

Taking Governments to Court

Climate Litigation and its Consequences



Alex White and
Luke O Callaghan-White



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"Climate change is undoubtedly one of the greatest challenges facing all states.

Ireland is no different." - Chief Justice Frank Clarke

Abstract

The volume of climate cases brought against national governments is on the rise. In many such cases, courts have found in favour of those endeavouring to force states to radically improve on commitments to tackle the effects, and limit the extent, of anthropogenic climate change. Climate policymaking is not a matter for the judiciary, but where policy has been formed, courts can have an important role in its supervision and enforcement.

This paper begins by offering a detailed assessment of three landmark European cases: the ***Urgenda*** case (2019), taken in the Netherlands; the ***Friends of the Irish Environment*** case in Ireland (2020); and ***Neubauer et al*** in Germany (2021). The three cases assessed in this paper produced landmark judgments over a strikingly short period between December 2019 and April 2021. Taken together, they demonstrate the significant potential of court intervention in this field. Despite the variations in legal systems and traditions, these cases confirm the emergence of a strong interventionist trend in the approach of domestic courts in Europe to the issue of climate change.

The paper then examines the policy implications of these rulings. We show that climate litigation can lead to the implementation of significant policy changes. The paper concludes by arguing that with each successful climate case taken against a state, the corpus of international jurisprudence grows and reverberates, creating a 'domino effect' in climate litigation. Each judgment adds to the resource base of case law that can be cited in the future, serving to intensify the pressure on policymakers to ensure that their climate action plans are robust and implementable. We argue that this will heighten the sensitivity of policymakers and significantly increase the evaluation of government action (and inaction) on climate change - beyond the electoral cycle.

¹ Alex White, Senior Counsel, is chair of the Energy Group at the IIEA and is a former Minister for Communications, Energy & Natural Resources. Luke O Callaghan-White is Senior Researcher with Responsibility for Climate and Energy Policy at the IIEA. The authors are not related.

Introduction

On 31 July 2020, the Supreme Court of Ireland delivered a unanimous judgment quashing the Government's 2017 National Mitigation Plan issued under the Climate Action and Low Carbon Development Act 2015. The case was brought by the Friends of the Irish Environment (FIE). The judgment was hailed variously as a "turning point,"² a "landmark judgment,"³ and a "watershed moment".⁴ Without question this was a significant moment in the evolution of Irish public policy on climate change: a critical plan adopted by the Irish Government was deemed inadequate, and therefore unlawful.

Climate cases against governments and public bodies are increasing throughout the world, and particularly in Europe. Court judgments are frequently grounded in the robust consensus now evident in the scientific community on the need to limit global temperature increases.⁵ In many high-profile cases, apex courts⁶ have found in favour of litigants and ordered states to enhance climate action measures. Indeed, the majority of such cases - 58% - taken outside of the U.S. have led to outcomes entailing more effective climate regulation.⁷

There are different kinds of climate cases: some are taken against corporate bodies, for example.⁸ However, most climate litigation is

against governments, and this is the category of cases on which we concentrate in this paper.

Climate policymaking is not a matter for the judiciary, but where policy has been formed, courts can have an important role in its supervision and enforcement. Courts can identify foot-dragging and can examine closely whether a government's declared objectives are being adequately addressed. Across Europe, while judgments differ, and reflect significant variations in legal systems and traditions, there is now a manifest willingness on the part of domestic courts to order compliance with established legal requirements and standards. From this perspective, the courts are not to be regarded as separate actors *per se*. Typically, they can only intervene where there are laws already in place – laws which may be subject to challenge by citizens, as in the cases under review here.

This paper proceeds in four parts. **Section I** provides a detailed assessment of three landmark European cases: the ***Urgenda*** case, taken in the Netherlands; the ***Friends of the Irish Environment*** case in Ireland; and ***Neubauer et al*** in Germany. While the incidence of climate cases continues to grow, diversify, and spread across regions and

² Dr Aine Ryall, UCC in <https://www.irishtimes.com/opinion/supreme-court-ruling-a-turning-point-for-climate-governance-in-ireland-1.4323848>

³ Dr. David R. Boyd, UN Special Rapporteur on human rights and the environment, quoted in: <https://www.climatecaseireland.ie/amidst-a-climate-and-biodiversity-crisis-hope-emerges-friends-of-the-irish-environment-win-historic-climate-case-ireland-in-the-irish-supreme-court/>

⁴ Dr David Kenny, TCD in <https://www.thejournal.ie/readme/supreme-court-ruling-government-climate-plan-impact-5165222-Aug2020/>

⁵ Setzer, J. and Higham, C. (2021) 'Global Trends in Climate Change Litigation: 2021 Snapshot', *Grantham Research Institute on Climate Change and the Environment*, London School of Economics and Political Science (hereinafter referred to as "Grantham (2021)"). https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf

⁶ An apex court is the highest court in a given jurisdiction, often the Supreme Court, whose judgments are not subject to further domestic review.

