

# Urgenda and Beyond: The past, present and future of climate change public interest litigation

Olivier van Geel

Faculty of Law, Maastricht University  
o.vangeel@alumni.maastrichtuniversity.nl

## Abstract

*Scientific evidence demonstrates that anthropogenic climate change is an urgent global problem with tremendous destructive capacity. Decades of multilateral negotiations have yielded limited success to date, but other responses are available. One such alternative is climate change litigation. Particularly interesting are recent public interest lawsuits, first in the Netherlands, and then in Pakistan, which have sought to hold the State responsible for climate change. This paper seeks to demystify the past, present, and future of climate change public interest litigation by placing it in a historical perspective, looking at contemporary developments, and assessing the potential of this technique for encouraging social change on a global scale.*

The anthropogenic alteration of the global climate undoubtedly represents one of the greatest challenges that humanity faces in the 21st Century. The urgency of climate change mitigation is reflected in the findings of the Intergovernmental Panel on Climate Change (IPCC), which suggest a failure to restrict temperature increases to 2 degrees Celsius above pre-industrial levels would irrevocably and perilously alter the world's climate (Peters et al., 2013). International policymaking has, to

date, been inadequate in dealing with climate change, and according to the findings of the IPCC's fifth assessment report, the current policy baseline would most likely result in a temperature increase of well above 2 degrees (Ibid.). Contemporary international political efforts to address climate change include the Paris agreement, which was signed by the US and China (the two greatest emitters) and entered into force on 4 November 2016, and the inclusion of a

climate target in the Sustainable Development Goals (SDGs). However, as political action has dragged its feet, climate litigation has emerged as a possible alternative method to encourage social change. In particular, public interest litigation has become an important talking point in contemporary debates about climate change subsequent to a landmark judgement recently issued by a Dutch court in the Urgenda case. In this case, the Hague District Court held the Dutch government responsible for climate change. The ruling, which is being discussed as a potential international precedent, was followed by a comparable decision by a Pakistani court in *Ashgar Leghari v Pakistan*.

The aim of this paper is to investigate domestic public interest litigation as a potential tool in the struggle against climate change. The following research question will be addressed: Taking into account past and present cases, as well as the potential future prospects of this technique, can public interest litigation play an effective role in combating the global problem of climate change? In this context, the effectiveness of this technique refers to the potential for encouraging political action and social change.

In addressing the research question, this paper will draw on case law and scholarly literature. Historical cases from the US and Indian contexts will be used as illustrative examples of past environmental public interest litigation. In the contemporary context, the Urgenda, Leghari, and Kelsey Cascade Rose cases

will be discussed, in addition to ongoing cases in Belgium and Norway, as they seem to signal the emergence of a new kind of climate change public interest litigation. Subsequently, climate change public interest litigation will be placed in a more analytical perspective in the discussion, which will be followed by some further comments on the future prospects of this technique. The discussion will be guided by some analytical questions, such as do these new cases constitute a global trend? and are they examples of (dangerous) judicial activism?

## I. Conceptualisation of public interest litigation and judicial activism

Both in theory and practice, public interest litigation is a concept that is not easily defined, especially as it may take on a different shape depending on the jurisdiction in which it occurs. Hussain (1993, p. 1) defines public interest litigation in a broad sense as “litigation in the interest of the public”, where “The word 'public' means public at large, including all classes and sections of society without any distinction of gender, social status, economic background, ethnic origin, religious credence or cultural orientation”. This form of litigation is often employed strategically as a motor for social change, and particularly aims to advance the cause of minority or disadvantaged groups, or individuals who have no voice (“About Public Interest Litigation,” n.d.). Climate

change litigation, which per definition seeks to protect the public interest, can thus be categorised as a subset of public interest litigation. Since climate cases frequently envisage the shielding of future generations from potential harm, they also aim to protect those with no voice. Though this cursory definition captures the spirit of public interest litigation, it also leaves many questions unanswered. Most notably, commentators clash over whether criteria for assessing public interest exist and, if so, what these may be. It is also often unclear whether a particular case should be considered public interest litigation. One of the main reasons for this disagreement is that there are diverging perspectives of what constitutes an advancement of social justice (Cummings & Rhode, 2009). Conceptions of the exact confines of public interest litigation may also differ across jurisdictions, especially when it concerns two legal systems that are poles apart.

