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Climate Litigation & Climate Justice: The Distributional Implications of Systemic Rights-Based Climate

Abstract: Human rights arguments have been successful before several domestic courts across Europe in persuading courts to impose obligations on governments to take more ambitious action to cut greenhouse gas emissions. Yet the integration of climate *justice* concerns in judicial decisions have been insufficiently studied. This paper analyses three prominent cases *(Urgenda v. The Netherlands, Klimaatzaak v. Belgium and Neubauer v. Germany)* against a climate justice framework. In the first part we set out our analytical framework. A climate justice approach acknowledges that climate mitigation, like the effects of climate change itself, is distributional in nature. In particular, climate justice highlights the unequal distribution of burdens and benefits across three dimensions: international (justice between states); *intergenerational* (justice between generations); and *intragenerational* (justice between social groups along socio-economic, racial and gender determinants). In the second part, we offer a close reading of three key rights-based mitigation decisions to evaluate how judges have accounted for the various dimensions of climate justice. Analysing the various aspects of climate justice in those decisions, we identify a common reluctance to engage in intragenerational justice concerns. We argue that this reluctance has important implication for lawyers, courts, and social movements, depending on the extent to which legal mobilisation strategies rely on the role of judiciaries as guardians of climate justice.

Keywords: *climate litigation; human rights and climate change; climate justice; intergenerational justice; international justice; intragenerational justice*

Introduction

The effects of the Climate Crisis play out simultaneously on two scales (Larrère, 2015: 73). On one hand, the Crisis is a global phenomenon that affects all human beings without exception. Humanity shares a common fate, and it might therefore be argued that all human beings have a shared responsibility to reduce greenhouse gas emissions. On the other hand, climate change is experienced differently across time and space, exacerbating existing inequalities and social hierarchies. This tension is reflected in the Preamble to the Paris Agreement, which acknowledges climate change as a 'common concern of humankind', whi-

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le simultaneously incorporates the 'principle of equity and common but different responsibilities and respective capabilities'. These well-established facts have given rise to the concept of 'climate justice', a framework adopted by both social movements and scholars (Schlosberg and Collins, 2014: 359). The climate justice framework squarely identifies the Climate Crisis as a distributional challenge, producing normative claims that its burdens should be shared fairly between individuals, communities, countries, and generations (Robinson, 2018).

At the same time as climate justice has emerged as a normative framework, so too has climate litigation as a legal practice. Climate litigation broadly refers to the strategic use of litigation to address the causes and consequences of the Climate Crisis.[1] While its usage dates back to the 1990s, recent years have witnessed an exponential increase in the number of cases being brought: one recent study estimates that over 2600 climate-related lawsuits have been filed since 1990, with more than two thirds of those filed since 2015 (Setzer and Higham, 2024). A significant proportion of these cases are grounded in constitutionally or internationally protected human rights, a form of law closely connected to conceptions of justice.

Despite their parallel development, the relationship between climate justice, and climate *litigation* and *rights*, remains under-studied (Setzer and Vanhala, 2019). While there exists significant debate as to the *efficacy* of climate litigation (see e.g. Mayer 2023; Setzer and Higham, 2023) in terms of reducing carbon emissions or improving adaptation, there is little focus on the *distributive fairness* of climate litigation.[2] This article offers a framework for evaluating the extent to which climate litigation reflects the claims of climate justice. Rather than assessing the vast and general body of climate litigation against climate justice concerns, we apply our framework to three significant and broadly similar judicial decisions, reflecting one particular model of climate litigation: systemic rights-based litigation (Maxwell et al., 2022). Our approach could be used in future to work to assess the justness of other aspects of climate litigation. First, we define climate justice by differentiating between three dimensions: *international* justice focusing on North/South inequalities between countries; *intragenerational* justice, which explores inequities within countries (often along the

1 The United Nations Environment Programme defines climate litigation as cases 'brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts' (UNEP, 2017: 10).

2 With some notable exceptions. See for example developing literatures on the calculation of 'fair shares' emissions budgets (Rajamani L et al (2021); Beauregard et al. (2021); Maxwell L et al. (2022); Auz (2022). There is also growing attention to the phenomenon of 'just transition' litigation. See for example Savaresi & Setzer (2022).

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lines of race, gender, and class); and *intergenerational* justice, concerning the distribution of climate harms between existing and future generations. In doing so, we pay attention to a variety of climate justice claims, and systematically structure our legal analysis of case law.

In the second part, we detail the three dimensions of climate justice: international, intragenerational, and intergenerational. In the third part, we apply this framework to an analysis of the decisions in *Urgenda, Klimaatzaak* and *Neubauer*. And in the fourth part we consider the normative implications of these findings in light of the competing conceptions of the role of courts in combating climate change.

The central finding of our analysis is that claims related to *intra*generational justice appear to receive little attention in the three cases discussed. We suggest that this neglect is likely to be pervasive across systemic climate litigation cases: while international and intergenerational justice frameworks are integral to the legal logic of such claims, intragenerational justice claims are not. The extent to which this should be of concern depends in large part on the role of the court in an overall litigation and legal mobilisation strategy. We sketch out two possible roles for courts in climate litigation, and provide suggestions for lawyers seeking to integrate intragenerational justice concerns under each model.

Defining Climate Justice

The notion of climate justice embraces many different movements and concepts, including social justice, democracy, just transitions, procedural justice and participation, individual and collective rights, ecological sustainability, and environmental justice (Chatterton et al., 2013). Climate justice has become part of the call for action across a range of civil society actors (Michelot, 2016: 21-24). It is impossible in this short space to faithfully canvass the rich literature on the various existing conceptions of climate justice. Nevertheless, we highlight three dimensions across which such conceptions operate. Appeals to climate justice can occur across at least three different dimensions: justice between states (international justice); justice between generations (intergenerational justice); and justice within states and generations (intragenerational justice).

International Climate Justice

The central claim of international climate justice is that the Global North owes a 'carbon debt' to the Global South.[3] The Global North has amassed its wealth from the burning of fossil fuels, accompanied by extensive colonization and extraction of Global South resources (Shue, 2014a: 4). Requiring the Global South governments to meet the same greenhouse gas emissions reductions obligations as the Global North would deprive poorer countries of the opportunity to reach the same level of development and would not reflect the uneven historical responsibility for the crisis. These arguments are frequently present in international climate negotiations (Kjellen, 2014: 38). In the Paris Agreement, they are reflected in the principle of 'common but differentiated responsibilities and respective capabilities' (CBDRRC), as well as general obligations of international equity and cooperation.

More precisely, the international dimension of climate justice highlights two injustices central to the relationship between states: asymmetries in historic and contemporary emissions (with implications for climate *mitigation*); and contemporary obligations to compensate for the uneven impacts of global heating (with implications for climate *adaptation* as well as *loss* and *damage*).

