle guarantees democratic government, but limits the court's role.[107] The courts cannot address matters which are otherwise the responsibilities of other branches of the state.[108] As such, there exists the need to finely balance the separation of powers with the legal protections of domestic citizens' rights—climate change is certainly a wicked problem that spans boundaries; therefore, it is imperative that resolutions span fragile but cemented boundaries, as well.[109]

When it comes to the idea that *protection from climate change* is a constitutional right, this point deserves a more pointed and specific analysis (despite the fact that the court did not allude to such a possibility). 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.'"[110] In this sense, the plaintiffs wanted "the government to [implement] a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].'"[111] At the district court level, this right is 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.'"[112]

Had the courts not dismissed the case on other legal grounds, it would have, perhaps, been more difficult to dismiss the case in accordance with the abovementioned definition. One should understand that U.S. legal documents—as well as U.S. politics, in general—harbor a great deal of conservatism in a sense that the process in introducing new rights and considering them as part of the system is

[106] Mank, *supra* note 80, at 902–03.

[107] PEEL & OSOFSKY, *supra* note 1, at 266–309.

[108] Henry Lininger, *Is Climate Litigation Too 'Political'?*, YALE CLIMATE CONNECTIONS (June 27, 2017), https://www.yaleclimateconnections.org/2017/06/is-climate-litigation-too-political/ [https://perma.cc/V9BM-DCZE].

[109] Dino Grandoni, *The Energy 202: Youth Climate Lawsuit Dismissal Shows Challenge of Using Courts to Tackle Climate Change*, WASH. POST (Jan. 21, 2020), 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/ [https://perma.cc/3FXY-5WHV].

[110] Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020).

[111] *Id.* at 1164–65.

[112] *Id.* at 1165.

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different than in other parts of the world,[113] as for example the decisions of the European Court of Justice in all EU member state legal systems. Understandably, the U.S. Constitution lacks an explicit right to a clean or healthy environment. Today's courts have not made it any easier to expand the Constitution to include *protection from climate change*.[114] Of course, demands for amending the Constitution continue in the U.S., with climate change being only one of many topics that are of serious debate.[115] Historically speaking, it seems very unlikely that any kind of amendment that depoliticizes climate change will be introduced, let alone approved, anytime soon.[116] However, this court's acknowledgement of the very dangers of climate change may be used for such an argument in the very near future.[117]

Time is of the essence to reduce and mitigate the negative effects of climate change. If this court's decision is followed by enduring governmental inactivity, in a future case with new circumstances, the court might change its position due to the passage of time and the consequent environmental degradation. Only the future will tell whether *Juliana* will be used to build a stronger case for the fundamental right to a healthy climate.[118] Indeed, *future generations* will have to be the key point of focus for such an argument, just as our *future generations* have already turned to climate litigation as a means to ensure a cleaner and healthier society.[119]

[113] Nathan Chael, *Two Environments of Rights: A Comparative Examination of Contemporary Rights-Based Climate Lawsuits in the Netherlands and the United States*, 15 J. SCI. POL'Y & GOVERNANCE (2019).

[114] Banda & Fulton, *supra* note 105, at 10124.

[115] Mank, *supra* note 80.

[116] Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT'L J. PEACE STUD. 71, 73 (2012).

[117] Levy, *supra* note 79, at 502.

[118] *See* Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 POL'Y ENV'T F. July–Aug. 2008, at 50–63; Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 879–924 (2008).

[119] Ylam Nguyen, *Constitutional Protection for Future Generations from Climate Change*, 23 HASTINGS ENV'T L.J. 183, 202–03 (2017).

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III. AN ANALYSIS OF THE MAIN ISSUES RAISED BY BOTH CASES

A. On the Concept of Separation of Powers

Separation of powers mainly emerged in the seventeenth century where several different theorists, such as John Locke and Montesquieu, advocated for the division of political authority in three powers: the executive, legislature and judiciary.[120] Since then, scholars and researchers have debated this notion, which resulted in numerous articles and studies.[121] The main objective of this principle is to prevent the concentration of power, ensuring that no single entity can exercise the essential functions of another. It is argued that only if the three powers (Legislative, Executive and Judicial) are separated a "good government is ensured."[122]

In the Netherlands, the Constitution regulates the separation of powers.[123] The Dutch Parliament is composed of two chambers—the House of Representatives and the Senate that possess legislative power. The government, led by a Prime Minister and consisting of ministers, holds the executive powers. The judiciary is composed of judges, appointed for life by the Crown.[124] As a unitary constitutional monarchy, the monarch serves as the formal head of the state. The monarch and the ministers form the government, but *only* the ministers are responsible for the acts of the government.[125] The government maintains independence in formulating policies and proposing legislation as it has the authority to shape both domestic and foreign policies, as well as exert control over the legislative agenda.[126] The parliament has a

[120] *See* EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE (2009); THOMAS CAMPBELL, SEPARATION OF POWERS IN PRACTICE 19–28 (2004); CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS (2013); Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 578 (1987); Suri Ratnapala, *John Locke's Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 189 (1993).