⁷ Grantham (2021) op. cit.

⁸ A recent example is the action against Royal Dutch Shell in which judgment was given in the Netherlands in May 2021: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

jurisdictions,⁹ the three cases assessed in this paper produced landmark judgments over a strikingly short period between December 2019 and April 2021. Taken together, they demonstrate the significant potential of court intervention in this field.

Section II consists of a comparative discussion of the three judgments. Such an exercise across jurisdictions must always be approached with caution since legal systems differ, sometimes significantly. In addition, court actions may not necessarily engage the same legal points, even if similar outcomes result. That said, a comparative analysis may assist us in understanding the potential, and the limitations, of the courtroom as a productive “battleground for climate activism”.¹⁰

In **Section III**, the policy implications and consequences of the three cases are examined. In the Netherlands, the **Urgenda** judgment has led to significant policy changes. The state has already radically updated its short-term climate targets and allocated considerable amounts of government capital to enhanced mitigation and adaptation measures. In Ireland, it is argued that the Supreme Court decision of July 2020 was a critical motivator in the deliberations on a new climate law, ultimately enacted on 23 July 2021. The legislation now binds Ireland to a steep emissions reduction trajectory of 51% by 2030, compared to 2018 levels. In Germany, the Federal Government acted expeditiously following the ground-breaking Constitutional Court judgment of April 2021. It re-cast its short and long-term climate policies to take account of the ruling, leading to immediate changes, most obviously in the energy sector. This presented an important opportunity for dramatic growth in zero-carbon technologies.

The final part of this paper, **Section IV**, assesses the potential growth of climate litigation as an effective tool for the

advancement of climate action. We predict that citizens will continue to take states to task for failing to implement cogent policy measures that are necessary to limit the consequences of anthropogenic climate change. Climate litigation is likely to endure as an effective means of accelerating climate action, since it affords citizens the opportunity to scrutinise and supervise government action through court intervention. This seems likely to heighten the sensitivity of policymakers to continuing and increased evaluation of government action (and inaction) on climate change – beyond the electoral cycle.

Section I: Assessment of the three judgments

It is proposed firstly to look at three recent judgments, beginning with the 2019 Dutch Supreme Court judgment in the **Urgenda** case, widely seen as foundational. We will then consider the 2020 Irish Supreme Court judgment in **Climate Case Ireland** (Friends of the Irish Environment v Government of Ireland) and conclude with the 2021 German Federal Constitutional Court judgment in **Neubauer et al v Germany**.

The State of the Netherlands v Stichting Urgenda

On 20 December 2019, the Supreme Court of the Netherlands upheld¹¹ a District Court order requiring the Dutch Government to implement an emissions reduction, by the end of 2020, of at least 25% compared to 1990.

This was the first case in the world to establish a legal duty on a government to prevent dangerous climate change. The Urgenda Foundation, a climate NGO, had sought an injunction to compel the Dutch government to reduce greenhouse gas emissions. There

⁹ Grantham (2021), op. cit.

¹⁰ See ‘Guilt by emission’ in The Economist Special Report ‘The great disrupter’ 19 September 2020 (p12).

¹¹ <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> (unofficial translation produced by the plaintiffs). The original District Court order was confirmed in the Dutch Court of Appeal, and then appealed by the State to the Supreme Court. It is important to note the role of the Supreme Court in a “cassation” case is to act as a check on the quality of contested judgments given by courts of appeal – both as regards the application of law, and the legal reasoning behind it. As is generally the case elsewhere, the Supreme Court does not itself hear evidence.

was no dispute that as an interest group, Urgenda had standing under Dutch law to pursue such a "class action".

An important distinguishing feature of the **Urgenda** judgment was the reliance placed on human rights and fundamental freedoms. Like Ireland, the Netherlands is a party to the European Convention on Human Rights (ECHR).¹² However, the nature of its incorporation into domestic law is different, in that the courts are under an express obligation under the Dutch Constitution to directly apply the provisions of the Convention.