The Global North bears historical responsibility for the Climate Crisis. When assessed on a cumulative basis, 53% of the world's greenhouse gas emissions since 1850 have come from the United States, the European Union, and Japan, a far outsized contribution given their share of world population (Hickel, 2020: 400). In recent years, attempts have been made to highlight the differentiated responsibilities owed by different countries through the concept of 'fair shares', and even to quantify how much of the overall cuts in greenhouse gas emissions should be borne by each country (Rajamani et al., 2021). In one such calculation, Jason Hickel starts from the scientific consensus as to the safe concentration of carbon dioxide in the Earth's atmosphere (350 parts per million (ppm)), divided into a budget according to the 'principle of equal per capita access to atmospheric commons' (Hickel, 2020: 399). He then compares this ideal scenario with the actual historical emissions of states to assess whether countries have exceeded their budget allocated according to this principle (Hickel, 2020:

3 While the terminological debate remains open, the term 'Global South' (and its counterpart 'Global North') is favoured by most scholars and policymakers. Even though a majority of the economically deprived countries are located in the South, this distinction goes beyond a purely geographical categorization as it is used to stress the economic inequalities between countries. The article will also use terms such as rich or industrialized countries to refer to the Global North, acknowledging the imperfection of those terms, and that the terms 'developed' and 'developing' are often used instead in international climate instruments.

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400). Hickel concludes that, as of 2015, over 90% of emissions in *excess* of the 350 ppm threshold have come from countries of the Global North.[4] This retrospective assessment of past responsibility suggests correlative prospective duties: affluent countries should bear the brunt of emissions reductions as part of a 'ecological debt' owed to the Global South (Neumayer, 2000; Martinez-Alier, 2003). To the extent that poorer countries transition to low-emitting sources of energy, this transition should be funded by wealthier countries. The argument is reinforced by the fact that historical asymmetries are still reflected in the profile of contemporary emissions: the richest half of countries (high and upper-middle income countries) emit 86% of global carbon dioxide emissions, while the bottom half (low and lower-middle income countries) account for only 14% (Ritchie, 2018). This picture is complicated, however, by the rapid increase in emissions by many middle- and low-income countries, include China, Brazil, South Africa, and India.

Secondly, the geographical distribution of climate impacts is deeply uneven. As a general matter, the Climate Crisis will hit poorer countries harder than rich countries – precisely those countries who have contributed the least to the Crisis, and who can least afford costly adaptation measures (Roberts and Parks, 2009: 393). This injustice stems from three factors: the geographical situation of Global South countries (in low-lying coastal areas and small island states, as well as currently tropical and desert-adjacent regions); economic dependence on agriculture; and lower adaptive capacity – many countries simply lack sources of finance or state capacity to invest in climate-resilient infrastructure (Meyer and Roser, 2010: 238). This dynamic combines with historical patterns of emissions to produce a particularly perverse injustice: the Climate Crisis is primarily caused by the countries of the Global North, yet primarily felt by the countries of the Global South. This injustice has led to calls for Global North countries to contribute more to not only reduce emissions, but to fund adaptation infrastructure in the Global South; and to compensate for climate-related 'loss and damage' and even reparations (James, 2014; Page and Heyward, 2017). The Paris Agreement recognizes 'the importance of averting, minimizing and addressing loss and damage' (Article 8 Section 1), although the COP21 Decision accompanying the Paris Agreement clearly states: 'that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.' In 2022, COP27 led to the establishment of 'Loss and Damage Fund' to provide financial support to nations that are most vulnerable and affected by the consequences of climate change, while still resisting the possibility of legal liability (Wyns, 2023; Serdeczny & Lissner, 2023).

4 Defined as those countries listed in Annex 1 of the Kyoto Protocol (1997).

Intergenerational Justice

The concept of intergenerational justice implies that existing adult generations owe moral obligations to those that come after them, including living children and future human beings. Unlike international justice, which highlights the *spatial* injustice of the Climate Crisis, intergenerational justice focuses on its *temporal* dimensions. The injustice is driven by the unidirectional nature of time: the actions of existing generations will have significant future effects, while future generations lack the agency to control past activities. As human beings continue to emit greenhouse gases into the atmosphere and fail to invest in infrastructure to combat the effects of climate change, the potential quality of life of future generations is correspondingly diminished. This can be imagined through the conceptual framework of a finite 'carbon budget' (Lahn, 2020: 636); the Earth's climate system can sustain only a limited amount of carbon emissions. The exhaustion or exceeding of this budget will not only result in a less stable climate for future generations, but also fewer opportunities to enjoy the benefits of fossil fuel use (Lewis, 2016: 211). The 1992 UN Framework Convention on Climate Change (UNFCCC) states that as one of the guiding principles that '[t]he Parties should protect the climate system for the benefit of present and future generations of humankind' (UNFCCC, 1992: Article 3(1)) while the Paris Agreement recalls in its Preamble that climate action must consider 'intergenerational equity' (Paris Agreement, 2015: Preamble).

As with other aspects of climate justice, the concrete implications of claims of intergenerational justice depend in part on how it is framed (Gosseries, 2008). In the context of climate change, many scholars and legal theorists have framed this requirement in terms of the *rights* of future generations, giving rise to corresponding *duties* owed by existing generations (Hiskes, 2006; Westra, 2008). These duties might include the obligation to ensure rapid decarbonization to maintain the Earth's habitability for future generations (Lawrence, 2015; Shue, 2014b: 59-61), as well as providing future generations with a full range of opportunities and resources to freely and autonomously live out their own conception of the good (Sax, 1990; Weiss, 1989). Any delay in the transition away from greenhouse gas emissions increases the risk not only of exhausting the intertemporal carbon budget, but also of crossing climate 'tipping points' which could unleash irreversible feedback loops and dramatically accelerate the effects of the Climate Crisis. The lack of action by existing generations thus implicates almost all human rights of future generations, including (but not limited to) rights to life, health, and a stable environment (Caney, 2008). It should be noted, however, that this framing has been criticised for artificially creating abstract categories ('we' in the present and 'them' in the future), thereby sweeping

away drastic inequities in the global population (Humphreys, 2023: 1063).

Intragenerational Justice

While the *intergenerational* paradigm focuses on disparities between generations, an *intragenerational* approach examines inequalities within the same generation. These inequalities operate not only between countries (as highlighted by the framework of international justice), but also *within* them. Climate change typically intensifies existing inequities, disproportionately affecting racial minorities, poorer communities and individuals, and women.[5] This unjust distribution exists within the countries of the Global North as well as the Global South (Levy and Patz, 2018).

As with the other dimensions of climate justice, intragenerational justice concerns both inequality of contribution, and inequality of impact. The most affluent 10% is responsible for 45% of global emissions, while the poorest 50% contribute only 13% (Chancel and Piketty, 2015). The inequality of contribution is even more stark when one focuses on the world's wealthiest 1%, who are estimated to be responsible for 17% of emissions (where both investment and consumption is accounted for) (Chancel, 2022). In other words, the world's wealthiest individuals 'appropriate more than their share of a global public good and, as a result, harming persons experiencing poverty by causally contributing to extreme climate events' (Jamieson, 2014: 148).

