

The Urgenda Climate Case: Reexamining its Legal Rationale, Debates and Implications Four Years Later

El caso Urgenda sobre el clima: reexaminando su fundamentación jurídica, los debates y las implicaciones cuatros años después

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Abstract

This article analyzes the legal rationale behind the key judgments in the Urgenda climate case, including the initial verdict, appeal, and Netherlands' Supreme Court ruling, exploring the pivotal aspects that sparked debates. By shedding light on these dynamics, some years after the final judgment, the study aims to provide insights relevant to current

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discussions on climate change mitigation strategies, legal obligations, and the need for multidimensional approaches.

Keywords

Urgenda case; legal reasoning; climate change mitigation; scientific evidences.

Resumen

Este artículo analiza la fundamentación jurídica de las decisiones clave en el caso Urgenda sobre el clima, abordando el fallo inicial, el fallo de segunda instancia y la sentencia de la Corte Suprema de los Países Bajos, y explorando los aspectos fundamentales que desencadenaron debates. Al arrojar luz sobre estas dinámicas, algunos años después de la sentencia final, el estudio tiene como objetivo proporcionar ideas relevantes para las actuales discusiones sobre estrategias de mitigación del cambio climático, obligaciones jurídicas y la necesidad de enfoques multidimensionales

Palabras clave

Caso Urgenda; razonamiento jurídico; mitigación del cambio climático; pruebas científicas.

Foreword

Even in an era of constant “paradigm revolutions” in the legal world, the victory of a lawsuit filed in the name of humanity against a national government, by a private foundation and before a national court, for the reduction of greenhouse gas emissions, remains a phenomenon that draws attention.

In this perspective, the Urgenda climate case against the Dutch government stands as a groundbreaking milestone in the realm of climate litigation and environmental policy. With its far-reaching implications, this landmark case has reverberated globally (on the day of the final judgment, 20 December 2019, UN High Commissioner for Human Rights Michelle Bachelet applauded the decision in a news release: see Office of the United Nations High Commissioner for Human Rights, 2019). Therefore, it is somehow surprising that the case has been object of

relatively few scientific studies (see however Wewerinke-Singh & McCoach 2021; Meguro 2020; Perona, 2020; Harvard Law Review 2019; Rodríguez García, 2016; Roy 2016; De Graaf & Jans 2015; Van Zeven 2015).

At the core of the case lies the fundamental issue of the legal responsibilities of governments in combatting climate change, especially vis-à-vis greenhouse emissions. Although in recent years climate change litigation has emerged as a powerful tool for advancing climate action and advocating for greater responsibility from governments and corporations, the Urgenda case stands out due to its unique approach, focusing on the violation of human rights and the possibility to challenge the government's climate policies under a combined reading of national and international law.

This article seeks to elucidate the legal rationale underlying the three key judgments rendered throughout the case, namely the initial verdict, the subsequent appeal, and the Supreme Court ruling. Moreover, it aims to examine the pivotal aspects that sparked a vigorous debate, employing an interdisciplinary approach that encompasses not only legal considerations but also pertinent factors like the utilization of scientific consensus to inform policy-making processes. By shedding light on these complex dynamics, the article provides valuable insights that, some years after the final judgment, can inform current discussions on climate change mitigation strategies, legal obligations, and the imperative need for multidimensional approaches to address this global challenge.

The Reasoning of the Courts

The “Urgenda case” stems from the action brought against the Dutch state by the Urgenda Foundation, a private law entity established under the national civil code with the statutory purpose of fostering and accelerating the transition to a more sustainable model of society, starting in the Netherlands, through the adoption of plans and measures to prevent climate change.

The Judgment of First Instance (2015)

At first instance, the claim was brought before the District Court of The Hague, which rendered its judgment on June 24, 2015 (The Hague District Court 2015).

For our purposes, it is interesting to emphasize the following aspects of the decision:

Urgenda's claim:

The Foundation's claim was essentially structured as follows (see par. 3.1 of the judgment):

- **Insufficient reduction targets:** The foundation contended that the emission reduction targets set by the Dutch government were inadequate to prevent the country from contributing to global warming beyond the internationally agreed-upon safe threshold of 2 degrees Celsius. Also, Urgenda stressed that, among the countries that emit a substantial amount of greenhouse gases, the Netherlands stands out as one with particularly high per capita emissions, thus making a significant contribution to climate change.
- **Human rights violations and duty of care:** Urgenda claimed that the government's insufficient climate action would result in the violation of human rights. Therefore, the foundation asserted that the Dutch government had a legal "duty of care" to take effective measures to prevent dangerous climate change, basing its claim on national and international laws and agreements, specifically Article 21 of the Dutch Constitution and Articles 2 and 8 of the ECHR .
- **Need for immediate action:** The foundation emphasized the urgency of the climate crisis and the need for immediate action. It argued that the government should not rely solely on future measures but should take immediate steps to accelerate emissions reductions and ensure a safe and sustainable living environment for current and future generations.
- **Consequently,** Urgenda requested the Court to determine that the State's actions would be deemed unlawful if it failed to achieve a reduction in annual emissions in the country by the end of 2020, either by 40 percent or, at the very least, by 25 percent compared to 1990 levels. Alternatively, Urgenda sought a declaration that the State's conduct would be unlawful if it did not accomplish a reduction in greenhouse gas emissions in the Netherlands by a minimum of 40 percent compared to 1990 levels by 2030.