[121] *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393 (1923).

[122] R.H. Brookes & K.C. Wheare, *Political Theory: The Separation of Powers*, 3 POL. SCI. 53, 53 (1951).

[123] For a comprehensive understanding of constitutional law, particularly regarding the separation of powers and the impact of EU law in the context of the Netherlands, see P.B. EERT & C. KORTMANN, CONSTITUTIONAL LAW IN THE NETHERLANDS 283 (2018).

[124] *Id.*

[125] DAVID HALJAN, SEPARATING POWERS: INTERNATIONAL LAW BEFORE NATIONAL COURTS 55–56 (2013).

[126] *Id.* at 56.

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broad jurisdiction to legislate without specific limitations or restrictions.[127] The government's continuation in power relies on maintaining the ongoing support of a majority in the Dutch Parliament. Consequently, the Parliament possesses the authority to dismiss the government, if the relations of trust is broken.[128] The judiciary in the Netherlands is divided between administrative law courts and ordinary ones.[129] In addition, there is a specific set of courts for corporate issues[130] and for administrative ones.[131] The judiciary cannot modify or amend the legislation, but it can review its conformity with both the constitution and international treaties.[132] Nonetheless, judges are able to provide interpretation and judicial review of the laws in the country, making them a sort of policy-maker, especially when the laws are vague and allow the courts a margin of interpretation.[133] This is clearly understandable in the context of U.S. law, which is aligned with the common law traditions where judges possess a broader power of judicial review that can sometimes be seen as expansive or proactive. This interpretive function is less evident in the legal system of EU member states, as expected in the civil law traditions, where judges have a more limited and narrowed capacity of law-making in their judicial review process. It is in this context that the Hague District Court was able to provide an explanation of its decision rejecting the legal claims of Urgenda as well as being able to interpret the rights under ECHR in accordance with Article 34. It is also in this context that the Court of Appeals of the Hague interpreted Article 2 ECHR and Article 8 ECHR finding legal grounds for Urgenda's claims.

In the U.S., the federal government and each state divide the authority into legislative, executive, and judicial branches.[134] At the federal level, the legislative

[127] *Id.* at 57.

[128] RUDY B. ANDEWEG & GALEN A. IRWIN, GOVERNANCE AND POLITICS OF THE NETHERLANDS 146 (3d ed. 2009).

[129] HALJAN, *supra* note 125, at 57.

[130] *Id.*

[131] Aalt Willem Heringa, *The Separation of Power Argument*, *in* JUDICIAL CONTROL: COMPARATIVE ESSAYS ON JUDICIAL REVIEW 27, 27 (Rob Bakker, A.W. Heringa & F.A.M. Stroink eds., 1995).

[132] *Id.*

[133] Peter J. Van Koppen, *Judicial Policy-Making in the Netherlands: The Case-by-Case Method*, *in* JUDICIAL POLITICS AND POLICY-MAKING IN WESTERN EUROPE 81, 81 (Mary L. Volcansek ed., 1992).

[134] For an analysis of the role of public administration within the separation of power doctrine, see David H. Rosenbloom, *Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's*

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power is exercised by the Congress, consisting of the House of Representatives and the Senate, which in theory[135] cannot delegate its power. The President holds the executive power and is responsible for approving and implementing the laws adopted by Congress. At the federal level, the judiciary is comprised of the Supreme Court and other federal courts which interpret and apply the laws. As envisioned in the Constitution, the system provides checks and balances, preventing a single power from becoming too powerful.[136] As examples of how the system works, the President can veto the laws adopted by the Congress, the Supreme Court can declare them unconstitutional and the Congress has the capacity to impeach the President.[137] The principles of separation of powers can be found similarly at the state and even municipal governments of the country where the three branches (Legislative, Executive and Judicial) are also the norm.[138] The system adopted in the U.S. was in response to the abuse of power by the British Crown leading to the American Revolution.[139] In this sense, the concentration of power in a single entity in the U.S. is limited by the separation of powers, at both federal and state levels, and the system of check and balances.

Twentieth-Century Progress, 60 PUB. ADMIN. REV. 39 (2000); William West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655 (2005).

[135] On the nondelegation doctrine, see generally K.E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2016); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

[136] For an analysis of the dynamic and evolving role of checks and balances within the United States, with a specific focus on executive overreaching, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2005).

[137] On the Presidential veto power, see CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER (2000); Nolan M. McCarty, *Presidential Pork: Executive Veto Power and Distributive Politics*, 94 AM. POL'Y SCI. REV. 117 (2000). On the genesis and evolution of impeachment, see MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2019). For an assessment of the role of impeachment under Trump Presidency, see Gary C. Jacobson, *Donald Trump and the Parties: Impeachment, Pandemic, Protest, and Electoral Politics in 2020*, 50 PRESIDENTIAL STUD. Q. 762 (2020).

