CENTRE FOR HUMAN RIGHTS

Global Climate Justice

A report on global climate change litigation trends

This is an independent report prepared by the Centre for Human Rights for the Commission on Human Rights of the Philippines.

About the Centre for Human Rights

The Centre for Human Rights, housed in Universal College Lahore, is a legal research institute that actively researches on issues of human rights, and works on legal policy, due process, rule of law and criminal justice reforms in Pakistan. The Centre aims to provide legal analysis which are rights-based, human centric and aimed at enhancing the constitutional freedoms of equality and non-discrimination.

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1. Background

1.1 Introduction

This research report has been carried out to understand and interpret judicial attitudes globally as regards climate justice by analysing four landmark climate change cases of the 21st century, and how these cases are mapping out the route for climate change litigation worldwide. With a specific focus on the four landmark cases, the report has identified two main categories and four pathways in which jurisprudence is developing. The report has also identified emerging themes in such litigation, and how these themes are contributing to the jurisprudence on environmental law as a whole.

1.2 Research Problem

The research problem was broadly to analyse judicial attitudes and the effects of the following cases; *Urgenda Foundation v State of the Netherlands*, *Juliana v USA*, *Luciano LLiuya v RWE AG, and Native Village of Kivalina v ExxonMobil*. These cases were chosen as they have considerably changed the course of climate change litigation with scientific assistance, and have thus set landmark precedents in environmental law. The focus while analysing these cases was to determine how courts have dealt with the arguments put forth in these cases; how willing they are to entertain climate change litigation; what gaps currently exist; the role of science in shaping new precedents; and finally, how the decisions of these cases are impacting climate change litigation globally.

1.3 Research Objectives

The objective of the research was to understand whether or not climate change issues, which have long been dealt with by the legislative branch of the state, can properly be tried in courts, and if so, then what are the solutions that have been provided by the courts to deal with climate change. If not, then why does the legislature continue to be the proper forum for dealing with climate change? The broader objective of the research was to understand how viable the concept of common but differentiated responsibilities[1] propounded in the Paris Agreement is in practice. With this in mind, the different cases discussed in the report, when observed in the collective, may aid the reader in predicting the realistic possibility of achieving the 2030 and 2050 targets, and the possibility of creating a net zero-carbon planet for the future generation.

[1] A principle of international environmental law, meaning that all states are responsible for tackling threats posed to the environment, and are yet not equally responsible, due to the varying degrees of economic ability.

1.4 Methodology

(a) Data Collection and limitations

The primary data for the research was original case petitions and judgements of the courts which were read and analysed in depth. A total of 31 cases were read, however, only a few of the cases are analysed in the report with a specific focus, but all 31 cases reflect the collective and broader analysis of the report.

The only limitation was the lack of availability of original and translated documents for a few cases. In order to overcome this limitation, secondary data, such as press releases, unofficial case briefs, unofficial translations of legal documents, news reports, etc. were relied upon.

(b) Framework of Analysis

The starting point was the identification of landmark cases governing two specific areas; Cases Against Governments and Cases Against Private Companies. Under the first category, there are cases which have been successful, and those where petitions have been denied. For successful cases, **Urgenda Foundation v State of Netherlands** is the leading precedent. This case was used to look for cases where Urgenda has been used as a basis for successful litigation. On the other hand, **Juliana v USA** has been used, to some degree, as the governing precedent for cases where petitions were denied, but more specifically for comparing the trends in the US litigation on climate justice. These two cases demonstrate the two pathways in which litigation against states is developing.

Under the second category, **Luciano Llliuya v RWE AG** was analysed to predict the future of litigation against private companies, and **Kivalina v ExxonMobil** has been relied upon to map out the patterns of climate change litigation in the USA against private companies. These two cases demonstrate the two pathways in which litigation against private companies is developing.

The framework of analysis of all cases is divided into three broad categories;

(a) Injury
(b) Cause
(c) Remedy

These generalised terms have been selected because they are commonly referred to in legal discussions. Within these broad categories, the report fits the novel aspects of the climate change cases.

2. Key Players in Climate Change Litigation

The key players in climate change litigation include the injured parties. In the mainstream context of judicial standing, it seems apparent that those directly injured, i.e., natural or legal persons, have locus standi to appear before the court. This is true for climate change litigation as well, however, the recognition of who is a legal or natural person is now being redefined given that the gravity of anthropogenic climate change does not affect human beings alone. In this survey of climate change litigation, it has been found that courts are now opening their doors to more "natural" and "legal" persons, leading to landmark developments in the law, recognising injuries of persons that did not previously have the capacity to defend their rights before the courts.

Referring first to the typical natural and legal persons that have been injured, the key players are farmers[2], charitable and not-for-profit organisations[3], youth[4], law students[5], women[6], and US States[7].

However, the courts are now also recognising the ability of future generations, and in some states, the right of forests and marine ecosystems[8] to appear before the court, as anthropogenic climate change is affecting both significantly.

It may seem strange to recognise rights of those who are not born yet, as well as those of ecosystems, as the longstanding conventional concept of "capacity" at law is restricted only to rational and sentient persons or those possessing a legal personality. By recognising the rights

[2] Luciano Lliuya v RWE AG [2015]; Family Farmers and Greenpeace v Germany [2018]; Asghar Leghari v Federation of Pakistan [2015].

[3] Urgenda Foundation v State of Netherlands [2013]; Friends of Irish Environment v Ireland [2017].

[4] Juliana v USA [2015]; Kim Yujin v South Korea [2020]; Ridhima Pandey v India [2017].