The preliminary procedural issues:

From a procedural standpoint, the most relevant issue regarded Urgenda's standing.

Urgenda acted both based on a specific mandate received from 886 individuals and on its own behalf. In the latter capacity, it presented itself as an entity that

represented collective interests, including the interests of all present and future generations of Dutch and non-Dutch citizens.

The state did not challenge Urgenda's standing in relation to present generations of Dutch citizens. Instead, it referred to the Court's judgment regarding future generations. The state argued that the Foundation lacked standing to represent both present and future generations, as it sought a remedy that extended beyond the protection of the interests of Dutch citizens.

Resolving these preliminary issues, the Court recognized Urgenda's standing as a representative of the interests of both present and future generations, encompassing Dutch and foreign citizens.

In this regard, the Court referred to Article 3:303 of the Dutch Civil Code, which states that a person could bring a legal action before a court only if they have a personal and individual interest in the case. However, the article also allows a foundation or association with full legal capacity to bring an action concerning the protection of general or collective interests of others if the entity represents such interests based on its Bylaw's objectives .

Considering this, the Court acknowledged Urgenda's legitimacy to act on behalf of persons or generations who were not Dutch citizens. The Court supported this legitimacy based on Article 2 of Urgenda's Statute, according to which the Foundation's scope of action extends itself beyond the Netherlands, thereby encompassing interests beyond national borders.

On the other hand, the Court did not fully address the question of standing regarding the 886 individuals that Urgenda intended to represent through a specific mandate. The Court stated that considering their interests would not have led to a different ruling than the one already adopted.

The merits:

On the merits of the case, the Court rendered a judgment in favor of Urgenda, determining that the state had an obligation to intensify its efforts to reduce greenhouse gas emissions in the Netherlands. The Court ruled that by 2020, these emissions should be at least 25 percent lower than the levels recorded in 1990.

The Court acknowledged the mutual recognition between the parties regarding the gravity and extent of the climate issue and the necessity to implement measures for reducing greenhouse gas emissions.

However, the evidence of the trial revealed that, based on the current state policies, the Netherlands would achieve, at most, a 17 percent reduction in emissions by 2020. This reduction falls short of the 25 to 40% reduction range recommended by the Intergovernmental Panel on Climate Change (IPCC) for Annex I countries under the United Nations Framework Convention on Climate Change (1992, ratified by the Netherlands). The IPCC's target is aligned with the "450 scenario"⁴, which aims to limit global temperature increase to 2°C when greenhouse gas concentrations stabilize at 450 parts per million (as stated in paragraph 4.31 of the judgment).

Consequently, the Court concluded that the state was obligated to enhance its efforts to mitigate the imminent risks posed by climate change. According to the judgment, this responsibility arises from the state's direct control over emission levels in the Netherlands and its inherent duty to safeguard and improve the living conditions of its citizens.

Regarding the legal basis for this obligation (paragraphs 4.35 et seq. of the judgment), the Court examined Article 21 of the national Constitution, which imposes a duty on the state to protect the livability of the country and promote a favorable living environment, as well as various international sources. However, the Court found that these sources are not directly helpful in establishing the basis for the decision on this point.

Instead, the Court focused on Articles 2 and 8 of the European Convention on Human Rights, invoked by Urgenda, which enshrine the right to life and the right to respect for private and family life, respectively.

The Court determined that the obligation imposed on the state cannot be derived directly from the aforementioned articles. Indeed, the Foundation could not be considered a direct or indirect victim of any violation of these rights, as required by Article 34 of the Convention.

⁴ The "450 Scenario" is a concept used in energy and climate discussions, particularly by the International Energy Agency (IEA), which introduced this concept for the first time in its "World Energy Outlook 2008" report, published in November 2008. This scenario was designed as a pathway to limit the long-term concentration of greenhouse gases in the atmosphere to around 450 parts per million of carbon dioxide (CO₂) equivalent. It was developed in response to growing concerns about climate change and the need to define a target that would limit global warming to 2 degrees Celsius above pre-industrial levels.

Nevertheless, the Court deemed that the international norms mentioned above are not without relevance to the case. On the contrary, in the Court's reasoning, these articles were considered as provisions that helped specify the indeterminate and general content of the norms of the Dutch Civil Code on civil liability (Articles 6:162 et seq.). Thus, international norms were used in an interpretative or supplementary sense in relation to domestic legislative provisions.

Furthermore, the Court relied on the interpretation of the substantive content of the aforementioned ECHR articles as provided by the jurisprudence of the European Court of Human Rights.

In this regard, the Court recognized a general duty of care on the part of the state, whose extent could be determined based on the following factors (paragraphs 4.64 et seq. of the judgment):

“The nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of this damage and the chance that hazardous climate change will occur;

The nature of the acts (or omission) of the state;

The onerousness of taking precautionary measures;

The discretion of the state to execute its public duties – with due regard for the public law principles.”

