17

The Role of Judges in Implementing Climate Policies
A Comparative Perspective on the Separation of Powers

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17.1 Introduction

The world faces a global climate emergency due to the negative impacts of climate change, not only on biodiversity and ecosystems including species loss and extinction, but also on livelihoods, health, water supply, food security, economic growth, and human security.[1] Currently, 'global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate'.[2] In order to mitigate climate change and adapt to its negative impacts on natural and human systems, urgent and unprecedented measures are needed. However, even though an international climate change legal regime is in place, states' measures are lagging behind what is needed to meet the mitigation, adaptation, and financial flow goals set in the Paris Agreement. In fact, between 2010 and 2019, the average annual emissions of greenhouse gases were higher than in any previous decade, and progress on the alignment of financial flows remains slow, heavily focused on mitigation, and has developed heterogeneously across sectors and regions.[3] Thus, the impacts of climate change continue to cause serious harm as the global temperature keeps increasing, glaciers continue to melt, and environmental disasters such as hurricanes and bushfires are sweeping through countries with increasing regularity.

To achieve more ambitious climate action, particularly through mitigation measures, proactive climate change litigation has emerged as a global trend in recent years.[4] Cases have been filed by a variety of claimants, such as individuals, local authorities, and non-governmental organisations (NGOs), mainly against national governments and corporations, holding them accountable to their legal obligations and, eventually, engendering

[1] OHCHR, Safe Climate: Report of the Special Rapporteur on Human Rights and the Environment (UN Doc. A/74/161), 2019. www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf.

[2] IPCC, Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty (IPCC, 2018). www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf.

[3] IPCC, Summary for Policymakers in Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC, 2022). https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.

[4] J. Setzer, C. Higham, Global Trends in Climate Change Litigation: 2022 Snapshot (Policy report, LSE, Grantham Research Institute on Climate Change and the Environment, 2022). www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.

policy change. In general, climate cases have several objectives,[5] ranging from increasing the alignment of national laws and corporate commitments with the Paris Agreement to debating compensation for damages caused by climate change, up to creating awareness of climate change-related human rights violations. Overall, 2,027 climate change-related cases have been recorded until July 2022 before judicial and quasi-judicial bodies at the international, regional, and domestic levels.[6] With the continuing increase of climate change cases worldwide, questions regarding the role that the judiciary can, and should, play have come to the fore. Not only in cases against governments but also in cases against corporations, the doctrine of the separation of powers has been used as a counterargument in domestic climate change cases.

The doctrine of the separation of powers, with its divisions of the three branches of government (legislative, executive, and judicial), is a vital ingredient of democratic political thought and practice. In the context of climate change litigation, it has called the justiciability of climate change matters, such as climate change legislation and climate targets, into question. Specifically, disagreement exists between advocates for an active judicial role in the climate crisis and those who favour legislative policy discretion. Proactive climate change litigation, which focuses on engendering policy change, especially raises the question as to what extent the judiciary can oblige the other branches of government to take urgent preventative action, and to implement or adjust climate policies. As the doctrine of the separation of powers can be, and has proven to be, an impediment to judicial engagement, climate change litigation faces a dilemma between urgently needed measures against the serious threats of climate change on the one hand and compliance with the doctrine of the separation of powers on the other.

This contribution analyses the role of judges in implementing climate policies as a global issue by taking into consideration the theoretical debates on the doctrine of the separation of powers in different legal systems, along with relevant case-law from different jurisdictions. In consideration of the comparative perspective adopted, the chapter connects international and domestic issues, and highlights to what extent those issues can be overcome to foster an effective implementation of more ambitious climate policies.

17.2 The Role of the Judiciary in Climate Governance: A Global Issue

The global and life-threatening effects of climate change pose an imperative that all nations must independently and co-operatively address with urgency. Climate change is a super-wicked problem,[7] with devastating and widespread consequences for the international community, making urgent preventative action a global responsibility. Unfortunately, at various levels of governance, cohesive and effective policy efforts to combat climate

[5] Climate Change Litigation: Insights into the Evolving Global Landscape (The Geneva Association, 2021). www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/climate_litigation_04-07-2021.pdf.

[6] See 'Climate Change Litigation Databases', Sabin Center for Climate Change Law, http://climatecasechart.com; 'Climate Change Laws of the World', LSE Grantham Research Institute on Climate Change and the Environment, https://climate-laws.org.

[7] R. Lazarus, Super wicked problems and climate change: restraining the present to liberate the future. *Cornell Law Review* 2009, 94: 1153–1234.

change have notably failed.[8] Climate change litigation has become an increasingly popular avenue for tackling the issue of climate change. It is being adopted as a strategy to push States, government bodies, large companies and/or everyday citizens to reconsider their stances and action plans *vis-à-vis* climate change.[9] However, it is important to note that not all climate change cases are intended for a social change or outcomes beyond what is associated with an individual case.[10] The main takeaway is that climate change litigation is becoming a more creative mechanism in pushing States towards redefining their climate action into more ambitious climate laws and policies. If it is within the domain of the judiciary to exercise its authority in response to this global imperative, how, and in what way, may its decisions influence or direct the outcome? Is the rapid increase in climate change litigation around the world undermining the doctrine of the separation of powers?