“Judicial activism” is another term that requires some further attention. This concept is multifaceted, defies clear definition, and also varies across jurisdictional contexts. As Kmiec (2004, p. 1443) points out, the exact meaning of judicial activism is frequently unclear, as “it is defined in a number of disparate, even contradictory ways”. He distinguishes between five core meanings of judicial activism, namely: “(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial “legislation”, (4) departures from accepted

interpretive methodology, and (5) result-oriented judging” (Ibid., p. 1444). In the context of public interest litigation, judicial activism can be broadly characterised as judges pushing the boundaries of existing law for political purposes. Such practices may run the risk of crossing these boundaries if not handled with sufficient care (Heringa, 2016, p. 203). Judicial activism is subject to different views depending on the applicable legal system. For instance, in Pakistan and India, judicial activism is embraced as an important facet of the respective legal traditions (Razzaque, 2004). By contrast, in the US context, judicial activism is often imbued with a negative connotation (Siegel, 2010). Interestingly, however, both jurisdictions have seen high-level justices defending this method, at least in some contexts. Climate lawsuits are frequently linked to (liberal) judicial activism, as was notably the case in relation to the Urgenda ruling. Accordingly, this debate will be more thoroughly addressed in the discussion section.

## II. Historical use of public interest litigation in relation to climate change

Though public interest litigation is used by lawyers globally, it is more developed in some legal traditions than in others. In the Indian and US national contexts, this form of litigation is particularly well established.

The following section will dissect some historical environmental public interest litigation cases with relevance to the climate change debate in the US and Indian contexts.

India has a rich history of public interest litigation, which really started to take off as a legal mechanism in the 1980s. In *SP Gupta v Union of India* (1982), a seminal case for the development of this concept in the Indian context, the Supreme Court explicitly mentioned and gave meaning to public interest litigation. Following this judgement, there have been many Indian cases that conform to this definition, particularly in the realm of fundamental rights. In environmental matters, the Indian Supreme Court has taken an interventionist line, partly due to its strong tradition of judicial activism (Deva, 2009). Public interest litigation is widely regarded as one of the most important legal innovations with regards to environmental protection in India (Sahu, 2008). There has been a long line of environmental public interest lawsuits, starting with the Dehradun valley litigation in 1983 (Ibid., p. 382-383). In fact, the Indian Supreme Court's public interest litigation guidelines specifically recognise the possibility of such claims '[...] pertaining to environmental pollution, disturbance of ecological balance, [...], forest and wild life and other matters of public importance' (Supreme Court of India, 2003, p. 2). However, most of these environmental public interest lawsuits have no immediately apparent link to climate change. One interesting case,

which is illustrative of the Indian approach, and has some relevance to climate change, is *Mehta v Union of India* (2002), in which the Supreme Court ordered the government to replace the entire bus fleet of Delhi by more environmentally friendly Compressed Natural Gas (CNG) buses. Though the issue of climate change was not explicitly mentioned in the Court's reasoning, the case is demonstrative of how environmental public interest litigation can be used indirectly as a tool for climate change mitigation. Additionally, due to the prevalence of such cases in India and the Court's activist role, a case in relation to climate change would certainly not be inconceivable (Gupta, 2007).

The US has a history of public interest litigation that finds its roots in the civil rights activism of the 1950s and 60s. *Brown v Board of Education*, in which the US Supreme Court found segregation in public schools unconstitutional, is often cited as the first example of this form of litigation (Hershkoff, 2005). In the US, recent years have seen an explosion of climate change litigation before the courts. One important vehicle that has been employed is initiating public nuisance tort claims (Hester, 2013). Though the conceptual delimitation of public nuisance is not entirely clear, an indicative definition is provided by the second US Restatement of Torts, which defines it as, 'an unreasonable interference with a right general to the common public' (Restatement (Second) of Torts § 821B, 1979). The first public nuisance climate

change lawsuit was the unsuccessful AEP v Connecticut case, but numerous other attempts followed (Hester, 2013). One case of particular interest is *Comer v Murphy Oil USA, Inc.* (2009). In this case, which went to the fifth circuit Court of Appeals before being dismissed, Mississippi residents sought to sue energy companies for contributing to global warming, and thus exacerbating the effects of Hurricane Katrina. A similar case, *Kivalina v ExxonMobil* (2012), saw Alaska residents suing oil companies over melting permafrost caused by greenhouse gas (GHG) emissions. Though these cases have not yielded successful results to date, they present an interesting legal technique in the struggle against climate change. When it comes to filing suit against the federal government for climate change, the *Massachusetts v EPA* case entailed an interesting application of state-initiated public interest litigation (Welti, 2008). After its petition asking the Environmental Protection Agency (EPA) to regulate GHG emissions from new motor vehicles under the Clean Air Act (CAA) was denied, Massachusetts appealed this decision in the courts. In *Massachusetts v EPA* (2007), the Supreme Court found, without imposing a specific obligation to regulate, that the EPA had the authority to regulate GHGs, and remanded the case to the EPA, requiring the agency to review its reasoning, as its argumentation had been inadequate. On remand, the EPA found that six GHGs met the threshold of endangering public health and welfare (Environmental Protection Agency, 2009).

Thus, though the Supreme Court exercised judicial restraint in its judgement, this kind of state-initiated public interest litigation can serve as an effective tool to address climate change.