[138] WILLIAM VERNON HOLLOWAY, INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES 75 (1972).

[139] For an in-depth analysis of the American Revolution, refer to the following landmark studies: BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789 (2007).

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The horizontal and vertical separation of powers through the system of federalism and limited sovereignty at the county and local level, as well as the separation of the three branches and the checks and balances, are meant to protect the liberties of citizens.[140] It is in this context that the importance of separation of powers was highlighted in *Juliana* whereby a judge at the federal level was allowed to refute the government's demands of dismissing the case and moving it forward to trial. And at the same time, the existing checks and balances and separation of powers led the United States Court of Appeals for the Ninth Circuit to dismiss the case citing the need to make the claims to the political branches and the electorate at large.[141]

B. On Considering Climate Change Consequences as a Human Right Violation

Climate change is being considered gradually as a human rights issue,[142] and more recently, the UN Human Rights Council recognized the interplay between climate change and human rights.[143] The explicit connection between human rights and climate change has been acknowledged in various international forums, including the UNFCCC.[144] However, it remains disputed how conventional human rights can be used as an effective legal tool to address climate change consequences.[145] In fact, there are certain challenges to rights-based climate legal actions. First, there is the challenge of establishing a relationship between a specific actor or stakeholder that failed to address climate change and human rights; second, there is the challenge of needing a long period of time to establish a clear connection between a specific climate change claim and human rights violation; third, there is the challenge of the inability to apply this approach extraterritorially; and finally, there is the challenge of the potential backlash that may occur from the use of such

[140] Daniel P. Franklin, *American Political Culture and Constitutionalism*, *in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 43–44 (Daniel P. Franklin & Michael J. Baun eds., 1995).

[141] *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

[142] UNESCO, *Climate Change and Arctic Sustainable Development: Scientific, Social, Cultural and Educational Challenges* 287 (2009).

[143] JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 221 (2012).

[144] MARGARETHA WEWERINKE-SINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW 5 (2019).

[145] Francesco Francioni & Ottavio Quirico, *Untying the Gordian Knot: Towards the Human Right to a Climatically Sustainable Environment?*, *in* CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE (Ottavio Quirico & Mouloud Boumghar eds., 2016).

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approach.[146] It is important to note that while climate change may affect the enjoyment of specific human rights, this does not necessarily imply that states have violated certain obligations under human rights law which forces them to ensure the realization of such rights. In fact, there may be serious challenges when it comes to connecting emissions from a specific country and the occurrence of a harm within that country or a third country. Among the rights that climate change affects, one can mention the right to life, the right to adequate food, the right to health, the right to water, and the right to adequate housing.[147]

Urgenda attempted to make use of the human rights argument by arguing that "Dutch emissions, for which the State as a sovereign power has systemic responsibility, are unlawful, since they violate the due care which is part of the State's duty of care to those whose interests Urgenda represents, as well as Articles 2 and 8 ECHR."[148] The Hague Court of Appeal managed to find a link between climate change and human rights by explaining that "the established facts and circumstances imply that there is a real threat of dangerous climate change, resulting in the serious risk that the current generation of Dutch inhabitants will be confronted with losing their lives or having their family lives disrupted."[149] This is significant because a tribunal acknowledged that there is a clear connection between climate change and human rights. As a consequence, a specific country or government could bear the responsibility to take action and to ensure the protection of these rights. What is more important is the global impact of this decision on human rights. After the decision from the Dutch courts, the UN Human Rights Commission issued a statement considering this impact and highlighted how, based on international human rights, governments across the globe should "undertake strong reductions in emissions of greenhouse gases."[150]

The decision is astonishing, because Urgenda, despite its status as an interest group, was able to claim "violation of the right to life and to private life and family

[146] Setzer & Vanhala, *supra* note 3, at 10.

[147] SIOBHAN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 11 (2011).

[148] The State of the Netherlands v. Stichting Urgenda, *supra* note 8.

[149] *Id.*

[150] Press Release, Michelle Bachelet, United Nations High Commissioner for Hum. Rts., Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change (Dec. 20, 2019), https://www.ohchr.org/en/press-releases/2019/12/bachelet-welcomes-top-courts-landmark-decision-protect-human-rights-climate#:~:text=GENEVA%20(20%20December%202019)%20%E2%80%93,adverse%20effects%20of%20climate%20change [https://perma.cc/E4RX-DHR3].

