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Judging Climate Change

A Comparative Legal and Political Analysis of the KlimaSeniorinnen Schweiz and the Urgenda Cases

Abstract: Since global and national political efforts to tackle climate change are failing, climate change litigation is on the rise worldwide. In climate change litigation, claimants try to legally advance climate protection in manifold ways. In particular, strategic, rights-based climate change litigation is becoming more common in which claimants use a human rights-based approach in their attempt to advance social change. While a rights-based claim filed by Urgenda in the Netherlands succeeded, a similar Swiss case brought by KlimaSeniorinnen Schweiz, failed. Why did the two cases have different outcomes despite the similarity of the cases and the countries? This paper seeks an answer by comparing the legal and political systems of the countries as well as by conducting expert interviews. In sum, the Urgenda and KlimaSeniorinnen cases differed because Dutch law has more generous procedural rules about the admissibility of claims than Swiss law. Furthermore, the Swiss highest court is more hesitant to engage in politically controversial questions compared to the Dutch highest court.

Key Words: Climate Change Litigation, Urgenda, KlimaSeniorinnen, Comparative Law, Comparative Politics

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List of Abbreviations

APA	Federal Act on Administrative Procedure of 20 December 1968, SR 172.021, (Administrative Procedure Act)
AR	Assessment Report (of the Intergovernmental Panel on Climate Change)
AR4	Fourth Assessment Report of the Intergovernmental Panel on Climate Change
AR5	Fifth Assessment Report of the Intergovernmental Panel on Climate Change
AR6	Sixth Assessment Report of the Intergovernmental Panel on Climate Change
CCL	Climate Change Litigation
COP	Conference of the Parties
CO2	Carbon Dioxide
CO2 Act	Federal Act on the Reduction of CO2 Emissions of 23 December 2011, SR 641.71 (CO2 Act)
DC	Constitution of the Kingdom of the Netherlands of 2018, English version available at: https://www.government.nl/binaries/government/documenten/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf , (Dutch Constitution)
DETEC	Swiss Federal Department of the Environment, Transport, Energy and Communications
DSC	Dutch Supreme Court
ECHR	European Convention on Human Rights of 4 November 1950, English version available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf
ECtHR	European Court of Human Rights
FAC	Federal Administrative Court
FC	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
FSC	Federal Supreme Court
GHG	Greenhouse Gas
HCA	The Hague Court of Appeal
HDC	The Hague District Court
IPCC	Intergovernmental Panel on Climate Change
KlimaSeniorinnen Schweiz	Senior Women for Climate Protection Switzerland
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, English version available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf
MSSD	Most Similar Systems Design
NDCs	Nationally Determined Contributions
NGO	Non-Governmental Organisation
Paris Agreement	Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, English version available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change of 9 May 1992, English version available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

Introduction

Climate change is an unprecedented threat to the world. Since global and national political efforts to tackle climate change are failing, climate change litigation (CCL) is on the rise worldwide. In CCL, claimants try to legally advance climate protection in manifold ways: For example, by pushing states to reduce greenhouse gas (GHG) emissions, holding corporate actors accountable for contributing to climate change, or by opposing the construction of coal-fired power plants. Increasingly, CCL lawsuits are based on human rights, indicating a *rights turn* in CCL.¹ A major step in human rights-based CCL was the 2015 Urgenda² judgement in which the Hague District Court (HDC) in the Netherlands allowed the non-governmental organization (NGO) Urgenda and 886 individual plaintiffs' claim and ordered the Dutch state to increase GHG emissions reduction efforts – representing the first case of a court ordering a government to do so. The Hague Court of Appeal (HCA)³ and the Dutch Supreme Court (DSC)⁴ later confirmed the judgement. In 2019, the DSC found that the Dutch state has an obligation to take suitable measures to prevent dangerous climate change under the fundamental right to life in Article 2 of the European Convention on Human Rights (ECHR)⁵ and right to family and private life (Art. 8 ECHR).⁶

Inspired by Urgenda, Greenpeace Switzerland decided to initiate a similar claim in Switzerland.⁷ In the KlimaSeniorinnen Schweiz case, the association Senior Women for Climate Protection Switzerland (KlimaSeniorinnen Schweiz) and four individual elderly women filed a claim with the Federal Council and four administrative authorities for their failure to pursue adequate climate protection policy, thereby failing to protect their right to life and right to family and private life based on the Federal Constitution (FC)⁸ and the ECHR. Three instances denied their claim: First the Federal Department of the Environment, Transport, Energy and Communications

1 Jacqueline Peel and Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?" *Transnational Environmental Law* 7 (2018): 37–67.