In any case, the Court added (paragraphs 4.83 et seq.) that the state's arguments concerning the fact that the resolution of the global climate problem did not solely rely on Dutch efforts had no merit: indeed, as it was determined that a causal connection exists between emissions and climate change, the mere presence of a potential harm, even if limited to the national borders of the Netherlands, was deemed sufficient to justify the legal action and provide a foundation for the decision.

The issue concerning the respect of the political domain:

Lastly, the Court found that the decision did not infringe upon the realm reserved for political discretion (paragraphs 4.94 et seq. of the judgment).

The Court observed that the Dutch legal system does not entail a complete separation of powers between the executive and the judiciary. Furthermore, the fact that the judiciary is not elected does not diminish its democratic legitimacy when

it enforces democratically enacted national or international norms. In this context, the judicial authority is entrusted with safeguarding legal rights, even if it means conflicting with governmental decisions, irrespective of the absence of political support for its rulings. This falls within the purview of judicial review.

Ultimately, according to the Court, the decision neither mandated nor prohibited the implementation of specific measures. It merely acknowledged that the state had not proven its inability to comply with the Court's order by improving its policies in this domain.

Moreover, the ruling claimed to respect the margin of appreciation accorded to political authorities by intervening in a properly calibrated manner. To that end, the Court restrained the extent of its order to reduce emissions to 25%, representing the lower threshold of the 25 to 40% range of the "450 scenario."

The Judgment in the Appeal (2018)

Against the first instance decision, the State appealed, and the Hague Court of Appeals rendered its judgment on October 9, 2018 (ECLI:NL:GHDHA:2018:2591; see: Burgers & Staal 2019; Mayer 2019).

(A) In essence, the grounds for the appeal were the following (see paragraph 30 of the judgment):

- The State argued that it had already adhered to substantial reduction commitments made at the European Union and national levels. It contended that the necessity of achieving a 25-40% reduction in emissions by 2020 had not been adequately demonstrated.
- The State asserted that its policies on this matter resulted from a comprehensive consideration of all relevant interests, including those of industry, finance, energy supply, health, education, and defense. It argued that decisions regarding the most appropriate emission reduction pathway were political in nature and beyond the purview of judicial authority.
- The State maintained that it adhered to all relevant international conventions and raised concerns that the Court of First Instance's decision could lead to negative consequences such as the waterbed effect or carbon leakage. Additionally, the State argued that it could not exceed the limits imposed by the European Emissions Trading System (ETS).

- The State emphasized that Dutch emissions, in absolute terms, constituted only a small portion of global emissions.
- The State pointed out that scientific evidence on the matter was contradictory, and the “450 scenario” was not the sole possible configuration. It also highlighted the significance of adaptation possibilities. Lastly, the State suggested that new calculation methods provided optimistic estimates of achievable emissions reductions based on existing policies.

Urgenda, in response, filed a cross-appeal, contesting the District Court of First Instance’s position that Articles 2 and 8 of the ECHR could not be directly invoked by the Foundation in the trial, based on Article 34 of the ECHR (paragraph 32).

(B) Firstly, the Court addressed the arguments raised by Urgenda in its cross-appeal (paragraphs 34 et seq. of the judgment).

In this regard, it confirmed that Article 34 of the ECHR did not permit “public interest actions.” However, Articles 2 and 8 of the Convention were considered appropriate to supplement Article 3:305a of the National Civil Code, which established the jurisdiction of Dutch courts in class actions. Furthermore, the parliamentary discussions during the drafting of this provision confirmed its applicability to legitimize actions related to “idealistic” interests, thereby confirming Urgenda’s sufficient interest in the case.

While the State reiterated its objections regarding the alleged inadmissibility of the action on behalf of future generations of Dutch citizens and present and future foreigners, it was reiterated that the action was admissible based on representing the interests of present Dutch generations alone.

(C) The Court then proceeded to analyze the prescriptive content of Articles 2 and 8 of the ECHR (paragraphs 40 onwards), reiterating that they were capable of establishing a positive obligation on the part of the State to protect the personal and private lives of citizens under its jurisdiction. These rights were directly and immediately threatened by climate change, given the gravity of the situation at hand.

Therefore, despite the parties not disputing the ultimate goal of achieving zero emissions by 2100, the state’s failure to prepare for a 25% reduction in emissions by 2020 constituted unlawful conduct. The “450 scenario,” which the state itself acknowledged, envisioned conditions that made it “more likely than not” to

achieve the goal of limiting temperature increase to within 2° C. The alleged risks of waterbed effect and carbon leakage lacked substantiation from the public side. Additionally, the case did not demonstrate that the projected 25-40% reduction should apply collectively to Annex 1 countries rather than individually. The precautionary principle prevented the invocation of uncertainties surrounding climate change (paragraphs 46 et seq. of the judgment).

Furthermore, the fact that the action sought the adoption of preventive measures concerning concrete risks, as opposed to claiming compensation for past damages, addressed the objections of a lack of causal link and the inapplicability of Article 6:163 of the Civil Code.

(D) Lastly, the objection of encroachment on the realm of decision-making reserved for political discretion was deemed unfounded.

