The role of judges in systemic climate litigation: a comparative analysis of Ireland and the Netherlands

ORLA KELLEHER

University College Dublin

INTRODUCTION

This paper addresses the question of what role the judiciary should play in reviewing the adequacy of a state's climate mitigation policies from a constitutional and human rights perspective. Using Jeff King's contextual institutional approach to public law adjudication,[1] this paper argues that notwithstanding the politically charged nature of such litigation, courts can still adjudicate without threatening the separation of powers.

There has been a spate of domestic and international climate litigation across the globe in recent times.[2] To date over 1,587 climate cases have been filed and/or decided in 37 jurisdictions.[3] The majority of these cases are sometimes described as 'routine cases'[4] in which courts are indirectly exposed to climate change arguments, for example, in cases dealing with planning applications or the allocation of emissions

[1] King, J (2012) *Judging Social Rights* Cambridge University Press; King, J (2008) 'Institutional Approaches to Judicial Restraint' (28, 3) *Oxford Journal of Legal Studies* 409.

[2] See generally: Setzer, J and Byrnes, R (2020) *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 at 4 ‹ available at http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf accessed: 19 June 2021.

[3] Ibid.

[4] See generally: Setzer, J and Byrnes, R (2019) *Global trends in climate change litigation: 2019 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 2019 at 2 ‹available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf› accessed: 19 June 2021.

allowances under schemes like the European Union's emissions trading system.[5] These routine cases are beyond the scope of this paper. This paper focuses instead on 'systemic rights-based cases' in two jurisdictions, the Netherlands and Ireland, where litigants have challenged the overall ambition of states' climate mitigation policies on fundamental rights (and statutory) grounds.

Climate litigation, particularly rights-based systemic cases, serve a number of important functions: holding governments and corporate entities[6] to account for contributing to climate change related-harm; spurring on regulatory and policy changes; reinforcing national commitments to obligations under international climate law; and raising public awareness about the impacts of climate change.[7] Although judges are increasingly being asked to engage with arguments relating to climate change, Fisher, Scotford and Barrett have highlighted the complex, polycentric and socio-politically charged nature of climate change means that these cases do not fit neatly into the 'existing and well-honed grooves' of the legal adjudicative process.[8]

A criticism often levelled at climate litigation is the alleged inappropriateness of courts weighing in on politically charged issues like

[5] Ibid.
[6] To date there has been 40 climate cases against 'Carbon Major' corporations. While most actions are argued on the basis of tort law, there has been one inquiry by Human Rights Commission of the Philippines which found in December 2019 that Carbon Major companies could be found legally and morally liable for human rights violations arising from climate change. See: Setzer and Byrnes *Global trends* supra note 2 at 18-22. See also: Setzer, J and Benjamin, L (2020) 'Climate Litigation in the Global South: Constraints and Innovations' (9, 1) *Transnational Environmental Law* 77 at 92-94.
[7] French, D, 'What's Good About Climate Change Litigation? A Subtle Critique'(Climate Change Law, Litigation and Governance Workshop, University of Warwick 18 February 2018) available at http://gnhre.org/2018/04/18/blog-climate-change-law-litigation-and-governance/ accessed: 19 June 2021.
[8] Fisher, E; Scotford, S and Barritt, E (2017) 'The Legally Disruptive Nature of Climate Change' (80, 2) *Modern Law Review* 173 at 174.

the adequacy of climate mitigation targets.[9] Climate action, particularly mitigation measures, raise 'complex, polycentric and seeming intractable'[10] ethical and political questions.

Climate change poses an ethical dilemma because wealthy countries and people, which historically and to the present day, disproportionately contribute to climate change have the least incentive to act; while poorer countries and people who have contributed the least and have the least capacity to adapt will be the most harmed by the impacts of climate change.[11] Climate change is politically fraught because limiting global average temperature rise to 1.5°C above pre-industrial levels would require energy transitions 'unprecedented in terms of scale' and 'deep emissions reductions in all sectors.'[12] According to Carbon Brief, limiting warming to 1.5°C starting in 2019, without net-negative emissions, would require a 15% reduction each year through to 2040.[13] Climate change poses an existential threat to our current economic systems as there is 'no empirical evidence that absolute decoupling from resource use can be achieved on a global scale against a background of continued economic

[9] de Graaf, KJ, and Jans, JH (2015) 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (27, 3) *Journal of Environmental Law* 517 at 523-526; Verschuuren J, 'Spectacular judgment by Dutch Court in climate change case' (Tilbury University Blog, 25 June 2015) available at https://blog.uvt.nl/environmentallaw/?p=109 accessed: 21 June 2021; Warnock C, 'The *Urgenda* decision: balanced constitutionalism in the face of climate change?'(OUP Blog, 22 July 2015) https://blog.oup.com/2015/07/urgenda-netherlands-climate-change/ accessed: 21 June 2021.

[10] Bodansky D; Brunnée, J and Rajamani, L (2017) *International Climate Change Law* Oxford University Press at 2.

[11] Office of the High Commissioner for Human Rights, *Report of the UN Special Rapporteur on Human Rights and Extreme Poverty on Climate Change and Poverty* A/HRC/41/39 (2019) at 4-5 available at https://undocs.org/A/HRC/41/39 accessed 20 June 2021.

[12] Intergovernmental Panel on Climate Change (2018) *Special Report on Global Warming of 1.5 C Summary for Policymakers* at 15 available at https://www.ipcc.ch/sr15/

[13] Hausfather, Z (2019) 'UNEP: 1.5C climate target 'slipping out of reach'' (*Carbon Brief*, 26 November 2019) https://www.carbonbrief.org/unep-1-5c-climate-target-slipping-out-of-reach accessed: 21 June 2021.

growth, and absolute decoupling from carbon emissions is highly unlikely to be achieved at a rate rapid enough to prevent global warming over 1.5°C or 2°C, even under optimistic policy conditions.'[14] The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has stated that 'Goals for [...] achieving sustainability cannot be met by current trajectories, and goals for 2030[15] and beyond may only be achieved through transformative changes across economic, social, political and technological factors.'[16] IPBES define 'transformative changes' as 'a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values.'[17]

Ethically challenged and politically fraught, climate change has also come to be recognised as the greatest ever threat to fundamental rights.[18]

---

[14] Hickel, J; Kallis, G (2018) 'Is Green Growth Possible?' (25, 4) *New Political Economy* at 469.

[15] 2030 goals refers to the 2030 Agenda for Sustainable Development and goals under the Paris Agreement.

[16] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (2019) *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* at 14 available at https://www.ipbes.net/sites/default/files/2020-02/ipbes_global_assessment_report_summary_for_policymakers_en.pdf accessed: 20 June 2021.

[17] Ibid.

[18] See Savaresi, A and Auz, J (2019) 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (9, 3) *Climate Law* 244, which examines the evolution of and growing traction for a rights-based approach to climate change over the past decade; see also: Michelle Bachelet, ' Global update at the 42nd session of the Human Rights Council: Opening statement by UN High Commissioner for Human Rights Michelle Bachelet' (Geneva, 9 September 2019) available at ‹https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E› accessed: 20 June 2021; OHCHR Report on climate change and extreme poverty supra note 11 at 1; Office of the High Commissioner for Human Rights, *Report of the UN Special Rapporteur on Human Rights and the Environment on a Safe Climate* A/74/161 (July 2019) at 10-13 available at https://undocs.org/en/A/74/161 accessed: 20 June 2021; Michelle Bachelet, 'Open-Letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action.' (21 November 2018) https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf accessed: 20 June 2021; The Committee on the Elimination of Discrimination against

The World Health Organization estimates that by 2030, some 250,000 climate-related deaths each year will be caused by heat stress, malaria, diarrhea and malnutrition alone.[19] According to the World Bank, at 2 °C of warming, 100 to 400 million more people could be at risk of hunger and 1 to 2 billion more people may no longer have adequate water.[20] The World Bank has also calculated that by 2050, climate change could internally displace more than 143 million people in Sub-Saharan Africa, South Asia, and Latin America alone.[21] Climate change threatens the whole range of fundamental rights including the right to life, health, food, water, housing, sanitation, property, education, an adequate standard of living, a healthy environment, self-determination, development and culture.[22] As the UN Special Rapporteur on Extreme Poverty and Human Rights recently highlighted, climate change also poses a growing threat to democracy and the rule of law because there is a risk that states will respond to the

---

Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, 'Joint Statement on 'Human Rights and Climate Change'' (16 September 2019) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998 accessed: 20 June 2021; Michelle Bachelet, 'Bachelet welcomes top court's landmark decision to protect human rights from climate change' (20 December 2019) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E accessed: 20 June 2021.

[19] World Health Organisation (2014), *Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s* at 1 available at http://apps.who.int/iris/bitstream/handle/10665/134014/9789241507691_eng.pdf;jsessionid=5904D43ED275AA9FEFBE65FEAC8E5116?sequence=1 accessed: 20 June 2021.

[20] World Bank (2010) *World Development Report 2010: Development and Climate Change* at 5 available at https://openknowledge.worldbank.org/handle/10986/4387 accessed: 20 June 2021.

[21] World Bank (2018) 'Groundswell: Preparing for Internal Climate Migration,' March 19, 2018, https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration

[22] Robinson M and Shine T (2018) 'Achieving a climate justice pathway to 1.5°C' (*Nature*, July 2018) 565 https://www.nature.com/articles/s41558-018-0189-7 accessed: 20 June 2021; see also: Schapper A (2018) 'Climate justice and human rights' (32,3) *International Relations* 275 at 277-280.

worsening climate crisis by augmenting government powers and restricting some fundamental rights.[23] While the impacts of climate change will impact earliest and hardest on countries in the Global South, these impacts will also be felt in the Global North. Within Europe environmental hazards associated with climate change such as extreme temperatures disproportionately impact on the health and wellbeing of older adults, children, those in poor health and groups of lower socio-economic status.[24]

As Fisher, Scotford and Barritt have noted the rise in climate litigation appears 'inevitable' and they argue in favour of a 'reflective, rigorous and creative discussion about the relationship between climate change and legal reasoning,'[25] which is exactly what this paper seeks to provide. The paper uses Jeff King's contextual institutional approach to judicial restraint theory to explore the role the judiciary can play in scrutinising government and legislative action on climate mitigation from a constitutional and human rights perspective. This paper assesses two systemic rights-based cases (the *Urgenda* judgments[26] in the Netherlands and the *Friends of the Irish Environment v Government of Ireland* judgments[27] in Ireland) through the lens of King's theory and engages in a

[23] OHCHR Report on climate change and extreme poverty supra note 11 at 15.
[24] Office of the High Commissioner for Human Rights (2009) *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* A/HRC/10/61 at 15-18 available at https://www.refworld.org/docid/498811532.html accessed: 20 June 2021. See also: Schapper Climate Justice supra note 22 at 280-281; European Environmental Agency (2018), *Unequal exposure and unequal impacts: social vulnerability to air pollution, noise and extreme temperatures in Europe* 6-7 available at https://www.eea.europa.eu/publications/unequal-exposure-and-unequal-impacts accessed: 20 June 2021.
[25] Fisher Scotford and Barritt 'Legally Disruptive' supra note 8 at 176.
[26] *Urgenda Foundation v Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7196; *Netherlands v Urgenda Foundation* (9 October 2018) ECLI:NL:GHDHA:2018:2591; *Netherlands v Urgenda Foundation* (20 December 2019) ECLI:NL:HR:2019:2006.
[27] *Friends of the Irish Environment CLG v Government of Ireland* [2019] IEHC 727; *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49.

comparative analysis of the approach to justiciability taken in both cases. The central claim of this paper is that it is possible for courts to adjudicate systemic rights-based cases and in doing so, strike the correct balance between respect for the separation of powers and fulfilling the judicial function of ensuring respect for fundamental rights.