An exhaustive study of historical global public interest litigation cases with relevance to climate change is beyond the scope of this paper. However, the US and Indian case studies serve as illustrative examples, and are particularly interesting for a number of reasons. Significantly, both India and the US have an extensive history of public interest litigation in their domestic legal systems, and belong to the world's greatest emitters of GHGs. A comparison between the two can also yield some thought-provoking insights. It is for example interesting that, despite the strong culture of judicial activism and public interest litigation in India, there have been no cases directly addressing climate change. Conversely, in the US, where these concepts are often approached with more caution, numerous claims have been brought, albeit with limited success.

### III. Present emergence of climate change public interest litigation

Starting with the *Urgenda* case in 2015, a new type of public interest litigation has started to gain currency in the courts. A subsequent ruling with comparative value occurred in *Leghari v Pakistan*, and further insights can be gained by looking at ongoing lawsuits in the United States,

Belgium, and Norway. These cases differ from the historical examples discussed above in that they hold the state directly responsible for climate change. Thus, the form of public interest litigation they embody appears to have tremendous potential in terms of influencing state policy, and encouraging social change. The following section seeks to further explain and compare these case studies.

In the Urgenda case, a non-governmental organisation (NGO) named Urgenda brought suit against the Dutch state. They argued that the government climate policy violated a duty of care under Dutch law, and the fundamental rights of Urgenda, as well as 886 individual plaintiffs, under the European Convention of Human Rights (ECHR). To remedy this transgression, they claimed the government would have to readjust its low emissions reduction targets, which were set at 17 percent by 2020 compared to 1990 levels at the time, to the 25-40 percent suggested in the Cancun agreements (Urgenda Foundation v. State of the Netherlands, 2015, para. 3.1). In their submission, they referred to national law, most notably article 21 of the Dutch Constitution, regional law, including articles 2 and 8 of the ECHR, as well as international treaty law and legal principles. The Dutch state contested these allegations, arguing that such an intervention in policymaking by the courts would violate the separation of powers. They also noted that the climate targets were in line with EU policy, and that the Dutch contribution to climate change was

rather insignificant on a global scale. This final argument would suggest that the correct solution should be found through multilateral talks, in which the Dutch government's negotiation position would allegedly be weakened by a judgement in Urgenda's favour (Ibid., para 4.100). On 24 June 2015, the Hague District Court ruled in favour of the plaintiffs, finding that the state had violated a duty of care under Dutch law and ordering it to readjust its targets to at least 25 percent reduction by 2020 (Ibid., para. 5.1). All other claims, including the argument under the ECHR, were dismissed. The Dutch government has launched an appeal and, accordingly, the District Court's decision will be reviewed by the Hague Court of Appeal, and potentially the Dutch Supreme Court.

The Court's reasoning merits some further discussion. The prevailing claim was ultimately that the Dutch government had breached a duty of care pursuant Book 6, Section 162 of the Dutch Civil Code, which was informed *inter alia* by article 21 of the Dutch Constitution, and various international obligations and legal principles (Ibid., para. 4.89). Significantly, whereas NGOs or individuals before national courts cannot usually invoke international obligations between states, this approach permitted the inclusion of international law through the so-called 'reflex effect' (de Graaf & Jans, 2015). The Court found a duty of a 'high level' of care, resulting in the required establishment of a satisfactory statutory framework to reduce emissions. Interestingly, the environmental rights approach did not meet such success,

as Urgenda itself could not rely on articles 2 and 8 of the ECHR on the right to life and private and family life, and the Court found that there was insufficient information to assess the separate claim put forward on behalf of the 886 individual plaintiffs (*Urgenda Foundation v. State of the Netherlands*, 2015, para. 4.109). Thus, even though the Court stopped short of confirming the validity of the ECHR argument, it also did not explicitly reject it. Internationally, this judgement was the first to hold the state responsible for climate change, and it certainly constituted a significant breakthrough in the Dutch context. Furthermore, it could be argued that this ruling indicates the onset of a broader global trend. The case studies that follow appear to suggest that such a trend may indeed be underway.

Another notable climate change public interest case that was inspired by the example of Urgenda is currently taking place in Belgium. The Belgian case, which mirrors the Dutch case in its arguments, was initiated by the NGO 'klimaatzaak vzw', established by 11 Belgian celebrities, with a parallel claim by a large number of individuals. The plaintiffs argue that the Court should order the Belgian government to reduce emissions by 40, or at least 25 percent compared to 1990 levels by 2020, and 87.5, or at least 80 percent by 2050 (*Summons of the Belgian climate case*, 2015, para. 14). The claim is that the current government policy is in violation of human rights, specifically article 2 and 8 of the ECHR, as well as article 7bis, 22, and 23 of the

Belgian Constitution on sustainable development, the protection of public health, and the right to the protection of a healthy living environment. Additionally, it is argued that the Belgian government is in violation of the principle of prevention, the precautionary principle, and a duty of care under Belgian law (*Ibid.*, para. 43). The proceedings are momentarily delayed due to a language dispute over whether the case should be heard in French or Dutch.