2 The Hague District Court, *Urgenda Foundation v. The State of the Netherlands*, Judgement of 24 June 2015, No. C/09/456689 / HA ZA 13-1396, ECLI:NL:RBDHA:2015:7196.

3 The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Judgement of 9 October 2018, No. 200.178.245/01, ECLI:NL:GHDHA:2018:2591.

4 Supreme Court of the Netherlands, *Urgenda Foundation v. The State of the Netherlands*, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006.

5 European Convention on Human Rights of 4 November 1950, English version available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 5 October 2023).

6 Therese Karlsson Niska, "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" *The Journal of World Energy Law & Business* 13 (2020): 335.

7 Cordelia Bähr et al., "KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation," *Journal of Human Rights and the Environment* 9 (2018): 194–221.

8 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101.

(DETEC)⁹, secondly the Federal Administrative Court (FAC)¹⁰ and lastly the Federal Supreme Court (FSC)¹¹ in 2020.¹² The FSC considered the case an illegitimate *actio popularis*, alleging that the KlimaSeniorinnen were attempting to pursue a public, instead of an individual interest. To pursue their interests, the FSC directed the KlimaSeniorinnen to the field of politics. The KlimaSeniorinnen case is currently (March 2023) under consideration at the European Court of Human Rights (ECtHR).¹³

In the Urgenda and KlimaSeniorinnen case, two NGOs filed human rights-based claims in support of individuals to force their governments to take more ambitious action to protect individuals from harms incurred by climate change.¹⁴ Politically, Switzerland and the Netherlands share similar structures, as they are both consensus/consociational democracies¹⁵ with multiparty systems.¹⁶ Legally, Switzerland and the Netherlands are both countries with a civil law tradition,¹⁷ and they are two of the few countries without formal constitutional review (*Verfassungsgerichtsbarkeit*).¹⁸

Given the various similarities of the lawsuits and the countries where the cases were issued, this article asks: Why were the outcomes of the two similar strategic, rights-based CCL cases brought by Urgenda and KlimaSeniorinnen different? To answer the question, I first describe the context in which CCL is embedded: dangerous, man-made climate change and CCL as a response to

9 DETEC. *Verfügung betreffend Begehren vom 25. November 2016 der Gesuchstellenden KlimaSeniorinnen Schweiz und andere*. 2017. https://aaines-climat.ch/wp-content/uploads/2019/01/Verfu%CC%88gung_UVEK_KlimaSeniorinnen.pdf (accessed 6 April 2022).

10 Judgement of the Swiss Federal Administrative Court A-2992/2017 dated 27 November 2018.

11 Judgement of the Swiss Federal Supreme Court 1C_37/2019 dated 5 May 2020.

12 Ursula Brunner and Cordelia Bähr, “Climate Change and Individuals’ Rights in Switzerland,” in *Comparative Climate Change Litigation: Beyond the Usual Suspects*, ed. Francesco Sindico and Makane Moïse Mbengue (Cham: Springer Nature Switzerland, 2021), 119–32.

13 ECtHR. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, Communicated Case, 17 March 2021, relinquishment to the Grand Chamber on 26 April 2022; KlimaSeniorinnen Schweiz. “Aktuell.” 2023. <https://www.klimaseniorinnen.ch/unsere-klage-am-egmr/> (accessed 27 March 2023).

14 Karlsson Niska, “A Strategic Next Step?,” 337; Bähr et al., “Swiss Senior Women’s Case,” 214.

15 Consensus democracies are distinguished from majoritarian democracies. Majoritarian democracies (e.g. the US oder UK) concentrate power in the hands of the majority (e.g., in a two-party system) while consensus democracies share, disperse, and restrain power in many hands (e.g., with a multi-party systems). Consensus democracies developed because the political elite consolidated the power in pluralistic societies with sharp religious, social, linguistic divisions. Lijphart, “Patterns of Democracy,” 31–33.

16 Hans Keman and Paul Pennings, “Comparative Reserach Methods,” in *Comparative Politics*, ed. Daniele Caramani (Oxford: Oxford University Press, 2017), 55; Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven & London: Yale University Press, 2012).

17 Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci, “Climate Change Litigation: Global Perspectives. An Introduction,” in *Climate Change Litigation: Global Perspectives*, ed. Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (Leiden & Boston: Brill, 2021), 21; Daniele Caramani, *Comparative Politics* (Oxford: Oxford University Press, 2017), 473.

18 Sascha Kneip, “Verfassungsgerichte in der Vergleichenden Politikwissenschaft,” in *Handbuch Vergleichende Politikwissenschaft*, ed. Hans-Joachim Lauth, Marianne Kneuer, and Gert Pickel (Wiesbaden: Springer VS, 2016), 368.

failing political efforts to tackle climate change. Then I recap the literature review, which yields that CCL cases are being decided very differently due to varying legal and political contexts. Thus, a comparative design is needed to grasp the different outcomes of CCL, which I explain in a next step. Finally, I summarize the systematic comparison and conclude the paper.