[5] Thomson v Minister for Climate Change [2015].

[6] Union of Swiss Senior Women v Federal Council [2016].

[7] Mayor & City Council Baltimore v BP Plc. [2018]; Rhode Island v Chevron [2018]; City of Oakland v BP Plc. [2017].

[8] Colombian Amazon is a subject of rights pursuant to the decision in Demanda Generaciones Futuras v. Minambiente [2018]; *See generally* Macpherson, E. (2019). Rivers as Subjects and Indigenous Water Rights in Colombia. In Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience (Cambridge Studies in Law and Society, pp. 131-160). Cambridge: Cambridge University Press.; *See also* Michael, S. (2017, March 21). Ganges and Yamuna rivers granted the same legal rights as human beings. (Michael Safi, 'Ganges And Yamuna Rivers Granted Same Legal Rights As Human Beings' (*The Guardian*, 21 March 2017) <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> Accessed 11 August 2020).

of other living organisms that make up the ecosystem such as the rivers, mountains, and forests is a big step in the right direction as the ecosystem is what makes up the planet and injuring the ecosystem injures every other living being on the planet. Furthermore, recognition of the rights of the future generations is also an important turning point because it legally solidifies the fact that it is the youth, and those who are yet to be born, that will have to bear the drastic consequences of climate change, and live in a world that may no longer be able to sustain life efficiently. For the proper survival of the human race, it is paramount to conserve the ecosystem and prevent it from being damaged by climate change and from eventually being destroyed completely. Therefore, the addition of future generations and different ecosystems legally recognises the extraordinary co-dependency of various life forms.

3. Landmark Precedents

3.1 Urgenda Foundation v State of the Netherlands

The Urgenda case has significantly contributed to international law, human rights, tort and public law. The judgement has inspired litigation worldwide, and currently holds great legal and symbolic value. In this case, Urgenda, a Dutch foundation, believed that the State was doing too little to prevent climate change. They alleged that dangerous climate change was injuring the lives, welfare and living environment of many people all over the world, including in the Netherlands, and that the State's inaction was violating human rights. Urgenda then made a petition to the court on behalf of 886 Dutch citizens seeking a court order directing the State to reduce its emissions of greenhouse gases (hereinafter referred to as "GHG") so that by the end of 2020 those emissions would have been reduced by 25% - 40%, as compared to 1990.

The Supreme Court of Netherlands rejected the appeal of the State, and determined that it would not be in violation of the separation of powers by deciding the case because although the decision-making on GHG emissions belongs to the government and parliament, it is up to the courts to decide whether the government and parliament have remained within the limits of the law in designing their policies. As the State had not designed a policy in compliance with the European Convention on Human Rights (hereinafter referred to as "ECHR") to take suitable measures to protect citizens of the Netherlands from climate change, the Supreme Court found the case to fall well within its jurisdiction. The Court ordered the State to reduce its emissions by at least 25% as compared to 1990 by the end of 2020, because based on climate science a direct causal link was found between GHG emissions and the burning of fossil fuels by humans. By doing so, the Court has established that it is the right avenue for climate change related issues, and ensures that the government will be held accountable should it not perform its part in dealing with climate change.

The human rights argument was upheld by the Supreme Court on the basis of Articles 2 (right to life) and 8 (right to respect for private life and family) of the ECHR which were interpreted to extend to environmental hazards that have created a real and immediate risk to people's life, even if the risk will not materialise in the short term. This, coupled with the separation of powers argument, shows excellent enforcement of the social contract between the Dutch citizens and the Dutch State.

Moreover, the Court, while reminding the State of the duty of care that it owes to Dutch citizens, also added that this duty extends globally as GHG emissions of the Netherlands also affect citizens of other countries. This is a great application of the no-harm principle.[9]

Additionally, the Supreme Court was very categorical in stating that responsibility cannot be escaped simply by reason that emissions of the Netherlands are limited in scope as compared to the rest of the world, and reduction in the State's emissions would have very little impact on a global scale. Therefore, the State was made to accept its responsibility with respect to its contributions to climate change, so it could at least contribute in slowing down climate change, if not reversing it. The *Urgenda* case makes the notion of "common, but differentiated responsibility" quite achievable in practice, and demonstrates how the essence of the non-binding Paris Agreement has so altruistically been upheld by the State of Netherlands.

The final point of the judgement was with respect to the precautionary principle.[10] This was used to reject the State's argument that full scientific certainty regarding the efficacy of reducing emissions by 25% was lacking. It was found that the existence of a real risk of danger as per scientific evidence placed the State under a duty to take precautionary measures, and was sufficient to pass the order against the State.

This case is a remarkable example of the interplay between international and domestic law to prevent climate change. The international standards set by the Paris Agreement were implemented through domestic resources, such as EU law on human rights, and the Dutch constitutional and tort law. It serves as a good guidance tool for other countries on how they can combine domestic and international legal resources to provide climate justice. Moreover, the acceptance by the Court of a petition on behalf of 886 citizens has made it possible for more

[9] This is a principle of customary international law which places a State under a duty to prevent, reduce, and control the risk of environmental harm to other states.

[10] As per this principle, where there is a lack of scientific certainty, it is better to take more far-reaching measures to reduce GHG emissions rather than less-far reaching measures.

people to access the courts in terms of climate change litigation, as previously only a defined and identifiable group of people could do so. However, in this case, the petition is on behalf of all the citizens of the Netherlands for the enforcement of not only their rights, but also the protection of the global community.

