

BURNISHED LAW JOURNAL

Nitish Mahajan

University Institute of Legal Studies, Chandigarh University

STATE OF THE NETHERLANDS V. URGENDA FOUNDATION: THE FUTURE OF CLIMATE-CHANGE LITIGATION

“Climate change is no longer some far-off problem; it is happening here, it is happening right now.”

- Barack Obama

ABSTRACT

The role of litigation in addressing the problem of climate-change focuses not only on how the growing number of lawsuits influences regulation directly but also on how these lawsuits shape corporate behavior and public opinion. It also provides an understanding as to how these lawsuits shape approaches to mitigate and adapt to try and force or block regulation.¹ The decision in the case of Urgenda v. The State of Netherlands² was a historic and ground-breaking one in the area of climate-change litigation. The decision although appealed several times by the government of the Netherlands was upheld by the Supreme Court of Netherlands in 2019, thereby giving an absolute and unanimous decision in the matter of the role of the government and the “duty of care” the government needs to fulfill towards its citizens. In this paper, the researcher examines the case in its entirety and also analyses the future of climate change litigation as it follows the tort law approach which was earlier tried only against large conglomerates and fossil fuel companies but the Urgenda case took it to a whole new level when they sued the Government.³

INTRODUCTION:

¹ Jacqueline Peel, Hari M. Osofsky, *CLIMATE CHANGE LITIGATION*, CAMBRIDGE UNIVERSITY PRESS. pg-9-12.

² State of Netherlands v. Urgenda Foundation, case no. 19/00135, ECLI:NL:HR:2019:2007 (2019)

³ Roger Cox, *A CLIMATE CHANGE LITIGATION PRECEDENT: URGENDA FOUNDATION v. THE STATE OF NETHERLANDS*, Journal of Energy & Natural Resources Law, 2016, pg-144-149

The Urgenda Foundation along with 886 Dutch citizens brought legal action against the Dutch state for its ongoing contribution to climate change.⁴⁵ They argued that the government by not regulating and not taking enough measures to curb the emission of Greenhouse gases (GHG), the state committed a tort of negligence against its citizens.

The Hague District Court rendered its decision on 24 June 2015, confirming the allegation and claims made by Urgenda and considered that the then existing climate policies were inadequate, unlawful and hazardous. The court ordered the Government to limit the joint volume of Dutch annual GHG emission by at least 25% at the end of 2020 compared to its 1990 levels.

The decision of the Hague district court is historic in the sense that it was the first successful climate change action that was found in tort law as well as the first time that a court actually determined appropriate emissions reduction target for a developed state relying on the state's "duty of care" and to find a solution for the Global Climate Situation.

The tort law approach has only been tried before against large fossil fuel companies such as the lawsuits filed against Exxon Mobil⁶ and American Electric Power Company⁷. These have gone without success as the US courts have repeatedly dismissed the cases on the grounds that the matter of GHG emission is more of a political issue than a legal one.

BURNISHED LAW JOURNAL

Climate-change litigation against Government institutions have historically been focused on administrative environmental and planning law rather than private/tort law; the case of *Gray v. the Minister of Planning*⁸ discussed the environmental impact and GHG impact of Burning coal and the importance of Environmental Impact Assessment as well as in the case of *Massachusetts v. Environmental Protection Agency (EPA)*⁹ in which 12 states and several other cities brought an action against the EPA to force it to regulate GHGs as air pollutants. These cases however only dealt with the capacity of powers the US constitution gave its states to oppose and bring about action against perpetrators that obstruct the basic rights of the people, in this case the right to life and access to clean air and environment.