An Unprecedented Threat

As early as the 19th century, scientists supposed that anthropogenic emissions of carbon dioxide (CO₂) may cause global warming.¹⁹ But it was not until the 1980s with the founding of the Intergovernmental Panel on Climate Change (IPCC) in 1988, that increased attention was drawn to that possibility.²⁰ The IPCC assesses the science related to climate change, contributes to an international consensus on the scientific facts on climate change and informs policy makers.²¹ In the past three decades, the IPCC has produced six extensive Assessment Reports (AR) and various special reports.²² The Fourth (AR4)²³ and Fifth Assessment Report (AR5)²⁴ underlined the anthropogenic character of climate change and the urgency to act²⁵ – confirmed and amplified by the newest AR6.²⁶ In fact, we live in a world which is already 1.1°C warmer than in 1850–1900.²⁷ Industrialized countries are historically and presently emitting most of the worldwide GHG emissions.²⁸ However, harmful effects of climate change²⁹ disproportionately affect the most vulnerable people and systems.³⁰

19 Alogna, Bakker, and Gauci, “An Introduction,” 7.

20 Ibid.

21 IPCC. *The Intergovernmental Panel on Climate Change*. 2022. <https://www.ipcc.ch/> (accessed 12 April 2022).

22 Alogna, Bakker, and Gauci, “An Introduction,” 7.

23 IPCC, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Rajendra K. Pachauri and Andy Reisinger (Geneva: IPCC, 2007).

24 IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Rajendra K. Pachauri and Leo A. Meyer (Geneva: IPCC, 2014).

25 Alogna, Bakker and Gauci, 2021, 7; C/09/456689, para. 2.18.

26 IPCC, *AR6 Synthesis Report: Climate Change 2023*. <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> (accessed 31 March 2023).

27 IPCC, “Summary for Policymakers,” in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Valérie Masson-Delmotte et al. (Cambridge & New York: Cambridge University Press, 2021), 4–5.

28 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*, ed. Priyadarshi. R. Shukla et al. (Cambridge & New York: Cambridge University Press, 2022), 13.

29 IPCC, “Climate Change 2022: Impacts, Adaptation, and Vulnerability,” in *Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Hans-Otto Pörtner et al. (Cambridge & New York: Cambridge University Press, 2022), 10.

30 Ibid., 7, 12.

Internationally, the three most important legal instruments to combat climate change are the 1992 United Nations Framework Convention on Climate Change (UNFCCC)³¹ with 197 signing Parties, the 1997 Kyoto Protocol³² (192 Parties) and the 2015 Paris Agreement³³ (193 Parties).³⁴ In addition, there are various decisions and resolutions adopted in international climate negotiations (for example, at the Conference of the Parties (COP) to the UNFCCC³⁵, the supreme decision-making body of the UNFCCC) which deal with the implementation of aspects of these instruments.³⁶ The main problem of these instruments is that they do not contain legally binding GHG emissions reduction targets due to a resistance of states to submit to such obligations – a problem which can be seen generally in international law.³⁷

Despite the scientific certainty about climate change and political agreements to tackle it, climate action is characterized by “weak promises, not yet delivered”.³⁸ Under Art. 3 Paris Agreement, states determine their own contributions, the NDCs, to achieve the long-term goal of *well below 2°C and 1.5°C* respectively.³⁹ However, the current updated NDCs fail to achieve the temperature goal of the Paris Agreement: If we are to continue on this path, global temperature will rise to 2.7°C compared to pre-industrial levels by the end of the century.⁴⁰ That is why in the last two decades, individuals and groups, NGOs and states around the world have increasingly turned to courts to accelerate action against climate change.

31 United Nations Framework Convention on Climate Change of 9 May 1992, English version available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

32 Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, English version available at: <https://unfccc.int/process-and-meetings/the-kyoto-protocol/history-of-the-kyoto-protocol/text-of-the-kyoto-protocol>.

33 Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, English version available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

34 Sandrine Maljean-Dubois, “Climate Change Litigation,” in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford: Oxford University Press, 2018), para. 4; UNFCCC. *Process and Meetings*. 2022. <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states> (accessed 13 July 2022).

35 Julia Hänni and Tienmu Ma, “Swiss Climate Change Law. International and European Context,” in *Swiss Energy Governance. Political, Economic and Legal Challenges and Opportunities in the Energy Transition*, ed. Peter Hettich and Aya Kachi (Cham: Springer, 2022), 23–24.