First, the debate on how strictly courts should scrutinise government action is presented from the perspective of King's contextual institutional approach to judicial restraint. This allows the present author to construct a normative theory of legal adjudication for systemic rights-based climate cases. The paper acknowledges that the kinds of far-reaching policy changes required to stay within 1.5°C global average temperature rise can only, and *should* only, come from the democratically elected legislature and government. It is certainly not the position of this paper that courts should usurp this role and devise climate laws or policies. The paper reasons, with reference to King's theory, that it is appropriate, for courts to intervene to ensure the protection of fundamental rights. The next section briefly addresses the comparative methodology, choice, and structure. The third section assesses the respective approaches taken by the Dutch courts in *Urgenda* and the Irish courts in *Friends of the Irish Environment* in light of King's theory of adjudication. The paper argues that judiciaries can and should scrutinise executive action on climate mitigation and that it possible to do so in a manner that does not encroach upon the separation of powers. The paper argues that a probing judicial attitude, where courts show a willingness to hold governments to account for the inadequacy of adopted mitigation policies, is justifiable given the scale of the climate-induced human rights crisis caused by the inadequacy of such policies. The final section offers some concluding remarks.

KING'S CONTEXTUAL INSTITUTIONAL APPROACH TO JUDICIAL RESTRAINT AND A NORMATIVE THEORY OF LEGAL ADJUDICATION FOR SYSTEMIC RIGHTS-BASED CLIMATE CASES

In his monograph, *Judging Social Rights*[28]and article 'Institutional Approaches to Judicial Restraint,'[29] King develops a roadmap for public law adjudication of 'hard cases.' In *Judging Social Rights,* King's focus is on social rights which he argues are important enough to be recognised as enforceable constitutional and human rights, but claims that their complexity requires a workable theory of judicial restraint.[30] In 'Institutional Approaches to Judicial Restraint,' King presents this contextual institutional theory to judicial restraint in the context of 'hard cases' in administrative law adjudication more generally.[31] According to King, institutional approaches to adjudication have grown out of a reaction to the problems with two principal alternatives: non-doctrinal approaches and formalist approaches to adjudication.[32]According to King, institutional approaches place emphasis on problems like uncertainty and judicial fallibility; the knock-on effect of judgments; such approaches generally see individual rights as *prima facie* claims subject to balancing rather than as trumps over collective welfare; and such approaches understand courts to be involved in inter-institutional comity or collaboration vis-à-vis the other

[28] King *Judging Social Rights* supra note 1.
[29] King 'Institutional Approaches' supra note 1.
[30] King Judging *Social Rights* supra note 1 at 17-58.
[31] King 'Institutional Approaches' supra note 1.
[32] According to King, the problem with non-doctrinal approaches is that the lack of calculability is unfair to the losing party and also offends our serve of being governed by the rule of law, rather than the whim of a judge. It also fails to take adequate account of possibility that judges get things wrong. The problem with formalist approaches, which are based on binary distinctions such as law and politics, principle and policy and justiciability and non-justiciability, is its façade of objectivity, its rigidity and resistance to revision. See: King 'Institutional Approaches' supra note 1 at 411-422.

branches of government.[33] Contextual institutionalists, like King, support an expansive notion of justiciability but advocate for the use of particular tools to address the aforementioned problems arising out of broad judicial discretion under conditions of limited institutional competency—principles of restraint.[34] Contextual institutionalists believe that judges can be trusted to balance competing interests in adjudication; that there is 'some intersubjectively stable normative content to human rights and other public values' that are worth protecting.[35] Contextual institutionalists also attach importance to the role of legal argumentation in courts and the ability of courts to deliver legal certainty.[36] Contextual institutionalists can be contrasted with restrictive institutionalists[37] who advocate for a strong degree of judicial restraint; reject balancing as part of the judicial function; support bright-line adherence to rules that lessen the use of judicial discretion; are keen on limiting the expansion of precedent; and prefer the absolute supremacy of legislatures to the idea of inter-institutional collaboration.[38]

King's contextual institutional approach involves consideration of four key principles of restraint, which should shape the exercise of judicial discretion *vis-à-vis* the question of justiciability in public law adjudication: democratic legitimacy, polycentricity, expertise and the need for

[33] King *Judging Social Rights* supra note 1 at 136-140; King 'Institutional Approaches' supra note 1 at 425-429.
[34] King *Judging Social Rights* supra note 1 at 141; King 'Institutional Approaches' supra note 1 at 430.
[35] King 'Institutional Approaches' supra note 1 at at 430.
[36] Ibid.
[37] For an example of restrictive institutionalism see: Vermeule, A (2006). *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* Harvard University Press
[38] King 'Institutional Approaches' supra note 1 at 430-431; King *Judging Social Rights* supra note 1 at 141-142.

administrative and legislative flexibility.[39] King explains that by democratic legitimacy, he is referring to problems of legitimacy when confronted with judicial fallibility and reasonable disagreement about the scope and interpretation of fundamental rights.[40] Polycentricity relates here to the effect of judgments in complex cases on unrepresented third parties.[41] Expertise, in this context, refers to the ability of courts to engage with certain kinds of evidence; to estimate the ramifications of their judgment; or to question the judgment of an official.[42] Flexibility is concerned with the judicial imposition of finality on a question such that it fetters administrative or legislative decision-making.[43]

While these principles may at first glance seem like objections to expansive powers of judicial review, under certain circumstances King claims they can justify judicial intervention. First, King argues that the presumptive *democratic legitimacy* of legislation or policy should fall away, such that it is appropriate for courts to intervene, where there has been an absence of legislative focus on a rights issue or where legislation or policy fails to protect groups that are particularly vulnerable to majoritarian bias or neglect.[44] Second, King contests the idea that all *polycentric* disputes are unsuitable for adjudication[45] and identifies several attenuating factors that could justify courts adjudicating polycentric issues: the existence of a judicial mandate; a limited degree of polycentricity; flexible remedies and

[39] King 'Institutional Approaches' supra note 1 at 435. For detailed exploration of these principles see: King *Judging Social Rights*, supra note 1 at 152-286.
[40] King 'Institutional Approaches' supra note 1 at 435.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] King *Judging Social Rights* supra note 1 at 153.
[45] See: Fuller, L (1978-9) 'The Forms and Limits of Adjudication' (92) *Harvard Law Review* 353 for a discussion of the problems with polycentric problems and adjudication.

the possibility of revisiting a precedent.[46] Third, King asserts that judicial deference towards *expertise* should be lost where there has been a failure to apply expertise; a failure due to a distinctive fact; or when the state's action runs contrary to established scientific/social evidence.[47] Fourth, regarding flexibility, King claims that other branches of government should remain flexible with respect to uncertain future events and judges should not stymie such flexibility.[48] Flexibility can be achieved by promoting, amongst other things, the use of vague legal standards, non-intrusive remedies and constitutional avoidance by judges.[49] It is important to point out that King's contextual institutional approach reflects the position of many contemporary judges and scholars on public law adjudication[50] including those who ardently defend rights-based judicial review.[51]

While King details much of his contextual institutional approach to judicial restraint, at least in *Judging Social Rights,* in the context of social rights, parallels can be drawn between social rights and environmental protection rights in terms of the importance and the challenges they raise. In *Judging Social Rights*, King notes that different theories of human rights – dignity, freedom, utilitarianism and social citizenship – support the recognition and constitutionalization of social rights.[52] Whether environmental protection is construed as a freestanding right, as deriving from existing rights such as the right to life, human dignity and family life, or as some kind of condition precedent for the enjoyment of other fundamental rights, a process constitutionalising environmental protection

[46] King *Judging Social Rights* supra note 1 at 189.
[47] Ibid at 235-249.
[48] Ibid at 264.
[49] Ibid at 275-286.
[50] King 'Institutional Approaches supra note 1 at 410.
[51] Ibid at 441.
[52] King *Judging Social Rights* supra note 1 at 20-28.

can also be observed across the globe. Evidence of this recent 'environmental rights revolution'[53] is borne out by the fact that 148 out of 193 national constitutions now incorporate some form of environmental protection provisions[54] and the superior/constitutional courts in several other countries have recognised some form of environmental right as implicit in existing constitutional provisions.[55] Like social rights, environmental rights raise issues in terms of complexity[56] and it can be reasoned by analogy that a theory of judicial restraint is also required.

In laying out a normative theory of adjudication for rights-based systemic climate cases here, the first point of note is that as an idealised theory,[57] restrictive institutionalism has its attractions. It would certainly be better if legislatures and governments enacted ambitious climate laws and policies rather than leaving it to courts to intervene. However, the restrictive institutionalists' emphasis on the absolute supremacy of the legislature and general posture of judicial restraint appear strategically naïve and sits uncomfortably with the experience hitherto of political foot-dragging when it comes to tackling climate change. As Burdon and Williams note 'in the context of the impending environmental crisis… individuals and communities should have the liberty to deploy whatever discursive

[53] Boyd, D, (2012), *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* UBC Press at 3.
[54] O'Gorman, R (2017) 'Environmental Constitutionalism: A Comparative Study' (6, 3) *Transnational Environmental Law* 425 at 441.
[55] Boyd, D (2010) 'The Implicit Constitutional Right to Live in a Healthy Environment' (20, 2) *Review of European Community & International Environmental Law* 171 at 172; see also: *Merriman v Fingal County Council* [2017] IEHC 695, [264].
[56] For a discussion of issues of complexity/polycentricity, climate change and justiciability, see: Fisher, Scotford and Barritt 'Legally Disruptive' ' supra note 8 at 180.
[57] An idealised theory can be understood as one where all relevant agents would be willing and able to fulfil their duties in the context of climate change. See: Zellentin, A (2015) 'How to do climate justice' in Brooks T (eds.), *Current Controversies in Political Philosophy* Routledge at 125-126.

strategy or law is appropriate to attain even modest or perhaps temporary protection.'[58] Courts are beginning to emerge as a second-best option for securing such protection. The contextual institutional approach to adjudication can therefore be seen as a non-idealised theory that strives to counter injustices in circumstances where some agents (particularly governments) are shirking their duties when it comes to tackling climate change.[59] The contextual institutional approach to adjudication offers more protection, at least for the time being, to those most vulnerable to the adverse impacts of climate change.