In its judgment, upheld by the Supreme Court, the Dutch Court of Appeal noted that climate science had "long ago" reached a high degree of consensus that the warming of the earth must be limited to no more than 2°C, and that for a "safe" warming of the earth it must not exceed 1.5°C. Otherwise, the court wrote, there would be a real risk of dangerous climate change, and it was:

"clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced."¹³

The Supreme Court observed that the state did not challenge these conclusions and rather it acknowledged the urgent need for measures to reduce greenhouse gas emissions. Neither did the state dispute its own duty to contribute to that emissions reduction. What it did challenge was the contention that Articles 2 and 8 of the ECHR obliged it to take the measures sought, and to ensure that the volume of greenhouse gases being emitted at the end of 2020 would be 25% less than it was in 1990.¹⁴

Article 2 of the Convention protects the right to life and Article 8 protects the right to respect for private and family life. The court noted that in the face of "real and immediate risk" such as that arising from climate change, states must take "appropriate steps" to address that risk. While states have discretion in choosing the steps to be taken, such steps must actually be "reasonable and suitable" – whether through mitigation or adaptation measures. The state's policy must be consistent, and measures taken in good time. The court can determine whether the policy as implemented satisfies these requirements.

The Supreme Court noted that every country that is party to the UNFCCC,¹⁵ including the Netherlands, has a responsibility to play its part in accordance with its share of the global responsibility to address climate change. Critically, the court concluded that this international responsibility was an obligation "based on Articles 2 and 8 of the ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands".¹⁶

As to what precisely is required in order for the Dutch State to "do its part" the Court of Appeal had referred to the IPCC¹⁷ reports and the emissions reductions widely agreed to be necessary in order to limit global warming. A reduction of 25-45% by the end of 2020 had been targeted as far back as 2007. Since then, virtually all COPs¹⁸ (Bali, Cancún, Durban, Doha and Warsaw) had referred to this 25-40% standard. The court said that while this may not have established "a legal standard with a direct effect", it did confirm that a reduction of at least 25-40% in emissions was needed to prevent dangerous climate change.¹⁹

In 2011, the Netherlands had lowered its

¹² The European Convention on the Protection of Human Rights and Fundamental Freedoms [ECHR].

¹³ Para 4.7

¹⁴ Para 4.8

¹⁵ United Nations Framework Convention on Climate Change.

¹⁶ See the paragraph entitled 'Global problem and national responsibility' under 'Summary of the Decision'.

¹⁷ Intergovernmental Panel on Climate Change.

¹⁸ Conferences of the Parties.

¹⁹ Supreme Court's summary of the Court of Appeal judgment at para 2.3.2

2020 emissions reduction target from 30% to 20%,²⁰ with a commitment to accelerate reductions to 49% in 2030 and 95% in 2050. But given the international consensus on what is actually required, the Supreme Court observed that:

"...there may be serious doubts as to whether, with the 20% reduction envisaged by the State at EU level by 2020, the overall reduction over the next few decades, which the State itself believes to be necessary in any case, is still feasible..."²¹

It was for the government to show how the proposed reduction of 20% would be adequate for the achievement of the stated objective, i.e. meeting the targets for 2030 and 2050 and keeping the 2°C and 1.5°C targets within reach. It had not done so, and this failure to justify or explain its policy approach was an issue for the court:

"The State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures... would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands' share. The State has confined itself to asserting that there "are certainly possibilities" in this context."²²

The Supreme Court acknowledged that decision-making powers regarding the reduction of greenhouse gas emissions were for the government and for parliament. These institutions have a large degree of discretion to make the necessary political decisions but it was up to the courts to decide whether the government and parliament had "remained within the limits of the law by which they are bound."²³

The Supreme Court agreed with the Court of Appeal's finding that the state's policy on greenhouse gas reduction did not meet the requirements of Articles 2 and 8 of the ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change.

In the circumstances the court was prepared to order a reduction in greenhouse gases by at least 25% (instead of 20%) by the end of 2020, compared to 1990.

This was, by any measure, a radical intervention by the courts of the Netherlands. It is difficult to read the Urgenda judgment as anything other than a court mandated adjustment of the Dutch State's emissions target. Convention rights were successfully invoked by the applicants, against the background of a stated objective of the Dutch Government to address climate change in line with international commitments, but in relation to which it had fallen short.

Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General ("Climate Case Ireland")

This successful action against the Irish Government is recognised internationally as a leading example of the developing trend in climate litigation. One commentator has described the judgment as "a ruling that can sit seriously alongside the small but growing pantheon of major impactful climate cases to date..."²⁴

The Supreme Court's unanimous judgment was delivered on 31 July 2020 by Chief Justice Frank Clarke.²⁵ The seven-judge court quashed the government's 2017 National Mitigation

²⁰ Both figures based on comparison with 1990.

²¹ Para 7.4.6

²² Ibid

²³ Para 8.3.2

²⁴ Dr Thomas Muinzer lists as comparators: Gloucester Resources v Minister for Planning (Australia), Massachusetts v Environmental Protection Agency (USA), Leghari v Federation of Pakistan (Pakistan), Juliana v United States (USA) and Urgenda (the State of the Netherlands v Stichting Urgenda (Netherlands). See <https://www.irishlegal.com/article/dr-thomas-muinzer-climate-case-brings-good-news-and-bad>

²⁵ Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] IESC 49

Plan issued under the Climate Action and Low Carbon Development Act 2015. The High Court ²⁶ had rejected a challenge to the plan by Friends of the Irish Environment but the Supreme Court, on appeal, ruled that by failing to give "at least some realistic level of detail" about how it was intended to meet the country's obligations to reduce greenhouse emissions, the Plan did not comply with the obligations set out in the Act.

The 2015 Act was the state's first climate legislation. It set out the statutory basis for Ireland's national transition objective to a low carbon, climate-resilient and environmentally sustainable economy by 2050. The Act (now amended significantly – see Section III below) required the Minister for Environment to submit to Government a 'national mitigation plan' every five years, setting out the Government's approach to decarbonisation, so as ultimately to deliver an 80% reduction in greenhouse gases by 2050 compared to 1990 levels. The plans were to ensure that the country met its 'national transition objective' of a low carbon and environmentally resilient future. Section 4(2) required such a plan to "specify" a number of matters, including the manner in which it was proposed to achieve the national transition objective, and the policy measures that would be required in order to manage greenhouse gas emissions.

A National Mitigation Plan ("NMP") was duly published in 2017. Friends of the Irish Environment (FIE) applied to the High Court for judicial review, contending that in view of the government's responsibility to reduce greenhouse gas emissions, the plan breached the provisions of the 2015 Act.

The applicants made essentially two key arguments. Firstly, they maintained that the government, in the NMP, failed to adequately vindicate rights which were said to be guaranteed by either or both the Constitution

and the European Convention on Human Rights. Secondly, FIE argued that the level of

global warming by 2050 will be dependent not only on whether zero emissions have been achieved by that time, but also the way in which the pattern of emissions reduction has developed in the intervening years.

FIE's case failed in the High Court on the grounds that the government enjoys a "considerable margin of discretion" in the area of climate policy, and the plan was within the limits of its powers. Although this disposed of the case, the High Court nevertheless accepted – in line with an earlier High Court judgment²⁷– the existence of a "right to an environment consistent with human dignity". This was a significant development. However, disappointingly for Irish and international climate activists, the Supreme Court on appeal was not prepared to recognise such a right. Nor did the court accept that the applicants had the standing to assert its existence.

However, the Supreme Court did agree with FIE's contention that the plan was inadequate having regard to the obligations contained in the 2015 Act. The government had argued that a judicial review application could extend only to process, i.e. the procedural aspects of the legislation, and not its substance. In response to these submissions, the Chief Justice stated that while it was true that the legislation left policy choices to the government, where the law mandates a plan to do certain things, the courts expect a plan to comply:

"...the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day...

"...whether the Plan does what it says on the statutory tin is a matter of law and

https://www.courts.ie/acc/alfresco/681b8633-3f57-41b5-9362-8cbc8e7d9215/2020_IESC_49.pdf/pdf#view=fit

²⁶ [2019] IEHC 747 per McGrath J

²⁷ Merriman v Fingal County Council [2018] IEHC 65 per Barret J

is clearly justiciable”.²⁸

There was an essential issue of transparency. The Act required that the public had sufficient information to enable them to reach whatever conclusions they wished – for example on its adequacy or otherwise. The Chief Justice continued:

“On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the National Transition Objective (NTO) so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy”.²⁹

Examining the plan in the context of the accepted need for action on greenhouse gas emissions, the Chief Justice concluded that the “level of specificity” required by the Act was absent. He considered that significant parts of it were “excessively vague or aspirational” giving a number of striking examples from the plan’s language concerning the agriculture sector.³⁰

Drawing on the language employed in a famous TV commercial,³¹ the court asked whether the plan “did what it said on the statutory tin”. The Chief Justice concluded that it fell “a long way short of the sort of specificity which the statute requires”. A reasonable and interested observer would not know, in any sufficient detail, how it really was intended to

achieve the NTO by 2050 on the basis of the information contained in the plan. Too much was left to “further study or investigation”.³² The Supreme Court determined that on these grounds the 2017 NMP was unlawful and thus must be quashed.