Since its origins, when the concepts of governmental functions and the theories of mixed and balanced government started to evolve,[11] the doctrine of the separation of powers has been a vital ingredient of democratic political thought and practice.[12] It is, standing alone as a theory of government, a political thought that has all along involved several discussions about its definition and use of terms.[13] The doctrine has been developed, modified, interpreted, and implemented in different ways, leading to various applications in, and understandings of, governmental structures. However, combined with other political ideas, such as the theory of mixed government, the notion of balance, and the concept of checks and balances,[14] the doctrine of the separation of powers has served as a basis for political systems around the world.[15] Fundamentally, there are three functions of government according to the doctrine of the separation of powers – legislative, executive, and judicial. In this way, State power is not concentrated within a single State body, but is rather organisationally divided and gives different functions to different actors. Therefore, the separation of the principal institutions of the State limits the possibility of arbitrary excess by the government, while securing citizens' liberty and individual freedom.[16] This is also intended to prevent one branch from having more influence or intervening in the affairs of another branch. In turn, achieving a continued balance of power is the end goal.

[8] UNEP, Global Climate Litigation Report: 2020 Status Review (UNEP, 2020), pp. 6–10.
[9] I. Alogna, E. Clifford, *Climate Change Litigation: Comparative and International Perspectives* (British Institute of International and Comparative Law, 2020), pp. 2–3.
[10] J. Setzer, R. Byrnes, Global Trends in Climate Change Litigation: 2020 Snapshot (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2020), p. 4.
[11] Ideas of mixed government utilise the 'conventional distinction between rule by the one, the few and many, placing particular weight on the risk attendant on any of these pure forms of government' and add, with ideas of balanced government, 'various elements [to] check the use of power by the others in order to produce a balance between the elements charged with performing different functions' (see J. Morrow, Mixed government, balanced constitutions and the separation of powers, in *History of Political Thought* (Palgrave, 1998), pp. 227–248).
[12] M. J. C. Vile, *Constitutionalism and the Separation of Powers*, 2nd ed (Liberty Fund, 2012), p. 3.
[13] Ibid. at pp. 2–22.
[14] The concept of checks and balances incorporates a set of positive checks to the exercise of power, meaning that each branch of the government is 'given the power to exercise a degree of direct control over the others by authorizing it to play a part, although only a limited part, in the exercise of the other's functions . . . The important point is that this power to "interfere" is only a limited one, so that the basic idea of division of functions remains, modified by the view that each of the branches could exercise *some* authority in the field of all three functions' (ibid., pp. 19–20).
[15] Ibid. at p. 2.
[16] C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013), p. 44.

Accompanying climate change litigation is a major concern for the status of the doctrine of the separation of powers.[17] For instance, the judicial branch may deem a government's climate policies inadequate or call for specific legislative action, breeding concerns about whether the judiciary is overstepping its remit with such rulings, and where exactly the separation of powers lies within a State.[18] Given that climate change is not an issue that will be disappearing soon, the international community is increasingly likely to hear of such concerns associated with climate change cases. Among these concerns is the so-called doctrine of 'majoritarianism', according to which the legislative and the executive are elected while the judiciary is not (at least, in most countries).[19] Therefore, a court ruling against the legislature or the executive 'would be going against the majority of the country'.[20] This is similar to the argument on the accountability of the judiciary, whereby the legislators are held accountable to the public, while the judiciary is not, and on public participation, which is generally restricted in the judicial process. Another argument against more proactive climate litigation is the pretended incapability of the judiciary to deal with a complex issue such as climate change, which involves implications of varying nature, concerning economic, scientific, technical, geopolitical, or even national security matters.[21]

On the other hand, several other reasons can be mentioned in favour of a proactive judicial role in climate governance: keeping the other branches in check, defending constitutional values, providing public goods in the long term (which is contrary to the short-termism typical of the elected branches of the State), and ensuring that rights are enforced and/or established. Rights enforcement seems particularly relevant in this historical period, notably after the adoption of Resolution 48/13 by the United Nations (UN) Human Rights Council (in October 2021) and Resolution 76/300 by the UN General Assembly (in July 2022) recognising that having a clean, healthy, and sustainable environment is a human right under international law, and calling on UN Member 'States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure' this right.[22] In general, judicial activism has always been an important source of legal developments around the world, despite presenting an element of opposition to legislators, executives, and even much of the population. This has been demonstrated in the case of the abolishment of segregation in schools by the United States Supreme Court,[23] or of the death penalty by the Hungarian *Alkotmánybírósága* (Constitutional Court).[24] It is also important to consider the typical phenomenon – and political science notion – of 'regulatory capture', by which lobbies and special-interest groups influence regulation and effectively

[17] UNEP, Global Climate Litigation Report: 2020 Status Review (UNEP, 2020), p. 40. [18] Ibid.
[19] A. James, Majoritarianism. *Bond Law Review* 2017, 29(2): 187–196.
[20] H. Colby, A. S. Ebbersmeyer, L. M. Helm, M. K. Røssaak, Judging climate change: the role of the judiciary in the fight against climate change. *Oslo Law Review* 2020, 7(3): 168–185, at p. 170.
[21] Ibid. at p. 181.
[22] See the text of the Resolution adopted by the General Assembly on 28 July 2022, UN Doc. A/RES/76/300. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/442/77/PDF/N2244277.pdf?OpenElement; see also A. Savaresi, The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean? EJIL:Talk! (12 October 2021). www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/.
[23] *Brown v. Board of Education* (1954) 347 US 483 at 495.
[24] Hungarian Constitutional Court, Decision 23/1990 of 31 October 1990.

exercise more power than the will of the majority. This puts the judiciary in a more independent and impartial position than the executive and legislative branches. While the judiciary cannot legislate, it can shape jurisprudence that might be conducive to evolution in climate policy, through the responsibility of interpreting the law. Moreover, the strategic function of climate litigation is to be carefully taken into consideration as a vehicle for raising awareness and social mobilisation, and, therefore, for encouraging executives and legislators around the world to foster their ambition in climate policies.

