A Dutch Group Is Suing Its Government Over Climate Change; Could We Do the Same in America?

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by Mark Hay (/author/mark-hay)

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People's Climate March 2014 in New York City. Photo via Flickr user South Bend Voice

Climate change sucks. It's getting hot in herre but nobody can take off all their clothes because of all the deadly UV rays. While we've made some nice strides (http://www.epa.gov/air/caa/40th.html) over the years, governments around the world have proven time and again that they aren't particularly good at curbing carbon emissions. On Tuesday, a Dutch environmental group called the Urgenda Foundation (http://www.urgenda.nl/) tried to hold their government responsible for its failure to protect them from climate change by filing a class action lawsuit (http://www.bbc.com/news/world-europe-32300214) on behalf of 866 citizens (http://www.theguardian.com/environment/2015/apr/14/dutch-government-facing-legal-action-over-failure-to-reduce-carbon-emissions).

The case, resting upon Dutch domestic and European Union-wide human rights laws (supposedly making it the first human rights-based climate change case in the world (http://www.bbc.com/news/world-europe-32300214)), is an attempt to use legal means to bypass legislative and executive logjams (http://www.theguardian.com/environment/2015/apr/14/dutch-government-facing-legal-
action-over-failure-to-reduce-carbon-emissions) on environmental policies—a first in European courts. Urgenda and its plaintiffs hope that they can convince the courts to compel the Dutch government to reduce carbon emissions to 25 to 40 percent below 1990s levels by 2020, the purported bare minimum needed to avoid a two-degree Celsius rise in worldwide temperatures.

Experts expect to see a verdict out of The Hague within the next six months. This may seem quick, but Urgenda has been building this case since 2012, when they sent a letter to the Dutch government requesting that they please reduce emissions ASAP and threatening a court case if appropriate legislation was not passed. They based the legal theories of their lawsuit on the writings of the American climate change lawyer (and currently one of the head lawyers involved in the litigation in the Hague) Roger Cox, who has equated the role of the courts in pushing climate change policies to their role in advancing civil rights policies in the fraught political environment of mid-20th century America.

Although no one is sure where the Dutch courts will fall on the issue, local papers have quoted court officials saying that they're open to forcing the adoption of climate change policies. Yet Urgenda and its allies are hoping for more than just a victory in the Netherlands—they're hoping that their case will inspire similar attempts to push environmental policies via legal channels across the world. At least one related case, on behalf of 8,000 Belgians against their government, seems to signal that such a global judicial climate change policy push could be on the way.

But although the Dutch case is novel in its approach and location, it's not the world's first use of the courts to try to push carbon emissions reduction requirements. Unfortunately, almost all of the previous attempts have met with failure. Most notably, in 2011...
The US Supreme Court ruled in a case filed by several states against fossil fuel-powered utilities companies that federal courts couldn't issue rulings or requirements that would regulate emissions. And another case (a class action lawsuit against national governmental entities similar to the one in the Netherlands) filed in 2011 has failed to gain substantial traction. That's partially due to similar assertions that, in the US, it's the job of the legislature and existing regulatory bodies (like the Environmental Protection Agency), rather than the courts, to regulate emissions and determine climate change policies.

Although these previous failures in the US courts will likely have little to no impact on Dutch judges' decisions, they do call into question whether the global movement Urgenda and its associates hope to inspire can take root here. Hoping to learn more about the potential impact of the Dutch case on American judges and lawyers, VICE reached out to Michael B. Gerrard of Columbia University, a professors of environmental law focusing on cases like the one in the Netherlands.

VICE: Tell me a little bit about the cases that've been filed in America with an eye toward pushing climate change policies through the judiciary—why did they fail?

Michael Gerrard: There were four lawsuits filed in the federal courts in the US based on the theory of public nuisance, with some of the same ideas that [show up in the Dutch case].

They were all ultimately dismissed under various legal doctrines, but they all revolve around the push for a separation of powers—what is the proper role of the courts versus the proper role of the Congress and the executive. One of these cases went up to the US Supreme Court, that actually was seeking relief somewhat similar to what's sought [in the Dutch case]—seeking an order from a court that half a dozen power companies reduce their greenhouse gas emissions. And the Supreme Court rejected that and said that when Congress enacted the Clean Air Act, it gave [the Environmental Protection Agency] the authority to regulate air pollution, including greenhouse gases. Therefore it's the EPA's job, not the job of the courts, to set emissions limits.