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[since] it was representing the rights of present and future Dutch citizens."[151] The success of this case paved the road for future bold decisions connecting climate change and human rights. As an example, the Philippines' Commission on Human Rights argued that "fossil fuel corporations can be found legally responsible for human rights harms linked to climate change."[152] This statement was in response to a 2016 petition from Greenpeace South-East Asia and other local groups.[153]

In *Juliana*, the plaintiffs made the claim that 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.'"[154] The Court of Appeals concluded that it did not have the constitutional power to address these demands.[155] This decision is understandable given the far-reaching implications of creating new constitutional rights as a result of climate change.[156] Still, the efforts of the federal district court in Oregon to recognize the existence of a right to a climate that can sustain human life is an achievement in itself in the U.S. context.[157] As a result, the case represented an official recognition of the detrimental impact of climate change denial and contributed to the advancement of environmental protection. It also established a clearer link between human rights and

[151] Richard P. Hiskes, *Denial and Debilitation: Environmental Rights and the Harm of Climate Change Denial*, *in* WHY HUMAN RIGHTS STILL MATTER IN CONTEMPORARY GLOBAL AFFAIRS 140, 152 (Mahmood Monshipouri ed., 2020).

[152] *Philippines: Landmark Decision by Human Rights Commission Paves Way for Climate Litigation*, AMNESTY INT'L (Dec. 9, 2019), https://www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/#:~:text=%E2%80%9CThe%20Philippines%20Human%20Rights%20Commission,harms%20linked%20to%20climate%20change [https://perma.cc/3MTT-BXEK].

[153] Isabella Kaminski, *Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules*, THE CLIMATE DOCKET (Dec. 9, 2019), https://www.climatedocket.com/2019/12/09/philippines-human-rights-climate-change-2/ [https://perma.cc/26SE-DEH3]; Press Release, Greenpeace International, Greenpeace Reactive on Philippine Commission on Human Rights' Announcement (Dec. 9, 2019), https://www.greenpeace.org/international/press-release/27847/greenpeace-reactive-on-philippine-commission-on-human-rights-announcement/ [https://perma.cc/CLK5-D4K4].

[154] Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020).

[155] *Id.* at 1165.

[156] BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS AND CLIMATE CHANGE: CURRENT STATUS AND FUTURE PROSPECTS 191 (2018).

[157] Amy Sinden, *A Human Rights Framework for the Anthropocene*, *in* RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM 132, 135 (Jordi Jaria-Manzano & Susana Borràs eds., 2019).

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climate change.[158] The court's acknowledgement goes directly against the defendant's claim of the absence of a "fundamental constitutional right to a life-sustaining climate system."[159] The court rejected this argument stating that "the Constitution does, in fact, afford sufficient 'protection against the government's knowing decision to poison the air its citizens breathe or the water its citizens drink.'"[160]

IV. LESSONS FOR FUTURE CLIMATE CHANGE LITIGATION CASES

The concrete demands were not so different in *Urgenda* and *Juliana*. *Urgenda* asked to change the energy mix and adhere to Netherlands's climate goals, while *Juliana* asked for a climate action plan. Further, in both the cases, the "action plan" is a remedy that falls outside of the court's powers.[161] The key difference is that *Urgenda* referred to existing legal goals, while such objectives for the U.S. are currently more difficult to construe.

Having independently examined both *Urgenda* and *Juliana*, it is important to discuss the main elements that led to such drastically different results in the context of the courts' rulings. The below-mentioned factors played vital roles in the success of the claimants in the Netherlands, and the failure of the plaintiffs in the U.S. These elements will likely play important roles in future climate cases. However, it is important to note that the lessons learned and drawn from these two cases are broad and do not account for different situations and the specificities of other legal systems.[162] This is why, such suggestions must be tailored to specific contexts, which

[158] Hiskes, *supra* note 151.

[159] Daniel Brister, Juliana v. United States, PUB. LAND & RES. L. REV. 1, 6–7 May (2019).

[160] *Id.* at 7.

[161] The State of the Netherlands v. Stichting Urgenda, *supra* note 8; Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).

[162] Indeed, different complaints and claims are usually submitted in different jurisdictions, contexts, and states, which might influence the final decision and the likelihood that the lessons learned from *Urgenda* and *Juliana* to be used in each different legal context. See, for instance, COMPARATIVE LEGAL HISTORY (Olivier Moréteau, Aniceto Masferrer & Kjell A. Modéer eds., 2019); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. OF INT'L L. 949, 949–71 (2011); DIVERSITY AND TOLERANCE IN SOCIO-LEGAL CONTEXTS: EXPLORATIONS IN THE SEMIOTICS OF LAW (Anne Wagner & Vijay K. Bhatia eds., 2009); Carole D. Hafner & Donald H. Berman, *The Role of Context in Case-Based Legal Reasoning: Teleological, Temporal, and Procedural*, 10 A. I. & L. 19, 19–64 (2002).

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require necessary legal advice and support, but could benefit from the insights provided by *Urgenda* and *Juliana*.