The courts do not make, dictate, or even normally review government policy. Here the Supreme Court did not decide on what the right level of emissions reduction should be, for example. Nevertheless, the judgment demonstrated a refreshing willingness on the part of the court to intervene in circumstances where the government’s acts or omissions, in the court’s words, fell “a long way short” of its statutory obligations – to such an extent as to render the policy unlawful.

For these reasons the FIE judgment (“Climate Case Ireland”) represents an important moment in the evolution of Irish public policy on climate change. A plan adopted by government was quashed, even if a new and more ambitious plan had anyway been published by 2019.

Neubauer et al. v Germany

This case was decided on 29 April 2021 and arguably is the most significant climate judgment³³ against a government thus far. A group of youth complainants challenged the constitutionality of emissions reduction targets contained in the Federal Climate Change Act 2019. They argued that the targets violated Article 20a of the German Basic Law – the German Constitution – which guarantees the natural foundations of life for future generations.

²⁸ Para 6.27

²⁹ Para 6.38

³⁰ In relation to grassland and cropland management it was stated that “we are endeavouring to improve our understanding of the drivers of emissions from these activities with a view to developing policies and measures to reducing the source of these emissions... Further investigation will also be necessary to analyse synergies between these policies and mobilising carbon credits under the LULUCF... While we cannot be sure what future technologies will deliver, this is true of every sector. In addition, continued research and development is needed to support the development and roll-out of new technologies to reduce greenhouse gas emissions, which highlights the importance of national research and coherence with the EC Horizon 2020 programme and LIFE funding”. Para 6.43.

³¹ For Ronseal

³² Para 6.46

³³ https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jses-id=92FEB92C608BEE851AC5C2C4AE8AA0B.2_cid386

It was claimed that by introducing a legal requirement to meet the overall goals of the Paris Agreement, while setting insufficiently specific emissions reduction targets post 2030, the law violated the rights of the youth plaintiffs by irreversibly offloading emission reduction burdens onto the future.

On the question of their legal standing to bring the case, the complainants as "natural persons" were permitted to do so. However, two environmental associations, said to be "advocates of nature", were found to have "no standing to lodge a constitutional complaint".³⁴

The Federal Climate Change Act ("Bundes-Klimaschutzgesetz"), against the backdrop of the Paris Agreement, mandated a gradual reduction in greenhouse gas emissions of at least 55% by 2030 relative to 1990 levels. Annual allowable emission levels were set for different sectors in line with the overall reduction target for 2030. However, no provisions were set out for the period beyond that year. Instead, the government was mandated to set, in 2025, annually decreasing emission amounts for the period post-2030. This was to be done by means of ordinances (the equivalent of Regulations in the Irish system, i.e. not requiring primary legislation).

The complainants challenged the legislation on constitutional grounds, claiming that the German State had failed to provide a statutory framework sufficient for the rapid reduction of greenhouse gases. The complainants – some of whom live in Bangladesh and Nepal – relied on specific protection provisions contained in the Basic Law, as well as on a claimed fundamental right to a future in accordance with human dignity, and a fundamental right to an ecological minimum standard of living ("ökologisches Existenzminimum").

The complainants did not succeed in all of their claims. However, as "intertemporal

guarantees of freedom" their fundamental rights were found to have been violated by the fact that the level of emissions permitted in the period to 2030 was such as to substantially narrow the remaining options for reducing emissions after 2030. The court stated that emissions permitted in the present pose an irreversible legal risk to future freedom. This is because every amount of carbon that is allowed today irreversibly depletes the remaining budget:

"...if the CO2 budget were to have already been largely depleted by 2030, there would be a heightened risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments needed to enable today's still heavily CO2-oriented lifestyle to make the transition to climate-neutral behaviour in a way that respects freedom[...]"