In September 2015, the Lahore High Court became the second to hold the state responsible for climate change in *Ashgar Leghari v Pakistan* (2015). It is noteworthy that Pakistan, like its neighbour India, also has a long history of public interest litigation (Razzaque, 2004). In this particular case, Ashgar Leghari filed suit against the government for its inaction in relation to climate change, especially its failure to implement the National Climate Change Policy (NCCP). The argument was that the government had violated the fundamental rights to life and dignity under articles 9 and 14 of the Constitution (*Ashgar Leghari v Pakistan*, 2015, p. 2, para. 1). The Court found in favour of the plaintiff, ordering the government to take numerous specific actions to remedy this offence. Several government ministries were ordered to appoint a 'climate change focal person' to monitor the implementation of the NCCP. Additionally, the Court even went so far as to create a Climate Change Commission (*Ibid.*, p. 5, para. 7).

The reasoning in *Leghari v Pakistan* is interesting in that it differed from *Urgenda* on a number of points. Notably, *Leghari* concerned an omission by the state. Moreover, public interest litigation and judicial activism are more accepted in the Pakistani legal system than in the Dutch context. It is thus not surprising that, in some ways, the Pakistani judgement appears even more progressive than *Urgenda*. The Lahore court expressly accepted the fundamental rights argument, from which the judges shied away in the Netherlands. Additionally, the Dutch judges went out of their way to exercise some degree of restraint, by choosing the lower bound of the 25-40 percent standard as an obligation, and refraining from prescribing specific tasks for the government to perform (*Urgenda Foundation v. State of the Netherlands*, 2015, para. 5.1). The Lahore court, on the other hand, determined the specific actions that the government was required to take, and even named the 21 individuals to be appointed to the Climate Change Commission (*Ashgar Leghari v Pakistan*, 2015, p. 7, para. 8(iii)). Ultimately, however, the central difference between the cases comes down to two different legal arguments with potential for future litigation, the duty of care argument and the fundamental rights argument.

On 8 April 2016, another interesting development took place in *Kelsey Cascade Rose v the United States of America*. In this case, the plaintiffs are 21 children from around the US aged 9 to 18, and climate scientist Dr. James Hansen on behalf of

future generations (*Kelsey Cascade Rose v the United States of America*, 2016, p. 1, para. 2). In its order denying the defendant's motion to dismiss, the Oregon District Court found that the plaintiffs' claims could move forward to trial. The plaintiffs allege that the government's actions and omissions in relation to climate change amount to a violation of their substantive due process rights, their right to equal protection under the fifth amendment of the US Constitution, as well as an implicit right to a stable climate under the ninth amendment. The claim is that the government's policy 'has resulted in a danger of constitutional proportions to the public health' (*Kelsey Cascade Rose v the United States of America*, 2016, p. 10, para. 1). Thus, as in the aforementioned *Leghari* case, the claim is firmly rooted in rights rhetoric. However, the judge also explicitly mentions the *Urgenda* case in this order, rejecting the argument that the fact that the GHG emissions only form a portion of the global whole meant that the claim should be dismissed in this instance (*Kelsey Cascade Rose v the United States of America*, 2016, p. 11, para. 2). Thus, even though it is questionable whether the plaintiffs' arguments will succeed at trial, this case study does go to show that climate change public interest litigation is also gaining traction in the US context.

In Norway, a similar case, aiming to hold the government responsible for its allegedly unconstitutional oil exploration in the Arctic, is underway. In *People v. Arctic Oil*, The claimants, Greenpeace Nordic Association and Natur og Ungdom

(Nature & Youth), argue that the Norwegian government's Licensing Decision, which opened up new acreage to oil and gas companies in the Arctic Barents Sea, is illegal under Norwegian law. Specifically, they claim a violation of Article 112 of the Norwegian Constitution on the right to a healthy environment. Additionally, it is argued that a procedural irregularity occurred, as the impacts of the decision were not properly assessed (Writ of Summons in the People v. Arctic Oil, p. 5-7). The case presents another example of environmental rights being mobilised in the public interest.

The case studies described above seem to suggest that public interest litigation seeking to hold states responsible for climate change may be taking hold as a legal mechanism. Before dismissing these examples as context-specific, it must be noted that the cases stretch across three continents, and have occurred in both common and civil law jurisdictions. Nonetheless, though they share like features, the respective courts' reasonings differ. Especially interesting in this regard is the distinction between the clear fundamental rights approach in Leghari, and the duty of care method that prevailed in Urgenda. The following section will attempt to deepen the analysis of public interest litigation as a possible driver for climate change mitigation on the basis of a number of evaluative questions.