As a result of this judgement, the government of Netherlands has come up with a comprehensive national plan to take 54 Actions For 17 M Tons of CO2 Reduction, and 30 of the measures have been lifted from Urgenda's "54 Climate Solutions Plan ".[11] This case, therefore, stands as a strong example for how collective efforts of the people, the judiciary, and the government can help reduce climate change.

3.2 Juliana v USA

Although the petition was denied in this case by the Court of Appeals of the Ninth-Circuit (hereinafter referred to as "the Ninth-Circuit"), it is still considered to be landmark in the manner it dealt with the injury and causation requirements. Moreover, the powerful dissenting judgement passed by Judge Staton shows that there are judges within the United States judiciary who are willing to exercise judicial activism to overcome dangerous anthropogenic climate change. The case is currently pending a rehearing.

The lawsuit was filed by 21 youth plaintiffs in 2015, arguing that the government, by supporting a fossil-fuel based economy despite being aware of the catastrophic damages to the climate, had caused them injury by violating their constitutional freedoms of life, liberty and property. The remedy they sought was an order requiring the government to develop a framework to phase out fossil fuel emissions, and draw down excess atmospheric carbon dioxide.

The Ninth-Circuit had to determine whether or not the youth plaintiffs had Article III standing under the US Constitution. The test for standing is threefold; existence of a particularised injury; causation; an injury capable of being redressed. The majority, whilst agreeing that climate change is occurring at a rapid pace and that the government affirmatively promotes fossil fuel use in a number of ways, denied the petition. It found that the youth plaintiffs had been injured, and that the government had caused climate change even though there were multiple other links in the chain of causation. However, it held that the injury could not be remedied by the courts because it raised questions of policy that disrupted the principle of separation of powers, and even if the judiciary were to grant the order, the enforcement of the order would require a lot

[11] '54 Actions For 17 MTons Of CO2 Reduction' (*Urgenda*) <https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan> Accessed 11 August 2020.

of time and supervision by the Court. The majority directed the plaintiffs to take their grievances to the legislative branches. The majority was also skeptical of the litigation itself and its consequences. They justified their skepticism by relying on the scientific opinion which stated that government contributions, even if eliminated completely, would neither halt nor decrease climate change.

However, the dissent of Judge Staton provides some hope for both US citizens and the global population which is affected by the GHG emissions of the USA. Judge Staton found all three requirements for standing to be satisfied, and stressed the importance of climate science which not only clarified the magnitude of the harm, but confirmed that the harm is irreversible. She also held that climate change is a major threat to the perpetuity of the USA which was a principle the Founding Fathers of America were most mindful of whilst drafting the Constitution. The Judge resolved the issue of separation of powers by stating that the tripartite system works on a balance, rather than a strict separation, and that this was not the first time this Court was being asked to decide on a policy question. She reminded her colleagues of the times where the judiciary had decided on, as well as spent years supervising, a policy question, such as in cases concerning racial segregation. The Judge did not see a reason why they could not decide on a policy matter now especially since these final efforts are what may "*slow down the impending cataclysm*", if not reverse it.

The decision of the majority stands in stark contrast with the *Urgenda* case. This, especially in consideration of the varying applications of the common but differentiated responsibility principle between the two cases. *Urgenda* and *Juliana*, therefore, have created two pathways in which the environmental jurisprudence is developing. However, interestingly, the dissent in *Juliana* reconciles the differences between the majority's decision and the *Urgenda* decision, and this makes *Juliana* a fascinating oddity. The *Juliana* case is the first time the majority of a US Court has upheld the first two requirements of Article III standing in a case brought by individual citizens. This is a major development in the US climate change litigation, and certainly shows a shift in judicial attitude. However, it remains to be seen what the final fate of *Juliana* will be.

3.3 Luciano Lliuya v RWE AG

This case, although still pending, may potentially change the course of climate change litigation against private companies through an artful and clever combination of tort law and environmental law backed by climate science.

The petition was made by a Peruvian farmer from Huaraz (an area in the flood path of Lake Palcacocha), who filed the case in a German court against the parent company RWE AG, an energy giant based in Germany. The plaintiff alleged that the increasing volumes of the lake were due to the glacial retreat caused by anthropogenic climate change, part of which could be scientifically measured and attributed to RWE (calculated at 0.47%). He alleged that this increase in lake volume may cause flooding, which would result in widespread injuries to the residents of Huaraz. The plaintiff attempted to establish causality in the legal sense between the flood risk and the defendant's GHG emissions through the "but for" test with a new twist; that but for RWE's contribution of 0.47%, the flood risk would not have increased, and therefore, RWE should be held liable only for the percentage of its contribution. The remedy sought by the plaintiff was a declaratory judgement establishing that the defendant is obligated to protect the property of the plaintiff against a glacial flood, proportional to its contribution to the damage, and claimed monetary damages calculated on the basis of the extent of GHG contributions.

The District Court did not find causation per the strict application of the "but for" test, "initially any action or inaction is causational, which, had it not occurred, would result in the effect in question being undone". The Court held that as the impact on the lake would not be undone by removal of RWE's GHG emissions, nor would the threat of a flood, therefore, no causal link existed. The claim was rejected on an additional ground that there are too many contributors of GHGs in this situation, and it is not possible to attribute damages to one emitter whose emissions are "insignificant" in any case.