⁴Roger Cox, *CLIMATE CHANGE*, Utrecht Journal of International and European Law, 2014, pg-156-189

⁵ Roger Cox, *CLIMATIC APOCALYPSE*, Journal of Planning and Environmental Law, 2014,pg-231-239

⁶ *Native Village of Kivalina v ExxonMobil Corp.*, 696 U.S. 849 (2012)

⁷ *American Electric Power Company v Connecticut*, 564 U.S (2011)

⁸ *Gray v Minister for Planning and Ors*, 152 LGERA 258 (2006)

⁹ *Massachusetts v Environment Protection Agency*, 549 US 497 (2007)

In the Urgenda case, the decision taken by the court was a conscious and revolutionary one, it brought tort law to bear against a national government rather than against the fossil fuel sector which had become a common sight, the national governments have made explicit statements in context of the United Nations Framework on Climate Change (UNFCCC) and its annual conferences regarding the danger of climate change and the actions that are required to be taken based on the findings of the Intergovernmental Panel on Climate Change (IPCC).

Since the initial drafting of the UNFCCC, the industrialized countries have committed to take initiative with respect to dealing with the problems and situations arising due to the GHG emissions.

THE DECISION

The Dutch Courts ruled on the matter on the basis of:

- The issue and dangers of climate change
- Global problem and national responsibility of the government to take sufficient measures to combat the problems arising
- The severity of the impact of Climate-change.

Urgenda and the state both endorse the view of climate science that a genuine threat exists that the climate will go through a dangerous change in the coming future. The parties also agreed that the warming of the earth beyond the limited temperature range as specified by the UNFCCC reports and in conventions that the temperature must not rise more than 2°C. If the temperature limits are not met with, there might be dire consequences such as extreme heat, drought, extreme precipitation, disruption of ecosystems that would jeopardize food supply and also lead to rise in the sea-levels due to the melting of glaciers and the polar ice caps. All of these consequences would jeopardize the lives, welfare and the living environment of the people globally making Climate-change a serious threat to human rights.¹⁰

The risk of the climate-change is global and is not specifically caused by the Dutch territory in particular but is a contribution of all the nations and territories of the world as greenhouse gases are emitted by all the countries. The consequences of these emissions are also experienced by all

¹⁰ State of Netherlands v. Urgenda Foundation, case no. 19/00135, ECLI:NL:HR:2019:2007 (2019)

of the contributors. The Netherlands is a party to the UNFCCC, which is a convention whose objective is to keep the concentration of GHGs in the atmosphere to a level that does not cause a disruption to the climate-system of the globe through human action. The UNFCCC requires its member nations to take measures to prevent climate change in accordance with their specific responsibilities and options.¹¹

Each country is responsible for its own the amount of emissions, which means a country cannot escape its own share of responsibility to take measures by arguing that in comparison with the rest of the world, its emissions are relatively limited and a reduction in its emissions will not have a significant impact on a global scale.

The District court ordered the State to limit the combined volume of Dutch annual GHG emissions or cause them to be limited so that the GHG emissions are reduced by at least 25% at the end of 2020 compared to its levels in 1990. The court also considered the severity of the impact from climate change and the significant chance that unless mitigating measures are taken dangerous climate-change would occur, the state has a “duty of care” to take mitigating measures.¹²

The decision was appealed by the state in the Court of Appeals where the decision of the District Court was upheld. The state also appealed to the Supreme Court where the Court ordered the Government to follow the decision delivered by the lower courts.

With regard to the question about the severity of the problem of climate change the court considered that the IPCC has established that a worldwide change in climate is taking place and it is highly likely that these changes are being caused mainly due to human actions such as combustion of fossil fuels and deforestation. The court then determined that the Dutch target for 2020 was below the standard that was deemed necessary by Climate science and International policy.