To what extent is the judiciary merely checking that 'the actions of the legislative and administrative branches conform with the existing law'?[25] This should be done by making clear through judgements whether the governmental environmental policies are not fulfilling legal obligations and by demanding compliance with those.[26] Undoubtedly, courts have also had a role in ensuring that any limitations on human rights are justified. By bringing climate cases before courts or quasi-judicial bodies, civil society and other actors are attempting to correct the functioning of the rule of law in a time of emergency. Furthermore, it cannot be emphasised enough that climate cases are not placing an extraordinary task on judges, but rather that the judiciary is performing an ordinary and appropriate function when determining whether the other branches of government are operating within the limits of the law.[27] Finally, the doctrine of the separation of powers should not be such a crucial problem for climate governance after all, as the judiciary is effectively occupying the void left by the other branches.

17.3 The Separation of Powers in Climate Change Litigation: Theoretical Debates

Considering the analytical and theoretical perspectives on the separation of powers in climate change litigation, several arguments have been advanced on both sides of the debate. What it boils down to is that the role of the judiciary in climate change litigation, and especially when it comes to climate policies, is disputed, between those advocates of absolute policy discretion, and those in favour of a progressive judicial role in the climate crisis.

17.3.1 Policy Discretion

Courts play a powerful role, particularly in democratic States. They protect individual rights and civil liberties, provide checks and balances on the other state branches, adjudicate as an 'impartial guardian of the law', and 'articulate constitutional values and ensure government compliance with the law'.[28] In the case of climate change litigation, domestic courts offer a critical forum to address global and local consequences as well as the implications of climate change, especially considering the absence of an international environmental law court.[29] However, when it comes to the question of whether courts have a role in defining and

[25] Colby et al., Judging climate change, p. 181. [26] Ibid.
[27] See discussions from different sessions captured in the event report published by the British Institute of International and Comparative Law, *Our Future in the Balance. The Role of Courts and Tribunals in Meeting the Climate Crisis* (August 2021).
[28] Ibid. at pp. 168–185.
[29] Note that a Chamber for Environmental Matters existed at the International Court of Justice (ICJ) between 1993 and 2006. However, no State ever requested that a case be dealt with by the Chamber, which is why the ICJ decided in 2006 not to hold elections for a Bench of the Chamber (www.icj-cij.org/en/chambers-and-committees).

developing climate policies, several concerns exist in legal scholarship that if they do, the doctrine of the separation of powers is disobeyed.

Due to the complexity of climate change policies, a concern that arises is whether courts are capable of deciding on such matters. On the one hand, climate policies must take several elements into consideration such as complex harms, ecology, economy, and effects on society, which can be led back to the polycentric nature of climate change.[30] On the other hand, courts are limited to interpreting existing law. In order to comply with the doctrine of the separation of powers, 'it is imperative that courts are not assigned with tasks that are more properly accomplished by other branches'.[31] As the late U.S. Supreme Court Associate Justice Ruth Bader Ginsburg commented, other bodies are 'better equipped to do the job than individual district judges issuing ad hoc, case-by-case decisions. They can hold hearings and balance the many interests involved'.[32] As such, if courts decide on climate change policies, they might overstep their powers – as the other two branches and their institutions might be better equipped to decide on those policies. In addition to the complexity of climate change policies, concerns exist regarding the judiciary's lack of expertise in the field of regulating greenhouse gas emissions.[33] Questions related to science, economy, and technology must be answered when regulating greenhouse gas emissions, which are 'consigned to the political branches, not the judiciary'.[34] If the judiciary regulates greenhouse gas emissions, it could overstep its powers as it interferes with the competence of the political branches.

Some scholars even go as far as to argue that litigating climate policies is per se 'anti-democratic', as the judiciary interferes with the workings of democracy when it rules on climate policies.[35] If climate change policies have been adopted by the means of a majoritarian decision taken by a democratically elected body, which represents the people, litigating those policies could be seen as bypassing the will of the people. As a result of these 'anti-democratic' concerns, climate change cases have been described as 'political stunts' addressing questions that no judge is qualified to answer.[36]

In addition, voices agreeing that the doctrine of the separation of powers is violated when the judiciary rules in climate change cases can be found when looking at scholarly work that covers cases which have already been litigated. For example, regarding the landmark Dutch case *Stichting Urgenda v. State of the Netherlands*,[37] some authors argue that the *Rechtbank den Haag* (District Court of The Hague) 'should have shown more restraint in the light of the discretionary powers of the government'.[38] Similarly, some scholars have raised concerns after a famous climate-related decision of the German

[30] Colby et al., Judging climate change, p. 181; D. G. Gifford, Climate change and the public law model of torts: reinvigorating judicial restraint doctrines. *South Carolina Law Review*, 2010, 62: 202–259.
[31] Colby et al., Judging climate change, p. 181; *Mistretta v. United States* (1989) 488 US 361.
[32] P. Goldberg, Climate change lawsuits are ineffective political stunts. The Hill, 2018. https://thehill.com/opinion/energy-environment/376307-climate-change-lawsuits-are-showy-ineffective-political-stunts.
[33] Colby et al., Judging climate change, p. 181; *American Electric Power Co v. Connecticut* (2011) 564 US 410. [34] Ibid.
[35] L. Bergkamp, K. M. Brouwer, The human right to a safe climate – putting democracy under judicial guardianship. RealClear Energy, 2021. www.realclearenergy.org/articles/2021/06/21/the_human_right_to_a_safe_climate__putting_democracy_under_judicial_guardianship_782320.html.
[36] Goldberg, Climate change lawsuits.
[37] *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of The Netherlands, Case 19/00135, Cassation Judgment of 20 December 2019.
[38] K. J. de Graaf, J. H. Jans, The Urgenda decision: Netherlands liable for role in causing dangerous global climate change. *Journal of Environmental Law* 2015, 27(3): 517–527.