However, the case has been deemed admissible by the Higher Regional Court in Hamm, and is now pending adjudication, and herein lies the significance of this case. In accepting the plaintiff's arguments, the Regional Court has said that it is enough that RWE's emissions are partially responsible for the flood threat, and that where multiple distributors exist, each distributor must eliminate their own contributions. The Regional Court has further confirmed that RWE's contributions at 0.47% are not insignificant. This appears to be a modified application of "common, but differentiated responsibilities", as it may now be possible to extend this concept to private companies as well. This reconfirms the practicality of the Paris Agreement, as it is useful not only for states, but also for private companies, and all other emitters of GHGs.

The simple recognition that a private company may potentially be responsible under the tort of nuisance for causing climate change is a significant development. It illustrates how the judiciary is slowly willing to hold the emitters of GHGs accountable one after the other, as our

understanding of who is making the emissions is enhanced through climate science. For instance, as of 2020, the judiciary has moved from holding states liable to possibly also holding private companies accountable. This shift in attitude can be credited to climate science which has made it possible to calculate climate data, and trace who has contributed how much. The numbers are certainly putting the reality of the events in perspective. Moreover, if this case results in a favourable decision for the plaintiffs, then this would be truly landmark as it would then be possible to hold private emitters liable causing climate damage in other jurisdictions. This could create an opportunity for developing countries to hold emitters in developed countries liable for causing climate change in developing countries through cross-border litigation.

3.4 Native Village of Kivalina v ExxonMobil

The Native Village of Kivalina alleged that massive GHG emissions emitted by energy producers substantially contributed to global warming, which unreasonably interfered with the public rights, including the right to enjoy public and private property, of the people of Kivalina. They argued that the contributions made by the energy producers to global warming had severely eroded the land where the City of Kivalina sits, and that Kivalina was threatened with imminent destruction which would require relocation of the inhabitants. The defendants, however, stated that these allegations could not be adjudicated as they raised political questions, and the court would have to determine the point at which GHG emissions became excessive without guidance from the political branches.

The Ninth-Circuit held that this case could not be decided by federal courts as their authority had been displaced by federal statute through the promulgation of the Clean Air Act, and that Kivalina's dire circumstances rested in the hands of the legislative and executive branches of the government, and not with the judiciary. Moreover, Judge Pro even went on to say that the chain of causation could not be established because global warming had been occurring for hundreds of years by multitude of emitters worldwide, and it would be very unreasonable to allow a private party to have standing to pick and choose from among a multitude of GHG emitters throughout history, and hold one of them liable for millions of dollars.

This case currently stands in contradiction with *Lliuya*, and was decided in 2012. However, it is unlikely that the decision of the Court would have been different in 2020 as Congress still largely governs environment related issues, and the strict procedures of the federal state have tied up the hands of the judiciary, as is evident from the *Kivalina* judgement. Moreover, most litigation against private companies that now occurs in the USA is in state courts as *Kivalina* court held that even though federal courts are inaccessible, state courts may still be able to

provide redress. This is the part of the judgement which has led to a never-ending game of cat and mouse between local states and private companies, as will be further discussed in Part 5 of the report.

4. Emerging themes and Patterns in Climate Change Litigation

Pursuant to the *Urgenda* case, people around the globe are now suing their governments for not doing enough to prevent climate change. A lot of this litigation is either being supported by the Urgenda Foundation through its creation of Climate Litigation Network[12] or the *Urgenda* case is being used as a precedent to demand climate justice. Although *Juliana* is a case of the same category, and the issues raised in that case are of global importance, it has been used as a precedent in only a few non-US cases[13] that have been reviewed for the purposes of this report. This may be because the case is still pending, and the procedural aspects of the case are very unique to the American Legal System. Nevertheless, these cases have led to similar legal arguments being raised with similar remedies demanded across the globe. The jurisprudential themes are both overlapping and unique.

4.1 Key Legal Issues

(a) Locus Standi

The legal definition of locus standi varies from country to country, and the criteria for standing may either be restrictive or broad depending on the type of legal system (civil or common).[14] In the European Union, for example, it is very difficult for citizens to establish standing under Article 263 TFEU before the European Court of Justice, and surpass the *Plaumman*[15] test of "direct and individual concern". This was the reason why the climate petition in *Armando Ferrão v European Parliament and the Council* was rejected by the EU General Court; a case which demanded a reduction of GHG emissions by 50% - 60% within the EU by 2030. Likewise, the legal system of the USA has a restrictive approach towards legal standing, and aside from *Massachusetts v EPA*, the courts have been extremely circumspect about establishing standing in climate change cases.

[12] 'Global Climate Litigation' (*Urgenda*) <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation> Accessed 11 August 2020.
[13] Ridhima Pandey v India [2017].
[14] Michael, B. (2017, May). The Status of Climate Change Litigation - A Global Review. UNEP and Sabin Center for Climate Change Law. Columbia University. Page 28.
[15] Plaumann v Commission (25/62, EU:C:1963:17).

However, the bottom line for standing is usually that the party appearing before the court has a stake in the outcome of the case, has been injured, and that the injury can be attributed to the defendant.[16] This often acts as a barrier to climate change litigation as plaintiffs are unable to establish the causal connection. For instance, the Federal Supreme Court of Switzerland[17] has held that the increased risk of injury due to prolonged periods of heatwaves was not specific only to women aged 75 and above, and so they did not have standing. Similarly, aesthetic and recreational harm caused by climate change preventing plaintiffs from seeking communion with nature was not considered to be a localised injury by the Federal District Court of Oregon.[18]

On the other hand, standing was not a hurdle in *Urgenda* as the Dutch law permits NGOs to defend the interests of people. Similarly, standing was not at dispute in *Shehla Zia v WAPDA*, where the issue was deemed a matter of public importance, and the Supreme Court intervened to protect the rights of citizens based on the precautionary principle, even in the face of inconclusive scientific data. *Asghar Leghari v Federation of Pakistan* followed suit, exhibiting how the Constitution has made the High Courts of Pakistan very accessible to the citizens for the enforcement of their constitutional freedoms. Therefore, how willing a court would be to entertain climate change litigation depends largely on the procedural nuances of the legal system that one is part of.