## IV. Discussion

The emergence of this new type of climate change public interest raises important questions. Significantly, does this development constitute a global trend? and, if so, can these climate cases really bring about the necessary social change? Additionally, are these cases (dangerous) examples of judicial activism? Finally, the distinction between the duty of care approach endorsed in the Urgenda case and the fundamental rights argument accepted by the Lahore court in Leghari merits some further scrutiny. The question here is which legal argumentation has more potential for climate change litigation? The cases mentioned in the analysis above do seem to suggest a global trend in the making.

In the Netherlands and Pakistan, claimants already successfully held the state responsible for climate change. Similar ongoing cases can be identified in the US, Belgian, and Norwegian national contexts. The diversity of the domestic jurisdictions in which these cases occur seems to deny the argument that this kind of public interest litigation is context-specific. The cases cut across continents and involve both common and civil law systems. Notably, the Netherlands shares common roots with a number of European legal systems, and Pakistan's neighbours, India and Bangladesh, have similar traditions of public interest litigation and judicial activism (Razzaque, 2004). However, the dismissal of some of the

ongoing cases could dull the enthusiasm surrounding this new technique. In this regard, the outcomes of other ongoing climate cases will be important in determining whether this emerging global trend solidifies into more established international practice.

Regarding the potential for encouraging social change, it has been argued that public interest litigation cannot bring about institutional reform per se, and can draw attention away from more effective (political) strategies (Cummings & Rhode, 2009). In this regard, it must be stressed that these climate cases are insufficient to resolve the dilemma of climate change on their own. Ultimately, it is up to political decision-making to address this global challenge. However, public interest litigation can contribute to tackling climate change in a number of ways. Firstly, the courts can encourage policymakers to act, and comply with their existing obligations. Secondly, climate change public interest litigation can contribute to awareness-raising. High profile climate cases against the state bring climate change into the public eye, enhancing the visibility of this issue. Finally, the potential for legal mobilisation is tremendous, as illustrated by the Belgian climate case, which involves over 10,000 individual co-plaintiffs (Belgian climate case website, n.d.). Mobilising citizens in the struggle against climate change can be essential in refocusing the priorities of society. Particularly striking is the new Chinese environmental protection law, which recognises the urgency of the air

pollution problem, and seeks to mobilise citizens by taking a relatively liberal approach to environmental public interest litigation, reflecting the Chinese state's increased focus on sustainability in view of the current economic slowdown (Carpenter-Gold, 2015).

As explained in the conceptualisation section, public interest lawsuits are often linked to judicial activism, which broadly entails judges pushing the boundaries of existing law for political purposes. Judicial activism may take on varying meanings depending on the context of a commentator's observations, or the jurisdiction in which a lawsuit occurs. Though it is not always clear whether a ruling constitutes judicial activism, the progressive climate change cases discussed above, particularly the Urgenda case, have been labelled as such. Specifically, the Dutch government position is that the Court did not respect the separation of powers in its decision, a claim that was dismissed by the Hague District Court in its ruling (*Urgenda Foundation v. State of the Netherlands*, 2015, paras. 4.94-4.102). In this regard, it is important to note that, whereas the Dutch court's interpretation was certainly progressive, it was based in existing principles of law (Heringa, 2016, p. 3). Loth and van Gestel (2015) also gave a more positive appreciation of Urgenda, placing the ruling in the context of multi-level governance, and noting that, in light thereof, judges seek to contribute to providing solutions for complex transboundary problems. Essentially, the

approach of the Hague District Court can be likened to civil rights cases in the US, where the courts found underlying legal principles, which were interpreted in a new way (The Guardian, 2015). Thus, while the Court may have exercised a fair degree of interpretative freedom, it is not clear-cut that this case would amount to judicial activism as such. The question, which will be addressed on appeal, is whether the Court only pushed the boundaries of existing law, or transgressed them, in its ruling. It must also be noted that, where conservatives in the US often describe judicial activism as something used by liberals to circumvent the requirements of the law, it is not only a liberal tactic. A recent example would be the Supreme Court's stay of the implementation of the Obama administration's Clean Power Plan (CPP) pending judicial review (Ryan, 2016).

The cases discussed in this paper seem to employ two different legal arguments. In *Urgenda*, the Court upheld the claim that there was a duty of care under Dutch law informed by constitutional and international law. By contrast, in the *Leghari* case, the Pakistani court found that the fundamental rights of the claimant had been violated. The relative power of these two arguments depends largely on the jurisdiction. It is noteworthy that, in the *Urgenda* case, the claimants also put forward a fundamental rights claim. The argument that article 2 and 8 of the ECHR had been violated, was not explicitly rejected by the Court, and these rights were used to inform the duty

of care (*Urgenda Foundation v. State of the Netherlands*, 2015, para. 4.52). Certainly, the environmental rights approach has a number of advantages. Significantly, rights rhetoric has tremendous potential for the mobilisation of citizens for a cause (Hilson, 2015). Additionally, human rights are universal in scope, and therefore this argument is applicable beyond the national boundaries of a single state. Hence, it could be employed in cases before regional courts such as the European Court of Human Rights (ECtHR). There are however some drawbacks. The concept of environmental rights does not enjoy broad recognition, and this approach is likely to face difficulties in domestic jurisdictions that have a more restrictive traditional conception of human rights as civil and political rights. Thus, where rights claims are more ambitious, they may also be more challenging.