"The smaller the remaining budget and the higher the emission levels, the less time will be left for the necessary developments. Yet the less that such developments are readily accessible, the more profoundly will holders of fundamental rights be affected by restrictions on CO2-relevant behaviour – restrictions that will become increasingly urgent under constitutional law as the CO2 budget disappears".³⁵

This case was brought by young people concerned that they would be faced with an unreasonable and disproportionate burden in the future. Applying constitutional principles, including that of proportionality, the court agreed that one generation must not be allowed to consume large portions of the carbon budget, while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom. This, according to the Constitutional Court, was confirmed by the Basic Law, which obliges

³⁴ See para 136: the court declared that "the Basic Law and constitutional procedural law make no provision for this kind of standing to lodge a constitutional complaint".

³⁵ Para 186

the state to:

"...treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence..."³⁶

The court acknowledged that the efforts required to reduce greenhouse gas emissions after 2030 will be considerable. Whether these efforts will entail unacceptable impairments of fundamental rights from today's perspective is impossible to determine, the court stated.

However, there is a significant risk of serious burdens which can only be reconciled with potentially adverse effects on fundamental rights if precautionary steps are taken to manage the reduction efforts anticipated after 2030. This requires initiating the transition to climate neutrality in good time. And it means that transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing direction for necessary implementation processes, and conveying a sufficient degree of developmental urgency and planning certainty. It was nothing short of a constitutional imperative that further reduction measures were defined in good time for the post-2030 period, extending sufficiently far into the future.

To the contrary, the German legislation had provided for the updating of the emissions reduction pathway in a manner that was insufficient under constitutional law. It was insufficient that the Federal Government was only obliged to draw up a new plan once – in 2025 – by means of an ordinance. It would at least be necessary to specify the intervals at which further plans must transparently be drawn up.

In these circumstances the Constitutional Court ordered the federal government to reconsider the targets, clarifying by the end of 2022 the emissions reduction targets for the period after 2030.

Section II: Comparative discussion of the judgments

The three Supreme Court judgments delivered respectively in the Netherlands, Ireland, and Germany in 2019, 2020, and 2021 are remarkable in their own terms. When taken together, they confirm the emergence of a strong interventionist trend in the approach of domestic courts in Europe to the issue of climate change.

While the comparative treatment of judgments from different jurisdictions and legal systems must always be approached with caution, nevertheless there are striking commonalities here. The most significant was the willingness of the courts in each case to hold governments to account for the sufficiency or credibility of their climate action commitments – whether contained in legislation, as was the case in ***Urgenda and Neubauer***, or in a statutorily-mandated action plan, as was the case in ***FIE***.

The benchmark against which the Dutch Supreme Court assessed the adequacy of the relevant legislation was the European Convention on Human Rights (ECHR). The court found that the Dutch Climate Act did not measure up to the state's responsibilities to vindicate citizens' human rights under Article 2 (right to life) and Article 8 (right to respect for private and family life), given these Articles are to be interpreted as including a right to be protected against environmental hazards. While the Netherlands, Ireland and Germany are all ECHR signatories, the manner of incorporation into domestic law varies. Uniquely, the Convention has "direct effect" in the Netherlands, thus allowing the court to make the findings which it did.

In ***FIE***, the Supreme Court was not willing to recognise the existence under Irish law of a right to a clean environment. However, the door was left open to future consideration of such a claim, it being held by the court that

³⁶ Para 193

the Friends of the Irish Environment NGO did not anyway have legal standing to pursue such a case. In **Urgenda**, the issue of standing was readily disposed of in favour of the NGO plaintiffs. By contrast, in **Neubauer** it was held that such complainants did not have standing, whereas individuals “as natural persons” did – a position similar to that in Ireland.

All three judgments referred to the prevailing scientific consensus on climate change and the necessity for timely action if its effects were to be adequately confronted. There are repeated references in each judgment to the respective states’ responsibilities under international agreements, notably the COP21 (Paris 2015). All three states had recognised these responsibilities in domestic legislation.

The Irish case represented a significant advance for climate activists. The judgment analysed the Irish Government’s 2017 National Mitigation Plan and found that in its lack of detail and specificity, and in its “excessively vague and aspirational” language, it did not do “what it says on the statutory tin”. The Supreme Court was especially concerned that any climate action plan should be transparent, so that citizens could see and understand what precisely was intended to be achieved through its implementation. The plan fell “a long way short” of what was required in this regard and was therefore unlawful and not in accordance with the 2015 legislation providing for such plans.³⁷