(b) Separation of Powers

This is a constitutional law doctrine that has branched out into other areas of law as well. As per this doctrine, one branch of the state exercises only those powers that have been granted to it under the constitution or other laws, and that it cannot usurp the power or authority of the other state branches. This doctrine often acts as a hurdle in climate change litigation, and has become the primary reason for the failure of climate change litigation in the USA. In *Juliana*, the third requirement of redressability was not met as the Ninth-Circuit did not have the power to award a remedy, and any redressal by the court would disrupt the separation of powers. Similarly, in cases against private companies, the same issue bars access to federal courts as the Clean Air Act in the USA has displaced federal authority, and any adjudication by federal courts would amount to a usurpation of authority of the federal statute.[19] Other countries have followed a

[16] *Supra note 12.*
[17] Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others [2016].
[18] Animal Legal Defense Fund v US [2018].
[19] Native Village of Kivalina v ExxonMobil [2008]; American Electric Power Co. Inc. v Connecticut [2004].

similar pattern; the Irish High Court[20] has stressed, "*courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic, and political preference*."

However, other countries have not been as stringent about separation of powers, and the issue has been artfully resolved.[21] In some countries, such as Pakistan, the issue has not even been raised.[22] In the *Shehla Zia* case, the Supreme Court invoked the Constitution and intervened to protect the fundamental rights of citizens, directing the Government to form a Commission consisting of leading scientists to be consulted before a policy decision was made. This judgement can be seen as striking the perfect balance between the role of the judiciary, and the government when it comes to tackling climate change, side-stepping issues of separation of powers in a model that can be followed by other jurisdictions as well. As the restriction placed by separation of powers is again a jurisdiction specific issue, great insights have also been provided by the New Zealand High Court in *Thomson v Minister for Climate Change Issues*. Here, the Court held that the entire subject matter of climate change issues is not a "no-go area" for the courts. It also found that the courts around the world[23] have held that they have a proper role to play in Government decision making with respect to climate change, whilst also recognising that there are constitutional limits in how to play this role and to what extent. Such skilful construction of legal arguments can help overcome the hurdle of separation of powers. Moreover, the spirit of this principle is rooted in effective checks and balances,[24] upon which US Courts have been able to historically rule on political matters.[25] This alludes to the possibility of the Government not doing enough to tackle climate change issues and the legal consequences it could have.

(c) Human Rights and Constitutional Law

Climate change litigation has surely taken a rights turned approach, and nearly all cases argue a violation of constitutional freedoms and international human rights. However, it must be noted that most jurisdictions do not recognise a freestanding right to a clean

[20] Friends of the Irish Environment v Ireland [2017].

[21] *See* Urgenda Foundation v State of Netherlands [2013].

[22] Asghar Leghari v Federation of Pakistan [2015].

[23] ClientEarth v SOS; Massachusetts v EPA; Urgenda v Netherlands [2013].

[24] Torsten Persson, Gerard Roland and Guido Tabellini, 'Separation Of Powers And Political Accountability' (1997) 112 The Quarterly Journal of Economics <https://www.jstor.org/stable/2951269?seq=2#metadata_info_tab_contents> Accessed 2 August 2021.

[25] Jonathan L Entin, 'Separation of Powers, the Political Branches, and the Limits of Judicial Review' (1990) 367 Faculty Publications <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1366&context=faculty_publications> Accessed 2 August 2021.

& healthy environment or a right to a stable climate. This non-recognition is once again one of the marking features of unsuccessful climate change litigation in the USA. For instance, the Supreme Court of Washington[26] as well as the Pennsylvania Federal Court[27] denied the existence of a right to a clean environment, and both courts denied the recognition of such rights in *Juliana* and termed the recognition by the Ninth-Circuit in the same to be erroneous, and not based on federal precedent.

However, in other jurisdictions, the lack of a freestanding environmental right has not been a huge barrier in climate change litigation. Some jurisdictions[28] have long recognised that changing environmental conditions can impact the enjoyment of other human rights, such as the right to life and health. In a number of non-US cases that were reviewed, there was no rejection of this right in the extended form even if the suits had been dismissed.[29]

(d) Tort Law

Urgenda has set a great precedent for arguing climate change cases in an alternative way of tort law, and this method has been followed in other cases.[30] By invoking tort law, the plaintiffs are now arguing that the states have violated the duty of care they owe to their citizens. This alternative method does away with the lack of recognition of a freestanding right to the environment. It is also a better way to argue climate change cases in jurisdictions that refused to recognise that environmental conditions impact other constitutional freedoms.

Tort law of nuisance and negligence, however, is more prevalent in cases against private companies in the USA, but most of these cases are unique to the procedures under American Legal System. Currently, *Lliuya* is the only non-US case that has created some hope to use the tort of negligence to successfully hold private companies liable through a modified but for test with the help of climate science.

(e) Climate Science

Climate science investigates the earth's climate, and technological advancements have led to more accurate collection of climate data which has enabled scientists to measure

[26] AJI P. v State of Washington [2018].
[27] Clean Air Council v United States [2017].
[28] *See generally* Shehla Zia v WAPDA PLD 1994 SC 963.
[29] Friends of Irish Environment v Ireland [2017]; Family Farmers and Greenpeace v Germany [2018], Union of Swiss Women v Federal Council [2016].
[30] Ridhima Pandey v India [2017]; Notre Affaire à Tous v France [2018].