The above analysis seems to suggest that this new breed of climate change public interest litigation cases constitutes an emerging global trend that could have enormous potential as a driver of social change. However, this technique can only encourage governments to take more effective action, and does not suffice in itself. Ultimately, it is the policymakers who must implement measures to tackle climate change. Therefore, though a progressive interpretation of the law does not necessarily amount to judicial activism, it would be wise for courts to exercise some judicial restraint, since it is not for judges to define policy. Restraint is

especially important as judicial activism is a double-edged sword, and can also be employed to curtail climate change mitigation policies, as illustrated by the US Supreme Court's CPP stay. Finally, though environmental rights claims have a more universal applicability and a high propensity for legal mobilisation, they may also face severe challenges, particularly in jurisdictions with a more restrictive conception of human rights. The following section will attempt to shed some light on what these developments could imply for the future prospects of public interest litigation as a tool for encouraging climate change mitigation.

## V. Future prospects

There are numerous threats and opportunities with regard to the future potential of climate change public interest litigation. Notably, continued enthusiasm over this technique depends on the outcome of certain ongoing cases. Substantial momentum could be gained by a victory on US soil in *Kelsey Cascade Rose*, or another successful European case in Norway or Belgium. However, a dismissal could have the opposite effect. Additionally, the problem of standing, particularly standing of NGOs, could present an obstacle. In assessing the future potential of this technique, some special attention should also be paid to the prospects of public interest litigation in the Chinese context, and before the ECtHR.

One obstacle that can pose a threat to future climate change public interest litigation is the problem of standing in environmental cases. In the Dutch legal system, there is an established, though not uncontested, practice of granting standing to NGOs, but this practice may not be as well accepted in some other jurisdictions (Broek & Enneking, 2014). Proving the interest of the individuals or legal persons involved can cause difficulties, considering that climate change litigation often concerns future harm. These challenges were all too apparent in the *Urgenda* case where, with regards to the human rights argument, the judges denied *Urgenda* standing, and refrained from assessing the individual claims. The difficulty of establishing a causal link for potential future harm is also of particular relevance in cases of this nature. Furthermore, it is often unclear what portion of the damage can be attributed to the conduct of the defendant, especially considering the plurality of third parties that often contribute to the emissions. These obstacles, along with the challenge of relying on international obligations in a domestic context, can hinder climate change public interest litigation. However, the successes of the *Urgenda* and *Leghari* cases suggest that they may be overcome.

References to the ECHR in the Dutch and Belgian climate cases raise the question of whether a state could be held responsible for climate change before the ECtHR. It must be noted that, as the Hague District Court reiterated, NGOs cannot themselves be considered victims of

individual rights violations. However, the potential standing of the individual claimants was essentially left unanswered. Certainly, some ECtHR case law appears to suggest that a climate case before the Court could have some potential of succeeding. However, there are also numerous obstacles that have to be considered. For instance, there is no *actio popularis* under the ECHR, and, in general, there is need for a clear link in order to receive victim status (Loucaides, 2005). Additionally, states are given a substantial margin of appreciation to pursue environmental objectives under the ECHR, and there is a requirement to exhaust local remedies (Boyle, 2006). Finally, it must be noted that the Court may opt to exercise judicial restraint in this regard with a view to political considerations.

In the Chinese context, there have also been some instances of environmental public interest litigation. Considering its status as the largest polluter globally, the potential for environmental public interest lawsuits in China is of particular interest. China's new environmental protection law, which came into force on 1 January 2015, has opened some doors in this regard by, for instance, granting standing for NGOs to bring cases on behalf of the public, if they satisfy certain conditions (Liu, 2015). It also enhances liability regimes for polluters and public officials who act in dereliction of their duties, leading ClientEarth CEO James Thornton to suggest that some of the law's provisions are more advanced than those

applicable in the UK context (Thornton, 2015). Under this new legislation, which seeks to involve citizens in the struggle against pollution, an increase in public interest litigation is to be expected. However, it is unclear whether the shift is merely symbolic, or if it will have a more concrete impact. Additionally, bringing suit against government authorities in China is marred with difficulties, with cases often disappearing into a so-called 'black hole' (Botsford, 2016). Significantly, judicial independence is lacking, and the socialist rule of law means that there is no clear hierarchy between the law and political practice (Peerenboom, 2015). Thus, where the new law is likely to enhance the effectiveness and frequency of environmental public interest litigation in China, much is dependent on how it is implemented, and there are limits to its potential.