Bundesverfassungsgericht (Federal Constitutional Court) in 2021,[39] accusing that court of crossing the line between jurisprudence and politics and, therefore, violating the separation of powers.[40]

17.3.2 Progressive Judicial Role

While these voices about the judiciary violating the principle of the separation of powers in climate change litigation exist in legal scholarship, there are also voices in favour of a progressive judicial role in climate litigation. As voices in favour of absolute policy discretion boil down to a democratic argument, Burgers uses Habermas' political theory on deliberative democracy to assess the role of the judiciary in climate change litigation.[41] According to Burgers' analysis, the 'climate litigation trend is likely to influence the democratic legitimacy of judicial decisions on climate change, as it indicates a growing recognition that a sound environment constitutes a constitutional matter and is therefore a prerequisite for democracy to be protected by judges'.[42] By bringing in political theories on democracy, as well as philosophical arguments, some scholars observe that '[a]fter all, the case must be decided one way or another. Judges cannot remain suspended in aporetic reverie, however intellectually enticing'.[43] Novak even goes as far as to argue that '[i]f courts continue to dismiss climate cases as political questions, this may eventually undermine the legitimacy of the judiciary, as well as the rule of law itself'.[44]

Instead of describing climate cases as 'political stunts', supporters of a progressive judicial role in climate litigation have classified those disputes as 'the civil rights cases of the 21st Century'.[45] As civil rights cases have invoked the authority of all State branches in the past, with each branch playing its role in promoting and protecting the rights and liberties of the people, it would be no different from climate cases.[46] On the contrary, according to the former Magistrate Judge Thomas Coffin, of the U.S. District Court for the District of Oregon, it is 'even more important for the Courts to step up to their role as a co-equal and independent branch, and to perform their duty to address the civil rights challenges of the 21st Century'.[47] Indeed, it can be argued that if the judiciary does not act as a co-equal and independent branch, its legitimacy might be in greater danger than if it plays an active role in climate change litigation.

Just as there are scholars who argue that judges have overstepped their powers and, therefore, have violated the doctrine of the separation of powers in already litigated climate cases, there are scholars who welcome the decisions taken by the respective courts. Taking the judgements in the *Urgenda* and *Neubauer et al.* cases again as an example, Eckes holds that judges do not 'undermine separation of powers as a time-honoured achievement of modern

[39] *Neubauer et al. v. Germany* 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (24 March 2021).
[40] V. Boehme-Neßler, Grenzüberschreitung: Das Bundesverfassungsgericht mach Klimapolitik. Cash.online (2021). www.cash-online.de/recht-steuern/2021/grenzueberschreitung-das-bundesverfassungsgericht-macht-klimapolitik/565281.
[41] L. Burgers, Should judges make climate change law? *Transnational Environmental Law* 2020, 9: 55–75. [42] Ibid.
[43] R. H. Weaver, D. A. Kysar, Courting disaster: climate change and the adjudication of catastrophe. *Notre Dame Law Review* 2017, 93(1): 295.
[44] S. Novak, The role of courts in remedying climate chaos: transcending judicial nihilism and taking survival seriously. *Georgetown Environmental Law Review* 2020, 32(4): 743.
[45] Hon. T. M. Coffin, American courts in climate emergency (IUCN, 2019). www.iucn.org/sites/default/files/content/documents/2019/american_courts_in_climate_emergency.pdf.
[46] Ibid. [47] Ibid.

constitutional democracies in order to force political branches to take urgently necessary actions'.[48] In general, in human rights-based climate change cases, '[j]udges should – pursuant to formal rules – oblige the policy-maker to justify her choices in public in light of their impact on human rights'.[49] Given the nature of human rights, which protects citizens from unjustified oppression, those who exercise public power in a way that restricts human rights are required to provide legitimate reasons for so doing.[50] According to Eckes, this is where the function of the judiciary comes in. The separation of powers 'is needed to ensure the sincerity of the reason-giving process. It reconciles law and politics in practice in a way that one never fully dominates the other and must therefore still answer to the other'.[51]

Other scholars, examining the *Urgenda* case and two other decisions, argue that the 'judiciary should . . . take an important role in climate change policymaking in order for the State to comply with its duty to instigate emission limits'.[52] While the latter scholars advocate for a progressive judicial role in climate change litigation, the different views in legal scholarship as illustrated above demonstrate that there are disagreements between support for absolute policy discretion and for a progressive judicial role in climate change litigation. More broadly, this applies to tensions between law and politics.

However, as noted in the sections above, the judiciary's role in climate change litigation has grown, and continues to grow, as more climate cases are filed not only at the domestic level but also at the regional and international levels. Thus, it is certain that as long as climate change cases are brought before the courts, the debate in legal scholarship about the 'appropriate role' of the judiciary in climate change litigation will continue. Beyond that, to find possible answers to the question of the role of the judiciary in climate litigation and in implementing climate policies, it is essential to examine not only different stances in legal scholarship but also opinions within the judiciary itself.

17.4 Comparative Case-Law

The tension between urgently needed climate measures and compliance with the doctrine of the separation of powers has played out with varying outcomes in recent climate change cases. The following selection of cases can be seen as representing different degrees of adherence to the doctrine in climate change litigation, moving from more progressive judicial stances to more policy discretion.