Applying King's four key principles of restraint to rights-based systemic climate cases, it becomes clear that courts do not need to shy away from adjudicating such cases. Taking King's claim that legislation should not enjoy *democratic legitimacy* where it ignores a pertinent rights issue or fails to protect groups vulnerable to majoritarian neglect, climate litigants in systemic cases invariably argue that a State's unambitious climate mitigation policies flout their human and constitutional rights obligations. While not the case in the two systemic rights-based cases examined here, litigants also frequently come from vulnerable, politically under-represented social groups like children, older adults and indigenous communities who are projected to suffer the worst impacts of climate change.[60] In terms of *polycentricity,* rights-based systemic climate change

[58] Burdon, P and Williams, C (2016) 'Rights of nature: a constructive analysis' in Fisher, D (eds) *Research Handbook on Fundamental Concepts of Environmental Law* Edward Elgar 196 at 205.
[59] For a detailed discussion of idealised and non-idealised theory in the context of climate change see: Zellentin 'How to do climate justice' supra note 57 at 125-126.
[60] See: *Juliana et al. v. United States of America* (http://climatecasechart.com/case/juliana-v-united-states/), in which twenty-one individual youth plaintiffs filed a lawsuit in the Federal District Court in Oregon against the US federal government alleging that the 'nation's climate system' is vital to their rights to life, liberty, and property; that the federal government has infringed their substantive due process rights by allowing fossil fuel production, consumption, and combustion at 'dangerous levels'; and that the government has

cases are the polycentric dispute *par excellence.*[61] However, several of the attenuating factors King refers to can also be seen in systemic rights cases. For example, the existence of a judicial mandate in most countries to ensure that the other branches act in accordance with the law gives judges authority to uphold and enforce existing climate legislation and to hold foot-dragging executives to account for inadequate climate policies.[62] Courts also have a mandate to vindicate individuals' legal rights and to remedy legal wrongs done to individuals relating to climate change.[63] With respect to the loss of judicial deference towards *expertise* where the state's action runs contrary to established scientific evidence,[64] the climate mitigation policies of the states' implicated in rights-based systemic climate litigation does contradict authoritative scientific evidence on climate

---

failed to fulfil its duties under the public trust doctrine; *ENVironnement JEUnesse v. Canada* (http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government) involved a class action taken on behalf of Québec citizens aged 35 and under. The litigants sought a declaration that the Government of Canada has failed in its obligations to protect the fundamental rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms by setting a greenhouse gas reduction target insufficient to avoid dangerous climate change impacts ; *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* (http://climatecasechart.com/non-us-case/union-ofswiss-senior-women-for-climate-protection-v-swiss-federal-parliament) where the litigants are a an association of Swiss women over the age of 75 claimed that by failing to steer Switzerland towards an emissions reduction trajectory consistent with the goal of keeping global temperatures below 2ºC above pre-industrial levels, the State was violating their constitutional and ECHR rights. In their request, the applicants asserted that they belong to a demographic group (women on average over 75 years old) that is particularly vulnerable to extreme heatwaves, which are being made more made more likely, longer and more intense in Switzerland because of climate change; Case C-565/19 P *Armando Ferrão Carvalho and Others v The European Parliament and the Council* (CJEU, 25 March 2021) counted among its applicants an association representing young indigenous Sami and a claim that EU's 2030 climate target to reduce domestic greenhouse gas emissions by 40% by 2030, as compared to 1990 levels, is too low to stave off dangerous climate change and threatens the applicants' fundamental rights of life, integrity, occupation, property and equal treatment under the Charter of the EU Charter of Fundamental Rights.

[61] Fisher Scotford and Barritt 'Legally Disruptive Change' supra note 8 at 178-181.

[62] Preston, B (2016) 'The Contribution of the Courts in Tackling Climate Change'(28, 1) *Journal of Environmental Law* 11 at 12-13.

[63] Ibid at 13.

[64] King *Judging Social Rights* supra note 1 at 235-249.

change. This makes the case for judicial restraint based on expertise weak. In terms of maintaining flexibility and King's claims that flexibility can be achieved by promoting, amongst other things, non-intrusive remedies, it will be seen that courts can and do carefully craft remedies in systemic rights-based cases so as not to hamper administrative/legislative decision-making in addressing climate change.

Based on King's contextual institutional approach to adjudication, this paper argues that judicial intervention in systemic rights-based cases is justifiable in circumstances where existing mitigation policies patently ignore relevant human rights issues; where courts have a constitutional mandate to uphold the rule of law and protect fundamental rights; where the state's actions run contrary to established scientific evidence and where non-intrusive remedies are available.

COMPARING URGENDA AND FRIENDS OF THE IRISH ENVIRONMENT THROUGH THE LENS OF KING'S THEORY OF ADJUDICATION

Before considering *Urgenda* and *Friends of the Irish Environment* in light of the author's adaptation of King's theory, some points should be made about the comparative approach that will be taken and the case selection.

According to Hirschl, the purpose of the comparative study of the 'international migration of constitutional ideas'[65] is to foster 'self-reflection

[65] Hirschl, R (2008) 'The Rise of Comparative Constitutional Law: Thoughts on Substance and Method' (2) *Indian Journal of Constitutional Law* 11 at13.

through analogy, distinction, and contrast'[66] allowing us to glean better insights into, or at least different viewpoints on, our own constitutional norms by juxtaposing them with the constitutional practices of other, broadly similar, jurisdictions.[67] Tushet notes that comparative constitutional study can help us dispense with ideas of 'false necessity' in our understanding of the law, that is: a belief that 'the institutions and doctrines we have are the only ones that could possibly be appropriate for our circumstances.'[68] It may also reinforce a belief that such doctrinal and institutional arrangements are in fact the only ones appropriate given the contextual backdrop.[69]

Tushet identifies three different 'ways of doing' comparative constitutional law: normative universalism, functionalism and contextualism, the latter coming in two variants, simple contextualism and expressivism.[70] The first two approaches involve looking at how constitutional ideas developed in one legal system might be related to, inform or improve those in another.[71] According to Tushet, these approaches are 'flawed' because their examination of abstract concepts lacks contextual analysis.[72] His answer to this problem is contextualism which:

> emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and that we are likely to go wrong if we try to think of any specific doctrine

[66] Ibid at 12.
[67] Ibid at 12-13.
[68] Tushnet, M (2008), *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* Princeton University Press at 13.
[69] Ibid.
[70] Ibid at 5.
[71] Ibid.
[72] Ibid at 9.

or institution without appreciating the way it is tightly linked to the context within which it exists.[73]

Contextualism requires us to 'take an appropriately wide view' of the context in which constitutional ideas operate.[74] Expressivism is a 'more comprehensive version of contextualism' conceptualising 'constitutional law – the doctrines and institutional arrangements' as the 'ways in which a nation goes about defining itself.'[75]

O'Connell has further refined Tushet's typology into two broad approaches: the emulative and sensitive approaches, which he claims should not be understood 'as mutually exclusive, but… as essential component parts of any fruitful comparative exercise.'[76] For O'Connell, the emulative approach examines how different legal systems have addressed the same legal problems with a view to improving the approach in the comparatist's own jurisdiction.[77] The emulative approach is then 'refined, nuanced and improved' by simultaneously using 'the sensitive approach, which requires the comparatist to be at all times cognisant of the economic, social and political maelstrom which gives rise to particular legal solutions in a given jurisdiction.'[78]

Climate change is evidently a global issue and needs to be discussed as such, but it must be recalled that countries and regions of the Global North are principally responsible for the GHG emissions driving climate change. Between 1751 and 2017, the USA is responsible for 25% of

[73] Ibid at 10.
[74] Ibid at 12.
[75] Ibid.
[76] O'Connell, P (2012), *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* Routledge at 18.
[77] Ibid.
[78] Ibid at 19.

historical emissions and the EU-28 (prior to Brexit) is the second largest historic emitter at 22%.[79] Between 1990 and 2015 (when the impacts of climate change were well known), the richest 10% of the world's population (approximately 630 million people who mostly live in the Global North) were responsible for 52% of cumulative emissions in that period, depleting nearly a third of the carbon budget consistent staying within 1.5°C.[80] In that same period, the poorest 50% (approximately 3.1 billion people who mostly live in the Global South) were responsible for just 7% of cumulative emissions for that period.[81] There is a growing number of climate cases in the Global South and a burgeoning scholarship tracing this trend.[82] The focus of such climate litigation — which is beyond the scope of this paper— has predominantly been on enforcing existing environmental legislation, protecting important native ecosystems, boosting adaptation efforts, and enhancing institutional structures rather than asking for more stringent mitigation measures (as has been the trend in the Global North).[83] The Global North's disproportionate responsibility for GHG emissions both historically and in contemporary times justifies a focus here on European litigation targeted at driving governmental climate mitigation measures.

Urgenda and *Friends of the Irish Environment* were chosen here because they are embedded in different contexts and legal systems but deal with a similar legal issue. In both cases, the courts were asked to consider

[79] Ritchie, H and Roser, M (2019) 'CO2 emissions' available at https://ourworldindata.org/co2-emissions accessed: 20 June 2021.
[80] Oxfam, 'Confronting Carbon Inequality' (21 September 2020) available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621052/mb-confronting-carbon-inequality-210920-en.pdf accessed: 20 June 2021.
[81] Ibid.
[82] Setzer, J and Benjamin, L, (2020) 'Climate Litigation in the Global South: Constraints and Innovations' (9, 1) *Transnational Environmental Law* 77.
[83] Ibid at 85-94.

the adequacy of a developed state's climate mitigation policies. *Friends of the Irish Environment* was inspired by the success of *Urgenda* at first instance.[84] Practically speaking, the comparison is also feasible as final judgment has been issued by the court of final appeal in both cases. Comparing the approach taken to the question of justiciability in *Urgenda* and *Friends of the Irish Environment,* through the lens of King's theory of adjudication, it becomes evident that the judiciary can play a legitimate role in examining governments' climate mitigation policies. Scrutiny of the negative human rights implications of climate change and recognition of the need for effective remedies can provide courts with a defensible route to limiting the executive branch's discretion in tackling climate change.