In terms of impact, intragenerational climate justice reveals the disproportionate effects of climate change on children (Ebi and Paulson, 2007; Gibbons, 2014),[6] women (Terry, 2009), ethnic minorities (Black Congressional Caucus, 2004), and the poorest individuals and communities within states (Alston, 2019). The most disadvantaged groups are more exposed to the effects of climate change, lack the resources to sufficiently adapt, and lack the political power to influence government policy (Islam and Winkel, 2017: 17-22). Not only are the impacts of climate change itself distributionally regressive, but potentially so too are many government policies designed to mitigate its effects. Government efforts to reduce deforestation can displace communities

5 The Preamble to the Paris Agreement specifically identifies 'indigenous peoples, migrants, children, persons with disabilities and persons in vulnerable situation [...] as well as gender equality [and] empowerment of women' as persons to whom states must 'consider their respective obligations on human rights' in the context of climate change (Paris Agreement, 2015: Preamble).

6 The position of children is significant in both *intra*generational as well *inter*generational frameworks. While children are vulnerable to the impacts of climate change as members of future generations (who will suffer its impact well into the future), they are also vulnerable in the immediate and short-term, as persons with less adaptative capacity, as well as more vulnerable physical and mental health.

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who rely on forest ecosystems; renewable energy transmission and generation infrastructure is likely to be sited in vulnerable communities; and blue-collar jobs in mining and manufacturing industries are placed at risk.

Scholars, activists and labour groups have responded to these dynamics by calling not only for a transition away from fossil fuels, but a *just* transition (Newell and Mulvaney, 2013: 132). This concept, though now widely widespread, remains contested (Ciplet & Harrison, 2020). Its genesis lies in the history of labour movements grappling with the impacts of the Climate Crisis – and mitigation policies – on workforces dependent on fossil fuel-reliant industries, while acknowledging that the long-term impact of the Climate Crisis would be devastating for workers (Stevis et al, 2019: 18-30). It reflects a 'sustainability-equity tension' between the importance of rapid decarbonization on the one hand, the way in which such decarbonization might impact vulnerable groups (Ciplet & Harrison, 2020: 446-51). Among other issues, intragenerational justice asks questions about who pays for climate mitigation and adaptation efforts, highlighting the costs borne by vulnerable individuals and groups within states.

On all three dimensions of climate justice, the inequality of contribution and impact combine to form a vicious cycle between climate change and social inequality: 'initial inequality causes the disadvantaged groups to suffer disproportionately from the adverse effects of climate change, resulting in greater subsequent inequality' (Islam and Winkel, 2017: 1). What all these dimensions of climate justice have in common is the identification of the distributional impacts of climate change. Although the Climate Crisis will affect human beings, it will do so in ways that vary between countries, generations, and individuals and communities. The extent to which such claims can be articulated in terms of human rights law will be analysed in the next section.

The Justice of Systemic Rights-Based Climate Litigation

Many claims brought against governments for their failure to adequately reduce greenhouse gas emissions are rooted in arguments concerning human rights. Human rights offer climate advocates a way to advance claims of climate justice not only as *moral* claims, but also *legal* ones. Constitutionally and internationally protected rights draw on moral values such as autonomy and dignity and codify these values in justiciable claims with corresponding duties owed by governments. One might expect such claims to align closely with the distributional concerns of climate justice. As a whole, human rights are framed as universal: they are owed to *everyone*, suggesting a level of minimum standards owed to all persons regardless of nationality, generation,

class, race, or gender.[7] Rights to equality and non-discrimination are a common feature of many rights regimes, including the European Convention on Human Rights.[8] These features of the rights regime could suggest that rights claims would strongly reflect not only the overall impact of the Climate Crisis, but also the question of who bears its greatest burden.

Alternatively, rights – both as moral and legal frameworks – have long been criticized for neglecting questions of distribution. As minimum standards, they may fail to provide a vocabulary as to how limited resources, benefits and burdens ought to be shared between different individuals (Moyn, 2018). Rights may also prove poor tools for mediating trade-offs, particularly where one person's assertion of a right may limit another person's ability to enjoy the same or other rights.[9] And crucially, rights-based litigation in practice is dependent on plaintiffs' abilities to bring claims to court. Lawsuits can be expensive, and generally require the expert services of lawyers. Courts can consider only the interests of the parties before them and may neglect the interests of those not represented. Accordingly, some scholars have suggested that legal rights frameworks – particularly those involving access to social and economic interests and resources – skew distributionally in favour of middle-class individuals who have the greatest degree of access to justice (Gauri and Brinks, 2014).

The remainder of this section intervenes in this debate by exploring the extent to which the distributional concerns of climate justice are reflected in rights-based judicial decisions. We focus on three decisions – Urgenda v. The Netherlands; Klimaatzaak v. Belgium; and Neubauer v. Germany. These three cases share some important features which enable their comparability: they challenge their respective governments for failing to take sufficient action to prevent drastic climate consequences; rely in large part on human rights frameworks (domestic or international) to establish the responsibility of authorities; and in all three cases, such claims have been successful. The three cases all follow a particular model of rights-based litigation, commonly referred to as 'systemic' litigation, which involves a challenge to high-level government policy rather than individual projects (Maxwell et al., 2022). The question that remains unanswered in each case is the extent to which the integration of human rights arguments also implies sensitivity to the distributive consequences of climate mitigation poli-

7 It should be noted, however, that certain specific rights might be owed only to identifiable groups, such as children's rights protected under the UN Convention on the Rights of the Child, or women and girls' rights protected under the UN Convention on the Elimination of Discrimination Toward Women.

8 See e.g. the European Convention on Human Rights Article 14.

9 See e.g. the critique of rights in the context of United States jurisprudence offered by Jamal Greene (Greene, 2021).

cies, as revealed by the framework of climate justice. In other words, we assess whether human rights arguments are effective not only as legal tools to foster more ambitious climate action, but also whether they might achieve a fair distribution of costs and benefits of the ecological transition, taking into account the differentiated responsibilities and vulnerabilities discussed above.

In doing so, we adopt a formal and interpretive approach, relying solely on the text of the judicial decisions, and in some cases, plaintiff submissions.[10] We note that the text of a judicial decision is not determinative of all practical climate justice outcomes in any given case: a wide chasm often separates 'law on the books' and 'law in action'. A case could include no consideration of climate justice, but nevertheless lead to an outcome that is highly just in distributive terms (for example, if an implementing agency has its own set of climate justice policies). Conversely, an implementing agency could ignore, or fail to interpret and apply, climate justice reasoning contained in a judicial decision. Our findings are therefore modest and should not be interpreted as a determinative assessment of the distributive consequences of systemic rights-based litigation in practice, let alone other forms of climate litigation. We hope, nevertheless, that the analysis which follows opens an avenue of inquiry to assess the extent to which climate *rights* and climate *justice* might align in the practice of systemic rights-based climate litigation, and we believe that our framework could be usefully applied to other types of climate litigation.

Urgenda v. The Netherlands

In June 2015, the District Court of the Hague ordered the Dutch state to reduce carbon dioxide emissions by 25% compared to 1990 levels by 2020 and concluded that the government was in breach of its duty of care owed toward Dutch citizens under Dutch civil law. Three years later, the Hague Court of Appeal affirmed the decision. However, instead of relying on Dutch civil law, the appellate Court found that the state was liable for the violation of human rights – articles 2 and 8 of the European Convention on Human Rights (ECHR), respectively protecting the right to life, and the right to private and family life. The Court found that these rights impose positive obligations on private authorities in the context of the climate emergency. A year later, on 2 December 2019, the Hoge

10 We rely on plaintiff submissions to the extent that they shed light on available approaches not taken by courts. For example, as discussed below in the *Klimaatzaak* decision, the Court expressly avoided the question of arguments brought under the UN Convention on the Rights of the Child, which would have raised both intergenerational and intragenerational issues. In this way, plaintiff submissions can illustrate how courts have decided to avoid questions of climate justice.