A. The Specificity of the Request Made to the Government

Easily recognizable, both cases' plaintiffs had similar intentions: to hold the government accountable for (1) inadequately responding to climate change in a *human rights* context and (2) failing to protect the rights of future generations. These lawsuits stem from the belief in altering each respective system, so as to hold the governments accountable for their actions and inactions and ultimately change the paradigm and depoliticize climate change. The lawsuits were brought forth with future generations in mind (one of which being brought forth by said "future generation"). The central claim in both cases is that *citizens have a right to protection from climate change*. However, even with similar objectives, the cases' strategies differ.[163]

In *Urgenda*, the foundation mainly focused on a shift toward alternative energy sources that would entail large changes in the Netherlands' economy. Nonetheless, the foundation requested the state increase its GHG emissions reduction targets, despite never having reached its goal of emissions reduction.[164] The Urgenda Foundation not only sought to place blame on the Dutch government, but offered a specific solution to the problem. Having this specific request by the Foundation in the lawsuit instead of demanding change of the entire state's 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 District Court and the Court of Appeals had differing reasoning in justifying their final verdicts, both courts requested that the state increase its GHG emissions reduction targets.[165]

In *Juliana*, by contrast, the plaintiffs offered no proposed remedy for such ecological chaos and particularly did not request the state to take very specific measures for combatting climate change; they simply sought to place blame and accept reparations. This is not to say, however, that *Juliana*'s plaintiffs did not seek betterment; indeed, they asked the government "to implement a plan to 'phase out

[163] Mayer, *supra* note 12, at 167–92; Stamhuis, *supra* note 17, at 43–60; Pace, *supra* note 65, at 85–114; Ryan et al., *supra* note 68, at 1–41.

[164] Mayer, *supra* note 12, at 167–71.

[165] *Id.* at 172–73; Leijten, *supra* note 32, at 112–18; Nollkaemper & Burgers, *supra* note 36.

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fossil fuel emissions and draw down excess atmospheric [pollution].'"[166] The proposed resolution by *Juliana*'s plaintiffs starkly contrasts from that of *Urgenda*'s; *Urgenda*'s resolution provided a specific target, whereas Juliana's proposal was incredibly broad-based and subjective,[167] entailing great consequences for the U.S. economy and requiring debates within the other branches of the federal government to assess the implications of such change on the entire U.S. system, economy, and society.

Akin to the arguments in favor of *separation of powers*, it is not the judge's responsibility to dictate future policies and directions of a nation, especially in the case of climate change (where, in America, such a concept is still not as widely accepted as it is around much of the world). Per the responsibilities given via *separation of powers*, it is generally the role of the legislative branch (and increasing, the role of the executive branch) to discuss and debate future policies and paradigms through which a nation is to commit; a judge's responsibility, in contrast, has (historically) been to determine the legality of such laws, regulations, and establish paradigms that ensure such rulings are based on previous decisions and scientific measurements.[168] The judges need to adopt, in independent judicial conscience, their interpretation of the law,[169] supporting their application or demanding a change in the rules or the measures taken when valid reasons exist, or when there is proof that the measures have negatively affected the rights of citizens explicitly and implicitly.

In the same vein, *Urgenda* greatly differs from *Juliana* in that *Urgenda*'s initial motion made reference to a policy (commitment) already in place; by contrast, *Juliana* weighed its argument on the assumption that climate change is a universally accepted occurrence. Of course, the Dutch government has already identified climate change as a serious national risk, and Urgenda Foundation was not asking the government to alter their overall course. Rather, the foundation was urging the Dutch government to enhance their efforts and step up their actions to meet the existing goals of GHG emission reductions. Obviously, the Urgenda Foundation was arguing

[166] *Juliana*, 947 F.3d at 1163.

[167] Kelly, *supra* note 77, at 183–239; Levy, *supra* note 79, at 479–506.

[168] Roger Hanson, *The Changing Role of a Judge and Its Implications*, 38 CT. REV. 10, 10–16 (2002); Lord Mance, *The Role of Judges in a Representative Democracy*, Lecture at the Judicial Committee of the Privy Council's Fourth Sitting in the Bahamas (Feb. 24, 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 INT'L AREA STUD. REV. 35 (1999).

[169] Sarah M.R. Cravens, *In Good Conscience: Expressions of Judicial Conscience in Federal Appellate Opinions*, 51 DUQ. L. REV. 95 (2013).

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that the Dutch government was failing to *meet their reduction goals*, and that their targets ought to be upped so as to more comfortably meet 20% reductions.[170] Urgenda Foundation left very little room for debate so far as their claims were concerned and made it hard for the court to renounce their demands (especially in the light that *human rights* became of clear priority). In *Juliana*, the plaintiffs were not asking the judge to interpret an already-existing government policy addressing this matter. Instead, they were requesting the judge to compel the government to establish rules and regulations aimed at combating climate change.[171] The outcome might have been different if the plaintiffs *tackled a particular federal regulation* that directly or indirectly impacted climate change. In this case, the judges would have had, perhaps, more substantial evidence to work with and potentially demand change, even if they had ruled in favor of the government. Our suggestion could not be more obvious—for future cases affecting U.S. courts, plaintiffs need to focus their efforts on specific policies, actions, or regulations that have otherwise contributed to mitigate climate disaster.