Urgenda

The contextual backdrop

As a low-lying country, the Netherlands is especially vulnerable to the impacts of climate change.[85] The report of the Delta Commission presented to the Dutch government in 2008 indicated that the Netherlands should be preparing for regional sea level rise of 0.65 to 1.30 metres by 2100 and 2 to 4 metres by 2200.[86] The report recommended *inter alia* that '[t]he level of flood protection must be raised by at least a factor of 10 with respect to the present level.'[87] The 2012 report of the Netherlands Court of

[84] Climate Case Ireland, 'What was the inspiration of the case?' https://www.climatecaseireland.ie/climate-case/#about-the-case accessed: 20 June 2021.
[85] PLN/Netherlands Environmental Assessment Agency, 'Correction wording flood risks for the Netherlands in IPCC report (PLN) https://www.pbl.nl/en/correction-wording-flood-risks accessed: 25 March 2020.
[86] Delta Commission (2008) *Working together with water: A living land builds for its future* at 10. This report was cited in the summons of Urgenda. See an unofficial translation of the summons, 45 available at www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf.
[87] Ibid. It is also worth mentioning the recent proposal of constructing a Northern European Enclosure Dam that stretches 637km between France, the United Kingdom and Norway to

Audit *Adaptation to Climate Change: Strategy and Policy* refers to some of the predicted impacts of climate change for the Netherlands including coastal and fluvial flooding, excessive precipitation, water shortages, decreasing water quality, salinization, waterlogging and droughts, loss of biodiversity, increased incidence of infectious diseases, deterioration of air quality, increased exposure to UV and an increase of water-related and food-related diseases.[88] These climate vulnerabilities form part of the backdrop to the *Urgenda* case, as do the Netherlands' climate and environmental policies. Until 2011, the Dutch government had set itself the goal to achieve a 30% reduction in greenhouse gas emissions in 2020 (compared to 1990).[89] This goal aligned with the finding in the IPCC Fourth Assessment Report 2007 ('AR4') that industrialized countries should realize an emission reduction of 25 to 40% by the year 2020, as compared to the base year of 1990, to have a 66% chance of staying within the 2°C global average temperature rise[90] (which is no longer recognised as a safe guardrail).[91] This AR4 finding was repeatedly referred in UNFCCC and Kyoto Protocol Conferences of the Parties (COP) decisions, which were

protect over 25 million people and important economical regions in northern Europe against sea level rise. See: Groeskamp, S and Kjellsson, J (2020) 'NEED: The Northern European Enclosure Dam for if climate change mitigation fails' *Bulletin of the American Meteorological Society* 1174.

[88] The Netherlands Court of Auditors, *Adaptation to climate change: national strategy and policy* (2012), 35. This report was cited in the summons of Urgenda. See an unofficial translation of the summons, 45 available at www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf

[89] *Urgenda*, District Court judgment supra note 26 at para 2.71-2.73.

[90] Gupta, S, et al, (2007), 'Policies, Instruments and Co-operative Arrangements' in Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change Ch 13, Box 13.7 at 776 available at https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg3-chapter13-2.pdf accessed: 20 June 2021.

[91] United Nations Framework Convention on Climate Change Subsidiary Body for Scientific and Technological Advice, (2015) *Report on the structured expert dialogue on 2013-2015* review at 18 available at https://unfccc.int/resource/docs/2015/sb/eng/inf01.pdf accessed: 20 June 2021.

endorsed by each of the state Parties including the Netherlands.[92] After 2011, the Netherlands revised its ambition downwards in line with the EU's overall reduction target of a 20% reduction by 2020 (compared to

[92] See: The Bali Action Plan adopted at COP13 which recognised the need for drastic reductions for the Annex I countries with detailed references to AR4, including to a table which states that the Annex I countries have to achieve an emission reduction of 25-40% by 2020 relative to 1990 in order to stay below the 2° C warming target. The Cancun Pledges adopted at COP16 stated that the Annex I countries should continue to lead the way in fighting climate change and that this requires Annex I countries to reduce their greenhouse gas emissions by 25-40% in 2020 relative to 1990. The COP also urged the Annex I countries to step up their level of ambition, either individually or jointly, relative to the earlier commitments of the Annex I countries. In Cancun, the EU said it was prepared to achieve a 20% reduction by 2020 compared to 1990, and offered to achieve a 30% reduction on the condition that other countries were to undertake the achievement of similar reduction targets. The Joint Statement at COP17 in Durban also made reference to a reduction for Annex I countries by 2020 of 25-40%. The Doha Amendment adopted at COP18 called upon Annex I countries again to increase their reduction targets to at least 25-40% for 2020. The EU reiterated its 30% pledge but did not follow through because other developed countries did not agree to a similar reduction target. At COP19 in Warsaw there was another call for Annex I countries were called upon to increase their reduction targets to at least 25-40% for 2020. At COP 21 in Paris, the Paris Agreement was adopted and created the Nationally Determined Contribution approach to emission reduction targets. At COP23 in Bonn there was a further acknowledgment of the need for 'enhanced action' in the period up to 2020. For more detail see: For more detail see: *Urgenda*, District Court judgment supra note 26 at para 2.48-2.52; Urgenda's notice of appeal of 18 April 2017 at para 6.14-6.18. *Urgenda* Court of Appeal judgment supra note 26 at para 11; *Urgenda* Supreme Court judgment supra note 26 at para 2.1.

1990).[93] The Netherlands' *per capita* emissions are the fifth highest in the European Union.[94]

It is also worth recalling some features of the Dutch legal order. Within the Dutch legal order, the legislature, rather than the courts, has the ultimate say as to the constitutionality of Acts of Parliament and treaties– this is reflected in article 120 of the Dutch Constitution, which places a bar on testing whether a statutory provision (other than secondary legislation) or treaty is compatible with the Constitution.[95] It is also well established that the courts are not entitled to interfere with the law making prerogative of the legislature by ordering the adoption of legislation.[96] As against this, Article 94 of the Dutch Constitution, reflecting the Netherlands' monist approach, to international law stipulates that statutory regulations – including Acts of Parliament – in force within the Kingdom shall not be applicable if such application is in conflict with the provisions of treaties that are binding on all persons. Article 94 therefore instates a form of

[93] EU, *2020 climate & energy package*. The EU endorsed a 30% target by 2020 (compared to 1990) provided other countries committed to comparable reductions, but pending these commitments committed itself to the 20% reduction: see: Presidency Conclusions of the Brussels European Council (8/9 March 2007). The EU reaffirmed commitment to move to 30%: see: Presidency Conclusions of the Brussels European Council (11 and 12 December 2008). Notwithstanding these commitments the EU did not move from 20% to 30% target. The EU also acknowledged that its 20% commitment fell outside the 25-40% range for industrialised nations which was supported by the EU at the Bali Climate Change Conference in December 2007.: see EESC Opinion on the Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community COM(2008) 16 final-2008/0013 COD.

[94] European Environmental Agency, 'Country profiles - greenhouse gases and energy 2019' (European Environmental Agency, 31 October 2019) https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/climate-and-energy-country-profiles/copy_of_country-profiles-greenhouse-gases-and accessed: 27 July 2020.

[95] Article 120: the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts. See: Efthymiou, N, and de Wit, J, (2013) 'The Role of Dutch Courts in the Protection of Fundamental Rights' (9, 2) *Utrecht Law Review* 75, at 76-77.

[96] *Waterpakt v State of the Netherlands* (21 March 2003) ECLI:NL:HR:2003:AE8462

judicial review whereby courts have to review national law, not for compatibility with *all* international law, but for compatibility with provisions of treaties that are 'binding on all persons.'[97] If a national provision is incompatible with a treaty provision which is binding on all persons, the national provision is no longer applicable and the treaty provision should be applied.[98] The general rule is that rights under the ECHR, such as Articles 2 (right to life) and 8 (right to respect for private and family life and home), are self-executing provisions binding on all persons.[99] Ng notes that the Dutch 'courts have a powerful tool under international law monism that has allowed them to build up a jurisprudence to protect rights.'[100]

The judgment of the Hague District Court

It was in the context of a worsening climate crisis that a Dutch NGO, Urgenda (a non-profit, limited liability foundation) and 886 individual co-plaintiffs initiated a lawsuit against the Dutch state in 2013 with the aim securing an order requiring the state to reduce Dutch GHG emissions by 40% at the end of the year 2020, or at least by a minimum of 25% (both in comparison to 1990).[101] At this time, the Netherlands did not have specific statutory framework for tackling climate change. Urgenda argued that the

[97] 'Binding on all persons' is determined by reference to the content of the provision. Where the provision of a treaty does not require enacting national legislation this will often be indicative of a provision being 'binding on all persons.' see: Efthymiou, N and de Wit, J (2013) "The Role of Dutch Courts in the Protection of Fundamental Rights" (9, 2) *Utrecht Law Review* 75 at 78.
[98] Ibid.
[99] van Schooten, H and Sweeney, J (2003) 'Domestic Judicial Deference and the ECHR in the UK and Netherlands' (11) *Tilburg Foreign Law Review* 439 at 453.
[100] Ng, G, (2014) 'Judicialisation and the End of Parliamentary Supremacy' 3 Global Journal of Comparative Law 50, 93.
[101] See: Unofficial translation of Urgenda's Summons, 121-122 www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf

Netherlands' GHG emissions are contributing to dangerous levels of climate change and that Dutch GHG emissions are excessive in absolute terms and on a per capita basis.[102] It claimed that under both national and international law,[103] the Dutch state was obliged, in order to prevent dangerous climate change, to ensure the reduction of the Dutch emissions level.[104] It claimed that Dutch emissions, for which the state as a sovereign power has systemic responsibility, are unlawful, and violate the Dutch state's duty of care, under Section 162 of Book 6 of the Dutch Civil Code, towards those whose interests Urgenda represented[105] Moreover, the plaintiffs also claimed that this also constitutes an infringement of article 2 (the right to life) and article 8 (the right to respect for private and family life and home) of the ECHR, on which both Urgenda and the parties it represented can rely.[106]

At first instance, the Hague District Court ordered the Dutch state to limit Dutch annual GHG emissions by at least 25% at the end of 2020 compared to the level in 1990.[107] The District Court based its judgment on the doctrine of hazardous negligence.[108] The Court held that the state's legal obligation could not be derived from the Dutch Constitution or international legal norms, but that the court was entitled to consider the objectives of international and European climate policy in determining the

[102] *Urgenda* District Court judgment supra note 26, at para 3.2.
[103] These national and international obligations include: Article 21 of the Dutch Constitution (which makes it the 'concern of the authorities to keep the country habitable and to protect and improve the environment'); the international 'no harm' principle; the UNFCCC and its associated protocols; Article 191 of the Treaty on the Functioning of the European Union.
[104] *Urgenda* District Court judgment supra note 26, at para 3.2.
[105] Ibid at para 3.2.
[106] Ibid.
[107] Ibid at para 5.1.
[108] Ibid at para 4.83-4.86.

minimum degree of care.[109] Based on the Dutch Supreme Court's ruling in *Kelderluik* (*Cellar Hatch*), and case law on the doctrine of hazardous negligence, the District Court extrapolated several criteria to determine the government's duty of care in the context of climate change.[110] These criteria included the nature and extent of the damage caused by climate change; the foreseeability of the damage; the likelihood of dangerous climate change; the nature of the government's acts/omissions; the onerousness of taking precautionary action; and the discretion that the government may exercise based on public law in light of scientific knowledge; availability of mitigation measures and cost benefit analysis.[111] Regarding the nature, foreseeability of damage and likelihood of dangerous climate change, the Court held that the state has a duty of care to take preventative measures in light of the high risk of dangerous climate change.[112] In relation to the onerousness of the requested relief, the court noted that the Netherlands had previously committed itself to a 30% reduction and the state had not argued that the decision to revise its target downwards was based on improved scientific insights or economic reasons.[113] Further, it was both more efficient and more cost effective to adopt more ambitious mitigation policies in the short term.[114] The Court held that the government's discretion was limited by the necessity to take mitigation measures and its obligation to protect its citizen from the 'risk of dangerous climate change with its severe and life-threatening consequences.'[115] Having recognised