GHG emissions as well as trace them to emitters. Along with being presented as factual legal evidence in climate change litigation, climate science is also being used to attribute responsibility to GHG emitters and establish causal links which can further the chances of success in climate change litigation, as has already been discussed.

In all the cases that were reviewed, none of the cases questioned the facts proved through climate science, and this also led to the acceptance by various courts of climate change as one of the greatest threats to humanity currently.[31] Moreover, courts are also recognising the importance of framing new policies and updating existing policies according to latest scientific developments. It was found in the *Thomson* case that the Minister for Climate Change should have reviewed domestic targets for 2050 after the updated scientific evidence in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change was released.

4.2 Jurisprudential Themes

Although the legal arguments that have been raised in various cases are similar, many cases had something new to offer in terms of symbolic value when it came to jurisprudence as each legal system and constitution is unique. However, even within jurisprudential themes, there were some common patterns such as the basic human rights, public trust doctrine, precautionary principle, no-harm principle, and the intergenerational principle.

However, even the intergenerational principle is constantly developing. In a pending South Korean case,[32] youth plaintiffs are symbolically making a constitutional petition through the court to the adult generation to make them realise the significance of intergenerational principle by highlighting the generational gap between the adults and the youth of South Korea; as such, there exists a "generational difference of the sense of imminence" of climate change between the adult and the youth. They have derived this notion from the South Korean Constitution which guarantees the protection of "*the safety, freedom, and happiness of "us" and "our descendants" now and forever*". This constitutional concept, the youth believes, has been violated by the adult population by leaving behind a world full of GHGs for the youth and future generation.

Moreover, in a pending French case[33] initiated by a Not-for-Profit organisation (hereinafter referred to as "NPO"), two fascinating legal concepts have been invoked which were derived

[31] Urgenda Foundation v State of Netherlands [2013]; Asghar Leghari v Federation of Pakistan [2015]; Juliana v USA [2015].
[32] Kim Yujin v South Korea [2020].
[33] Notre Affaire à Tous and Others v. France [2018].

from the French Civil Code. The first concept is that of "moral prejudice"; per this, the NPO holds that due to the French government's violations of environmental rights, the NPO is unable to achieve its statutory objectives, and the collective interests that the NPO defends are hence being infringed by the government. In this regard, the remedy sought is a symbolic sum of €1. This is an interesting addition to the ideas of "injury" and "remedy". Secondly, they have also invoked the concept of "ecological prejudice"; this form of prejudice entails that environmental damage caused is "*non-negligible*" and that this has also damaged "*the elements or functions of ecosystems or collective benefits drawn from the environment by mankind*."[34]

Finally, one of the most landmark contributions to environmental jurisprudence has been made by the Supreme Court of Colombia[35] by making the Colombian Amazon a subject of rights; as such, it is now entitled to protection, conservation, maintenance, and restoration which is to be led by the State and territorial agencies. The jurisprudential reasoning behind giving legal personality to the Amazon Rainforest was to create an intergenerational pact for the life of the Colombian Amazon. Furthermore, the Court identified the fundamental rights as being substantially linked with the environment. It held humanity to be responsible for this attack on the environment, and the fundamental rights due to the adoption of a "selfish" anthropocentric model, and urged everyone to let go of self-interest and shift from private-ethics to public-ethics. It was also of the opinion that natural resources are shared by everyone on Planet Earth, but the future generations do not yet have a hold of them. In order to conserve resources for the unborn, "solidarity and environmentalism" become related, and develop a binding legal relationship regarding environmental rights of future generations. This is a noteworthy application of the public trust doctrine.

The Colombian judgement gives renewed meaning to the following quote:

"This we know: the earth does not belong to man: man belongs to the earth. . .. Whatever befalls the earth, befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself".

Chief Seattle[36]

[34] Case Brief. Notre Affaire à Tous and Others v. France [2018]. Submitted (2019, March 14). Page 14.
[35] Demanda Generaciones Futuras v. Minambiente [2018].

[36] *Retrieved from* Brown Weiss, Edith, "Our Rights and Obligations to Future Generations for the Environment" (1990). *Georgetown Law Faculty Publications and Other Works*. 1627.
https://scholarship.law.georgetown.edu/facpub/1627

4.3 Remedies

A range of similar remedies are being sought across the globe such as declaratory judgements on the legality, or lack thereof, of government actions and inactions; injunctions; damages; directing states to implement national policies; directing courts to submit revised climate action plans. However, in the USA, none of these remedies have been considered to be practical by the judiciary because, in their opinion, these remedies would not reverse the effects of climate change. In any case, they deem the passing of any such redressal would impinge on legislative powers.

For the implementation of these remedies, states often make use of peculiar resources available within their legal systems. One such example is the legal system of Pakistan. In the past 25 years, Pakistan has shown a lot of activism in developing a dense jurisprudence of public interest environmental litigation[37] because the judiciary believes "*non-intervention by courts in complaints of matters of public concern will amount to an abdication of judicial authority*."[38] In exercise of this authority, Pakistani courts have adopted the innovative technique of appointing Commissions to investigate the issues and then making recommendations. Recently, the Lahore High Court constituted a Climate Change Commission in 2015[39] which consisted of key ministers and technical experts who could investigate matters concerning forests, biodiversity, wildlife, disaster management groups, energy, coastal and marine life, agriculture and livestock, and water. In 2018, a supplemental decision was passed and the case was treated as a *continuing mandamus*[40] so the court could remain accessible. This demonstrates an excellent collaboration between the judiciary and the government to balance each other's powers, whereby the judiciary spent three years in supervising the commission which was set up to carry out governmental policies on climate change, and judicial recommendations were then offered for the way forward.