The Court argued that was obligated to apply norms with direct effect derived from treaties ratified by the Netherlands, including Articles 2 and 8 of the ECHR, which formed part of the Dutch legal system and held precedence over conflicting domestic provisions (paragraph 69 of the judgment).

Based on these arguments, the Court of Appeals upheld the ruling of the first instance.

The Judgment of the Supreme Court (2019)

The state filed a cassation appeal against the decision of the Court of Appeal, raising numerous objections to that decision. The deputy Procurator General and the Advocate General recommended to the Supreme Court that they reject the State's appeal and uphold the decision of the Court of Appeal. The Supreme Court of the Netherlands rendered the final judgment on December 20, 2019.

In conclusion, the Supreme Court's decided that the original order issued by the District Court to the State, and subsequently upheld by the Court of Appeal, should remain valid: therefore, the State must reduce greenhouse gas emissions by at least 25% compared to 1990 by the end of 2020.

The reasoning of the Supreme Court may be summarized as follows:

The danger of climate change (par. 4 of the judgment):

Urgenda and the State share a common understanding, supported by climate science and the international community, that there is a significant and imminent threat of detrimental climate change. This threat stems from the emission of greenhouse gases, including CO₂, which leads to an increased concentration of these gases in the atmosphere. As a result, the Earth's temperature has been steadily rising, with a warming of approximately 1.1°C over the past century and a half, most notably within the last forty years, accounting for 0.7°C of the increase.

It is widely agreed in climate science and by the international community that efforts should be made to limit global warming to no more than 2°C, and preferably to 1.5°C based on recent findings. Beyond these limits, the consequences of further warming could be dire, including extreme heat, drought, and precipitation, disruption of ecosystems with potential impacts on food supply, rising sea levels due to melting glaciers and polar ice caps, and the potential for abrupt and extensive changes in the Earth's climate, known as tipping points. These consequences pose a significant threat to the lives, well-being, and environments of people worldwide, including those in the Netherlands. Some of these effects are already being observed.

Legal obligations of the Netherlands under international law (par. 5 of the judgment):

The ECHR imposes a responsibility on its Member States to safeguard the rights and freedoms enshrined in the convention for their citizens. Specifically, Article 2 of the ECHR safeguards the right to life, while Article 8 protects the right to privacy and family life. According to the jurisprudence of the European Court of Human Rights (ECtHR), if there is a genuine and immediate risk to the lives or well-being of individuals, the state is obligated under these provisions to take appropriate measures, provided that the state is aware of such risks.

This obligation to implement suitable measures also extends to environmental hazards that pose a threat to large groups or the general population, even if the hazards may only materialize over a long period. However, it is important to note that Articles 2 and 8 of the ECHR do not permit imposing an impossible or disproportionate burden on a state. Nevertheless, these provisions do require the state to adopt measures that are genuinely effective in mitigating the imminent hazard to

the best extent possible. Furthermore, in accordance with Article 13 of the ECHR, national legislation must provide an effective legal recourse in cases of actual or impending violations of the rights protected by the convention. This ensures that individuals can seek adequate legal protection from national courts.

The risk of severe climate change is a global concern that extends beyond the borders of the Netherlands. Greenhouse gas emissions originate from various sources worldwide, leading to widespread consequences. The Netherlands is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), which aims to limit the concentration of greenhouse gases in the atmosphere to a level that prevents disruption of the climate system caused by human activities. The UNFCCC recognizes that all member countries have a collective responsibility to act against climate change based on their individual capacities and circumstances.

Therefore, each country bears its own share of responsibility. It is not valid for a country to evade its obligation to implement measures by arguing that its emissions are relatively small compared to the global scale and that reducing them would have minimal impact. The State is thus obligated to proportionately reduce greenhouse gas emissions from its territory, reflecting its share of responsibility. This obligation arises from the principles enshrined in Articles 2 and 8 of the ECHR, as there is a significant risk of severe climate change that poses a threat to the lives and well-being of many individuals in the Netherlands.

Specific scope of the legal obligation of the State (par. 6 and 7 of the judgment):

In fulfilling the positive obligations imposed on the State under Articles 2 and 8 of the ECHR, it is essential to consider widely supported scientific knowledge and internationally accepted standards. The Intergovernmental Panel on Climate Change (IPCC) reports play a significant role in this regard. The IPCC, an intergovernmental scientific organization established within the United Nations, conducts comprehensive research on climate studies and developments. In its 2007 report, the IPCC presented a scenario aiming to limit global warming to a maximum of 2°C. To achieve this target, Annex I countries (including developed nations like the Netherlands) were advised to reduce their emissions by 25-40% by 2020 and by 80-95% by 2050, compared to 1990 levels.

Since 2007, during annual climate conferences held under the UNFCCC, nearly all countries consistently emphasized the need to align with the IPCC's scenario

and achieve a 25-40% reduction in greenhouse gas emissions by 2020. The scientific consensus, supported by the EU on multiple occasions, stresses the imperative of reducing emissions by 30% in 2020 compared to 1990 levels.

Moreover, there has been a widely embraced understanding since 2007 that limiting global warming to 1.5°C, rather than 2°C, is necessary for ensuring safety. The 2015 Paris Agreement explicitly calls for efforts to limit global warming to 1.5°C, which requires even greater emissions reductions than previously estimated.