[109] Ibid at para 4.52. The 'reflex effect' rule enables a domestic court to interpret national law consistently with international law, even when that international law lacks direct applicability.
[110] *Kelderluik* (5 November 1965), ECLI:NL:HR:1965:AB7079.
[111] *Urgenda* District Court judgment supra note 26 at para 4.54, 4.63.
[112] Ibid at para 4.65.
[113] Ibid at para 4.70.
[114] Ibid at para 4.73.
[115] Ibid at para 4.74.

that the state has a duty of care to take mitigation measures,[116] the Court held that it was hazardously negligent and unlawful for the state to set emission reduction targets for 2020 *lower* than the minimum level of 25% by 2020 compared to 1990 levels.[117] The District Court rejected the ECHR aspect of Urgenda's claim on the basis that Urgenda, a limited liability foundation, could not be designated as a 'direct or indirect victim' within the meaning of the admissibility provision, Article 34 of the ECHR.[118] The Court said that Articles 2 and 8 of the ECHR could nevertheless serve as an interpretative aid when detailing the open standard of care under Book 6, Section 162 of the Dutch Civil Code.[119]

According to Burgers and Staal, this approach 'caused the District Court to veer off into unchartered and complicated territory.'[120] By refusing to recognise the direct applicability of articles 2 and 8 of the ECHR, the District Court had to stretch the doctrine of hazardous negligence,[121] creating a 'rickety contraption'[122] that left the District Court open to criticism for the judgment's 'questionable' legal basis.[123] While the District Court's 'unprecedentedly complicated construction'[124] of hazardous negligence may have been unsatisfactory, its justification for intervention

---

[116] Ibid at para 4.83.
[117] Ibid at para 4.84-4.86.
[118] Ibid at para 4.45.
[119] Ibid at para 4.46.
[120] Burgers, L and Staal, T [2019] '*Climate action as positive human rights obligation: The Appeals Judgment in Urgenda v The Netherlands*' in Nijdam, J and Wouter, W (eds.) (2019) (49) *Netherlands Yearbook of International* Law *2018: Populism and International Law* Springer 223 at 226.
[121] Ibid at 227.
[122] Ibid.
[123] For a critique of Urgenda including its legal basis and a critique of judicial determinations of climate disputes see: Bergkemp, L (2015) 'Adjudicating scientific disputes in climate science: the limits of judicial competence' (3) *Environmental Liability*, 81. https://energypost.eu/urgenda-judgment-victory-climate-likely-backfire/› accessed: 27 March 2020.
[124] Burgers and Staal *'Climate action'* supra note 120 at 227.

in the context of climate harm is robust and aligns closely with King's contextual institutional approach to public law adjudication and the operation of his principles of restraint.

The District Court engaged in a comprehensive analysis of the justiciability/separation of powers issue noting that Dutch law has a distribution of powers in which the judiciary is tasked with providing legal protection and settling legal disputes, which it must do if requested.[125] The District Court observed that although unelected, judges enjoy another form of democratic legitimacy: their authority and resulting power is derived from democratically enacted laws which charge them with the task of settling disputes, including disputes in which citizens are taking legal action against their governments.[126] The Court determined that Urgenda's claim was for legal protection vis-à-vis the state and was amenable to judicial review.[127] The Court further stated that the fact that a judgment might have political repercussions did not render the matter a political issue beyond the scrutiny of the courts.[128] Reflecting the polycentricity and flexibility principles in King's theory, the District Court acknowledged that a measure of restraint is required when dealing with polycentric issues that could impact third parties or curtail executive power in international climate negotiations.[129] In a similar way to King, the District Court acknowledged the existence of attenuating factors including the *existence of a judicial mandate* to provide legal protection and settle disputes and the availability of *non-intrusive remedies* that maintain flexibility. This flexibility is reflected in the District Court's conclusion that government

[125] *Urgenda* District Court judgment supra note 26, at para 4.95.
[126] Ibid at para 4.97.
[127] Ibid at para 4.98.
[128] Ibid.
[129] Ibid at para 4.95-4.96, 4.100.

retained discretion in how it wishes to comply with the order of at least a 25% reduction by 2020 compared with 1990 levels because the method of mitigation is not detailed in the order.[130]

While the District Court accepted Urgenda's standing to initiate the claim, it rejected (partially on practical grounds) the claim initiated on behalf of the 886 individual co-plaintiffs.[131] The Court noted that consideration of these interests would not alter the judgment— the individual co-plaintiffs did not have sufficient own interests distinct from Urgenda's interest to justify the recognition of standing in their own right.[132] The Dutch government appealed the judgment to the Hague Court of Appeal and Urgenda cross-appealed (on its own behalf without the 886 co-plaintiffs) arguing that it was entitled to rely directly on Article 2 and 8 of the ECHR.

The judgment of the Court of Appeal

In 2018, the Hague Court of Appeal upheld the decision of the District Court but based its decision directly on article 2 and 8 of the ECHR.[133] The Court of Appeal, setting aside the District Court's restrictive interpretation of victimhood, reasoned that article 34 of the ECHR only relates to the admissibility of claims to the European Court of Human Rights and could not be used as a basis for denying Urgenda the possibility of relying on Article 2 and 8 of the ECHR before the national courts.[134] The Court of Appeal held that Dutch law was 'decisive in determining the access to the Dutch courts' and Book 3, Section 305a of the Dutch Civil Code expressly provides for 'class actions,' in fact it was designed to facilitate the kind of

[130] Ibid at para 4.101.
[131] Ibid at para 4.109.
[132] Ibid.
[133] *Urgenda* Court of Appeal judgment supra note 26 para 35-36.
[134] Ibid at para 35.

class action being brought by Urgenda.[135] The Court found that '[a]s individuals who fall under the state's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf under Book 3 Section 305a of the Dutch Civil Code.'[136]

With reference to the case law of the European Court of Human Rights (ECtHR) on articles 2 and 8 on environmental harm,[137] the Court of Appeal noted that articles 2 and 8 impose a positive obligation on governments to 'take concrete actions to prevent future violations of these interests.'[138] The Court of Appeal surmised that these obligations extend to both public and private activities which could endanger these rights including industrial activities, which by their nature are dangerous.[139] It further extrapolated that where there is a known, real and imminent threat then the state 'must take precautionary measures' to prevent a violation as far as possible.[140] It reasoned that, given the real threat of dangerous climate change and the consensus that global warming should be limited to well below 2°C, articles 2 and 8 impose a duty on the State to protect against this serious threat.[141] The Court of Appeal found the Netherlands' endorsement of a 25-40% reduction in the UNFCCC/Kyoto COP decisions and its previous target of a 30% reduction by 2020 factually significant and

[135] See: *Urgenda* District Court judgment supra note 26 at para 4.6;
Urgenda Court of Appeal judgment supra note 26 at para 38.
[136] *Urgenda* Court of Appeal judgment supra note 26 at para 36.
[137] *Öneryildiz v Turkey* (App no. 48939/99) ECtHR 30 November 2004, no. 48939/99), *Budayeva et al./. v Russia* (ECtHR 20 March 2008,App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02),) ECtHR 20 March 2008; *Kolyadenko et al./. v Russia* (ECtHR 28 February 2012, nos.App nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05),)ECtHR 28 February 2012; and *Fadeyeva/ v Russia* (App no. 55723/00) ECtHR 9 June 2005, no. 55723/00.
[138]*Urgenda* Court of Appeal judgment supra note 26 at para 41.
[139] Ibid at para 43.
[140] Ibid.
[141] Ibid at para 45, 50.

opined that a minimum 25% reduction was in line with the State's obligations under the ECHR.[142]

Criticism of the Court of Appeal's judgment has centred on its failure to adequately explain how the case law of ECtHR on environmental harm, which related to environmental dangers on a much smaller scale with consequences for fewer people, can be applied to climate change.[143] Burgers and Staal point out that, notwithstanding the Court of Appeal's 'at times perhaps too straightforward' [144] analysis, there is nothing in the ECtHR environmental harm case law that would necessarily place climate change outside the scope of positive obligations under the ECHR; on the contrary, one would expect more protection the larger the scale of the threat.[145] In other words, while the Court of Appeal could have elaborated on how the ECtHR environmental law case law applies to climate change, it is also difficult to identify an obvious legal error in its analysis.

By grounding its judgment on European human rights law, the *Urgenda* decision found more sure footing from the point of view of the separation of powers. As the Court of Appeal put it, the State is violating fundamental rights through its inadequate climate policies and this calls for the provision of measures by the judiciary.[146] This justification aligns with King's presumptive *democratic legitimacy* claim, which he says should fall away where important human rights issues are being ignored. Reminiscent of the contextual institutionalist emphasis on balancing rights, the Court of

[142] Ibid at para 51-53; See also para 41 where the Court of Appeal explains how the state has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests and as shorthand for these obligations refers to 'a duty of care.'
[143] Burgers and Stall *'Climate action'* supra note 120 at 229-231.
[144] Ibid at 226.
[145] Ibid at 240.
[146] *Urgenda* Court of Appeal judgment supra note 26 at para 67.

Appeal also acknowledged that measures to reduce emissions have financial implications and entail other sacrifices but emphasised what was at stake: the danger of irreversible changes to ecosystems and liveability of our planet.[147] The Court stressed its constitutional duty to apply provisions of international treaties with direct effect, including Articles 2 and 8 ECHR; these provisions take precedence over Dutch laws that conflict with them.[148] This emphasis on the court's constitutional role reflects King's assertion that the existence of a *judicial mandate* is an attenuating factor when it comes to polycentricity, which can legitimise judicial interference with the other two branches of government. The Court of Appeal dismissed the argument that such an order would require the adoption of legislation and underlined that the State was free to decide how to comply with the order,[149] according with King's flexibility and *non-intrusive remedies* point that weighs in favour of judicial scrutiny.