36 Alogna, Bakker, and Gauci, “An Introduction,” 10.

37 Hänni and Ma, “Swiss Climate Change Law,” 26.

38 UNEP, *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered* (Nairobi: UNEP Copenhagen Climate Centre (UNEP-CCC), 2021), XV, available at: <https://wedocs.unep.org/handle/20.500.11822/36990;jsessionid=8066582C0B31D66B9E5366278785C07B> (accessed 16 May 2023).

39 Hänni and Ma, “Swiss Climate Change Law,” 27.

40 UNEP, *Emissions Gap Report 2021*, XVI.

Climate Change Litigation

CCL cases are “lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organizations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts”.⁴¹ Starting in the 1990s with sporadic cases in the United States and Australia⁴², CCL expanded to Europe and was used to fill a gap in the absence of legally binding international climate action.⁴³ Current CCL (2015 to date) marks a growing expansion and diversification in the type of claim, the amount of cases, the defendants, and the jurisdictions in which CCL cases are launched.⁴⁴ Since 2015, the number of climate change-related cases has more than doubled: in 2022 there were 2,002 pending or concluded CCL cases worldwide.⁴⁵ In particular, strategic CCL is on the rise.⁴⁶ Strategic litigation is “the strategic use of a lawsuit as a tool to pursue interests”.⁴⁷ In strategic cases, “claimants’ motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some broader societal shift”.⁴⁸ A lot of recent CCL cases have invoked human rights and/or have been brought before human rights treaty bodies.⁴⁹

Methodology and Methods

As mentioned before, the two CCL cases filed by Urgenda and KlimaSeniorinnen are remarkably similar with regards to the content of the lawsuit but also the political and legal system in which they were issued. However, in the Netherlands, Urgenda was successful whereas the KlimaSeniorinnen case was rejected.

How different courts in different countries react to strategic, rights-based CCL varies and depends largely on the context.⁵⁰ That is why a comparative approach is needed to understand the differences

41 Joana Setzer and Catherine Higham. “Global Trends in Climate Change Litigation: 2021 Snapshot,” London School of Economics and Political Science, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London, 2022, 8.

42 Jacqueline Peel and Hari M. Osofsky, “Climate Change Litigation.” *Annual Review of Law and Social Science* 16 (2020): 23.

43 Setzer and Higham, “2021 Snapshot,” 23.

44 Ibid.

45 Setzer and Higham, “2021 Snapshot,” 1.

46 Setzer and Higham, “2021 Snapshot,” 5.

47 Alexander Graser, “Strategic Litigation – oder: Was man mit der Dritten Gewalt sonst noch so anfangen kann,” *RW Rechtswissenschaft* (2019): 319.

48 Setzer and Higham, “2021 Snapshot,” 12.

49 Setzer and Higham, “2021 Snapshot,” 32.

50 Mehrdad Payandeh, “The Role of Courts in Climate Protection and the Separation of Powers,” in *Climate Change Litigation: A Handbook*, ed. Wolfgang Kahl and Marc-Philippe Weller (München, Oxford, Baden-Baden: Beck Hart Nomos, 2021), 62–80.

of judicial outcomes in CCL.⁵¹ Even though domestic courts have an important role to play in strategic, rights-based CCL, comparative interdisciplinary research on them is lacking.⁵² Thus, the article put a special focus also on the highest national courts as important actors in these cases.

For the comparison of the cases, the comparative political and legal method was chosen. Comparative politics looks at “differences and similarities between countries and their institutions, actors and processes through systematic comparison”.⁵³ The two cases called for a paired comparison (“Paarvergleich”) for the study design.⁵⁴ The logic behind the comparison is a Most Similar Systems Design (MSSD). In a MSSD, typically the outcome varies, even though the cases are very similar with respect to their macro level context. Keeping macro factors constant helps find explanatory factors (X) responsible for the outcome (Y).⁵⁵ So the goal was to find possible explanations (X) for the different outcomes (Y) of the Urgenda and KlimaSeniorinnen cases which are not explained by macro level factors. Within this design, comparative law was applied in order to compare the legal aspects of the Urgenda and KlimaSeniorinnen cases. The comparative legal method allows us to find out how different jurisdictions react to shared social or economic problems (for example, climate change).⁵⁶ In the article, specific legal aspects of the Urgenda and KlimaSeniorinnen cases (procedural rules, etc.) were compared between two jurisdictions, the Netherlands and Switzerland.⁵⁷

In a paired comparison, two cases are systematically compared with each other regarding their similarities and differences led by previously explanatory factors.⁵⁸ The explanatory factors were found and evaluated via extensive literature research and expert interviews. The interviewees were: the lawyer of the KlimaSeniorinnen case, a member of the KlimaSeniorinnen association, two legal experts on the KlimaSeniorinnen Case and CCL. Unfortunately, none of the representatives from Urgenda could be interviewed. However, the article benefited from a wealth of sources for this internationally renowned case.