Overall, there is a strong consensus on the urgent need for Annex I countries to reduce greenhouse gas emissions by at least 25-40% by 2020. This consensus should be considered when interpreting and applying Articles 2 and 8 of the ECHR. The Netherlands, as an individual country, is equally bound by the pressing necessity of achieving a 25-40% reduction in emissions by 2020.

Now, both the State and Urgenda agree on the importance of limiting greenhouse gas concentrations in the atmosphere to achieve either the 2°C or 1.5°C target. However, they have differing opinions on the required pace of reducing greenhouse gas emissions.

Previously, the State aimed to achieve a 30% reduction in emissions by 2020 compared to 1990. This was seen as necessary by the State to maintain a credible path towards the 2°C target. However, after 2011, the State revised its reduction target for 2020 to 20% within the context of the European Union. The State plans to accelerate the reduction to 49% by 2030 and 95% by 2050, as stated in the Dutch Climate Act. The State has not provided an explanation for why a 20% reduction in 2020 is considered responsible within the EU context, despite the international consensus supporting a 25-40% reduction in 2020 as necessary.

Given that, as exposed before, there is a widely accepted consensus in climate science and the international community that delaying reduction measures increases their comprehensiveness and cost, it was the State's responsibility to explain how the proposed acceleration of reduction after 2020 would be feasible and effective enough to meet the targets for 2030 and 2050, thereby keeping the 2°C and 1.5°C targets within reach. However, the State failed to provide such an explanation.

Therefore, the Court of Appeal was justified in ruling that the State must comply with the internationally recognized target of at least a 25% reduction in 2020, as deemed necessary by the international community.

The issue of political discretion:

The State has argued that it is not within the jurisdiction of the courts to engage in the political considerations involved in deciding on greenhouse gas emission reductions.

According to the Dutch governmental system, the authority to make decisions on greenhouse gas emissions rests with the government and parliament. They possess significant discretion to consider the political aspects relevant to this matter. The role of the courts, on the other hand, is to determine whether the government and parliament have stayed within the boundaries set by the European rules, national constitution and law. These boundaries are derived from various sources, including the European Convention on Human Rights (ECHR). The Dutch courts are obligated by the Dutch Constitution to apply the provisions of this convention, interpreting them in line with the European Court of Human Rights (ECtHR). This judicial mandate to provide legal protection, even against the government, is a fundamental element of a democratic state governed by the rule of law.

The Court of Appeal's verdict aligns with the aforementioned principles, as it found that the State's policy on greenhouse gas reduction clearly fails to meet the obligations outlined in Articles 2 and 8 of the ECHR, which require appropriate measures to safeguard Dutch residents against dangerous climate change. Moreover, the Court of Appeal's order to the State was limited to the lower end (25%) of the internationally recognized minimum necessary reduction range of 25-40% by 2020.

The specific measures required to comply with the order are left to the discretion of the State. If legislative measures are necessary to achieve compliance, it is the responsibility of the State to determine which specific legislation is both desirable and necessary.

Critical Assessment

The Urgenda case has generated various debates and critical commentary, extending beyond the realm of environmental law and even beyond legal dimensions.

It has spurred public awareness and engagement, inspiring individuals, communities, and organizations to act on climate change. Also, it has generated doubts and debates.

Normative and Doctrinal Issues

From a legal perspective, scholars have identified some relevant aspects to be discussed ever since the first judgment was rendered (Van Zeven, 2015).

The examined judgments in the Urgenda case provide a vivid example of how national courts operate within the framework of “multilevel law,” reflecting the contemporary legal pluralism (Schyff, 2020; Eliantonio, 2016). The courts demonstrated the utilization of various sources of law and normative acts in reaching their decision. These included international law, national civil and civil procedural law, and provisions from the Foundation’s Bylaws.

The courts displayed selectivity in relying on the most relevant sources or acts for decision-making purposes, sometimes deviating from traditional logical-legal procedures or argumentative styles. For instance, when the Civil Code proved insufficient in defining the state’s responsibility, the courts turned to international sources to supplement Dutch civil law (Wewerinke-Singh & McCoach, 2021). Similarly, when the legitimacy of the Foundation was in question and international norms did not provide a clear answer, the courts resorted to the Civil Code, supplemented by provisions from the Urgenda’s Bylaws, which is not a legal source per se.

This approach highlights how the Dutch courts navigated between different legal sources, resorting to what has been called an “integrated approach” (Wewerinke-Singh & McCoach, 2021). While this approach served the purpose of establishing legitimacy and achieving a favorable outcome for Urgenda, it raises the question of a more robust and well-founded legal basis at times, especially considering that the studied case has been presented as the basis for establishing new standards for the “next generation” of climate cases (Maxwell & van Berkel, 2022).

And as far as the issue of generations is concerned, it is worth noting the adherence of the courts, as well as the plaintiff, to a classical viewpoint. According to this viewpoint, the environment is not protected as an autonomous legal subject (on the matter see Míguez Núñez, 2018), but rather, it is seen as indirectly and functionally protected in relation to the safeguarding of human rights. The protected

rights primarily encompass shared or even collective “third-generation” of rights, with an openness to future generations (of people), at least in the judgment of first instance (Leijten, 2019).