This theme of transparency is also to be found in **Urgenda**. The judgment noted the absence in the Dutch Climate Act of any explanation as to how its emissions reduction target was “feasible” in view of the stated climate policy objectives. This raised an important question as to the role of the court itself; an issue reflected in each of the judgments. Policy is not for judges. But the courts can – and will – intervene to ensure that policy statements, targets and legislative measures have internal coherence and credibility, and

are faithful to what the state has said it is setting out to achieve. In this context, the Dutch Supreme Court was prepared to go so far as to order the state to reduce its emissions targets, since the existing targets fell short of what the state itself said it was intending to achieve. Otherwise, according to the court, future reductions would have to be “more stringent in order to stay within the confines of the remaining carbon budget”.³⁸

Such “off-loading” of necessary actions to the future was a central theme of the German judgment. In its assessment of the adequacy of the German state’s climate legislation the court applied constitutional principles including the “right to a future consistent with human dignity”. The Constitutional Court characterised such a right as “intertemporal” – entailing “an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations”.³⁹

In failing to enact sufficiently specific pre-2030 emissions reduction targets, the state was postponing too much of the burden to the post-2030 period, thus impairing the rights of the youth complainants in the **Neubauer** case. In a sense what the court was saying (as arguably was the case in all three judgments) was that – if the state was serious about arresting global warming, it simply could not fairly deliver on its objectives relying on current policies and legislative provisions. In the absence of radical adjustments, the state could not achieve its stated objectives without adversely affecting the future welfare and fundamental rights of the youth complainants. This was because they and their generation would be required to bear an inordinate and perhaps impossibly dangerous burden.

Each of the three judgments was important in its own terms. But it may be that in its elaboration of the “intertemporal” character of the rights engaged in the German case, the Constitutional Court is potentially the

³⁷ The legislation itself was not challenged or condemned in the Irish case.

³⁸ Para 4.6

³⁹ Para 183

most radical and seminal. While of course the adverse impact of climate change is already visible, including in Germany itself, there are greater risks to come. The **Neubauer** judgment makes it clear that the off-loading of such risk works a *present* injustice to citizens certain to be affected in the *future* in the absence of radical state action.

Section III: Policy Responses and Legislative Outcomes

We now turn to examine the policy implications and consequences of the three judgments. In each case, it will be seen that the apex court's ruling has led to a significant response by policymakers.

Urgenda – implications and consequences

As highlighted in Section I, the Urgenda Climate Case against the Dutch Government was the first successful legal action to establish that a government had a legal duty to prevent dangerous climate change. According to the Urgenda organisation, the case has had a transformative impact on the incidence of climate cases around the world, by making new arguments and tools available to climate litigants challenging governments over insufficient climate policies.⁴⁰ For this reason, the case "may be considered almost as significant for the work done outside the courtroom as for the decisions taken within it".⁴¹

The **Urgenda** ruling has affected Dutch climate policy and has spawned further, unprecedented legal action in the Netherlands.

As we have seen, the government was mandated to change policies to ensure that the 2020 emissions reduction target was met.

The **Urgenda** ruling also required Dutch climate policy to ensure that the rights to life and well-being of residents in the Netherlands were not compromised by hazardous climate change.

Since the ruling by the Supreme Court, it is estimated that there has been an investment of €3 billion by the Dutch Government in new climate initiatives.⁴² **Urgenda** has driven a sense of urgency into Dutch climate policy. Given that inadequate decarbonisation policies could trigger further judicial intervention against the government, potential climate litigants can now act as a real check against unambitious state action.

In May 2021, the district court in The Hague ruled that Royal Dutch Shell must cut its global carbon emissions by 45% relative to 2019 levels by 2030. This is the first time that a fossil fuel company, indeed any private party, has been ordered to reduce its heat-trapping emissions to address climate change.⁴³ This decision extends the principles developed in the **Urgenda** judgment to a responsibility, in this case on private companies, to respect human rights of Dutch residents and protect against hazardous climate change.⁴⁴

The Policy Impact of Climate Case Ireland

In July 2020, a new government was formed in Ireland with a focus on climate action. The 2020 Programme for Government (PfG) placed an emphasis on strengthening Ireland's climate commitments by updating policies and passing new laws. This was a discernible shift in direction with respect to climate and energy policy. The Government made a commitment to reduce greenhouse gas emissions by an average of 7% per annum leading to a 51% reduction by 2030 compared to 2018 baseline levels. No modern economy has ever deliberately achieved this level of emission reductions in a ten-year span.