51 Anna-Julia Saiger, “Domestic Courts and the Paris Agreement’s Climate Goals: The Need for a Comparative Approach,” *Transnational Environmental Law* 9 (2020): 37–54.

52 Peel and Osofsky, “Climate Change Litigation,” 28–29.

53 Daniele Caramani, “Introduction to Comparative Politics,” in *Comparative Politics*, ed. Daniele Caramani (Oxford: Oxford University Press, 2017), 3.

54 Susanne Pickel, “Methodologische Grundlagen des Vergleichs und Vergleichsdesigns,” in *Handbuch Vergleichende Politikwissenschaft*, ed. Hans-Joachim Lauth, Marianne Kneuer, and Gert Pickel (Wiesbaden: Springer VS, 2016), 33.

55 Keman and Pennings, “Comparative Research Methods,” 57.

56 Stephan Seiwerth, “Einführung in die Methodik des Rechtsvergleichs,” *Juristische Ausbildung* 38 (2016): 598–99.

57 Seiwerth, “Einführung,” 596.

58 Ibid.

Comparing the Cases

First, the Urgenda and the KlimaSeniorinnen cases were examined regarding their broader legal and political system in order to rule out the possibility that these macro factors substantially explain the outcomes of the two cases. In sum, both countries' legal systems are grounded in civil law⁵⁹, they represent consensus democracies with multiparty systems⁶⁰ and have no constitutional review.⁶¹ The first part of the analysis thus confirmed that – despite minor differences – the key political and legal structures surrounding the cases resemble each other. In a second step, the cases were compared in terms of the following explanatory factors.

Procedural Rules

Procedural rules can be understood as gatekeepers to courts, as they determine access to them. Whether a plaintiff can launch a CCL case depends on whether the plaintiff has “legal standing” in the specific context.⁶² Usually, the plaintiff must do so by showing that there is an impact on their individual right or legally protected interest.⁶³

The strict procedural rules in the KlimaSeniorinnen case and the rigid interpretation of the FSC versus the more open and generous procedural rules in the Netherlands explain the different outcome of the Urgenda and KlimaSeniorinnen case well. Urgenda was initiated based on a class action⁶⁴ which makes it easier for claimants to sue. Urgenda pursued its claim on behalf of the interests of the current Dutch inhabitants who are threatened by dangerous climate change. The DSC accepted this.⁶⁵ Dutch procedural rules and the legal nature of the claim did not require the claimants to be individually affected in a causal way by the defendant's omission, which is difficult to prove in terms of climate change.⁶⁶

59 Jan M. Smits, “Chapter 50: The Netherlands,” in *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits (Cheltenham, UK: Edward Elgar Publishing, 2012), 620; Pascal Pichonnaz, “Chapter 69: Switzerland,” in *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits (Cheltenham, UK: Edward Elgar Publishing, 2012), 852.

60 Lijphart, *Patterns of Democracy*, 33, 244.

61 Art. 120 of the Constitution of the Kingdom of the Netherlands of 2018, English version available at: https://www.government.nl/binaries/government/documenten/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf; Art. 190 of the Swiss Civil Code of 10 December 1907, SR 210.

62 Hans-Heinrich Jescheck et al., “Procedural Law,” in *Encyclopedia Britannica*, 11 August, 2023, <https://www.britannica.com/topic/procedural-law> (accessed 14 August 2023).

63 Payandeh, “The Role of Courts”.

64 Article 3:305a Civil Code of the Netherlands of 1992, English version available at: <http://www.dutchcivillaw.com/civil-codegeneral.htm>.

65 DSC, 19/00135, para. 2.2.1.

66 Chris Backes and Gerrit van der Veen, “Urgenda: the Final Judgment of the Dutch Supreme Court,” *Journal for European Environmental & Planning Law* 17 (2020): 310.

In contrast, the KlimaSeniorinnen had to show that they have an individual legal interest in the claim, by proving how they were individually and specially affected by climate change.⁶⁷ The KlimaSeniorinnen tried to show that they were specifically and individually affected by providing scientific evidence and medical certificates demonstrating the excess mortality rate and suffering of elderly women during climate change-induced heat waves.⁶⁸ The FSC argued that the KlimaSeniorinnen are not yet affected with the intensity required to fulfil the procedural requirements.⁶⁹ Thereby, the FSC interpreted the already high requirements of the procedural rule very narrowly.⁷⁰ Interviewees underlined that the FSC could also have accepted the KlimaSeniorinnen's legal standing since the KlimaSeniorinnen provided strong grounds for their individual affectedness and that the FSC had been more generous about procedural requirements in a past case. The narrow interpretation leads to a failure to provide effective legal protection of fundamental rights.⁷¹ The fact that the FSC focused so intensely on the discussion of procedural requirements might also be interpreted as an attempt to avoid engaging in the complex, politically sensitive matter of the claim (for example, state duties to protect individuals from climate change)⁷² – a strategy which the FSC had applied in a different case too.⁷³

Procedural rules raise fundamental questions about effective legal protection in the context of climate change.⁷⁴ Since climate change affects all people, but not everyone in the same way, proving individual affectedness and fulfilling a required intensity of affectedness when harm materialises in the long run is tricky – and risks effective rights protection being forsaken.