In this context, questions arise concerning how to qualify the interest represented by Urgenda, such as whether it can be classified as a public interest since the action is proposed on behalf of all Dutch citizens. Additionally, one might question whether the mere provision of a statute can sufficiently justify the legitimacy to act on behalf of humanity. Addressing these aspects with more precise and developed arguments would have strengthened the courts’ positions.

Political Domain, Judicial Discretion and Scientific Consensus

This also leads to the most controversial issue of the Urgenda case, i.e., that regarding the respect of the political domain, an aspect clearly addressed by the courts in the judgments. This relates to the legitimacy of the judges’ decision *vis-à-vis* the principles of the separation of powers and the rule of law.

It is worth noting that in the judgments, especially that of second instance, the issue at hand is treated somewhat hastily and, perhaps, superficially. The courts simply reiterate the obvious notion that the judiciary is not entirely barred from assessing the choices made by the political power.

Some scholars have argued that judicial intervention in complex policy matters such as climate change might encroach upon the domain of the executive and legislative branches, potentially undermining democratic processes (Wegen-er 2019; Bergkamp, 2015; for an opposite view, Graser, 2019)⁵. These debates highlight the need for further examination and analysis of the legal and practical implications of the Urgenda case and similar climate litigation. It is important to explore the potential challenges and limitations associated with court decisions in the context of addressing climate change. This includes assessing the feasibility of the mandated emission reduction targets, evaluating the effectiveness of enforcement mechanisms, and considering the broader implications for governance and democratic processes.

⁵ “The debate concerning the distinction between the realm of political discretion and that of judiciary intervention permeates legal history and theoretical postures. Perhaps the most classical debate on the topic is that between Carl Schmitt (1931) and Hans Kelsen (1931). For an influential account on the critiques to judicial discretion, see Bickel, 1986.”

The issue is also strictly connected to the judges' reliance on scientific evidence and expert knowledge in shaping its judgment, reinforcing the importance of scientific consensus in climate-related legal proceedings. This has raised the question of the possible subordination of political choices, and by judicial order no less, to scientific evidences (Backes & van der Veen 2020).

In this regard, the issue of consensus and *communis opinio* played a significant role in the case. The courts recognized the scientific consensus on the urgency of addressing climate change and the need for substantial greenhouse gas emissions reductions to prevent dangerous consequences. They relied on the Intergovernmental Panel on Climate Change (IPCC) reports and other scientific studies to establish this consensus. The courts acknowledged that while there may be some scientific uncertainties, the prevailing scientific opinion supports the necessity of taking immediate action. The concept of *communis opinio*, or the shared understanding within the scientific community, bolstered the judgments and the final decision, as it highlighted the broad consensus among experts on the gravity of the climate crisis and the responsibility to mitigate its impacts.

The question remains, however, of whether compelling scientific evidences may lead to consider, as it has been affirmed, that the relevance of the case supersedes the persistent doubts regarding the legal merits of the judges' reasoning (Backes & van der Veen 2020).

On the Enforcement of the Decision

Also, a different area of debate revolves around the enforcement mechanisms available to ensure compliance with the emission reduction targets set by the court. Critics argue that the court's decisions lack specific enforcement measures, relying primarily on the government's voluntary commitment to implement the required measures (Drenovak-Ivanović, 2020).

In practice, after the final judgment of the Supreme Court, in April 2020 the state announced relevant measures to cut coal emissions (Watts, 2020).

In an interview released on May 25, 2022, Dennis van Berkel, the lawyer of Urgenda, said that the government was "lucky" to actually meet the 25% target in 2020. Van Berkel attributed this mostly to the economic crisis caused by the Co-

vid-19 pandemic and highlighted that the same result was not achieved again in 2021 (Kaminski, 2022).

Moreover, the specific emission reduction targets set by the court in the Urgenda case have faced criticism for their feasibility and potential economic repercussions (on the critiques regarding, among other aspects, the possible economic impact of the Urgenda case, see Roy, 2019; for a general overview on the classical debate on the economic repercussions of judicial decisions, see Anant & Singh, 2002). Skeptics argue that the mandated reductions place an undue burden on certain industries and may hinder economic growth and job creation. Striking a balance between environmental concerns and economic considerations remains a complex challenge that requires nuanced decision-making and policy implementation. Curiously enough, in early 2021 the coal phase-out generated new legal actions against the State, this time by two German energy companies, RWE and Uniper, seeking compensation under the Energy Charter Treaty, which provides protections for foreign investors in the energy sector and access to dispute settlement mechanisms (Taylor, 2021a, 2021b).

Later, in the *2022 Budget Memorandum* released in September 2021, the Government announced the plan to *“invest an additional sum of over €6.8 billion in climate measures on top of existing spending on climate policy. Part of this investment is necessary to carry out the National Climate Agreement. The remainder of this package is directed at the further implementation of the Urgenda judgment”* (Government of the Netherlands, 2021).

According to a research article coauthored by van Berkel himself, the principles affirmed by the Dutch courts in the Urgenda case may offer concrete legal standards for *“the ‘next generation’ of systemic mitigation cases”* (Maxwell et alii, 2022).