The State appealed the Court of Appeal's decision and in September 2019 the deputy Procurator General and the Advocate General provided a joint opinion advising the Supreme Court to reject the State's appeal and allow the Court of Appeal's decision to stand.[150]

The judgment of the Supreme Court

In December 2019, the Dutch Supreme Court also found that the State's obligation to 'do its part' in averting dangerous climate change by reducing emissions by at least 25% by the end of 2020 was grounded in human rights law.[151] Referring to case law of the ECtHR, the Supreme Court

[147] Ibid.
[148] Ibid at para 69.
[149] Ibid at para 68.
[150] *Netherlands v Urgenda Foundation* (8 October 2019) ECLI:NL:PHR:2019:1026.
[151] *Urgenda* Supreme Court judgment supra note 26 at para 5.7.1.

emphasised the State's positive obligation to take suitable measures including preventive measures, where there is a known, real and immediate risk to people's lives or welfare.[152] The Supreme Court held that while Articles 2 and 8 ECHR must not result in an impossible or disproportionate burden for a state,[153] the state had not sufficiently substantiated why a reduction of 25% was impossible or disproportionate.[154]

The Supreme Court held that the obligation arose even when it comes to environmental dangers that threaten large numbers of people (i.e. not impacting specific people or specific groups of people) and even if the risk will only materialise decades from now.[155] The Supreme Court referred to Article 13 of the ECHR[156] as well as the Aarhus Convention[157] on access to environmental justice to explain the need for national courts to be in a position to provide effective legal protection in the case of violations or imminent violations of rights under the ECHR. Having determined that Articles 2 and 8 of the ECHR could cover climate change harm, the Supreme Court used the 'common ground' method of interpreting the ECHR[158] to assess whether the positive obligations therein could imply as specific an obligation as a minimum 25% reduction in emissions by 2020.[159] The Supreme Court found that the repeated endorsement in UNFCCC/Kyoto

[152] Ibid at para 5.2.2-5.3.2.
[153] Ibid at para 5.3.4.
[154] Ibid at para 7.5.3.
[155] Ibid at para 5.3.1-5.3.2, 5.6.2.
[156] Ibid at para 5.5.1-5.5.3.
[157] Ibid at para 5.9.2.
[158] See: *Demir and Baykara v Turkey* (App no. 34503/97) ECtHR 12 November 2008, at para 85-86 where the ECrHR held that in the interpretation of the ECHR, courts can take into account international instruments, whether binding or not, as long as these 'denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.'
[159] *Urgenda* Supreme Court judgment supra note 26 at para 5.4.1-5.4.3.

COP decisions of the urgent necessity for developed countries to reduce emissions by at least 25-40% by 2020 established a high degree of consensus, which had to be taken into consideration when interpreting and applying Articles 2 and 8 ECHR.[160] In other words, there were 'objective grounds from which a concrete standard can be derived.'[161]

Like the Court of Appeal, the Supreme Court could readily dismiss the State's argument that the judiciary was overstepping its powers and entering the political domain by reference to its constitutional duty to apply the ECHR.[162] Acknowledging the 'exceptional situation' the threat of climate change created, the Supreme Court emphasised its constitutional duty to assess whether the other two branches, in exercising their discretion, do so within the limits of law, including the limits imposed on them by the ECHR.[163] Like the District Court and Court of Appeal, the Supreme Court also emphasised that the order did not amount to an order to adopt legislation, with a particular content, because the State was free to choose the measures to be taken to comply with the order to reduce emissions by a minimum of 25% by 2020.[164]

By explaining the application of Articles 2 and 8 to climate harm and using 'the common ground' method of interpretation to read the target of at least a 25% reduction by 2020 into the positive obligations of art 2 and 8 ECHR, the Supreme Court arguably increased the precedential value of the judgment.[165] While the legal basis for the *Urgenda* decision was clearly

[160] Ibid at para 6.1- 7.3.6.
[161] Ibid at para 6.4.
[162] Ibid at para 8.3.3.
[163] Ibid at para 8.3.4.
[164] Ibid at para 8.2.7.
[165] See: Sicilianos, L, 'Speech of the President of the ECtHR on the occasion of the opening of the judicial year 31 January 2020' available at https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf accessed: 20

refined and strengthened on appeal,[166] it is interesting to note the consistency of all three courts' reasoning on the doctrine of the separation of powers. The approach of all three courts to the question of justiciability/separation of powers aligns closely with King's contextual institutional approach to public law adjudication and the operation of his principles of restraint. This is evident from all three courts' emphasis on the existence of a judicial mandate and availability of a non-intrusive remedy which attenuate concerns relating to polycentricity and maintain flexibility. The Court of Appeal and Supreme Court's emphasis on violations of fundamental rights as a justification for interference lines up with King's claim that presumptive *democratic legitimacy* should be lost where important human rights issues are being ignored by the other two branches. What emerges from all three courts is a cogent and theoretically sound justification for the judiciary playing a role in reviewing the adequacy of a state's climate mitigation policies.

Friends of the Irish Environment

The background

The backdrop to *Friends of the Irish Environment* is notably different to *Urgenda*, yet there are clear points of overlap. Ireland's climate vulnerabilities are well documented by Ireland's Environmental Protection Agency (EPA). According to the EPA, the impacts of climate change for

June 2021. Here, the President of the ECtHR described the Dutch judges' direct reliance on the ECHR as highlighting that the ECHR 'can provide genuine responses to the problems of our times.'

[166] See: Leijten, I, 'Dutch Supreme Court confirms: Articles 2 and 8 ECHR require a reduction of greenhouse gas emissions of 25% by 2020' (Strasbourg Observers, 25 January 2020) available at https://strasbourgobservers.com/2020/01/23/dutch-supreme-court-confirms-articles-2-and-8-echr-require-a-reduction-of-greenhouse-gas-emissions-of-25-by-2020/#more-4495 accessed: 20 June 2021. Here the author describes the reasoning of the Supreme Court as more 'convincing' and 'elegant' than the Court of Appeal's reasoning on human rights.

Ireland include an increased risk of fatalities, injury, ill health (including a likely increase in food-borne and water borne disease and higher instance of skin cancer).[167] The EPA has also documented the risk of disruption to livelihoods from extreme weather events as well as a danger that more extreme storms and inundation from sea level rise could wreak havoc on hundreds of square kilometres of coastal areas.[168] Notwithstanding the risks posed by climate change, Ireland has been a notoriously poor performer on climate action.[169] Addressing the European Parliament, the former *Taoiseach* (head of government) Leo Varadkar described Ireland as a 'laggard' when it comes to tackling climate change.[170] Ireland's *per capita* emissions are the third highest in the European Union.[171]

In terms of Ireland's climate strategy, Ireland went from being allowed to increase its emissions (from 1990 to 2012) to having one of the highest emission reduction targets in the EU (for the period of 2012 to

---

[167] The Environmental Protection Agency (2016) *A Summary of the State of Knowledge on Climate Change Impacts for Ireland*, 30 available at https://www.epa.ie/publications/research/climate-change/EPA-RR-223_web.pdf.
[168] Ibid at 26.
[169] See: Germanwatch, NewClimate Institute and Climate Action Network, (2019) *Climate Change Performance Index* at 7, 19 available at https://germanwatch.org/sites/germanwatch.org/files/CCPI-2019-Results-190614-WEB%20A3.pdf accessed: 20 June 2021 in which Ireland was ranked the worst in the EU on climate action performance; see also: Germanwatch, NewClimate Institute and Climate Action Network, *Climate Change Performance Index 2020* at 9, 21 available at https://germanwatch.org/sites/germanwatch.org/files/CCPI-2020-Results_1.pdf accessed: 20 June 2021 in which Ireland was ranked the second worst performer on climate action after Poland.
[170] Sargent, N, 'Taoiseach tells EU he is not proud of Ireland's role as Europe's climate 'laggard' *The Green News* (18 January 2018).
[171] European Environmental Agency, 'Country profiles - greenhouse gases and energy 2019' (European Environmental Agency, 31 October 2019) available at https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/climate-and-energy-country-profiles/copy_of_country-profiles-greenhouse-gases-and accessed: 20 June 2021.

2020).[172] Under the Effort Sharing Decision, Ireland is required to reduce its non-ETS emissions by 20% in 2020 compared to 2005 levels.[173] Attempts to enact framework legislation on climate change date back to the mid-2000s.[174] Almost a decade later, after several more ambitious climate action bills were defeated, the Climate Action and Low Carbon Development Act 2015 (2015 Act), devoid of binding emission reduction targets, was enacted.[175] The decision to omit emission reduction targets was motivated by concerns that 'the inclusion of targets might render government vulnerable to legal action and/or constitutional challenge.'[176]

The 2015 Act sets the objective of a 'national transition' to an undefined 'low carbon, climate resilient, and environmentally sustainable economy' by 2050.[177] With a view to achieving this transition, the 2015 Act requires the government to adopt a National Mitigation Plan (NMP) every 5

[172] See: Jackson, A, [2020] 'Ireland's Climate Action and Low Carbon Development Act 2015: symbolic legislation, systemic litigation, stepping stone?' in Muinzer, T, (eds.) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* Hart.
[173] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136.
[174] Jackson 'Ireland's Climate Action Act' supra note 172.
[175] Ibid.
[176] Conor Linehan, (2013) 'UK and Irish domestic greenhouse gas reduction targets: justiciability, enforceability and political context' 21(2) *Environmental Liability* 45 at 54.
[177] Section 3(1) of the Climate Action and Low Carbon Development Act 2015. The National Policy position on Climate Change, which envisaged 'an aggregate reduction in carbon dioxide emissions of at least 80% (compared to 1990 levels) by 2050 across the electricity generation, built environment and transport sectors; and in parallel, an approach to carbon neutrality in the agriculture and land-use sector, including forestry, which does not compromise capacity for sustainable food production,' provides an indication of what the government understand this 'low carbon, climate resilient and environmentally sustainable economy' would entail. See: https://www.dccae.gov.ie/en-ie/climate-action/publications/Pages/National-Policy-Position.aspx

years.[178] In 2017, the Irish government approved its first NMP, for the first period of 2017 to 2022.

The NMP has come in for criticism from the Climate Change Advisory Council, an independent statutory body,[179] which has described Ireland's current and projected emissions to 2035 as 'disturbing'[180] and has repeatedly warned that: '[Ireland] is not on a pathway towards a low-carbon transition. The 2017 National Mitigation Plan contained insufficient measures to put Ireland on this pathway.'[181] Over the lifetime of the NMP and over the coming decades, Irish GHG emissions are projected to remain above 1990 levels rather than falling steeply below this level.[182]

The government's adoption of the NMP was challenged by way of judicial review in *Friends of the Irish Environment CLG v Government of Ireland*.[183] Friends of the Irish Environment (FIE), an non-profit company and environmental charity, argued that the NMP was *ultra vires* the 2015 Act; violated the right to life, bodily integrity and an environment consistent with human dignity under the Irish Constitution; was in breach of Articles 2 and 8 of the ECHR via the duty on organs of the State to perform functions compatibly with ECHR obligations (pursuant to section 3(1) of the European Convention on Human Rights (ECHR) Act 2003); and

[178] Section 3(1)(a) and section 4(1)(b) of the Climate Action and Low Carbon Development Act 2015.
[179] Section 8 of the Climate Action and Low Carbon Development Act 2015.
[180] Climate Change Advisory Council, *Annual Review 2018* (July 2018) at iii available at https://www.climatecouncil.ie/media/climatechangeadvisorycouncil/contentassets/publications/CCAC_AnnualReview2018.pdf accessed: 20 June 2021.
[181] Ibid at 40.
[182] EPA, *Ireland's Provisional Greenhouse Gas Emissions 1990-2018* (October 2018) at 10 available at https://www.epa.ie/publications/monitoring--assessment/climate-change/air-emissions/Report_GHG-1990-2018-Provisional-Inventory-October-2019.pdf accessed: 20 June 2021; EPA, I*reland's Greenhouse Gas Emissions Projections 2018-2040* (June 2019) at 4 and 18 available at https://www.epa.ie/publications/monitoring--assessment/climate-change/air-emissions/Greenhouse_Gas_Projections.pdf accessed: 20 June 2021.
[183] *Friends of the Irish Environment* High Court judgment supra note 27.