67 Art. 25a Federal Act on Administrative Procedure of 20 December 1968, SR 172.021, The Administrative Procedure Act allows claimants to challenge executive or administrative acts, but they must prove that they are individually and specially affected, FSC, 1C_37/2019, paras. 4.1–4.2.

68 KlimaSeniorinnen Schweiz, “Request to stop omissions in climate protection pursuant to Art. 25a APA and Art. 6 para. 1 and 13 ECHR,” *KlimaSeniorinnen Schweiz*. 2016. https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf (accessed 10 May 2022).

69 FSC, 1C_37/2019, paras. 5.3–5.5.

70 Johannes Reich, “Bundesgericht, I. öffentlich-rechtliche Abteilung, 1C_37/2019, 5. Mai 2020; zur Publikation in der amtlichen Sammlung vorgesehen,” *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBI)* 9 (2020): 502–03.

71 Mirina Grosz, “Grundrechte und Klimaschutz: Nationale Perspektive,” *Aktuelle Juristische Praxis AJP* 11 (2021): 1361–63; Patricia Kaiser, “Rechtsschutzlücken im Rahmen von Realakten,” *SJZ – Schweizerische Juristen-Zeitung* 147 (2020): 147–56.

72 Grosz, “Grundrechte und Klimaschutz,” 1362; Kaiser, “Rechtsschutzlücken,” 156.

73 Thomas Bernauer et al., “Die Judikative,” in *Einführung in die Politikwissenschaft*, ed. Thomas Bernauer et al. (Baden-Baden: Nomos, 2018), 423.

74 Lorenz Kneubühler and Dominique Hänni, “Umweltschutz, Klimaschutz, Rechtsschutz. Ein Plädoyer für eine Verbandsbeschwerde im schweizerischen Klimarecht,” *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht ZBI* 9 (2021): 479–502.

The Competences of Courts

Courts have certain competences formally prescribed by the constitution which can be encompassing or not (for example, whether a court can rule on the constitutionality of legislative acts or not).⁷⁵ But courts can also choose to a certain degree whether or not to make use of these formal competences, depending on their domestic role.⁷⁶

Regarding formal competences, the FSC and DSC resemble each other as neither are constitutional courts and both are primarily responsible for ensuring the uniformity of their legal order.⁷⁷ Neither court is very powerful or politicized.⁷⁸ However, the DSC is more powerful in its political system than the FSC, since the EU membership of the Netherlands has generally strengthened national courts of EU member countries.⁷⁹ Also, in contrast to the FSC, the DSC has engaged in politically controversial questions in the past, such as abortion or euthanasia.⁸⁰ In Switzerland, the parliament solves these contested societal issues, as an interviewee remarked.⁸¹

Courts and Science

In CCL, courts are confronted with complex climate science which can be challenging, for example with regards to the assessment of the harm caused by climate change.⁸² Also for the plaintiffs, especially in rights-based CCL, proving a causal link between government (in)action and harms related to climate change is very difficult.⁸³

Science played an important role in both the Urgenda and KlimaSeniorinnen judgments. The DSC used IPCC reports in combination with other sources to establish that there is an international consensus about the reduction targets industrialized countries such as the Netherlands must

75 Payandeh, “The Role of Courts,” 73.

76 Eva Maria Belser, Thea Bächler, and Sandra Egli, *Recht auf Umwelt. Eine Untersuchung der geplanten Anerkennung eines Rechts auf Umwelt durch die UN und ihrer Folgen für die Schweiz* (Bern: Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR), 2021), 77.

77 Nick Huls, “The Dutch Hoge Raad: Judicial Roles Played, Lost, and Not Played,” in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge: Cambridge University Press, 2013), 181–98; Bundesgericht, “The Swiss Federal Supreme Court – The Third Power within the Federal State,” *Rechtspflege – Wissenswertes zum Bundesgericht* (Lausanne & Luzern: BGer, 2021), Seitenzahl(en) im PDF?.https://www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/BG_Brosch_Inhalt_A4_21_eng.pdf (accessed 20 May 2022).