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Raad (the highest court in the Netherlands) confirmed that the government had violated protected rights by failing to take sufficient action to reduce national greenhouse gas emissions.

Urgenda and International Justice

The *Urgenda* judgments contain rich reflections on international justice. First, international justice considerations play a role in discussion of the plaintiff's standing – the Hague District Court's assessment of whether Urgenda, a non-profit organization (NGO), was entitled to bring a claim to Court. The government argued that Urgenda lacked standing to bring a claim on behalf of non-Dutch residents. In considering the claim, the Court first looked to Urgenda's own bylaws, which specified the goal of defending a 'sustainable society'. The Court concluded that such an interest could not be limited solely to Dutch territory, given the objective's 'inherent international (and global) dimension' (*Urgenda v The Netherlands*, 2019: section 4.7). Because the interests advanced by Urgenda were transnational in nature, the Court concluded that 'Urgenda can partially base its claim on the fact that the Dutch emissions also have consequences for persons outside the Dutch national borders, since these claims are directed at such emissions' (*ibid.*: section 4.7). This discussion at the District Court level was not revisited at the Court of Appeal or Supreme Court.

Perhaps more consequentially, international justice played a significant role in the Court's assessment of the Netherlands' responsibility for the global phenomenon of climate change, as well as the proper remedy to be awarded. The Dutch government claimed that because climate change is produced by multiple countries and that the Netherlands was responsible for only 0.5% percent of total emissions, the government could not be found responsible for its effects. Likewise, the government argued that any remedy granted by the Court would accordingly be ineffective (*ibid.*: section 4.78). The District Court responded to the claim by stressing that 'climate change is a global problem and therefore requires global accountability' (*ibid.*: section 4.79) – each country is required to implement reduction measures to contribute to worldwide efforts to mitigate the threat (*Urgenda v The Netherlands*, 2018: para. 62). The Hague Court of Appeal similarly found that although climate change is a global issue that an individual state cannot address on its own, this 'does not release the State from its obligation to take measures in its territory, within its capabilities, which in concern with the efforts of other states provide protection from the hazards of dangerous climate change' (*Urgenda v The Netherlands*, 2019: section 2.3.2). The Supreme Court reached the same conclusion through the application of the 'no harm' principle in international law: under this principle, each country is

partially responsible for climate change, and the Netherlands accordingly had a duty to do its 'fair share'.

Additionally, the District Court argued that 'industrialized countries have to take the lead in combating climate change and its negative impact', because 'from a historical perspective the current industrialized countries are the main sources of the current high greenhouse gas concentration in the atmosphere and that these countries also benefited from the use of fossil fuels, in the form of economic growth and prosperity' (*ibid.*: section 4.57). The Court added that, despite its low levels of total greenhouse gas emissions, 'the Dutch per capita emissions are one of the highest in the world' (*ibid.*: section 4.79).

The Appeal Court noted that the Netherlands was part of the Annex I (the developed countries) as opposed to the Annex II (the developing countries) in the UNFCCC framework and that considering 'their per capita emissions, the long history of their emissions and their resource bases', the former countries had to 'take the lead' in the fight against climate change effects (*ibid.*: section 9).

Overall, the *Urgenda* decisions demonstrate a genuine awareness of international justice insofar as it gives rise to a duty of the Dutch government to do its 'fair share'. The courts determine the climate obligations of the Netherlands by taking into account both the historical and current emissions which increases the responsibility of the country. The decisions embrace a 'per capita' perspective to avoid the flattering comparison in absolute terms with more populated countries. Hence, the Dutch government must adopt an ambitious climate mitigation strategy not only as a member of the international community on an equal footing with all countries but also as a country which bears a disproportionate historical responsibility.

Intergenerational Justice

The District Court decision first discusses the concept of intergenerational justice in the context of the plaintiff's standing. The government challenged Urgenda's standing not only in relation to its representation of non-Dutch residents, but also its purported representation of future generations. In addition to finding Urgenda to be a legitimate representative of non-Dutch citizens, the Court cited Urgenda's central purpose – of achieving a 'sustainable society' – as justifying Urgenda's standing to represent future generations. Therefore, 'in defending the right of not just the current but also the future generations to availability of natural resources and a safe and healthy environment, [Urgenda] also strives for the interest of a sustainable society' (*Urgenda v The Netherlands*, 2015: section 4.8). The Hague Court of Appeals declined to revisit this decision

on appeal, and the issue is not referenced in the Supreme Court opinion.

The District Court also considered matters of intergenerational justice as it developed the principle of fairness, requiring as part of its remedy that 'the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change.' (*Urgenda v The Netherlands,* 2019: section 4.57) The Court added that 'the State, in choosing measures, will also have to take account of the facts that the costs are to be distributed reasonably between the current and future generations' (*ibid*.: section 4.76). References to intergenerational justice, however, are absent from the appellate court decisions.

Intragenerational Justice

Questions of intragenerational justice (as we have defined it) are absent from the *Urgenda* decisions. The only references to this dimension can be found in the District Court's factual summary of the case, which stresses that climate-related costs 'are economic, but also social and environmental and will especially fall on the poor, in both developing and developed countries' (*Urgenda v The Netherlands*, 2015: para. 2.60). This observation plays no role in the Court's reasoning or remedies, and any further discussion is absent in the appellate court decisions.

Neubauer v. Germany

In *Neubauer*, several groups of plaintiffs – including German children, environmental NGOs, and individuals living in Bangladesh and Nepal – challenged the legality of the German Federal Climate Act (FCCA). At the time of the *Neubauer* complaint, the FCCA set a target of a 55% reduction in Germany's greenhouse gas emissions by 2030 (on a 1990 baseline), and a goal of climate neutrality by 2050. The Act set out concrete, year-by-year sector-specific targets up until 2030. However, no specific targets were set post-2030, and the Act simply allowed for future targets to be set by ordinance. The plaintiffs argued that the FCCA violated several rights contained in Germany's Basic Law (*Grundgesetz*). First, the plaintiffs argued that the pre-2030 targets were insufficient to adequately mitigate climate change, and accordingly violated their protected rights. Secondly, the plaintiffs argued that the scheme of the Act – bifurcated between pre- and post-2030 – essentially deferred the bulk of climate mitigation action to the future. This in turn would require drastic reductions in greenhouse gas emissions by future generations (in other words, existing children), violating their constitutionally-protected freedoms.