was manifestly unreasonable/disproportionate.[184] FIE sought an order quashing and remitting the Plan to government for redrafting; and declarations that the Plan was in violation of the ECHR, the Irish Constitution.[185]

The factual basis for FIE's claim was that Irish emissions are projected to rise by c.10% between 1990 and 2020 and would further increase by 2030.[186] FIE argued that, in circumstances where emissions were going to rise over the lifespan of the NMP, the State failed in its obligations under the 2015 Act. Under the 2015 Act, the NMP must 'specify' the manner in which it is proposed to achieve the national transition objective.[187] Relying on criticisms levelled at the NMP by the Climate Change Advisory Council, FIE argued that the NMP did not comply with the requirements under the 2015 Act because it fails to specify how it was proposed to achieve the national transition objective.[188] FIE (like *Urgenda*) emphasised the factual significance of the finding in AR4 that a 25-40 % emission reduction trajectory was required of developed countries to have a 66% chance of staying below 2°C and the repeated endorsement of this finding in UNFCCC/Kyoto COP decisions.[189] Under the Paris Agreement well below 2°C and striving for 1.5°C is now recognised as the temperature goal,[190] accordingly, the required emissions reductions trajectory is now even steeper than that outlined in AR4.[191] FIE also relied on the concept of carbon budgets and the linear relationship between cumulative emissions and global temperature rise, discussed in the IPCC's Assessment Report 5

[184] Ibid at para 12-13.
[185] Ibid at para 12.
[186] Ibid at para 24.
[187] Sections 4(2)(a) of the Climate Action and Low Carbon Development Act 2015.
[188] *Friends of the Irish Environment* High Court judgment supra note 27 at para 66.
[189] Ibid at para 19.
[190] Article 2(1)(a) of the Paris Agreement
[191] IPCC SR15 supra note 12.

(AR5), to impress upon the Court that eleventh hour reductions would not be sufficient to keep global average temperature rise within the limits of the Paris Agreement. In addition, FIE relied on AR5 and other authoritative peer-reviewed reports[192] on the adverse impacts that climate change would have on humans and ecosystems as evidence to support its claim that a NMP not calculated to achieve short term emission reduction targets violated fundamental rights.[193]

The government argued that neither the decision to approve the NMP nor the NMP itself were justiciable.[194] The government pleaded that even if the NMP were justiciable, a high degree of deference should be afforded to the government and that the NMP was only "an initial step" towards putting Ireland on a pathway to achieving the 2050 national transition objective: the NMP was a 'living document,' the government argued.[195] The government also asserted that, as a company rather than a natural person, FIE lacked standing to litigate personal and human rights under the Constitution and the ECHR.[196] The government also contested that there was any breach of statutory provisions or constitutional and ECHR rights.[197]

The judgment of the High Court

The High Court held against FIE, finding that the NMP complied with the 2015 Act, that the government enjoys 'wide discretion' in this area; and that in circumstances where the NMP was made in accordance with the 2015 Act, dismissed the alleged fundamental rights breaches on the basis

[192] *Friends of the Irish Environment* High Court judgment supra note 27 at para 27-30.
[193] Ibid at para 6-8.
[194] Ibid at para 38.
[195] Ibid at para 41, 46.
[196] Ibid at para 38.
[197] Ibid at para 42.

that if the NMP was *intra vires* the 2015 Act, it could not be subject to a 'freestanding' challenge on rights grounds.[198] Two aspects of the judgment are relevant to understanding the role the High Court envisaged for itself in reviewing the adequacy of the State's climate mitigation policies: the Court's approach to the justiciability question and the Court's analysis of the alleged fundamental rights breaches.

In considering the issues of justiciability and separation of powers, the High Court began by referring to the school of thought that would legitimise judicial intervention.[199] The Court referred to the right and duty of courts to interfere with the executive's activities to protect and secure constitutional rights where those rights have been, or are being encroached upon, or are threatened by executive activities.[200] It noted where the executive was in breach of the Constitution, the courts would not be precluded from intervening to secure compliance with the provisions of the Constitution.[201] The High Court acknowledged that 'courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference'[202] in the absence of special qualification, experience and democratic accountability.[203] The High Court observed that this is particularly so where there are financial implications for the exchequer and in the context of polycentric issues where a range of competing interests must be taken into consideration.[204] The High Court summarised as follows: while it should not trespass on the executive's

[198] Ibid at para 145.
[199] Ibid at para 88.
[200] Ibid. see also: *T.D. and Others v Minister for Education* [2001] 4 IR 259, 301.
[201] Ibid.
[202] Ibid at para 92. See: *Moore v Minister for Arts, Heritage and the Gaeltacht* [2018] IECA 28, at para 57; *Garda Representative Association v. Minister for Finance* [2010] IEHC 78, at para 15.
[203] Ibid at para 89.
[204] Ibid at para 93.

function, once it was acting within the bounds of the Constitution, it should also be slow to decide that a manner was non-justiciable and insulated from review. [205]

Yet having carefully set out the doctrine of the separation of powers, the High Court shied away expressing a definitive view on whether the government's climate mitigation policies expressed in the NMP were justiciable, repeatedly framing its conclusions in the form 'even if the court concludes that a matter or issue is justiciable'.[206] The Court focused on the wording of the 2015 Act which, in its opinion, were 'couched in terms of policy measures and considerations,' giving the government considerable latitude in achieving its 2050 national transition objective.[207] The High Court held that it could not be said that the NMP does not contain proposals to achieve the 2050 national transition objective.[208]In light of this considerable discretion, the High Court was of the view that the NMP was *intra vires* the 2015 Act and it was not its role to 'second-guess the opinion of Government on such issues.'[209]

On the alleged constitutional rights violations, the High Court held, without much elaboration, that it had difficulty seeing how it was the NMP itself that impacted constitutional rights or put them at risk.[210] This conclusion seems to be premised on the fact that because the NMP contains some proposals for reducing emissions, adopting the NMP could not be said to violate the right to life, bodily integrity or the environment, even if emissions would not decrease over the life of the NMP. Climate change is

[205] Ibid at para 94.
[206] Ibid at para 91, 94, 97, 112.
[207]Ibid at para 97, 112.
[208] Ibid at para 113.
[209] Ibid at para 97.
[210] Ibid at para 133.

increasingly framed as a fundamental rights issue and the impacts of climate change on rights are also now well recognised, including by the Irish government.[211] It is difficult to reconcile the High Court's glossing over of FIE's constitutional rights claim with the fact that climate change poses an existential threat to the future of human rights themselves.[212]

With respect to the alleged breaches of Articles 2 and 8 of the ECHR, the High Court did not follow the finding of the Court of Appeal in *The State of the Netherlands v. Urgenda Foundation* (the Dutch Supreme Court having not yet ruled at the time of the hearing) that the State was under a duty to protect its citizens against the real threat of dangerous climate change based on Articles 2 and 8 of the ECHR.*[213]* The High Court defended this position by invoking the 'mirror principle,' [214] first outlined in *R.(Ullah) v Special Adjudicator*[215] and endorsed by the Irish Supreme Court in *McD v. L & M*.[216] The 'mirror principle' provides that the duty of domestic courts to 'take account'[217] of the jurisprudence of the European Court of Human Rights (ECtHR) involves 'keep[ing] pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[218] The Irish Supreme Court in *McD v L & M* adding to this principle that for reasons of

[211] See for example the following resolutions of the UN Human Rights Council: Resolution 7/23 (2008), Resolution 10/4 (2009), Resolution 18/22 (2011), Resolution 26/27 (2014, while Ireland was a member of the Council), Resolution 29/15 (2015, while Ireland was a member of the Council), Resolution 32/33 (2016), Resolution 35/20 (2017), Resolution 38/4 (2018), Resolution 42/21 (2019), Resolution 44/7 (2020) https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx accessed: 20 July 2021.
[212] Supra note 18.
[213] *Urgenda* Court of Appeal judgment supra note 26, at para 45.
[214] *Friends of the Irish Environment* High Court judgment supra note 27 at para 139.
[215] *R.(Ullah) v Special Adjudicator* [2004] 2 A.C. 323, at para 20.
[216] *McD (J) v. L (P) & M (B)* [2009] IESC 81, at para 95-104.
[217] See: section 2 of the Human Rights Act 1998 and section 4 of the European Convention on Human Rights Act 2003.
[218] *Ullah* supra note 215 at para 20.

consistency, a national court 'should not adopt interpretations of the Convention *at variance* with the current Strasbourg jurisprudence (emphasis added)'.[219] The Supreme Court stressed that the ECHR could not be directly applied under Irish law[220] and was only made part of Irish law through the portal of the 2003 ECHR Act.[221] Because the ECtHR has not yet ruled on the applicability of its Article 2 and 8 case law to environmental harm arising from climate change, the High Court took the view that 'it was not for domestic courts to declare rights under the [ECHR].'[222]

There was no reason why the High Court in *FIE* could not have interpreted the 2015 Act, in light of the existing case law of the ECtHR on environmental harm, to reach a decision on the compatibility of the government's adoption of the Plan with its Convention obligations. This line of analysis would even have been consistent with the approach advocated by the Irish Supreme Court in *McD v L & M*. It is also bears mentioning here that 'a retreat from the mirror principle' is already underway in the UK.[223] Since the *Ullah* judgment, the UK Supreme Court has repeatedly acknowledged that it would be 'absurd' to have to wait for the ECtHR to make an authoritative decision almost directly on point before a domestic court could find a violation of the Convention.[224] The UK

[219] *McD* supra note 216 at para 104.
[220] Section 2 and 4 of the ECHR Act 2003 require that a statutory provision or rule of law be interpreted in light of any decisions of the ECtHR. According to the Supreme Court section 2 is 'an interpretative section and is limited to requiring that a court, so far as possible, when interpreting or applying any 'statutory provisions' or 'rule of law' do so in a manner compatible with the State's obligations under the Convention.' The Supreme Court also made clear that a court must identify a positive rule of law which it is interpreting or applying. See: *McD* supra note 216 at para 44. Section 4 of the ECHR Act requires 'judicial notice' to be taken of the ECHR and decisions of the ECtHR.
[221] *McD* supra note 216 at para 17.
[222] *Friends of the Irish Environment* High Court judgment supra note 27 at para 139.
[223] *Moohan, Petitioner* [2014] UKSC 67, at para 104-105.
[224] *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2 at 112; *Moohan* supra note 223 at para 104.

Supreme Court has also found that where there is no Strasbourg authority directly on point, it is the responsibility of the domestic court to extract principles expressed in the case law of the ECtHR, even if only indirectly relevant, and apply them to the case before it.[225] In these circumstances, the High Court's interpretation of *McD v L & M* could be characterised as either overly restrictive or, in the alternative, in need of re-evaluation in light of the shift away from the mirror principle in the UK.