The future prospects of public interest litigation as a tool to tackle climate change merit some cautious optimism. Despite numerous obstacles, including the problem of standing and proving causation in climate change cases, other ongoing cases are already attempting to hold the state accountable for climate change, following the successes of *Urgenda* and *Leghari*. Climate change public interest litigation could also be used to bring cases before regional courts, particularly the ECtHR. However, it is unclear whether such claims would succeed. Significantly, public interest litigation has some potential as a mechanism in the Chinese context,

especially under the new environmental protection law, though it seems unlikely that a claim seeking to hold the state responsible for climate change would be successful in the Chinese context.

## VI. Conclusion

The emerging trend of public interest cases holding the government responsible for climate change is an important breakthrough in climate litigation. This paper has sought to deepen the understanding of this phenomenon by elaborating on its historical context, analysing the present emergence of climate change public interest litigation, and assessing the future potential of this technique. It was found that these cases, which have revolutionised attitudes towards climate litigation, represent a trend in the making. The successful Urgenda and Leghari cases can serve to embolden the efforts of civil society pushing for climate action worldwide.

Essentially, these examples demonstrate that it is possible for non-governmental actors to hold states responsible for climate change, something that seemed impossible or at least highly unlikely before. Perhaps this development alone can be presented as evidence of shifting attitudes, which in themselves indicate that social change is underway. Nonetheless, much depends on the outcomes of ongoing cases, particularly in Belgium, the US, and Norway, to ensure that this emerging trend solidifies. If this solidification occurs, climate change public interest litigation could also be taken to the regional level at, for instance, the ECtHR, in addition to various national jurisdictions. These findings suggest that the potential impact of this new method to address the widespread political intransigence with regard to climate change is significant. However, only the future can tell to what extent these climate cases will actually succeed in stimulating action, and effectuating meaningful social transformation.

## Footnotes

- 1 US Supreme Court Justice John Paul Stevens remarked in relation to a series of cases viewed as activist that, “[...] with the benefit of hindsight I can say that I now agree with each of these examples of judicial activism” (Stevens, 2002, p. 26), and former Indian Chief Justice A. H. Ahmadi noted that judicial activism forms a necessary adjunct of the judicial function, seen as the main concern is the public as opposed to the private interest (Sathe, 2001, p. 30).
- 2 The Court defined public interest litigation in para. 19A as “[...]litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest [...]”.
- 3 Other jurisdictions that have seen environmental public interest litigation include Pakistan, Bangladesh, the UK, and China.
- 4 See the Dutch government website for an up-to-date overview of developments in the *Urgenda* case: <https://www.rijksoverheid.nl/onderwerpen/klimaatverandering/inhoud/klimaatrechtszaak>.
- 5 See the Belgian climate case website for an up-to-date timeline of the proceedings: <http://www.klimaatzaak.eu/nl/de-rechtszaak/#klimaatzaak>.
- 6 For legal arguments against Norwegian oil exploration in the Arctic see: Sjøfjell, B., & Halvorsen, A. M. (2015). The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway. *Oil, Gas and Energy Law (OGEL), Special Issue September*.
- 7 For a more extensive coverage of the argument for climate change liability under the ECHR see: Cox, R. H. J. (2014). The Liability of European States for Climate Change. *Utrecht Journal of International and European Law*, 30(78), 125-135.

## References

### Legislation

Restatement (Second) of Torts § 821B (1979).

### Case law

Ashgar Leghari v Federation of Pakistan, W.P. No. 25501/2015.

Comer v. Murphy Oil, 585 F.3d 855 (5th Cir. 2009).

Kelsey Cascade Rose Juliana v. the United States of America, 6:15-cv-01517-TC. Order denying the government's motion to dismiss (2016).

Massachusetts v EPA, 549 US 497 (2007).

M.C. Mehta (CNG buses) v. Union of India, AIR 2002 SC 3696.

Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

SP Gupta v. Union of India, AIR 1982 SC 149.

Urgenda Foundation v. State of the Netherlands, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689 / HA ZA 13-1396.

### Scholarly articles

Boyle, A. (2006). Human Rights or Environmental Rights-A Reassessment. *Fordham Environmental Law Review*, 18, p. 471-511.

Broek, B. V. D., & Enneking, L. (2014). Public Interest Litigation in the Netherlands: A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts. *Utrecht Law Review*, 10, p. 77-90.

Carpenter-Gold, D. (2015). Castles made of sand: public-interest litigation and China's new environmental protection law. *Harvard Environmental Law Review*, 39, p. 241-567.

Cox, R. H. J. (2014). The Liability of European States for Climate Change. *Utrecht Journal of International and European Law*, 30(78), p. 125-135.