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Were those public nuisance cases the only ones in America?
There's one other theory that is being litigated now. That's the public trust doctrine (https://www.law.cornell.edu/wex/public_trust_doctrine). There's this group in Oregon called Our Children's Trust that has organized lawsuits in several different US states. Most of those have been dismissed, but there's one still pending in Oregon.

Why were the others dismissed?
There are three principle grounds that have been used. One is that the public trust doctrine does not extend to the atmosphere. Second is that it's not the proper role of courts to be setting emissions limitations. The third is that the plaintiffs don't have standing in that they're affected by climate change the same as everyone else—under some theories in order to have standing you need to be affected differently than the public at large.

Decisions in the US thus far have been pretty gloomy. Is there really any hope that the remaining case will open up a path for people to use the judiciary to advance climate change policies?
[The remaining Oregon public trust case is] based on state law, and so it will be up to the courts of Oregon to decide. The case did survive an initial motion to dismiss, which meant that the court felt there was enough there to be worth going forward.
But future cases suing for policy change in America would have to happen state-by-state?
I think it would most likely be on a state-by-state basis.

Hasn't the dismissal of such cases in some states made that difficult in those areas?
But remember this was on particular grounds. If somebody came up with other grounds [the courts] might think about it differently.

How do the theories US cases were built on compare to those used in the Dutch case?
As I read the Dutch complaint, it's an array of theories. Some of them overlapped with what we have in the US. I think there was some reference to the public trust issue and to nuisance. They also relied heavily on various human rights as established by the European Commission on Human Rights, which are not applicable here.

Even if they're similar in spirit, does the difference in the theoretical basis and legal system at play in the Netherlands mean that there's little we can learn from that case?
I don't want to prejudge that. Who knows whether something will emerge that will inspire some US judges. But certainly the Supreme Court precedent in the Connecticut case is difficult. But on its terms it only applies to federal common law. It doesn't apply to state common law. So one could imagine a state court taking up such a case.

The legal avenue for pushing climate change policies in America seems pretty knotty.
Should we just look to legislative solutions as the more promising approach?
In the United States, Congress is moving backward. The current Congress is dominated by those who deny the very existence of climate change and by those who would like to cut back on the EPA's authority to deal with greenhouse gases.

So a judicial route would be preferable in the US?
Don't put words into my mouth [laughs].

Most of the judicial effort in America is by states and industries to shut down the EPA's rule-making, and the legal effort of the environmental community is mostly to defend the EPA and upholding its current actions under the Clean Air Act.
We're not close to seeking affirmative judicial action along the lines of what's being sought in the Netherlands. That was tried. It didn't succeed. And that's not the current focus.

VICE also called Professor Mary Wood (http://law.uoregon.edu/faculty/mwood/) of the University of Oregon, who focuses on pushing environmental policies in the courts via public trust theories. We asked her to clarify a few points on the legal grounds for bringing cases in America and to share her own views on the Dutch case.

**VICE: What's the big difference between nuisance and trust cases?**

**Mary Wood:** The nuisance cases were brought against corporations for the most part. Public trust is a claim brought by citizens against a government.

**What do you think of this recurrent idea that the American courts can't play a role in pushing climate change policies?**

They've assumed that the other two branches of government would deal with the problem. And what the Netherlands plaintiffs are saying and what the US plaintiffs are saying is, *if the courts stay passive, and the other branches don't act, it will be too late*. I can only believe that judges, like everybody else, are starting to wake up to the urgency of climate change and will view their role a little differently once they truly appreciate the gravity of the situation.

[Plaintiffs in America and the Netherlands] are simply asking the courts to require a plan of action, requiring the other branches to do their jobs. In the United States, courts have done that many times in history. They've done that in land use cases, education funding cases, treaty rights cases, and so forth. The only thing that makes it difficult here is that courts have become very passive in environmental law.

**Even if courts can play a role in determining climate policies, it seems like they're just too reticent to do so. Is there any hope for the remaining cases in the US court system?**

Two courts have found that there is a public trust in the atmosphere... and the cases are moving forward and more are being brought.
How would you compare the basis of the Dutch case to America's cases? They're part of the same thought. Each country has a different legal system, but both of them proceed from the same basis: that government is in control of the atmospheric property and has control over actions that affect the climate. So government should be held responsible when we're facing climate catastrophe.

What do you think the chances are of the Dutch plaintiffs winning their case?
At some point, the chances of success are moved from the realm of law to the realm of judicial courage.