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The case was ultimately decided by Germany's Federal Constitutional Court. Although the Court found that Germany's climate targets arguably constituted a violation of the legislature's objective duties to protect life, physical integrity, and property (as required by articles 2(2) and 14(1) of the *Grundgesetz*), the legislature was acting within the scope of its margin of appreciation in setting these targets. However, the Court *did* find a violation of the *Grundgesetz*'s subjective obligations not to violate fundamental freedoms, enshrined throughout the *Grundgesetz* and especially in article 2(1). The Court found that the scheme of the Act would require the enactment of drastic cuts to greenhouse gas emissions after 2030, which in turn would impermissibly interfere with the freedoms of future adult generations. In the Court's words, '[r]especting future freedom requires that the transition to climate neutrality be initiated in good time' (*Neubauer v Germany*, 2021: para. 248).

International Justice

International climate justice played a limited role in the Court's decision. The Court contextualized the case in the context of the Climate Crisis as a global phenomenon, noting Germany's contemporary and historically high emissions of greenhouse gases, and interpreting Germany's constitutional requirements to include broad obligations of international cooperation. The Court also refused to dismiss outright the claims of non-German complainants, although it recognised their standing only in a limited sense.

In its factual summary of the case, the Court accepted that Germany had played an outsized role in contributing to global greenhouse gas emissions: '[h]istorically, Germany accounts for 4.6% of greenhouse gas emissions. Per capita CO2 emissions in Germany were 9.2 tonnes in 2018 – almost twice as high as the global average' (*Neubauer v Germany*, 2021: para. 29). Even in 2018, the Court further observed that '[w]hile accounting for approximately 1.1% of the world's population, Germany is currently responsible for almost 2% of annual greenhouse gas emissions' (*ibid.*: para. 30). These observations contextualized much of the Court's further discussion.

International justice also plays a role in the Court's analysis of standing and admissibility. First, like the Dutch courts in the *Urgenda* decision, the Court rejected what might be described as a 'drop in the ocean' argument (*Verschuuren*, 2019). This argument holds that most single countries' reductions in greenhouse gas emissions will not substantially mitigate the Climate Crisis, and therefore that no judicial remedy can effectively address climate change and courts should not recognize the standing of parties bringing such claims. The Court rejected this argument, instead finding that it 'does not render it impossi-

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ble or superfluous for Germany to make its own contribution towards protecting the climate' (*Neubauer v Germany*, 2021: para. 99). Secondly, the Court initially found that complaints from non-German plaintiffs were admissible. The complainants included several parties from Bangladesh and Nepal who argued that they were entitled to protection against rights violations that were partially attributable to Germany's actions. The Court found that 'complainants living in Bangladesh and Nepal also have standing … because it cannot be ruled out from the outset that the fundamental rights of the Basic Law also oblige the German state to protect them.' (*ibid*.: para. 90).

Although their standing was recognized, the complaints brought by the international plaintiffs were ultimately unsuccessful. They were unaffected by the particular subjective rights violation determined by the Court: the burdens that Germans would experience because of the future drastic cuts to greenhouse gas emissions that would be required in the future. Because the Nepali and Bangladeshi complainants were not subject to these obligations, they would not experience the same rights violation.

Nevertheless, the Court did discuss the German state's objective obligation insofar as it was owed to non-German citizens. Noting that '[t]he fact that the German state is incapable of halting climate change on its own … does not, in principle, rule out the possibility of a duty of protection', the Court found that Germany must 'involve the international level in seeking to resolve the climate problem' (*ibid*.: para. 149). Article 2(2) of the *Grundgesetz* 'compels the state to engage in internationally oriented activities to tackle climate change at the global level and requires it to promote climate action within the international framework' (*ibid*.: para. 149). Meanwhile, Article 20A of the *Grundgesetz* was found to require the state to 'promote climate action within the international framework … even in cases where it proves impossible for international cooperation to be legally formalized in an agreement' (*ibid*.: para. 200). Finally, the Court determined that while the legislature was entitled to a wide margin of appreciation in determining what Germany's 'fair share' of the global climate burden should be, 'this does not make it permissible under constitutional law for Germany's required contribution to be chosen arbitrarily … Germany's contribution must be determined in a way that promotes mutual trust in the willingness of the Parties to take action' (*ibid*.: para. 225).

Like Urgenda, the *Neubauer* decision takes some account of intergenerational justice, albeit in different ways. Both courts take account of international justice in standing analysis, and both reject 'drop in the ocean' type arguments. However, the margin of appreciation given to the legislature in *Neubauer* means that

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its fair shares analysis is perhaps weaker. The Federal Constitutional Court acknowledged the differentiated global impact of climate change, including Germany's historical and contemporary record on emissions. But ultimately, the government retained a wide margin to determine its 'fair share' of emissions reductions, and international inequality of impact played little role in the decision. As in *Urgenda*, Germany's obligations were found to be duties of cooperation, rather than duties of compensation or reparation (*ibid*.: para. 225).

Intergenerational Justice

Intergenerational justice sits at the core of the *Neubauer* decision, which expressly assesses the distribution of climate burdens across time. Through interpretation of section of 20A of the *Grundgesetz* (read together with the challenged legislation and the Paris Agreement), the entire judgment is premised on the German government's obligation to cut greenhouse gas emissions. Having established this premise, the Court then framed the decision in terms of distributing Germany's finite 'carbon budget' toward this end. If the carbon budget is rapidly exhausted, future generations (specifically, the child plaintiffs in the case once they have grown older) will be required to accept drastic cuts to their standard of living and overall freedoms. The Court acknowledges that future burdens are dependent on immediate investment and actions, rather than hoping that action will be taken in the medium- or long-term. (*ibid*.: para. 121).

The Court found that the scheme of the FCCA 'offloaded [burdens] onto the post-2030 period … which it will then have to impose on the complainants and others' (*ibid*.: para. 142). At the same time, the German government – under Article 20A of the *Grundgesetz* – had an obligation to 'preserv[e] the natural foundations of life', while also paying attention to 'how environmental burdens are spread out between different generations … The objective protection mandate encompasses the necessity to treat the natural foundations of life with such care and leave them in such condition that future generations who wish to carry on preserving those foundations are not forced to engage in radical abstinence' (*ibid*.: para. 193). This dynamic between the carbon budget and the state's objective environmental obligations had 'an advance interference-like effect (*eingriffsähnliche Vorwirkung*)' (*ibid*.: para. 183), which interfered with the subjective freedoms of the complainants. It is in this specific sense - of 'giving rise to substantial burdens to reduce emissions in later periods' (*ibid*.: para. 142) - that the Court found a violation of the *Grundgesetz*, including the general guarantee of freedom enshrined in Article 2(1).

The Court's discussion of admissibility and standing also reflects consideration of intergenerational justice. The Court accepted that child complainants living

in Germany had standing because 'their fundamental rights might be violated by the fact that they will have to accept considerable reduction burdens and corresponding losses in freedom in the post-2030 period' (*ibid*.: para. 90) and that they would be 'potentially faced with immense reduction burdens after 2030 which might jeopardize their freedom' (*ibid*.: para. 96). Importantly, the admissibility of the complaints rested on the plaintiffs being existing *children* rather than abstract future generations. The Court noted that '[t]he complainants are not asserting the rights of unborn persons or even of future generations, neither of whom enjoy subjective fundamental rights. Rather, the complainants are invoking their own fundamental rights' (*ibid*.: para. 109). The decision thus concretised the intergenerational dynamics of the climate crisis. Accordingly, the complainants fell within the class of persons protected by the *Grundgesetz*'s 'intertemporal guarantees of freedom' (*ibid*.: para. 122).