17.4.1 Pakistan

Shortly before the adoption of the Paris Agreement, in the *Leghari* case, the Lahore High Court decided that '[t]he existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering [that is] climate change'.[53]

[48] C. Eckes, Separation of powers in climate cases. Comparing cases in Germany and the Netherlands. *Verfassungsblog* (2022). https://verfassungsblog.de/separation-of-powers-in-climate-cases/.
[49] C. Eckes, The Urgenda case is separation of powers at work. Amsterdam Law School Legal Studies Research Paper (No. 2021–39, 2021).
[50] Ibid. [51] Ibid. [52] Colby et al., Judging climate change, p. 170.
[53] *Ashgar Leghari v. Federation of Pakistan* (2015) Lahore High Court W.P. No. 25501/2015.

The plaintiff alleged the violation of his fundamental rights, such as the right to life and the right to dignity, in conjunction with environmental principles, as a result of the Pakistani government's neglect in the implementation of climate change policies. Because of 'the delay and lethargy of the State in implementing the Framework' and the impact of this on the 'fundamental rights of the citizens of Pakistan', the court ruled in favour of the plaintiff. In doing so, the Lahore High Court directed several governmental ministries to nominate a 'climate change focal person' and to present a list of action points. In addition, it created the Climate Change Commission with various powers to ensure that its ruling was duly implemented.

17.4.2 The Netherlands

A rights-based approach was taken by the claimants in the *Urgenda* case in the Netherlands. Until the last decade, the Netherlands had played a central role in establishing cohesive international environmental policies,[54] maintaining the position that further climate action, beyond the European Union's (EU) minimum requirements, would not be pursued unless Dutch interests would significantly benefit from it.[55] This policy course began to falter when 886 Dutch citizens, represented by the Urgenda Foundation, brought a class action suit against the Dutch government in 2013. The main request was that the Dutch government commits to limiting greenhouse gas emissions to 40% below the 1990 level by 2020.[56] The *Rechtbank den Haag* ruled in favour of Urgenda in 2015, ordering the Dutch government to reduce its greenhouse gas emissions by at least 25%.[57] The Court did not specify *how* the government was to achieve this target, as that policy process is the government's prerogative. However, the Dutch government almost immediately began to file an appeal after the announcement of the decision, stating inter alia that the court's verdict was in breach of the separation of powers,[58] arguing that it is not within the court's mandate to rule over policy on reduction targets for greenhouse gas emissions. The *Gerechtshof den Haag* (Court of Appeals of The Hague) reaffirmed the government's duty of care to the Dutch population. In line with the European Convention on Human Rights (ECHR) provisions (articles 2 and 8, respectively, on the right to life and right to family and private life), the Court considered that it is the responsibility of the judiciary to offer protection to the Dutch population, even from their own government.[59] Making its way to the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), the case was eventually won by the claimants, ordering the government to reduce its greenhouse gas emissions by at least 25% compared to 1990, by the end of 2020. This was based on an unwritten duty of care as well as on the positive

[54] Considering a State's environmental history is important because it influences where they stand on the issue of climate change, and the level of policy action that they are willing to commit to on a domestic and international level. Cf. J. van Zeben, Establishing a governmental duty of care for climate change mitigation: will Urgenda turn the tide? *Transnational Environmental Law* 2015, 4(2): 339–357, at pp. 339–340.

[55] Ibid. at p. 340. [56] Ibid. at p. 343.

[57] Cf. S. Roy, E. Woerdman, Situating *Urgenda v. the Netherlands* within comparative climate change litigation. *Journal of Energy & Natural Resources Law* 2016, 34(2): 165–189, at pp. 165–167.

[58] Cf. L. Burgers, Should judges make climate change law? *Transnational Environmental Law* 2020, 9(1): 55–75, at p. 59.

[59] J. Spier, The "strongest" climate ruling yet: The Dutch Supreme Court's Urgenda judgment. *Netherlands International Law Review* 2020, 67: 319–391, at pp. 321–323; cf. M. Meguro, *State of the Netherlands v. Urgenda Foundation*. *The American Journal of International Law* 2020, 114(4): 729–735, at pp. 729–730.

obligations to protect human rights under articles 2 and 8 of the ECHR. According to the court,[60] even if governments 'have a large degree of discretion to make the political considerations that are necessary … it is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound'. Moreover, the *Hoge Raad* held that the decision 'does not amount to an order to take specific legislative measures but leaves the State free to choose the measures to be taken in order to achieve' this target. Shortly after the decision, the Dutch government announced an 'action plan' containing several climate initiatives for a value of three billion euros in spring 2020. Climate actions include inter alia the expansion of renewable energy, the reduction of coal-fired power stations, speed limits during daytime hours to control nitrogen dioxide emissions, and many more. An extension of the plan in scope and costs has already been announced.[61]

17.4.3 The Republic of Ireland

In *Friends of the Irish Environment v. Government of Ireland*, the *Cúirt Uachtarach na hÉirann* (Supreme Court of the Republic of Ireland) brought an assertive judicial approach to climate policies. The Supreme Court overruled the Republic of Ireland's National Mitigation Plan 2017 due to its lack of specificity, which does not clearly state how Ireland will achieve its 2050 goals. By putting the Plan to the side, the *Cúirt Uachtarach* made clear that 'a compliant plan must be sufficiently specific as to policy over the whole period to 2050'.[62] While the government argued that 'the Plan simply involves the adoption of policy, and that … courts have frequently indicated that matters of policy are not justiciable', the court found that:

> [m]ost legislation has some policy behind it … It may have been the policy of a particular government to introduce the legislation in question but once that legislation is passed it then becomes law and not policy … [W]hether the Plan does what it says on the statutory tin is a matter of law and clearly justiciable.