78 Lijphart, *Patterns of Democracy*, 215; Nicos C. Alivizatos, “Judges as Veto Players,” in *Parliaments and Majority Rule in Western Europe*, ed. Herbert Döring (Frankfurt a. M., New York: Campus/St. Martin’s, 1995), 575.

79 Huls, “The Dutch Hoge Raad,” 195.

80 Huls, “The Dutch Hoge Raad,” 186–87.

81 Beleg Interview.

82 Joana Setzer and Lisa Vanhala, “Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance,” in *Wiley Interdisciplinary Reviews on Climate Change* 10 (2019): 10.

83 Ibid.

pursue to prevent dangerous climate change.⁸⁴ In the KlimaSeniorinnen case, the FSC used an IPCC special report to underline that dangerous climate change has not yet materialized, which is why the rights of the KlimaSeniorinnen were not yet sufficiently affected to be legitimated to claim.⁸⁵ Thus, the DSC and FSC both interpreted the science in a way that meant it upheld their decisions: in Urgenda to order the Dutch State to act immediately, and in the KlimaSeniorinnen case to justify not entering the substantive treatment of the case.

Substantive Law and the Legal Order in General

Another important explanatory factor is how courts weigh substantive legal principles and rules of the claim. CCL which aims to correct mitigation efforts is more likely to be successful when there are legally binding mitigation obligations under international or national law.⁸⁶

Substantive law and the legal order in general were decisive for the DSC's judgement in the Urgenda case. The DSC approved the lower courts' decisions that the Dutch State has a duty of care based on human rights to increase Dutch climate protection.⁸⁷ The courts extensively interpreted the duty of care as well as the scope of human rights obligations.⁸⁸ The DSC's judgement was majorly informed by international law even though the DSC acknowledged that no direct obligation to a specific reduction target could be derived from international law: Rather, the DSC made a detour via international law, climate science and political statements to underline what the Dutch state must pursue to adhere to its human rights obligations.⁸⁹ Generally, the Dutch legal order and legal tradition is very open to its surroundings⁹⁰, which may provide a more open space for an innovative judgment about duty of care and positive obligations in climate change. Such discussions are less established in Switzerland, as an interviewee observed.

Legal Culture / Legal Environment

A general challenge in environmental law which also manifests in CCL is the legal culture.⁹¹ Legal culture helps us understand the context of courts' decision-making, the courts' role in the national system and its self-conception.⁹²

84 DSC 19/00135, paras. 7.2.1–7.6.2.

85 FSC 1C_37/2019, paras. 5.3–5.4.

86 Payandeh, "The Role of Courts," 73.

87 DSC, 19/00135, paras. 8.3.5, 9.

88 Christine Bakker, "Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond," in *Climate Change Litigation: Global Perspectives*, ed. Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (Leiden: Brill, 2021), 212–13, 221.

89 DSC, 19/00135, paras. 7.2.8, 7.4.4.

90 Huls, "The Dutch Hoge Raad," 193.

91 Kleoniki Pouikli, "Editorial: A Short History of the Climate Change Litigation," *ERA Forum* (2022), 581.

92 Saiger, "Domestic Courts and the Paris Agreement," 53.

The FSC is very reserved towards federal politics, even with judgements that have only signalling effect.⁹³ Switzerland attaches high value to popular participation and direct democracy, even to the extent that past popular initiatives, such as the “Minarett Initiative” which wanted to ban new constructions of minarets, conflicted with fundamental rights (in the minaret initiative, this concerned religious freedom).⁹⁴ This might explain why the FSC told the KlimaSeniorinnen to pursue their interest via political means.⁹⁵ In contrast, Dutch legal culture is more open to the discussion of problems and even accepts judicial solutions to contested topics.⁹⁶ However, the interviewees were careful about drawing definitive conclusions about the impact of legal culture on the varying outcomes of the cases. The interviewees were more concerned with what a jurisdiction’s procedural and substantive law allows courts to do.⁹⁷

Political Power Structures

Courts are not isolated actors: The judiciary will consider what decision is possible within a social and political setting. The domestic and international political context can influence the outcome of a CCL.⁹⁸

How political power structures influenced the DSC’s verdict could not be fully assessed, as additional background knowledge was not accessible due the fact that interviews could not be conducted with Urgenda. Neither the literature nor the interviews revealed a clear indication of how political power structures influenced the FSC’s judgement. What can be said is that the DSC’s judgement did not back the Dutch State and its current climate protection policies, and the Dutch State increased its climate action after the verdict.⁹⁹ The FSC on the other hand relinquished making a judgement in order to underline the importance of ambitious climate policy to the parliament, which was at the time of the judicial proceedings negotiating the new CO₂ Act.¹⁰⁰ With or without intent, the FSC’s judgement preserved the status quo.