The highly deferential approach showed a reticence to look behind an NMP and scrutinise its negative human rights implications. The High Court's constrained approach to human rights protection and justiciability was also not the only approach available to the court. Analysing and comparing *FIE* and *Urgenda,* through the lens of King's theory allows us to dispense with the belief that the only option open to the High Court, without encroaching upon the separation of powers, was this restrictive approach to justiciability and human rights adjudication. According to King, the *democratic legitimacy* of a law or decision (or in the present case an NMP) presupposes the legislature has, is fact, focussed on a pertinent rights issue. Yet the High Court had before it a NMP that was not calculated to achieve substantial emission reductions, the IPCC's '25-40%' reduction advice repeatedly endorsed by Ireland and a myriad of uncontested evidence documenting the risk of severe and life-threatening harm to humans and environment from unambitious climate policies. These factors cast doubt on the continued *democratic legitimacy* of the NMP. The High Court referred to a need for 'objective criteria' to review the government action, yet it failed to identify any such criteria.[226] The High Court could

[225] *Surrey County Council v P (Equality and Human Rights Commission intervening)* [2014] UKSC 19, at para 62; *D v Commissioner of Police of the Metropolis* [2018] UKSC 11 at para 77.
[226] *Friends of the Irish Environment* High Court judgment supra note 27 at para 92.

have used these factors as a yardstick against which to assess the NMP, which could have provided the High Court with an acceptable avenue for intervention. Such an approach was taken by the Dutch Supreme Court which said that the repeated endorsement of the IPCC's 25-40% recommendation could provide a concrete standard against which it could assess the compatibility of government's conduct with its obligations under the Convention.[227] As for *polycentricity,* there are several attenuating factors including the existence of a judicial mandate to protect constitutional rights from incursions by the executive; a judicial mandate expressly acknowledged by the High Court. The High Court, based on its judicial mandate, could have conceptualised the matter before as whether it is lawful for the government to adopt climate policies that threaten human life, human health and peoples' livelihoods without compelling reasons; rather than simply as a question of whether it was acceptable to adjudicate on the adequacy of the state's climate mitigation policies. This was how the Court of Appeal and Supreme Court in *Urgenda* construed the question of justiciability and separation of powers.[228] In terms of deference towards *expertise,* King's contention is that judicial deference should be lost where the government's actions flout established scientific evidence. The High Court had before it an abundance of evidence that an NMP not calculated to reduce emissions in the short to medium term runs contrary not only to uncontested IPCC science but also evidence that the NMP has been repeatedly criticised by the Climate Change Advisory Council. In these circumstances, the High Court's highly deferential approach to the exercise of government discretion under the 2015 Act was clearly misplaced. It seems reasonable that the 'wide margin of discretion' in the field of climate

[227] *Urgenda* Supreme Court judgment supra note 26, at para 6.4, 7.1-7.3.6.
[228] Burgers and Staal 'Climate action' supra note 120 at 239.

mitigation should be constrained by accepted climate science and expert advice. Where the government flouts such expertise, a high level of judicial restraint becomes harder to justify, and legal accountability seems necessary. In terms of maintaining *flexibility* and King's claims that flexibility can be achieved by promoting, amongst other things, non-intrusive remedies, the High Court could have easily maintained such flexibility in granting the remedies sought. It is interesting to note that the remedies sought in *FIE* were notably less intrusive than those sought in *Urgenda*. An order of *certiorari* quashing the NMP and declarations of unconstitutional and incompatibility with the ECHR would not have stymied the government's response to tackling climate change but indicated the limitations by which they are bound. It was hoped that on appeal to the Supreme Court would reconsider both the justiciability question and the High Court's analysis of the alleged rights breaches.

The judgment of the Supreme Court

The Supreme Court's judgment focused on the *vires* issue and the requirement under the 2015 Act that a Plan must 'specify' the manner in which it is proposed to achieve the national transition objective. On the issue of justiciability, the Supreme Court found that the issue of whether the NMP complied with the 2015 Act was a matter of law and the Supreme Court had jurisdiction to determine 'whether the [NMP] does what it says on the statutory tin.'[229] The Supreme Court reasoned that the Irish Parliament had enacted legislation detailing at least some of the elements of a compliant NMP, while leaving some other elements as policy decisions

[229] *Friends of the Irish Environment* Supreme Court judgment supra note 27 at para 6.27.

for the government of the day.[230] Once policies of a particular government were enshrined in legislation (such as the 2015 Act) they became law not policy and could be reviewed by the courts.[231] The Supreme Court noted that a 'fundamental obligation of a compliant Plan' is that it *specifies* in 'real and sufficient detail' how it is intended that the NMP will be met by 2050.[232] The Supreme Court noted that the objectives of the 2015 Act are to provide for public participation and transparency so that any 'interested member of the public' can decide whether the NMP is 'effective and appropriate' for meeting the National Transition Objective by 2050.[233] In assessing whether the National Mitigation Plan was 'sufficiently specific'[234] and in contrast to the High Court's decision, the Supreme Court indicated that 'significant weight' should be attached to the Climate Change Advisory Council's criticisms of the NMP, even if the government was not obliged to follow those findings.[235] The Supreme Court concluded that the NMP fell 'a long way short of the sort of specificity required' to comply with the 2015 Act.[236] The Supreme Court indicated that a compliant Plan should have in fact been a 33-year mitigation plan (covering the period up to 2050) rather than a five-year one, albeit one which would be adjusted every five year in light of developments in knowledge, data and technology.[237]

On the alleged fundamental rights breaches, the Supreme Court found that in circumstances where FIE did not itself enjoy any of the fundamental rights it was seeking to rely on, it did not have standing to maintain this aspect of case and did not come within any of the exceptions

[230] Ibid.
[231] Ibid at para 6.25.
[232] Ibid at para 6.20, 6.36.
[233] Ibid at para 6.37.
[234] Ibid at para 6.32.
[235] Ibid at para 6.41.
[236] Ibid at para 6.46.
[237] Ibid at para 6.20, 6.45.

to the standing rules.[238] The finding that FIE did not come within the standing exceptions was certainly not inevitable as standing rules can be relaxed 'where the justice of the case so requires'[239] or there is 'a real risk that important rights would not be vindicated.'[240] Given the rapidly closing window for climate action, the length of time it would take an individual to run the gauntlet in similar proceedings and the cost barriers to environmental public interest litigation, it is certainly arguable that these fundamental rights might not be vindicated. By shutting down the alleged fundamental rights breaches on procedural grounds, the Supreme Court missed an opportunity to clarify whether contributing to an increased risk of climate harms by adopting an NMP that does not reflect the IPCC's 25-40% advice was tantamount to a breach of fundamental rights, such that judicial intervention could be justified. The Supreme Court also passed up on the chance to elucidate how the mirror principle should operate in contemporary rights-based adjudication. However, the Supreme Court did state that if an individual with standing were to take a similar case in the future, constitutional rights and obligations could have a role to play even if these cases were to involve complex matters that touch upon policy.[241]

In a similar fashion to King, the Supreme Court's judgment placed a strong emphasis on the existence of a *judicial mandate* to review government actions for compliance with legislation and constitutional rights, even if involves complex policy issues like climate change. The Supreme Court's reliance on the Climate Change Advisory Council's negative assessment of the NMP aligns closely with King's assertion that judicial deference towards government *expertise* may be lost where

[238] Ibid at para 7.22.
[239] *Cahill v Sutton* [1980] IR 269, 285.
[240] *Friends of the Irish Environment* Supreme Court judgment supra note 27 at para 7.21.
[241] Ibid at para 8.14, 8.16.

government action flies in the face of established scientific evidence. The Supreme Court's remedy of an order of certiorari quashing the NMP is notably less invasive than the remedy in *Urgenda* and leaves policymakers with ample *flexibility* in formulating future NMPs, even though it indicated that a compliant plan would have to be 'sufficiently specific as to policy over the whole period to 2050.'[242] Another technique for maintaining *flexibility* that mirrors King's theory is the avoidance of the constitutional question by preferring the administrative law remedy available instead. Although the Supreme Court determined the case on non-constitutional grounds, it did shed light on three important constitutional issues that could have created uncertainty in future rights-based cases. These three issues were the lack of NGO standing to litigate personal rights; the impossibility of deriving a right to a healthy environment from the text or structure of the Constitution;[243] and the potential relevance of the constitutional guarantees in respect of the ownership of natural resources and state property, property rights and the special position of the home for future cases.[244] These *dicta* tentatively support the suggestion that the presumptive *democratic legitimacy* of any future NMP may dissipate if it were to continue to increase the risk of adverse climate impacts that could threaten these constitutional rights. In those circumstances, rights-based arguments ventilated by an individual could theoretically succeed before the Irish courts and provide a legitimate avenue for judicial intervention to review future government climate action. This speculative observation that judicial intervention on rights grounds might be possible in future case in Ireland would be bolstered if the ECtHR rules on the applicability of the

[242] Ibid at para 9.2.
[243] Ibid at para 8.14.
[244] Ibid at para 8.17.

Convention and existing ECHR case law to climate harms, as is expected in the coming months.[245]

CONCLUSION

The paper has argued, adapting Jeff King's contextual institutional approach to judicial restraint theory, that the judiciary can play a role in scrutinising government action on climate mitigation from a constitutional and human rights perspective. It has shown how the *Urgenda* judgments accord closely with King's theory and provide a cogent and well-reasoned justification for judicial intervention in reviewing the adequacy of a state's climate mitigation policies. In stark contrast, the High Court in *FIE* fudged the justiciability question and focused instead on the wide margin of discretion enjoyed by the government, per the High Court, under the 2015 Act. While it is implicit that this discretion should be exercised with due regard to the government's obligations to respect constitutional and ECHR rights, the High Court, with little analysis, shut down the constitutional and ECHR arguments and denied itself a legitimate avenue for judicial scrutiny. An application of King's theory to *FIE* and a comparison with the Dutch courts' approach to justiciability, separation of powers and the ECHR, demonstrate the approach taken by the Irish High Court was not the only one available. The Supreme Court's judgment, in contrast, aligns more

[245] See: *Duarte Agostinho and Others v. Portugal and Others*, filed 2 September 2020 available at https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf accessed: 20 June 2021; *Klimaseniorinnen v Switzerland*, filed 26 November 2020 available at https://klimaseniorinnen.ch/wp-content/uploads/2020/11/201126_Application_ECtHR_KlimaSeniorinnen_extract_anonymised-2.pdf accessed: 20 June 2021; *Mex M v Austria*, filed 12 April 2020 available at ‹ https://www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf› accessed: 20 June 2021.

closely with King's theory. Even though it left the constitutional and human rights arguments broadly unanswered, the judgment did offer clarity on the role the judiciary can and should play in reviewing the adequacy of a state's climate mitigation policies on both statutory and constitutional rights grounds. Both *Urgenda* and the Supreme Court's judgment in *FIE* illustrate that a robust case can be made for judicial intervention to review the adequacy of a government's climate policies including on constitutional and human rights grounds, without threatening the separation of powers.