The government is currently working on a Climate Action and Low Carbon Development (Amendment) Bill 2021 (Ir.), which 'will support Ireland's transition to Net Zero and achieve a climate-neutral economy by no later than 2050' in the form of a 'legally binding framework with clear targets and commitments set in law'.[63]

17.4.4 Germany

The German *Bundesverfassungsgericht* also took a position in favour of judicial engagement in its *Neubauer et al.* decision concerning inter alia the *Bundesklimaschutzgesetz* (Federal Climate Change Act). According to the court, the legislature has a wide margin of

[60] English translation of the Dutch Supreme Court decision in the *Urgenda* case. http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.
[61] Fifty-four Climate Solutions. Urgenda (blog). www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan/.
[62] *Friends of the Irish Environment v. Ireland*. http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland.
[63] Climate Action and Low Carbon Development (Amendment) Bill 2021 (Ir.). www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020.

discretion in specifying the emission reduction objectives. This is based on the open formulation of a constitutional norm, notably article 20a of the *Grundgesetz* (the 'Basic Law', or constitution), which obliges the German State to protect the climate. It further held that it is not the judiciary's task to derive concrete limits for global warming, as well as corresponding reduction targets from an open-worded constitutional norm. However, a norm must not run empty as a climate protection requirement. The court concluded that it is the judiciary's task to ensure that the outer normative boundaries are respected. It found that proportionate and non-discriminatory allocation of greenhouse gas reduction burdens on an inter-temporal scale is necessary to prevent the violation of the young claimants' constitutional rights. Consequently, it ordered the parliament to produce new concrete plans by 31 December 2022. The German government started the amendment process of the *Bundesklimaschutzgesetz* without delay and announced a programme for immediate action to support ambitious goals, alongside the draft legislation.[64]

17.4.5 The United Kingdom

In a recent decision, the High Court of Justice has ordered the United Kingdom government to outline exactly how its net-zero policies – contained in the net-zero strategy published in October 2021 – will achieve the set emissions targets. In the *R (on the application of Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* case, the environmental groups Friends of the Earth, ClientEarth, and the Good Law Project challenged the government's climate change strategy, arguing that it had illegally failed to include the necessary policies to cut down emissions.[65] While that case was not decided in favour of the claimants, the judgment stated that the government's strategy lacked any explanation or qualification regarding how its emissions targets would be achieved. As such, the UK had failed to meet its obligations under the Climate Change Act 2008 (UK). Following the decision, the Department for Business, Energy and Industrial Strategy was required to prepare a report explaining how the policies in the net-zero strategy contribute towards emissions reductions and submit it to Parliament by April 2023.

17.4.6 Belgium

The decision in *VZW Klimaatzaak v. Kingdom of Belgium* in Belgium follows the rulings of the German and Dutch courts.[66] In this dispute, the Brussels *Rechtbank van Eerste Aanleg* (Court of First Instance) ruled that the federal State and the three regions jointly and individually breached their duty of care by failing to implement good climate governance, in turn leading to a violation of the *Burgerlijk Wetboek* (Civil Code) and to a violation of their human rights obligations under articles 2 and 8 of the ECHR. The Belgian court took

[64] Climate Change Act – climate neutrality by 2045. Webseite der Bundesregierung. www.bundesregierung.de/breg-de/themen/klimaschutz/climate-change-act-2021-1913970.
[65] *R (on application of Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) (18 July 2022).
[66] *VZW Klimaatzaak v. Kingdom of Belgium and Others* (2021) Brussels Court of First Instance 2015/4585/A.

a step further than the Dutch and German courts by recognising that 58,000 citizens, acting as co-plaintiffs, are in direct, personal, and real danger because of climate change. However, the court rejected a demand for the imposition of new carbon targets on the State, as this would have been a breach of the separation of powers:

> If the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it . . . The extent and pace of Belgium's [greenhouse gas] emission reductions and the internal distribution of the efforts to be made in this direction are and will be the result of political arbitration in which the judiciary cannot interfere.[67]

Therefore, the Brussels *Rechtbank van Eerste Aanleg* found a violation of human rights and domestic law, yet declined to issue an injunction ordering the government to set the specific emissions reduction targets that were requested by the plaintiffs.

17.4.7 The United States

To date, the United States maintains the largest number of pending climate change litigation cases in a legal system.[68] Being the first climate change case heard in the U.S. Supreme Court, *Massachusetts v. Environmental Protection Agency* gained significant national and international attention. Beginning in 2003, the U.S. Environmental Protection Agency (EPA) deemed that, under the Clean Air Act of 1970, it was not in its statutory authority to regulate greenhouse gas emissions on the basis of climate change concerns.[69] In a milestone 5:4 majority decision by the U.S. Supreme Court in 2007,[70] it was determined that greenhouse gases are in fact 'air pollutants and the responsibility to regulate lies with the [Clean Air Act]'.[71] Therefore, the EPA does have the mandate to regulate greenhouse gas emissions standards for vehicles.[72]. The outcome of this case is long-lasting in the sphere of climate change litigation and, having been the first of its kind, it marks a new path for enacting and enforcing climate change action. However, concerns regarding the sanctity of the separation of powers have grown ever more present, as this case set a precedent that legal action can be taken to determine the regulatory responsibilities and powers of bodies that fall under the legislative branch of government. This has contributed to concerns that climate change litigation paves a way for the judicial systems to impede other key government functions, disrupting the balance between powers. Recently, another critical decision was adopted in *West Virginia v. Environmental Protection Agency*, where the U.S. Supreme Court invoked, for the first time, the 'major questions doctrine' – according to which any