5. Climate Justice in the USA

A wealth of climate change litigation has taken place in the USA since the late 20th century. Although the USA's position has already been discussed in the foregoing, it has so far been done in a global context. To truly understand the nature of climate change litigation in the USA,

[37] Pervez, H. (2018). Judicial Commissions and Climate Justice in Pakistan. Page 2.
[38] State vs. M.D. WASA 2000 CLC 471 (Lahore).
[39] Asghar Leghari v Federation of Pakistan [2015].
[40] A writ directing the government to carry out their duties so as to satisfy the Court's judgement, and till such time the court retains supervisory jurisdiction so that compliance with its orders can be ensured.

it is necessary to place it in the local context through a comparison of *Juliana* with other American climate change cases.

(a) Cases against the Local and Federal Government

The starting point is a comparison between the Supreme Court decision in *Massachusetts v EPA* and the *Juliana* case. In *EPA*, environmental groups and several states made a rulemaking petition to the Environmental Protection Agency (hereinafter referred to as "EPA") to regulate GHGs under the Clean Air Act. The request was denied by the EPA, and at the Supreme Court, EPA's determination was overruled. Finding that Massachusetts had standing, it was held that Congress's authority for the EPA to regulate "air pollutants" under the Clean Air Act could include regulation of GHGs as well. The Court rejected EPA's argument that the relief petitioners sought would not mitigate their injuries. The Court found that agencies like legislatures do not generally resolve massive problems in "one fell regulatory swoop". It conceded that regulation of motor-vehicle emissions would not *reverse* climate change, but it would *reduce* it. The Court held that all that a petitioner needs to show to satisfy the redressability requirement is that a favourable decision will relieve them of a discrete injury, and not every injury.

However, it must be noted that the court did not decide that the EPA *must* regulate GHGs, but only consider *if it had to do so* and justify its decision. The Supreme Court said that its powers of review were narrow, and that the EPA had discretion to decide to best utilise its resources. On remand, the EPA held GHGs are air pollutants, and that it had authority to regulate them. Later governmental policies were then drafted based on this decision.

The decision of this case is well in line with the current international jurisprudence on climate change actions against the states. The Supreme Court accepted climate science to conclude that the injuries were caused by a state department and that the Court's remedy could at least reduce the pace of climate change, if not reverse it. This is precisely the gist of the decision which was taken in *Urgenda*, and has since been developing further worldwide. It is unfortunate that a similar decision could not be reached in *Juliana*, but this case can be distinguished from *Juliana* as the petitioners are not private individuals, rather, it is a sovereign US state. It appears from the decision of this case that it is easier for sovereign US states to surmount the hurdle of Article III standing than US citizens. Also, the relief sought in the two cases was also different; *Juliana* prayed for a declaratory judgement, whereas in *EPA* the prayer was for EPA to

determine whether or not GHGs are air pollutants, something that Congress had already entrusted them with in the Clean Air Act. Moreover, the political atmosphere in which the two cases were decided was also very different.

On the other hand, it is also necessary to see how *Juliana* is being perceived in the US State Courts. Two points of *Juliana* are necessary to note; firstly, it is the first US case that has recognised a "constitutional" right to a clean environment, and secondly, the youth plaintiffs were asked to take their grievances to the legislative branches to get a favourable remedy.

As regards the first point, *Juliana* is being viewed as a bad precedent[41] and has even been labelled as an "outlier".[42] The State Courts are finding that *Juliana* has ignored federal precedents in recognising this right, and the actual position of federal courts has always been that a right to a clean environment represents the goal of a people, and not the right of a person; it is a shared aspiration, just like world peace, or economic prosperity.[43]

As regards the second point, the American youth appears to be really upset as they can neither get a remedy from the courts nor the legislative branches because a lot of them do not have the capacity to vote. This is leading to interesting arguments in the State Courts under the Equal Protection Act; the youth are arguing to be part of a separate class, and in need of extraordinary protection from the political process because they are an insular minority with no voting rights or political influence over the government and its actions. They also believe they have immutable age and generational characteristics that they cannot change. However, these arguments are not finding favour with the courts as they find no discrimination on the basis of age because the youth live in the same climate as everyone else, and are experiencing harmful effects of climate change like everyone else. The courts also believe the youth is not without influence, as they have rights to free speech and assembly which can be used to advocate political change, and that they can also persuade their parents when it comes to voting.[44]

[41] AJI P. v State of Washington [2018]; Sinnok v Alaska [2017]; Clean Air Council v United States [2017].
[42] AJI P. v State of Washington [2018].
[43] *Ibid.*
[44] Held v State of Montana [2020]; AJI P. v State of Washington [2018].

(b) Cases against Private Companies

The Supreme Court authority which led to the rejection of the claim in the *Kivalina* case is *American Electric Power Co. Inc. v Connecticut* (hereinafter referred to as "AEP"). In this case, the plaintiffs were eight States and New York City who initiated legal proceedings against five electric power companies[45] for contributing to global climate change that resulted in substantial and unreasonable interference with the public rights, violating the federal common law of interstate nuisance, or in the alternative, state tort law. They sought a decree to set CO2 emissions for each of the defendants at an initial cap, which could be reduced annually. The case was dismissed by the Supreme Court. It held that federal common law of nuisance had been directly dealt with by Congress through the passing of the Clean Air Act, therefore, the issues raised were non-justiciable political questions.