Conclusive Remarks

The Urgenda climate case, which was resolved in favor of Urgenda Foundation, has had a profound impact on raising awareness about climate change and initiating a broader dialogue on the legal obligations of governments in addressing this global issue. The case has not only catalyzed action within the Netherlands but has also garnered international attention, inspiring similar legal challenges in other countries.

The judgments delivered by Dutch authorities have underscored the legal duty of governments to take proactive measures to combat climate change and protect the fundamental rights of their citizens. These landmark decisions have highlighted the significance of integrating environmental considerations into legal frameworks, policy-making processes, and governance structures. They have also reinforced the concept of intergenerational equity⁶, emphasizing the responsibility of current generations to ensure the well-being and sustainability of future generations.

However, it is important to critically assess the potential challenges associated with implementing and sustaining the changes demanded by such court rulings. One concern is the potential encroachment on democratic processes, as some argue that unelected judges should not dictate policy decisions that traditionally fall within the purview of elected representatives. Striking the right balance between judicial intervention and democratic decision-making is crucial to ensure the legitimacy and acceptance of climate-related actions.

Economic considerations also come into play, as transitioning to a low-carbon economy may entail costs and trade-offs. The Urgenda case has sparked debates on the economic feasibility of certain emission reduction targets and the potential impact on industries, employment, and economic growth. It is essential to find equitable solutions that minimize the burden on vulnerable communities and facilitate a just transition to a sustainable future.

Finally, political commitment plays a pivotal role in translating legal rulings into concrete actions and long-term sustainability. While the legal victories in the Urgenda case provide a strong basis, sustained political will is necessary to implement effective climate policies, allocate resources, and monitor progress. It is essential for governments to remain committed to their climate obligations even in the face of changing political landscapes and competing priorities.

By acknowledging and addressing these complex challenges, societies can forge a path towards a more just, sustainable, and resilient future for generations to come. The Urgenda climate case serves as a powerful reminder of the transformative potential of the law in addressing one of the most pressing issues of our time and creating a framework for collective action on climate change.

⁶ “Intergenerational equity refers to the concept of fairness and justice between different generations, particularly in the context of resource use, environmental protection, and social policies. It is the idea that the current generation should not compromise the ability of future generations to meet their own needs and enjoy a similar quality of life. This principle emphasizes the responsibility to consider the long-term impacts of decisions and actions on the environment, economy, and society for the benefit of future generations. On the issue see Tremmel, 2009; Barresi, 1997

Bibliography

- Anant, T. C. A., & Singh, J. (2002). An Economic Analysis of Judicial Activism. *Economic and Political Weekly*, 37(43), 4433–4439. <http://www.jstor.org/stable/4412779>
- Barresi, P. (1997). Beyond fairness to future generations: An intergenerational alternative to intergenerational equity in the intergenerational environmental arena. *Tulane Environmental Law Journal*, 11, 3
- Backes, C., & van der Veen, G. (2020). Urgenda: the Final Judgment of the Dutch Supreme Court, *Journal for European Environmental & Planning Law*, 17(3), 307–321. doi: <https://doi.org/10.1163/18760104-01703004>
- Bergkamp, L. (2015). A Dutch Court’s ‘Revolutionary’ Climate Policy Judgment: The Perversion of Judicial Power, the State’s Duties of Care, and Science, *Journal for European Environmental & Planning Law*, 12(3-4), 241–263. doi: <https://doi.org/10.1163/18760104-01204002>
- Bedoya Jiménez, A. M. (2023). Reflexiones frente a los rellenos sanitarios en Colombia: impacto, tratamiento y pautas para la mitigación de los daños ambientales. *Revista Jurídica Mario Alario D’Filippo*, 15(30), 277–288. <https://doi.org/10.32997/2256-2796-vol.15-num.30-2023-4249>
- Bickel, A. M. (1986). *The Least Dangerous Branch*. Yale University Press. <http://www.jstor.org/stable/j.ctt1nqbmb>
- Burgers, L. & Staal, T. (2019). *Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v the Netherlands*. In: Nijman, J., Werner, W. (eds) *Netherlands Yearbook of International Law 2018*. Netherlands Yearbook of International Law, vol 49. T.M.C. Asser Press, The Hague. https://doi.org/10.1007/978-94-6265-331-3_10
- De Graaf, K. J., & Jans, J. H. (2015). The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change. *Journal of Environmental Law*, 27(3), 517–527. <https://doi.org/10.1093/jel/eqv030>
- Drenovak-Ivanović, M. (2020). Standing In Environmental Law After Urgenda, Juliana And Covid-19 Crises: Who Should Force Governments To Act In Environmental Issues Related To Climate Change?. *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 4, 3–20. <https://doi.org/10.25234/eclic/11893>
- Elia Antonio, M. (2016). The Urgenda case in the EU multi-level governance system. *Milieu & Recht*, (3), 207–211. [M en R 2016/35]