[67] Ibid.
[68] UNEP, Global Climate Litigation Report: 2020 Status Review, p. 4. The climate litigation databases provided by the Sabin Center on Climate Change Law identify 1477 climate litigation cases in the United States and 609 in the rest of the world (including cases brought before international or regional courts or tribunals, see www.climatecasechart.com/about).
[69] E. Fisher, Climate change litigation, obsession and expertise: reflecting on the scholarly response to Massachusetts v. EPA. *Law & Policy* 2013, 35(3): 236–260, at pp. 245-246.
[70] J. Peel, J. Lin, Transnational climate litigation: the contribution of the global south. *The American Journal of International Law* 2019, 113(4): 679–726, at pp. 686–689.
[71] *Massachusetts v. Environmental Protection Agency* (2007) 549 US 497.
[72] R. MacNeil, Alternative climate policy pathways in the US. *Climate Policy* 2013, 13(2): 259–276, at pp. 267–270.

issue with major economic or political consequences requires a 'clear congressional authorisation' – to limit the scope of powers granted to the EPA through the Clean Air Act.[73]

There are many other climate litigation cases that have failed or are at a critical point. This is due to the judges' determination that the judiciary has no responsibility or scope to rule on climate change. In the ongoing case of *Juliana v. United States*, 21 young claimants argue that the federal government has violated their constitutional rights by causing dangerous carbon dioxide (CO_2) concentrations and seek relief for governmental action in regulating CO_2 pollution.[74] The plaintiffs have leaned heavily on the 'public trust' doctrine and argued that the government's commitment to the fossil fuel industry and lack of targeted climate action will only contribute to further environmental damages.[75] Concern for the separation of powers was underlined by the plaintiff's request that the court '[o]rder[s] Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system'.[76] It was considered in *Juliana* that calling for compensation or relief for the damages caused by the governmental actions is completely different from demanding courts' intervention in the (legislative) policy sphere: partly based on protecting the doctrine of the separation of powers, the plaintiffs' requests were denied.[77]

17.4.8 Switzerland

In *Verein KlimaSeniorinnen Schweiz and Others*,[78] the claimants in that case argued that the Swiss government has failed to reduce greenhouse gas emissions and thereby violated the human rights that are enshrined in the Swiss *Bundesverfassung* (Federal Constitution) and the ECHR. They requested a ruling asking federal agencies to develop a regulatory

[73] Notably, the Supreme Court held that the Clean Air Act of 1970 doesn't give the EPA the authority to set emissions limits for existing power plants in the 'generation shifting' process from fossil fuels to renewable energy sources. See *West Virginia v. Environmental Protection Agency* (2022) 597 US: 'in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there'. Considering two other cases, namely *American Electric Power v. Connecticut* and *Utility Air Regulatory Group v. EPA*, the conservative members of the Supreme Court appear to also be embracing another theory: the 'non-delegation' doctrine. This means that Congress cannot delegate too much of its discretion to agencies and that it needs to be extremely specific in what it does delegate. If firmly adopted by U.S. Courts, the doctrine could become problematic for the powers of the EPA under current statutory authority, as the Courts have been very active in striking down administrative actions related to the environment that exceed statutory authority.

[74] See D. C. Smith, 'No ordinary lawsuit': will *Juliana v. United States* put the judiciary at the centre of US climate change policy? *Journal of Energy & Natural Resources Law* 2018, 36(3):259–264, at p. 260.

[75] U.S. District Judge Ann Aiken, Opinion and Order in Case No. 6:15-cv-01517-TC (10 November 2016), pp. 36–38, 51–52 (https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf).

[76] *Juliana v. US*, Prayer for Relief, 10 September 2015, p. 99. https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaint AgainstUS.pdf.

[77] C. N. Kempf, Why did so many do so little? Movement building and climate change litigation in the time of Juliana v. United States. *Texas Law Review* 2021, 99(5): 1005–1040, pp. 1024–1025. Having moved to the U.S. Court of Appeals for the Ninth Circuit, and according to Judge Hurwitz, the redress that is sought – an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO_2' – is 'beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government'. However, in the oral argument about the claimants' motion to amend complaint, which was held on 25 June 2021, Judge Aiken was clearly sympathetic to the motion to amend complaint to seek declaratory but not injunctive relief regarding children's rights and climate change. See U.S. Court of Appeals for the Ninth Circuit Judge Andrew D. Hurwitz, Opinion in Case D.C. No. 6:15-cv-01517-AA (17 January 2020), p. 11. http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf.

[78] *Verein KlimaSeniorinnen and Others v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* (2020). Federal Supreme Court 1C_37/2019.

approach to achieve necessary emissions reduction. However, the Swiss *Bundesgericht* (Federal Court) decided that '[s]uch matters are to be advanced not by legal action, but by political means, for which purpose the Swiss system with its democratic instruments opens up sufficient opportunities'.[79] Therefore, the case was dismissed. Following this decision by the *Bundesgericht*, the claimants (the Association of Swiss Senior Women for Climate Protection) made a recourse to the European Court of Human Rights (ECtHR) in December 2020. They alleged inter alia that their right to effective access to a court (article 6(1)) and the right to an effective remedy (article 13) had been violated, as no national authority assessed the dispute and examined the substance of their complaint. The case was considered admissible at the preliminary stage and was communicated to the Swiss government in March 2021. In April 2022, the ECtHR announced that the case will be dealt with by the Grand Chamber, considering whether the case raises 'a serious question affecting the interpretation of the [ECHR] or the Protocols thereto', or whether 'the resolution of a question before the Chamber might have an outcome inconsistent with a judgment previously delivered by the Court'.[80]

17.5 Comparison and Recommendations

While considering the cases discussed in the previous section, one can begin to piece together that the judiciary's role is not static or homogenous among different legal systems. Instead, it takes varied forms. This leads to the question of why, and how, the different interpretations of the doctrine of the separation of power might influence this role? Moreover, considering some of the more restrictive judgements, how can the doctrine of the separation of powers be less of an impediment and lead to more proactive judgements in the future?