This case, combined with the *Kivalina* judgement, is very categorical in pronouncing that federal redressal for climate change against private companies through federal courts is not accessible as the matter is already being addressed by the statute. The eventual consequence appears to be the same as it is for cases against the governments; broadly put, that courts do not have jurisdiction to try climate change cases. However, both cases have held that the avenue of State Courts remains open for such litigation. To what extent it remains open is something that the Courts did not provide guidance on in either case, and this is what has led to complications in subsequent litigation against private companies.

So far, there is no clear word on whether or not state courts can address legal matters against private companies as there is divided precedent. Some cases still hold that federal courts, and not the state courts are the appropriate avenues,[46] despite *AEP* and *Kivalina*, whereas other cases have denied authority of federal courts, such cases have not had the chance to be tried before state courts due to clever tactics employed by energy companies.

The energy companies have invoked various statutes and procedures to keep the case out of state courts, and in every case that has been reviewed for the purposes of this report, the defendants have applied to remove the case to federal courts[47] where it is

[45] Main companies that have been a target of climate change litigation are ExxonMobil, Shell, BP P.l.c., Chevron, and ConocoPhillips.

[46] City of New York v BP P.l.c. [2018]; Federal District Court's decision in City of Oakland v BP P.l.c. [2017]

[47] This is done by invoking the federal removal statute under 28 U.S.C. § 1442.

more likely to be dismissed due the governance of *AEP* and *Kivalina*. Where this fails, and the federal courts remand the case to state courts, then energy companies cause further delay by making a writ petition to the Supreme Court.[48] The purpose of the energy companies, it seems, is to cause considerable delay so that the case can eventually be moved out of the court system entirely due to the existence of the legal rule of finality, efficiency, and economy[49] in the USA. According to this rule, cases on which considerable economic and judicial resources are spent and wasted for years without resolution can eventually be driven out of the court altogether.

Even though it has been found that state courts can appropriately review such cases[50], there still exists a lot of uncertainty in this regard, and it is not possible to say with certainty what the nature or fate of such litigation in the USA is or will be.

6. Conclusion and Recommendations

Based on the aforementioned analysis, it can be said that whether or not the judiciary is the appropriate forum for climate change litigation depends largely on the fundamentals of the legal system itself. However, legal systems that can support climate change litigation may find a lot of inspiration from successfully decided cases because judicial attitudes look very promising in flexible legal systems. The courts in such systems are resolving strong legal issues and developing strong jurisprudence which can be used as persuasive authorities. Moreover, the growing number of laws to address climate change and constant developments in climate science is also encouraging climate change litigation, and successful cases like *Urgenda* have also prompted more favorable climate policies that can complement the climate laws.

This report sees no particular and concrete reason as to why the legislative branch should continue to be the only appropriate forum to deal with climate change issues. The cases reviewed in this report only reaffirm what was already known; that climate change must be fought with collective effort. It is not an issue which is to be addressed only by one branch of the State, but has to be truly a national and global effort. Each branch of the State must be entrusted with various responsibilities to reduce the State's GHG emissions in order to achieve the common and global goal of climate justice.

[48] Mayor & City Council of Baltimore v BP. P.l.c. [2018].
[49] City of Oakland v BP Plc. [2017]; Rhode Island v Chevron Corp.[2018].
[50] County of San Mateo v Chevron Corp.[2017].

Cases like *Urgenda* and *Asghar Leghari* also practically demonstrate how the central tenets of the Paris Agreement, i.e., mitigation and adaptation, can be implemented. The successful cases have also confirmed the practicality of the "common, but differentiated responsibilities" aspect of the Paris Agreement.

Recommendations:

1. Restrictive legal systems can consider restructuring their laws in a manner so that powers of various state branches can be balanced, and not further separated, in order to share the burden of tackling climate change. Such restructuring would also do away with the locus standi issue as laws could be drafted in a manner so that issues related to climate change can raise legal, and not policy questions.

2. More use of climate science must be made to understand event attribution, and to simplify the process of proving the injury and its cause for the plaintiffs. Event attribution makes the comprehension of various weather events easier, and helps to accurately measure the anthropogenic alteration of the probability and magnitude of a particular weather event.[51] This can enable governments to draft policies specifically aimed at the reduction of weather events caused by anthropogenic climate change, and to also understand their national climate conditions better. This could possibly work well in those countries where group petitioners are told they are living in the same climate as everyone else or are exposed to the same risks etc. This can, therefore, lead to more event focused litigation where plaintiffs can show focused and particularised injuries caused by particular weather events.

3. The vulnerable developing states must be provided assistance through transfer of technology and financial support especially since they are the ones who are bearing, and will continue to bear the consequences of climate change caused by GHG emissions in developed countries. As it is being more drastically affected by climate change, litigation in the developing world has been more successful. However, even by taking responsibility for their minimal GHG contributions, developing countries will still not be able to stop the emissions from other countries. Climate change will continue to occur in these countries due to the activities abroad, which is why mitigation is not entirely practical for the third world. Therefore, states must come together and set up a mechanism in line with the Warsaw International Mechanism for

[51] Sophie Marjanac & Lindene Patton (2018): Extreme weather event attribution science and climate change litigation: an essential step in the causal chain? Journal of Energy & Natural Resources Law, DOI: 10.1080/02646811.2018.1451020

Loss and Damage Associated with Climate Change to create funding for, and transfer technology to developing countries.