- Government of the Netherlands (2021, September 21). 2022 Budget Memorandum: Resilience and further steps forward. Retrieved from: <https://www.government.nl/latest/news/2021/09/21/2022-budget-memorandum-resilience-and-further-steps-forward> (last access: July 2023).
- Graser, A. (2019). Vermeintliche Fesseln der Demokratie: Warum die Klimaklagen ein vielversprechender Weg sind – Eine Replik auf Bernhard Wegener, Urgenda – Weltrettung per Gerichtsbeschluss? Klimaklagen testen die Grenzen des Rechtsschutzes. *Zeitschrift für Umweltrecht*, 5, 271-278
- Harvard Law Review. (2019). State of the Netherlands v. Urgenda Foundation. *Harvard Law Review*, 132. Retrieved from <https://harvardlawreview.org/print/vol-132/state-of-the-netherlands-v-urgenda-foundation/>
- Kaminski, I. (2022, May 25). Urgenda two years on: What impact has the landmark climate lawsuit had? Retrieved from: <https://www.the-wave.net/urgenda-two-years-on/> (last access: July 2023)
- Leijten, I. (2019). Human rights v. Insufficient climate action: The Urgenda case. *Netherlands Quarterly of Human Rights*, 37(2), 112–118. <https://doi.org/10.1177/0924051919844375>
- Maxwell, L., Mead, S., & van Berkel, D. (2022). Standards for adjudicating the next generation of Urgenda-style climate cases. *Journal of Human Rights and the Environment*, 13(1), 35-63. <https://doi.org/10.4337/jhre.2022.01.02>
- Mayer, B. (2019). The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018). *Transnational Environmental Law*, 8(1), 167-192. doi:10.1017/S2047102519000049
- Meguro, M. (2020). State of the Netherlands v. Urgenda Foundation. *American Journal of International Law*, 114(4), 729-735. doi:10.1017/ajil.2020.52
- Míguez Núñez, R. (2018). *Le avventure del soggetto*. Milan: Mimesis.
- Office of the United Nations High Commissioner for Human Rights. (2019, December 20). Bachelet welcomes top court's landmark decision to protect human rights in climate change. Retrieved from <https://www.ohchr.org/en/press-releases/2019/12/bachelet-welcomes-top-courts-landmark-decision-protect-human-rights-climate?LangID=E&NewsID=25450>
- Perona, R. (2020). II caso Urgenda: aspetti di interesse e spunti di riflessione in prospettiva giuspubblicistica. In H. M. Dias, W. P. Gavião Filho, E. A. Velandia Canosa (Eds.), *Anais*

- do IV Congresso Mundial de Justiça Constitucional: justiça constitucional e os direitos fundamentais de terceira dimensão (pp. 85-96). Belo Horizonte: Editora Dialética.
- Rodríguez García, N. (2016). Responsabilidad del Estado y cambio climático: el caso Urgenda contra Países Bajos. *Revista Catalana de Dret Ambiental*, 7(2), 1-38.
- Roy, S. (2019). Urgenda II and its Discontents. *Carbon & Climate Law Review*, 13(2), 130–141. <https://www.jstor.org/stable/26739660>
- Roy, S. (2016). Situating Urgenda versus the Netherlands within comparative climate change litigation. *Journal of Energy & Natural Resources Law*, 34(2), 165-189. <https://doi.org/10.1080/02646811.2016.1132825>
- Schyff, Gerhard. (2020). The Urgenda Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism. *Constitutional Review*. 6. 210. DOI: 10.31078/consrev622
- Supreme Court of The Netherlands. (2019). The State of the Netherlands v. Urgenda Foundation.
- Taylor, K. (2021a, February 21). Germany's RWE uses Energy Charter Treaty to challenge Dutch coal phase-out. Euractiv. Retrieved from: <https://www.euractiv.com/section/energy/news/germanys-rwe-uses-energy-charter-treaty-to-challenge-dutch-coal-phase-out/> (last access: July 2023)
- Taylor, K. (2021b, April 21). Energy Charter Treaty strikes again as Uniper sues Netherlands over coal phase-out. Euractiv. Retrieved from: <https://www.euractiv.com/section/energy/news/energy-charter-treaty-strikes-again-as-uniper-sues-netherlands-over-coal-phase-out/> (last access: July 2023)
- The Hague Court of Appeal. (2018). The State of the Netherlands v. Urgenda Foundation. ECLI:NL:GHDHA:2018:2591
- The Hague District Court. (2015). Urgenda Foundation v. The State of the Netherlands. ECLI:NL:RBDHA:2015:7196
- Tremmel, J. C. (2009). *A Theory of Intergenerational Justice*. Routledge.
- Van Zeven, J. (2015). Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide? *Transnational Environmental Law*, 4(2), 339-357. doi:10.1017/S2047102515000199

- Watts, J. (2020, April 24). Dutch officials reveal measures to cut emissions after court ruling. The Guardian. Retrieved from <https://amp.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling> (last access: July 2023)
- Wegener, B. (2019). Urgenda – World Rescue by Court Order? The “Climate Justice”-Movement Tests the Limits of Legal Protection. *Journal for European Environmental & Planning Law*, 16, 125-147. <https://doi.org/10.1163/18760104-01602003>
- Wewerinke-Singh, M., & McCoach, A. (2021). The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation. *Review of European, Comparative & International Environmental Law (RECIEL)*, 30, 275-283. <https://doi.org/10.1111/reel.12388>



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