In fact, all future climate litigation cases should use *Urgenda* as the blueprint for their strategies and successes. Here, "changing the system in one lump attempt" should not be the goal of any single lawsuit. Instead, multiple lawsuits should attempt to target specific harmful policies and regulations, in turn bringing small and incremental changes over time as litigations progress.[172] Legal systems have faced challenges in defining the boundaries of responsibility for harmful actions and have only recently begun to address this matter in the context of climate change.[173] This is even more relevant in the context of other government branches seeking consensus over climate policy, as there is a risk that courts "making" the laws could undermine

[170] Roy & Woerdman, *supra* note 40, at 165–89.

[171] *Juliana*, 947 F.3d at 1163.

[172] See, for instance on this matter, Leila Choukroune, *Rights Interest Litigation, Socio-Economic Rights, and Chinese Labor Law Reform*, *in* CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW (Paolo Davide Farah & Elena Cima eds., 2016); Denis Barthélemy & Martino Nieddu, *Non-Trade Concerns in Agricultural and Environmental Economics: How J.R. Commons and Karl Polanyi Can Help Us*, 41 J. ECON. ISSUES 519, 519–27 (2007).

[173] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE: WORKING GROUP III CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 218 (2014).

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democracy and the separation of powers.[174] Therefore, the changes should occur one step at a time in a gradual and progressive manner. Successful climate litigation could "force" governments to approach climate change with a depoliticized manner. Consequently, climate change could be addressed at the same level of importance as trade, economic growth, and national security. In fact, pushing a state via a lawsuit to change the entire system is not the best strategy, as the state would have to then navigate different and competing concerns. In contrast, addressing specific regulations can be more effective, as this provides greater opportunities for a judge to address the specific claims and potentially bring about changes to the regulation or the government's approach.

B. The Importance of Judicial Activism[175]

Urgenda's plaintiffs should be thanking the courts for their flexibility and courage in holding the Dutch government accountable. Whether through the District Court or the Court of Appeals, judicial activism proved swift and decisive; a concept that ultimately led to the case's positive outcome. Of course, both national governments in the Netherlands and in the U.S. responded very similarly. They both emphasized the significance of the *separation of powers*. Still, it was the Dutch judge who delivered such a blow to the national government, ultimately throwing the government's defense right back at them and using the specificity of Urgenda's claims, the Dutch legal system peculiarities along with international and EU law to reach the final outcome. Not only is this the case, but the Hague Court of Appeals actually corrected the District Court's rationale, in turn providing a more substantial legal basis that furthers the importance of *Urgenda*. This allowed *human rights* to become a dominant part of the deliberation[176] by considering state inaction as a breach of specific human rights as outlined in the ECHR. The Dutch judge empathized with the perspective of climate activists, where the judge provided a basis not only for Dutch litigation processes, but for litigation processes all over the

[174] CHUN-YUAN LIN, CLIMATE CHANGE ADAPTATION THROUGH ADMINISTRATIVE LITIGATION? THE EXPERIENCE OF TAIWAN, IN CLIMATE CHANGE LIABILITY AND BEYOND 175–76 (Jiunn-Rong Yeh ed., 2017).

[175] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1441–77 (2004); M.M. Semwal & Sunil Khosla, *Judicial Activism*, 69 INDIAN J. POL. SCI. 113, 113–26 (2008); Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, 3 J. INT'L DISP. SETTLEMENT 247, 247–78 (2012).

[176] Mayer, *supra* note 12, at 167–92; Stamhuis, *supra* note 17, at 43–60; Burgers & Staal, *supra* note 30, at 223–44; Verschuuren, *supra* note 31; Leijten, *supra* note 32, at 112–18.

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world. *Urgenda* is a landmark case for many reasons.[177] Nonetheless, judicial activism in this case may backfire. Finding the policies of the Netherlands as insufficient is consistent with the EU's Effort Sharing Decision (this establishes binding annual greenhouse gas emission targets for Member States for 2013–2020). But finding these policies insufficient and unlawful also implies that the EU's Effort Sharing Decision is unlawful. As noted, national courts do not possess the authority to make determinations on the lawfulness of EU legislation. Instead, they are required to seek a preliminary ruling from the European Court of Justice.[178]

In *Juliana*'s case, it is important to note Judge Ann Aiken's activism by refusing to dismiss the argument from the very outset. It is also important to mention the activism of the dissenting judge from the Ninth Circuit Court.[179] The language used in the dissenting opinion is *very* strong, whereby the court hardly minces words in their support of the plaintiff's cause.[180] In fact, the dissenting opinion in support of the plaintiffs' claims and arguments is longer than the entire judgement.[181] According to 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?[182]

Of course, the Ninth Circuit Court could hardly demand intervention because the claims brought forth by the plaintiffs were so vague; nonetheless, it seems that

[177] Danny Noonan, I*magining Different Futures Through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia*, 37 UNIV. TAS. L. REV. 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 ULR 77–90 (2014).