Because of its prominent role in the Court's reasoning, intergenerational climate justice infuses the remedies awarded by the Court. The Court ordered that the legislature redefine its climate targets directly, or by delegation to the executive, but only 'in such detail that sufficiently specific orientation is provided' for the post-2030 period (*ibid*.: para. 254).

Intragenerational Justice

The Court paid very little attention to intragenerational justice. The concept of a 'just transition' does not appear in the Court's legal reasoning, discussion of standing, or remedies. Its only appearance comes in a brief reference to climate change's inequality of impact, discussed in the factual background to the case. The Court observed that 'climate change exacerbates social inequalities and carries the potential risk of violent conflict' (*ibid*.: para. 28). Even this discussion, however, focused primarily on international rather than German climate justice, noting that 'pronounced changes in the climate thus amplify worldwide refugee movements and could intensify international displacement and migration towards Europe' (*ibid*.: para. 28). The remedies awarded by the Court also neglect any requirements related to intragenerational justice.

Klimaatzaak v. Belgium

In June 2021, the Brussels Tribunal of First Instance (hereafter 'the Tribunal') held that the Belgian federal and regional governments had breached their duty of care to citizens by failing to implement essential measures to mitigate climate change (*Klimaatazaak v Belgium*, 2021). Besides establishing civil liability, the Tribunal also found that the governments' lack of sufficient action on climate change amounted to a violation of rights protected under the European Con-

vention on Human Rights – the same rights found to have been violated by the Dutch government in the *Urgenda* decision. The Tribunal, however, refused to issue an injunction mandating governments to elevate their climate targets in accordance with climate science, citing concerns related to the separation of powers. This prompted the plaintiffs, led by the organization, Klimaatzaak, to appeal the decision.

On November 2023, the Appeal Court of Brussels (hereafter 'the Court') upheld and extended the Tribunal's decision (*Klimaatzaak v Belgium*, 2023). This time the Court issued a specific injunction, mandating a reduction of at least 55% in overall emissions by 2030 relative to 1990 levels. The Court however did not rule against the regional government of Wallonia which fulfilled its mitigation obligations.

International Justice

The first instance Tribunal explicitly drew on the *Urgenda* decision in finding that 'the global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their obligation under Article 2 and 8 of the ECHR' (*Klimaatzaak v Belgium*, 2021: 61). However, unlike the Dutch courts in Urgenda, the Tribunal does not discuss Belgium's historical responsibility for greenhouse gas emissions or its high per-capita carbon footprint to determine the country's obligations. More fundamentally, the Tribunal refused to quantify Belgium's 'fair share'. The decision acknowledged that 'while it is within the remit of the tribunal to note a failure on the part of the federal state and the three regions, this does not authorise it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions' (*ibid*.: 82). The decision mentions the fact that 'international law is [...] limited to setting a common objective, i.e. to keep the increase in average global temperature 'well below' 2°C below pre-industrial level' (*ibid*.: 81) but does not specify what this entails for Belgium as an industrialized country which bears a disproportionate responsible in climate change.

On appeal, the Court confirmed that Belgium's small contribution to global emissions does not absolve it from mitigation obligations (*Klimaatzaak v Belgium*, 2023: para. 160). Notably, the Court referenced both the Dutch Supreme Court's decision in Urgenda and the German Constitutional Court's ruling in Neubauer to reinforce the argument that individual governments bear responsibility for climate change.

In contrast to the first instance decision, the Court issued a specific injunction, mandating a reduction of at least 55% in overall emissions by 2030 relative to

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1990 levels. However, the Court found that 'the principle of separation of powers prohibits the court from determining a GHG reduction rate that it would deem desirable or equitable in the light of Belgium's historical responsibility' (*ibid.*: para. 190). In other words, while the Court could set a reduction target for the governments to achieve by 2030, separation of powers concerns mandated that such a target constitute the absolute minimum level of ambition based on the best available science.

The Court rejected the plaintiffs' demand for a higher 61% reduction target. This 61% target was based on a scientific study cited by the plaintiffs, authored by Joeri Rogelj (Rogelj, 2023). Rogelj's study assessed Belgium's share of necessary emissions reductions based on the global residual carbon budget. When accounting for the historical emissions of Belgium, factoring in a per capita approach to ensure an equitable distribution among individuals worldwide, Rogelj concluded that Belgium should reduce its emissions by 81% by 2030. Alternatively, using the method of 'grandfathering', (Knight, 2013) which posits that past emissions amplify future emission entitlements, the study arrives at the 61% reduction target. By not penalizing Belgium for its historical share of emissions, the Rogelj study represents a conservative calculation of Belgium's 'fair share' of global emissions reductions. The Court nevertheless rejected even the 61% reduction target, finding that 'in the absence of a political consensus on this point, the judge can only take into account the distribution key that is least restrictive for the State' (*Klimaatzaak v Belgium*, 2023: para. 192).

Furthermore, the Court challenged a key premise of the study – that emissions reductions should follow modelling which aims for a 67% chance of limiting global warming to 1.5°C. Noting that some modelling is based on a more generous 50% probability framework, the Court concluded that separation of powers entitles governments to greater leeway. Authorities can – and probably should – go further than that for equity reasons but this is beyond judicial reach. The judge can set a floor, not a ceiling, limiting the capacity of judges to reflect global justice concerns in their decision-making.

Intergenerational Justice

Plaintiffs in the *Klimaatzaak* case relied heavily on intergenerational justice arguments. An entire section of the complainants' brief details the 'intergenerational discrimination' suffered by young people (VZW Klimaatzaak, 2019: 108-09). They pointed to a 'discriminatory paradox' whereby 'older generations have had the benefits of the massive use of fossil fuels that led to global warming and that the young and future generations will suffer the burden of paying for it' (VZW Klimaatzaak, 2019: 108). The plaintiffs further alleged violations of

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children's rights protected under the United Nations Convention on the Rights of the Child (CRC) as well as Article 7b is of the Belgian Constitution (which requires public authorities to consider 'the solidarity between generations' in policymaking decisions). While the Tribunal did find that that climate change poses 'a serious risk to current and future generations living in Belgium and elsewhere that their daily lives will be profoundly disrupted' (*Klimaatzaak v Belgium*, 2021: 50), this brief mention was the only reference to intergenerational justice in the decision. Importantly, the Tribunal did not employ intergenerational justice concerns in determining the climate obligations of Belgian authorities. As with international justice, the fact the Tribunal refused to specify the climate objectives of Belgium on the basis of separation of powers concerns also explains why the decision does not delve into the reductions GHG emissions which would be required for the respect of future generations' rights.

The Court of Appeal first took into account future generations' interests when assessing the costs associated with climate (in)action. The Court referred to scientific evidence which indicates that 'postponing efforts will be more costly than rapidly implementing reduction measures' underscoring the 'price of procrastination' (*Klimaatzaak v Belgium*, 2023: para. 234). The Court cited the German Constitutional Court in *Neubauer*, affirming that 'safeguarding future freedom requires that the transition to climate neutrality must be launched in due time'.