17.5.1 Different Interpretations of the Doctrine of the Separation of Powers

As discussed in the first section of this chapter, the doctrine of the separation of powers has been developed, modified, interpreted, and implemented in different ways. Although the doctrine provides a classical division of the judicial, executive, and legislative powers of government, it is applied differently depending on the country and its constitution. When considering the case-law mentioned above, in Pakistan, it was possible for the judiciary to create a Climate Change Commission with various powers to ensure that the judgement was implemented. On the other hand, in Belgium, the judiciary went only so far: it found a human rights violation, but denied the injunction ordering the government to set specific emissions reduction targets. Therefore, the implementation and interpretation of the doctrine of the

[79] Federal Supreme Court, Public Law Division I – Judgment 1C_37/2019 of 5 May 2020, *Verein KlimaSeniorinnen Schweiz et al. v. DETEC – Ruling on Real Acts relating to Climate Protection Unofficial Translation Prepared on behalf of KlimaSeniorinnen*. http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200505_No.-A-29922017_judgment.pdf.

[80] ECHR, article 30; European Court of Human Rights, Communiqué de presse (29 April 2022) CEDH 142; E. Schmid, Victim status before the ECtHR in cases of alleged omissions: the Swiss climate case. EJIL:Talk! (2022). www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case.

separation of powers influence the judiciary's role in climate change litigation, and in the implementation of climate change policies.

Considering the different interpretations and implementations of the doctrine of the separation of powers, Colby and others have explained that '[w]hen comparing *Juliana*, *Urgenda* and [*Friends of the Irish Environment*], it is necessary to highlight that the separation of powers is interpreted differently across jurisdictions'. A paradigmatic example is provided by the United States, which has 'a more rigid interpretation of the separation of powers than the Netherlands'. The same authors keep arguing that 'the relation between the *trias politica* in the Netherlands is not a strict separation of powers but rather a balanced system in which the judiciary reviews the legality of governmental actions in individual cases'.[81]

17.5.2 Recommendations for the Future

As long as the climate emergency continues, civil society will attempt to correct the functioning of the rule of law by bringing climate cases before the courts. As such, the role of the judiciary is becoming even more important when it comes to climate change litigation and the implementation of climate policies.

To find an appropriate balance between the doctrine of the separation of powers on the one hand and progressive judicial stances within the judicial power on the other, three recommendations are proposed:

1. Instead of justifying judicial law-making as a necessary intrusion in climate policy, a reconceptualisation of the doctrine of the separation of powers is needed. Considering that the doctrine was originally conceived as a protection against autocracy, the judiciary must act in its power to keep the balance. In fact, by adjudicating climate change cases, the judiciary is effectively occupying the void left by the other branches.
2. To give judges the possibility of making decisions based on the law and within their powers, countries should adopt national frameworks including remedies that are safe for judges in their respective jurisdictions.
3. Although domestic law differentiates between countries, it is important that 'cross-pollination' and dialogue continue between courts. This can be fostered through conferences, workshops, or judicial training in the field of climate change litigation.[82]

17.6 Conclusion

There is a strong debate on the role of judges in implementing climate change policies. Between legal scholarship and the judiciary, the role of judges is classified differently. While some are in favour of a more activist judicial role in climate change litigation, and

[81] Colby et al., Judging climate change, p. 170. Emphasis added.

[82] See the event report published by the British Institute of International and Comparative Law, *Our Future in the Balance. The Role of Courts and Tribunals in Meeting the Climate Crisis* (August 2021). See also the text of the Declaration on Climate Change, Rule of Law and the Courts, presented during the COP26 in Glasgow and signed by over 160 international experts in the field, among legal academics, legal practitioners, NGOs, in-house counsels, scientists and economists, and available on BIICL website: www.biicl.org/climate-change-declaration.

in implementing climate policies, others are in favour of policy discretion, and assign the implementation of climate policies to the legislative and executive bodies of government. However, most climate policies are not sufficiently meeting the climate targets that are urgently needed to ensure sustainability. An ever-growing number of climate change cases are being filed before judicial and quasi-judicial bodies, targeting these insufficient policies. As a result, the role of judges in climate change litigation is becoming increasingly important.

The question to be answered is whether it is possible to overcome the concern of breaching the doctrine of the separation of powers in climate change litigation. It is also important to consider if a common reference in this field can be found, which might offer some interesting arguments to be circulated in future climate change litigation in different legal systems. It is important to keep in mind that the doctrine of the separation of powers is applied and understood differently across the world. A divide emerges between EU countries, where courts tend to overcome the division of powers, and other countries, particularly the United States, which is notably the major emitter of greenhouse gases worldwide, where courts tend to respect the autonomy of the legislative and the executive in the matter of climate policy. Lastly, it is interesting to note that many of these cases have determined that action must be taken by States, but do not stipulate *how* legislative and governmental bodies are to do so.