[178] Lucas Bergkamp, *The Urgenda Judgment: A "Victory" for the Climate that is Likely to Backfire* (Sept. 9, 2015), https://energypost.eu/urgenda-judgment-victory-climate-likely-backfire/ [https:// perma .cc/VX24-P8AR].

[179] *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (Staton, J., dissenting).

[180] *See id.* at 1175–91.

[181] *Compare id.* at 1175–91, *with id.* at 1164–75.

[182] *Id.* at 1191.

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the judges understood the weight of the issue.[183] Perhaps a judge (or some of the judges, if not all) wanted to rule in favor of the plaintiffs but assumed that (1) the federal government would have appealed such judgment and (2) the current Supreme Court would likely rule against the plaintiffs.[184] As such, one may assume that the judges at the Ninth Circuit Court considered the political reality before issuing their judgement, and the potential consequences from a differing Supreme Court decision concerning the topic of the right to a healthy climate. In fact, it appears that the negative outcome of the case itself has prevented it from eventually moving forward to the Supreme Court. This has also avoided the judicial risk of a Supreme Court decision against the plaintiffs' arguments developed by the lower courts' judges including the dissenting opinions. In this way, the supportive arguments in *Juliana* may be used to set the pace for future domestic climate change litigation cases. Perhaps this case is just as significant as *Urgenda*, as it urges us to reconsider the issue of climate change and highlight a potential role for the Judiciary in this context.

Judicial activism is extremely important to surpass the (divided) political interests of the different branches of governments, as well as the short-term benefits that may emerge by simply addressing *nonaction* in the field of climate friendly policies and regulations.[185] In fact, different successive governments have different political views when it comes to climate change reflecting the views of their own parties; either a government supports and pushes forward with the adoption of policies and measures combating global warming or eliminates all the rules and measures that were adopted in this regard. For example, the Trump administration withdrew from the Paris Agreement that was signed by the Obama administration.[186]

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[183] Kelly, *supra* note 77, at 183–239; Levy, *supra* note 79, at 479–506; Chael, *supra* note 113.

[184] SUPREME COURT OF THE UNITED STATES, *Current Members*, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/VRC3-4X5K] (last visited Jan. 17, 2020). See on this point, David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411–35 (2018); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. UNIV. J.L. & POL'Y 133, 133–214 (2009).

[185] Ingrid Leijten, *Climate Change and the Oslo Principles: Judicial Activism or the Problem with Politics?*, LEIDEN L. BLOG (Apr. 26, 2015), https://leidenlawblog.nl/articles/climate-change-judicial-activism-environmental-law-oslo-principles [https://perma.cc/Q3MF-8STV].

[186] *See generally* Johannes Urpelainen & Thijs Van de Graaf, *United States Non-Cooperation and the Paris Agreement*, 18 CLIMATE POL'Y 839, 839–51 (2018); Phillip M. Kannan, *President Trump's Unilateral Attempt to Cease all Implementation of the Paris Agreement and to Withdraw from it: Constitutional?*, 35 PACE ENV'T L. REV. 292, 292–307 (2018); Matthew Lockwood, *The Political Sustainability of Climate Policy: The case of the UK Climate Change Act*, 23 GLOB. ENV'T CHANGE 1339, 1339–48 (2013).

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President Biden rejoined the Paris Agreement on the first day of his Presidency.[187] The Trump administration also eliminated Obama administration rules and regulations that addressed different environmental problems,[188] which President Biden decided to revitalize. Hence, such activism becomes necessary in light of stalemated internal decision-making processes,[189] not to mention the general failures of international efforts to fight climate change. Domestic courts become political battlefields.[190] Such activism is needed, even if a judge's desired results are not realistically feasible, as their judgments reach a new incremental milestone that provide further legal support for climate change activists. As shown in *Juliana*, judges may gain credibility for such activism and in turn, acquire social and political support for ruling in favor of combatting climate change. In fact, merely *acknowledging climate change as a real issue* in their court decisions is a victory in and of its own right.[191]

These judgments also put further pressure on governments and corporations to shift their regulations. The cases highlighted above, and the role of the judges, have led scholars to state that, "the vital purpose of justiciability is to give courts a mechanism by which to avoid awkward cases."[192] Such an observation is essential as judges cannot serve as the authority that determines a policy of any kind; even so, their indications of the need to push toward a more sustainable future are ever more important.[193] Decisions should be able to navigate through political complexities, striking a balance between divergent interests and concerns. By doing so, judges lend credibility to climate litigation not only within their own government while

[187] *See generally id.*

[188] *Id.*

[189] 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 VIC. UNIV. WELLINGTON L. REV. 315, 316 (2018).