In setting a reduction target for 2030, the Court observed the necessity of establishing a threshold that is 'necessary to avoid exposing future generations to the risk of major climatic disturbances, rendering part of the territory uninhabitable (e.g., rising sea levels, flood zones)' or that would 'necessitate a substantial reduction in greenhouse gas emissions over a 20-year period spanning from 2030 to 2050' (*Klimaatzaak v Belgium*, 2023: para. 244). Finally, in the context of evaluating governments' civil liability (and identifying tangible harms to the plaintiffs), the Court highlighted the phenomenon of 'eco-anxiety' and the associated moral prejudice stemming from 'the awareness of the inadequacy of the measures implemented by the Belgian authorities to protect the interests of future generations' (*ibid.*: para. 268).

Intragenerational Justice

Claimants in *Klimaatzaak* incorporated intragenerational justice arguments in claims made on behalf of children – that is, they argued that not only are children threatened by climate change as future adults, but also that children are more susceptible to the existing or imminent impacts of climate change. Specifically, claimants argued that public authorities' lack of action on climate

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change violated articles 6 and 24 of the Convention on the Rights of the Child, which respectively protect children's rights to life and health (VZW Klimaatzaak, 2019: 265). The Tribunal found that these provisions in international law did not impose positive obligations on States, and instead allowed the Belgian government significant leeway in how to implement the affected rights (*Klimaatzaak v Belgium*, 2021: 63). The plaintiffs decided not to persevere with this line of reasoning in the appeal.

Other climate-vulnerable groups were also neglected by the Tribunal's decision, and do not appear to have been referred to in the plaintiffs' claims. The disproportionate impacts of climate change were mentioned only in the factual presentation of the plaintiffs' submissions, rather than being integrated into their legal arguments. For example, the plaintiffs mentioned that climate change would intensify existing inequalities and absolute poverty (VZW Klimaatzaak, 2019: 87), and that heatwaves would disproportionately affect the elderly and economically disadvantaged, as well as persons in working class jobs which require physical effort (VZW Klimaatzaak, 2019: 107). Given that they were not integrated into substantive legal arguments, it is perhaps unsurprising that these arguments were not addressed by the Tribunal.

When discussing the climate damages already suffered by Belgian citizens, the Court on appeal noted that climate change permeates every facet of people's daily lives, including health, particularly impacting 'vulnerable individuals' as well as 'food and energy security' (*Klimaatzaak v Belgium*, 2023: para. 251). Additionally, the Court observes that the escalation of extreme weather events such as droughts, heat waves, and floods will result in heightened costs for public authorities to fund adaptation and reconstruction efforts, leading to budgetary cuts in critical sectors like education and health (*ibid.*: para. 257). Although not explicitly stated, it is evident that such austerity measures would disproportionately affect economically disadvantaged individuals heavily reliant on public services.

Climate Justice and Climate Litigation – What we can Learn from the Three Cases

Are the judicial decisions in these cases sensitive to the claims of climate justice? As reflected in Table 1 below, considerations of climate justice differ in important respects across the three cases. International justice played a limited role in judicial decisions in *Urgenda* and *Neubauer*. Courts were willing to entertain claims brought by, or on behalf of, non-residents. Furthermore, judges acknowledge the Global North's outsized contributions to greenhouse gas emissions. However, these observations played only a limited role in the courts'

analysis. While courts in all three cases accepted that Global North countries had to do more to combat climate change as part of their 'fair share', these were framed primarily as duties of cooperation, rather than justice or reparations. In other words, although courts have embraced the logics of 'fair shares', this does not lead them to principles or concrete calculations based on disproportionate historical contributions to the Climate Crisis. Intergenerational justice played only a limited role in *Urgenda*, where the Court accepted Urgenda's standing to bring claims on behalf of future generations and broadly accepted that level of greenhouse reductions should be set with reference to the interests of future generations. By contrast, the German Constitutional Court's decision in *Neubauer* relies extensively on intergenerational justice concerns: it is precisely the displacement of climate burdens onto future generations which gives rise to the finding of a rights violation. This assessment was influentially cited in *Klimaatzaak*, and influenced the setting of overall targets.

Perhaps the most striking finding, however, is that intragenerational justice concerns are largely absent across all three cases. This is true both in terms of

	International Justice	**Intergenerational Justice**	**Intragenerational Justice**
Urgenda v. The Netherlands	* Global interests as basis for standing * 'Drop in the ocean' rejected * Fair shares approach * No obligation of compensation/reparation	Limited discussion in first instance	Absent
Neubauer v. Germany	*Foreign standing partially accepted * 'Drop in the ocean' rejected * Duty of cooperation * Some fair shares analysis * No obligation of compensation/reparation	* Basis for decision * Temporal remedies * Standing for children (not future generations)	Absent
Klimaatzaak v. Belgium	* 'Drop in the ocean' rejected * Rejection of international justice criteria in setting governments' climate target for 2030 due to the separation of powers	Part of the Court's reasoning in setting the governments' climate target	Absent

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the impacts of climate change itself, as well as the distributional impacts of the courts' decisions. In other words, although in all three cases governments were found to have violated human rights, in none of these cases were they required to remedy that violation through a *just* transition to reduced greenhouse gas emissions. The relevant courts barely acknowledged either the uneven impact of, or contribution to, climate change by different groups and individuals. None of the remedies awarded across the three cases require decisions to be implemented in a way that is sensitive to differential impact.

On one level, this neglect of intragenerational justice could perhaps be expected, given that all three cases discussed relate to overall target-setting by national governments, and to persuade a court that greenhouse gas emissions beyond a certain level are incompatible with human rights. International and intergenerational claims are baked into the legal logic of such claims, while intragenerational justice is not. International justice is highly relevant to that goal since comparisons between states are crucial to the methodology of establishing the 'fair share' that a given country must reduce its emissions by. Target-setting typically involves establishing a timeline that outlines the ultimate goal of achieving net-zero emissions and/or multiple interim objectives. Recognizing that delays will cause heightened impacts to future generations is essential to this task. In other words, the remedy sought in each case lent itself to an assessment of justice based on the establishment of particular timelines (implicating intergenerational justice) and targeting *states*: the actors who are the primary subjects of international justice. Intragenerational justice, by contrast, is less obviously relevant to the task of national target-setting. This does not imply however that applicants have no flexibility in integrating these concerns into their demands. As we note below, for example, cause lawyers could integrate equality rights claims into their systemic litigation arguments. Separately, lawyers may explore litigation grounded in alternative frameworks, such as the concept of 'just transition litigation' (Savaresi & Setzer, 2022: 28-30). In what follows, we consider the extent to which the neglect of intragenerational justice in these significant cases should be a cause for concern and propose possibilities for cause lawyers both within and beyond rights-based systemic litigation cases.