Cummings, S. L., & Rhode, D. (2009). Public interest litigation: Insights from theory and practice. *Fordham Urban Law Journal*, 36, p. 9-19.

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), p. 517-527.

Deva, S. (2009). Public interest litigation in India: A critical review. *Civil Justice Quarterly*, 28, p. 19-40.

Gupta, J. (2007). Legal steps outside the climate convention: litigation as a tool to address climate change.

Review of European Community & International Environmental Law, 16(1), p. 76-86.

Heringa, A.W. (2016). Rechter en politiek: verzaakt de politiek/wetgever of dient de rechter juist het belang van de wetgever? *Milieu en Recht*. 3(34), p. 203-206.

Hershkoff, H. (2005). Public interest litigation: selected issues and examples. Washington, DC: The World Bank.

Hester, T. (2013). Private Claims for a Global Climate: US and Indian Litigation Approaches to Climate Change and Environmental Harm. *Journal of the Indian Law Institute*.

Hilson, C. (2015). The Curious Invisibility of Environmental Rights in the EU Legal Order. Paper presented at the 22nd International Conference of Europeanists.

Hussain, F. (1993). Public Interest Litigation in Pakistan. Sustainable Development Policy Institute, Work Paper Series, (5).

Liu, T. (2015). China's Revision to the Environmental Protection Law: Challenges to Public Interest Litigation and Solutions for Increasing Public Participation and Transparency. *George Washington Journal of Energy & Environmental Law*, 6(2), p. 60-70.

Kmiec, K.D. (2004). The Origin and Current Meanings of "Judicial Activism". *California Law Review*, 92(5), p. 1441-1477.

Loucaides, L. (2005). Environmental protection through the jurisprudence of the European Convention on Human Rights. *The British Year Book of International Law*, 75(1), p. 249-267.

Peerenboom, R. (2015). Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! *Hague Journal on the Rule of Law*, 7(1), p. 49-74.

Peters, G. P., Andrew, R. M., Boden, T., Canadell, J. G., Ciais, P., Le Quéré, C., Wilson, C. (2013). The challenge to keep global warming below 2 C. *Nature Climate Change*, 3(1), p. 4-6.

Ryan, E. (2016). The Clean Power Plan, the Supreme Court's Stay, and Irreparable Harm. *FSU College of Law, Public Law Research Paper No. 798*.

Sahu, G. (2008). Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence. *Law Environment & Development Journal*, 4(1), p. 1-19.

Sathe, S.P. (2001). Judicial Activism: The Indian Experience. *Washington University Journal of Law and Policy*, 6, p. 29-107.

- Siegel, N. (2010). *Interring the Rhetoric of Judicial Activism*. *DePaul Law Review*, 59(2), p. 555-600.
- Sjåfjell, B., & Halvorssen, A. M. (2015). *The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway*. *Oil, Gas and Energy Law (OGEL)*, Special Issue September, Tina Hunter (ed.).
- Stevens, J.P. (2002). *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*. *Chicago Bar Association Record* 16(2002), p. 25-33.
- Welti, T. (2008). *Massachusetts v. EPA's Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*. *Virginia Law Review*, 94(7) p. 1751-1785.
- Loth, M., and van Gestel, R. (2015). *Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?* *Nederlands Juristenblad*, 37, p. 2598 - 2605.
- Books**
- Razzaque, J. (2004). *Public interest environmental litigation in India, Pakistan, and Bangladesh (Vol. 7)*: Kluwer Law International.
- Other**
- About Public Interest Litigation. The PILS Project. Available at: <http://www.pilsni.org/about-public-interest-litigation>.
- Botsford, P. (2016). *China's War on Pollution*. International Bar Association. Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=d4101ee7-fb0b-41cf-b1d1-936a075382d5>.
- Environmental Protection Agency. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*. 74 FR 66496-66546 (2009).
- Greenpeace Nordic Association and Natur og Ungdom. (2016). *Writ of Summons in the People v. Arctic Oil*. Available at: [http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal\\_writ\\_english\\_final\\_20161018.pdf](http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf).
- Hague climate change judgement could inspire a global civil movement. (2015). *The Guardian*. Available at: <http://www.theguardian.com/environment/2015/jun/24/hague-climate-change-judgement-could-inspire-aglobal-civil-movement>.
- Klimaatzaak vzw. (2015) *Summons in the Belgian climate case*. Available at: <http://www.klimaatzaak.eu/wp-content/uploads/2015/04/Dagvaarding.pdf>.
- The Supreme Court of India. *Guidelines to be followed for entertaining letters/petitions received in the court as public interest litigation*. Available at: <http://supremecourtfindia.nic.in/circular/guidelines/pilguidelines.pdf>.
- Thornton, J. (2015). *Can We Catch-Up? How the UK is falling behind on Environmental Law*. Garner Lecture 2015.