[190] Lisa Vanhala, *The Comparative Politics of Courts and Climate Change*, 22 ENV'T POL. 447, 447–74 (2013).

[191] Don C. Smith, *Landmark Climate Change-Related Judicial Decisions Handed Down in the Netherlands and Australia: A Preview of what's to Come?*, 37 J. ENERGY & NAT. RES. L. 145, 146-47 (2019).

[192] Fernando, *supra* note 189, at 316.

[193] 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 L. REV. 265, 267 (2010).

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respecting the roles of other branches of government but also globally.[194] Judicial activism cannot be the long-term solution to combat climate change, as it could undermine the separation of powers and could be dangerous in the long run.[195] For instance, a recent decision by the Supreme Court of Ireland "overturned the Government's 'excessively vague and aspirational' plan to combat climate change" stating that the national Mitigation Plan (2017–2022) of the country is not sufficiently specific. The court found that "the plan does not comply with Ireland's obligations under the Climate Action and Low Carbon Development Act 2015 to give sufficient detail about achieving the national transition objective of a low carbon economy by the end of 2050."[196] Relying merely on judicial activism can be very problematic for other reasons. In fact, that very same activism can also go in the opposite direction. In the *West Virginia v. EPA* decision regarding the Clean Air Act, and the extent to which the EPA can regulate carbon dioxide emissions related to climate change, the Supreme Court limited the EPA's power and ability to regulate emissions.[197] Following the *West Virginia* decision, the U.S. Congress passed the Inflation Reduction Act (IRA) in August 2022, which favors the outcome of the *Massachusetts v. EPA* decision with the inclusion and denominations of new air pollutants (with an amendment of the Clean Air Act). The IRA also abrogates the reach of the *West Virginia v. EPA* decision by providing the EPA the congressional authorization to regulate emissions.[198]

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[194] *Id.* at 268.

[195] Nupur Chowdhury & Els Reynaers, *Introduction to the JGLR Special Issue on Environmental Governance*, 6 JINDAL GLOB. L. REV. 1, 6 (2015).

[196] Mary Carolan, *Supreme Court Quashes Government's Plan to Reduce Greenhouse Gases*, IRISH TIMES (July 31, 2020), https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/supreme-court-quashes-government-s-plan-to-reduce-greenhouse-gases-1.4318578 [https://perma.cc/6RSW-Q3MM].

[197] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) ("Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.'. . . But it is not plausible that Congress gave the EPA the authority to adopt on its own such a regulation scheme.").

[198] Greg Dotson & Dustin J. Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ENV'T L. INST. 10017, 10017 (2023) ("Numerous energy modelers have released analyses projecting that following passage of the IRA, the United States will reduce greenhouse gas (GHG) emissions by approximately 40% by 2030 from 2005 levels."); *id.* at 10033 ("This provision can be seen as a response to those who sought to convert the Supreme Court's decision in *West Virginia* into a categorical weakening of EPA's authority to use the CAA to reduce climate pollution. While the provision does not directly address the specific holding of that decision, it makes clear that Congress agrees that the CAA regulatory authorities apply to GHGs and directs EPA, backed

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Judicial activism should remain the last resort without infringing upon the other branches.[199] Rulings and justifications should serve as indicators that it is time to recognize climate change as a very real, detrimental, and imminent threat that poses risks for all mankind.[200]

CONCLUSION

Urgenda and *Juliana* are landmark cases that future climate-related lawsuits can and should use as blueprints for achieving success. *Urgenda* is the most applicable case to establish a solid foundation for successfully utilizing the legal system to combat climate change, particularly by focusing on specific laws and regulations harmful to the environment.[201] This provides judges with the opportunity to exercise their margin of appreciation and interpretation of the rules in favor of the claimants. *Juliana* offers insights on the need to ensure that the demands made before the courts are always realistic and achievable, without trying to overhaul the entire system of a particular country with only one single case. *Juliana* could serve as a blueprint for those governments unwilling to flex their *separation of powers* in favor of environmental protection. In this context, judges should play a proactive role in climate change and act as catalysts of change. Future climate change cases should carefully learn the lessons presented by *Urgenda* and *Juliana* to ensure weighted, credible, and successful legal arguments. Litigation may be the most maneuverable route forward, as climate change becomes more detrimental every day.

by specially designated resources, to use its CAA authorities to achieve greater reductions in GHG emissions from the power sector than expected in the newly calculated baseline.").

[199] Chowdhury & Reynaers, *supra* note 195, at 6.

[200] NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATIONS IN CANADA, GERMANY AND SOUTH AFRICA 32 (2017).

[201] Spijkers, *supra* note 11, at 331–33; van Wyk, *supra* note 37, at 329–35; Simlinger & Mayer, *supra* note 46, at 181–82.

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