Two Models of Judicial Intervention on Climate Justice

The relative neglect of intragenerational justice in systemic rights-based climate litigation is particularly striking given that the implementation of these decisions can lead to significant distributive consequences. As noted in Part

II above, it is not only climate change itself that has distributionally regressive consequences, but also measures that are implemented to mitigate climate change. Renewable energy infrastructure may be sited proximate to poorer communities; jobs may be disproportionately lost in blue-collar industries; and subsidies paid to mitigate climate burdens may be directed primarily to wealthier communities and interests, whose legal and political strength poses a greater threat to government decarbonization plans. This latter phenomenon is already observable in the Netherlands and Germany, where large coal power companies have sought billions of dollars in compensation (European Commission, 2023; Shaw, 2023).

Intragenerational justice is thus highly relevant to climate litigation. But to what extent is it the role of courts to address these issues? Here, we sketch out two models: on that is judicially minimalist, and one that is judicially maximalist. On the *minimalist* model, the lack of attention to intragenerational justice issues might be considered less of a concern. On the *maximalist* model, however, the judicial neglect of these issues is deeply problematic.

On a minimalist view, the role of the judge is more limited. The role of the Court is to set out general obligations for governments to act – such as by utilizing the framework of high-level targets – and then leave the political branches to develop a more comprehensive scheme for implementation and working through details. This view might be justified by a particular view of the political process, whereby the role of litigation is to catalyse an otherwise moribund system into action (Bookman, 2023). Once this catalysis has been achieved through the establishment of a high-level target, questions of distribution and 'who pays' are best left to the political process. This could be defended on the basis of a government's greater capacity to weigh competing interests and calibrate policy settings across an entire country. Governments typically possess greater technical expertise and expert advice and are able to seek inputs and consider views of a far greater range of constituents than the handful of parties represented in a courtroom – particularly in the context of classically 'polycentric' issues such as climate change (Fuller, 1978). In liberal democracies (such as the three jurisdictions discussed in this paper), governments can also claim greater democratic legitimacy as the branch of government best placed to consider politically sensitive questions of distribution (Tushnet, 2004). On this view, therefore, the lack of attention to intragenerational justice in a judicial decision does not mark the end of the road for climate justice concerns: these matters can be addressed through the political or policy processes (Bookman, 2023). At most, a judicial minimalist might be satisfied by broad statements urging political institutions to consider intragenerational justice concerns, without necessary

making specific binding orders.

A maximalist view, on the other hand, imagines a much more expansive role for courts. This role could be defended on the basis that the political branches of government simply cannot be trusted with issues related to climate justice – that the very structures which produce distributive inequalities in the first place are unlikely to be able prevent those inequalities from intensifying, unless they are subject to precise legal standards and ongoing judicial scrutiny (Kuh, 2019; Landau, 2012). Many communities lack access to the political process, meaning that they are unlikely to be able to influence implementation decisions and priorities (Kuh, 2019: 744-58). Furthermore, as studies of environmental justice have long suggested, market dynamics might incentivize governments to prioritize the least-costly implementation pathways (Lazarus, 1993). These factors could combine to ensure that even where a government implements a judicial decision, carbon-intensive activities of poorer, less powerful communities (such as small-scale deforestation and farming) are targeted over those of wealthier interests, or that renewable infrastructure (such as solar arrays or transmission lines) are more likely to be sited in more vulnerable communities. In some circumstances, decisionmakers may simply hold animus toward certain groups based on class, race, or gender (Ely, 1981). On this view, the failure of courts to impose specific climate justice obligations on the political branches, and to specify and supervise precise remedies, will likely lead to an absence of climate justice considerations in practical implementation.

Implications for Social Movements and Cause Lawyers

Taking a universal position between the two models sketched here is beyond the scope of this article. The more persuasive model in any given jurisdiction will depend on factors such as the relative institutional capacity of courts and governments; the level of representation and power of vulnerable communities within the political branches; national legal doctrines, traditions, and culture; and the type of mitigation activities required in order to meet a judicially-ordered target. It will also depend on the strategy of the litigating plaintiffs, including whether they intend to follow up with further litigation, or with action through the political branches. This section sets out considerations that social movements and cause lawyers ought to take into account when selecting either strategy.

If social movements and cause lawyers subscribe to the maximalist view – looking to judges to provide both a roadmap and precise remedies to force greater action on climate change – then the absence of intragenerational justice concerns from judicial decisions is deeply troubling. Hence, litigators subscribing

to judicial maximalism should integrate intragenerational concerns into their legal arguments. As suggested by the courts' analysis of international justice in *Urgenda* and *Neubauer*, and of intergenerational justice in *Neubauer*, courts are more likely to pay attention to such issues where they are not merely factual background or contextual framing, but essential to the logic of the legal argument itself. This could be achieved in two ways. First, cause lawyers could include claims grounded in equality rights.[11] Depending on the legal and constitutional framework of the relevant jurisdiction, equality rights may protect many of the classes who are likely to be affected by climate injustice – including older persons, children, racial and ethnic minorities, and women. In some (although not all) jurisdictions, equality law may also permit discrimination arguments related to class or socio-economic disadvantage. Plaintiffs could be drawn from these communities, allowing litigators to highlight the differentiated impact that they experience both from climate change itself, and potentially from government measures to address climate change. By incorporating intragenerational justice into the very logic of their claims, litigators can argue for remedies that demand that the transition to a low-carbon economy be consistent with protected rights. Depending on the remedies available in a jurisdiction, litigators may be able to request ongoing judicial supervision to ensure that decisions are implemented in a way which is protective of intragenerational justice. Secondly, cause lawyers following the maximalist model may decide that addressing intragenerational justice is simply not feasible in the initial claim. In such cases, however, litigators should work with vulnerable communities to anticipate the possibility for regressive implementation of the decision and be prepared to challenge individual actions as they arise. Ongoing litigation against the German government's decision to heavily subsidize historic greenhouse gas polluters in the wake of the *Neubauer* decision offers one illustration of this strategy.[12]

If, on the other hand, social movements and movement lawyers adopt a *minimalist* view, the lack of attention to intragenerational justice would be of less concern. However, they should ensure that there is a political strategy in place to ensure that judicial decisions are fairly implemented. This could include working with vulnerable communities to ensure that their voices are heard in the political and regulatory processes which follow the court's decision, and highlighting climate justice concerns in public mobilization campaigns that ac-

11 For an example of such a claim, see the Canadian case of *Mathur v. Ontario*, brought under section 15 of the Canadian Charter of Rights and Freedoms (*Mathur v Ontario*, 2023).

12 This strategy has thus far proved unsuccessful (European Commission, 2023).

company the trial or media coverage of the result. Litigation can have important framing effects on subsequent political debate (Rodríguez-Garavito, 2011). It is important that the public perception of the litigation not only highlights the importance of overall reductions in greenhouse gas emissions but doing so in a fair way.

Conclusion

This article has highlighted three dimensions of climate justice, and explored the extent to which they are reflected in three leading judicial decisions concerning rights-based litigation. Our findings suggest that while some aspects of international and intergenerational justice are reflected in these decisions, intragenerational justice is not. This is likely a consequence of the legal logic of the cases examined – a logic that is common to many climate cases. The extent to which the absence of judicial consideration of intragenerational justice is a concern – and the way in which it should be addressed – depends on the overall model of litigation, including its theory of change. We have sketched out two models, minimalist and maximalist. Whichever model litigators pursue, greater attention to intragenerational justice in litigation strategy would amount to a welcome development.[13]

References

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