93 Belser, Bächler, and Egli, *Recht auf Umwelt*, 113, 128, 135.

94 Bernauer et al., “Die Judikative,” 422.

95 FSC, 1C_37/2019, paras. 5.5, 7.

96 Smits, “The Netherlands,” 623; Huls, “The Dutch Hoge Raad,” 183–84.

97 Belege Interviews.

98 Payandeh, “The Role of Courts,” 75–76.

99 Backes and van der Veen, “Urgenda,” 321.

100 Federal Act on the Reduction of CO₂ Emissions of 23 December 2011, SR 641.71 (CO₂ Act); Mirina Grosz, “Bundesgericht, I. öffentlich-rechtliche Abteilung, Urteil vom 5. Mai 2020 (1C_37/2019); BGE-Publikation,” *Umweltrecht in der Praxis (URP)* 4 (2020): 414.

Public Opinion

Courts are also sensitive to their social environment. The judiciary may be more willing to advance climate protection when the broader society pushes for action.¹⁰¹ How public opinion explains the different judgments by the DSC and FSC is unclear, either from literature or the interviews. Urgenda successfully mobilized civil society for their claim.¹⁰² The Urgenda case was from the beginning surrounded by tremendous international and national public, media and scholarly attention. From information collected during the interviews, it seems media attention on the KlimaSeniorinnen case was rather low until the FSC's judgment. The topic of climate change has generally become more prominent, also due to weekly protests by students and climate activists worldwide.¹⁰³

Judges' Attitudes

Ideological preferences or attitudes may influence judges, especially when they decide on contentious policy questions like climate policy.¹⁰⁴ Many courts react conservatively to contentious policy questions.¹⁰⁵

Information on how judicial attitudes maybe have influenced the DSC's judgement was not accessible due to a lack of relevant data. The interviewees in the KlimaSeniorinnen case could only report from their subjective perception and with reference to certain statements of the Swiss courts. They believed that the Swiss judiciary did not appear to take the KlimaSeniorinnen seriously and were skeptical about their case being a strategic one.¹⁰⁶

101 Payandeh, "The Role of Courts," 75–76.

102 Marjan Minnesma, "Not slashing emissions? See you in court," *Nature* 7787 (2019): 379–81.

103 Kneubühler and Hänni, "Umweltschutz, Klimaschutz, Rechtsschutz," 480.

104 Jasmina Nedevska, "An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges," *Sustainability* 13 (2021): 3.

105 Peel and Osofsky, "Climate Change Litigation," 33.

106 Belege Interviews.

Conclusion

The outcomes of the Urgenda and KlimaSeniorinnen cases mainly differed because Dutch law has more generous procedural rules about the admissibility of claims than Swiss law. Swiss procedural law places high requirements on claimants to be able to sue. In the KlimaSeniorinnen case, the FSC further applied a narrow interpretation of already strict procedural requirements. Furthermore, the FSC is not a court that has been known to intervene in politically contested questions, while the DSC even solved these questions. Dutch law and the Dutch legal order also offer more room for innovation than Swiss law. Other factors may have also played a role, but their influence was not as clear as the abovementioned.

The Urgenda judgment has shown that courts can be significant actors in the achievement of stronger climate protection despite the lack of internationally legally binding and concrete GHG emission targets.¹⁰⁷ Meanwhile, the final judgement in the KlimaSeniorinnen case at the ECtHR is awaited with suspense.¹⁰⁸ It is the court's first case in which it has to determine the applicability and scope of human rights in climate change – and has the potential to become a landmark ruling.¹⁰⁹

Thereby, CCL contributes to the continuous development of law and legal adaption to climate change in the long run. Even if CCL cases fail, they create societal consciousness and political pressure.¹¹⁰ Similar to strategic litigation, strategic, rights-based CCL is generally one of many tools used to achieve necessary climate policy and behavioral change, and works effectively when combined with other tools of political and social mobilization.¹¹¹

107 Bakker, "Climate Change Litigation," 221.

108 KlimaSeniorinnen Schweiz. "Aktuell." 2023. <https://www.klimaseniorinnen.ch/unsere-klage-am-egmr/> (accessed 27 March 2023).

109 Johannes Reich, Flora Hausammann, and Nina Victoria Boss, "Climate Change Litigation Before the ECtHR: How Senior Women from Switzerland Might Advance Human Rights Law," *VerfBlog*, 16 May 2022, <https://verfassungsblog.de/climate-change-litigation-before-the-ecthr/> (accessed 31 March 2023).

110 Heather Colby et al., "Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change," *Oslo Law Review* 7 (2020): 184.

111 Peel and Osofsky, "Climate Change Litigation," 34.

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