It should be noted that the court found that due to the principle of fairness, the state would be required to choose measures that would take into account the costs that are to be reasonably

¹¹ Article 2, United Nations Framework on Climate Change Convention (UNFCCC)

¹² Intergovernmental Panel on Climate Change (IPCC), Fifth Assessment Report (www.ipcc.ch)

distributed between the current and future generations. The court also said that the only effective remedy to prevent hazardous climate change is to reduce GHG emissions.¹³

THE SIGNIFICANCE OF THE DECISION FOR CLIMATE CHANGE LITIGATION

Urgenda is significant as the first judicial decision to recognize that the IPCC science findings provide an appropriate basis for a court to determine that a domestic government owes its citizens a duty of care to reduce carbon emissions in order to avoid overshooting the 2°C limit on a global temperature rise. The confidence placed by the Urgenda court on IPCC science will likely be influential for courts in other countries considering whether IPCC findings should similarly be regarded with high confidence and as essentially determinative¹⁴.

The Urgenda Foundation took a new approach to deal with the problems of climate change; they used the tort law approach, specifically the tort of “negligence”. Negligence is defined as “coming short of the performance of duty¹⁵.” Urgenda sued the state using this principle stating that the state had not performed its duty to take sufficient measures to combat Climate change.

This approach has been previously applied only to sue conglomerates and companies that contribute directly to pollution and climate change, such as companies dealing with Fossil Fuels, etc. but was never applied to make the government act or take more measures to do something, as a “Tort” is defined as “an injury or a wrong committed with or without force against a person or property¹⁶” meaning it only deals with personal wrong committed against an individual and not a matter of policy. The court started with the premise that, under Dutch law, NGOs are allowed to institute public interest cases. Under the Dutch Civil Code, a foundation or association with full legal capacity may bring an action to the court pertaining to the protection of general interests or the collective interests of other persons, insofar as the foundation or association represents these general or collective interests¹⁷.

¹³ Supra 2

¹⁴ Supra 2

¹⁵ P RAMANATHA AIYAR, *CONCISE LAW DICTIONARY*, SIXTH EDITION, PAGE-875, LEXIS NEXIS

¹⁶ P RAMANATHA AIYAR, *CONCISE LAW DICTIONARY*, SIXTH EDITION, PAGE-1311, LEXIS NEXIS

¹⁷ Supra 2

The case of Urgenda foundation v The State of Netherlands¹⁸ was a unique and historic victory for the struggle for climate change litigation in a global perspective, as for the first time since the dawn of the legal world, an authority, in this case the domestic court found its national government in breach of its “duty to care” to citizens and requiring it to take appropriate action to reduce emission of Green House Gases (GHGs). It is to be noted that this case inspired citizens to take up matters of environmental importance to the legal authorities to initiate action and compel / compel speedy action from the side of the citizens’ government to curb/regulate the issues on a global scale. The Urgenda case exemplifies the role of modern day institutions especially the domestic courts as action-forcing mechanisms that can help achieve a sustainable and reliable environment.¹⁹

CONCLUSION

Urgenda illustrates that there are various junctures when courts or legal authorities find it appropriate to require state actions because among other significant reasons, the governments do not act unless told to do so by a legitimate superior authority in this case the rule of law.

The judicial findings in the Urgenda case explicitly states that “the time has passed when we can simply ignore or minimize what we know with great certainty has been developing into the most serious environmental crisis in the history of humanity”²⁰.

While the Urgenda decision does not explicitly state the role of the judiciary in combating climate change but does implicitly personify the timeliness for judicial intervention in the court’s reasoning and its decision that expands the boundaries of the government’s tort duty of care and not just declare the insufficiency of action taken by the state. Urgenda thus provides important and significant insights that the insufficiency in the government’s carbon reduction policies that can increasingly be found as a propitious subject matter that can be taken up for judicial review.

¹⁸Supra 2

¹⁹ David Estrin, *LIMITING DANGEROUS CLIMATE CHANGE: THE CRITICAL ROLE OF CITIZENS AND DOMESTIC COURTS*, C.HURST AND COMPANY, pg- 6-12 (2016)

²⁰ Allan Early, *Urgenda Foundation v The State of Netherlands (Ministry of Infrastructure and the Environment) Summary and Commentary*, (2018)