⁴⁰ <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/#oslo>

⁴¹ Grantham 2021 op. cit. (p.18)

⁴² <https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling>

⁴³ <https://peacepalacelibrary.nl/blog/2021/impact-dutch-landmark-climate-cases-5>

⁴⁴ <https://www.natlawreview.com/article/dutch-decision-shell-s-carbon-emissions-should-us-companies-be-worried>

To support the suite of wide-reaching policy ambitions in the PfG, the incoming Government pledged to introduce a Climate Action Bill within 100 days of taking office. The Bill would legislate for Ireland's net-zero target by 2050; outline how 5-year carbon budgets would be set; establish a sectoral emissions ceiling for every sector of the economy; and promote climate justice.

At the time of the Supreme Court's **FIE** judgment, newly appointed Minister for Climate Action, Eamon Ryan, welcomed the ruling and said that: "We must use this judgment to raise ambition",⁴⁵ indicating that the ruling would inform the substance of the ensuing Bill and act as a catalyst for greater government action on climate change.

While the plans to implement a Climate Action Bill predated the Supreme Court judgment of 31 July 2020, its substance and form were clearly influenced by the outcome of the **FIE** case.

The Irish Government published the draft text of the Low Carbon Development Amendment Bill on 7 October 2020. The publication was followed by pre-legislative scrutiny undertaken by the Joint Oireachtas Committee on Climate Action (JOCCA), where it emerged that there was a consensus to increase the ambition and enhance the frameworks for climate action in the Bill.

The cross-party scrutiny by the JOCCA produced a report with testimony and recommendations which Climate Case Ireland said provided "an unprecedented mandate to create a much strengthened second draft".⁴⁶

During the testimony, experts called for the Bill to use clearer and stronger language when referencing government's legal obligations, and to include interim targets to guide carbon budgets, thereby enhancing the public participation obligations in the Bill. As we have seen, the Supreme Court had attached significance to this principle of transparency.⁴⁷

The JOCCA Report included a total of 78 recommendations. These consisted of several from Climate Case Ireland, including the insertion of a national minimum interim target to reduce emissions by 51% by 2030, and the call for a ban on the importation of fracked gas and the construction of LNG terminals.⁴⁸ The Minister accepted the former recommendation and agreed to revert to the JOCCA with a comprehensive policy statement on the ban of imported fracked gas and on the construction of new LNG terminals in Ireland.

On 23 March 2021, the Irish Government published a revised draft of the climate Bill.⁴⁹ Dr Diarmuid Torney of Dublin City University expressed the view that the updated draft Bill went a long way to address what were seen as weaknesses in the original text.⁵⁰

Despite opposition to late amendments and continued concerns among some climate scientists regarding what they saw as ambiguous language in subsections of the Bill,⁵¹ the legislation was passed on 16 June 2021 by the Oireachtas and subsequently signed into law by President Michael D. Higgins on Friday, 23 July 2021.

While efforts to enhance Ireland's climate

⁴⁵ <https://www.gov.ie/en/press-release/410b1-minister-ryan-welcomes-the-judgement-of-the-supreme-court-today-in-relation-to-national-mitigation-plan/>

⁴⁶ [https://www.climatecaseireland.ie/climate-case-ireland-welcomes-cross-party-report-that-recommends-minister-eamon-ryan-preserve-the-effect-of-the-supreme-court-in-climate-case-ireland/#FixTheBill%20\(3\).pdf](https://www.climatecaseireland.ie/climate-case-ireland-welcomes-cross-party-report-that-recommends-minister-eamon-ryan-preserve-the-effect-of-the-supreme-court-in-climate-case-ireland/#FixTheBill%20(3).pdf)

⁴⁷ Joint Committee on Climate Action, Wednesday, 21 October 2020 https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_climate_action/2020-10-21/debate/mul@/main.pdf

⁴⁸ <https://www.climatecaseireland.ie/climate-case-ireland-welcomes-cross-party-report-that-recommends-minister-eamon-ryan-preserve-the-effect-of-the-supreme-court-in-climate-case-ireland/>

⁴⁹ <https://www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020/>

⁵⁰ Dr Diarmud Torney in <https://www.irishtimes.com/opinion/revised-climate-bill-is-a-step-forward-but-now-comes-the-hard-part-1.4519113>

⁵¹ <https://greennews.ie/expert-letter-climate-bill-concerns/>

credentials were underway prior to the **FIE** ruling, the judgment has clearly had a significant impact. State action was swift and, with respect to the enactment of climate legislation, given its complexity, unprecedented.

There is, of course, no quantitative method to measure the causal link between the success of the litigants in the Supreme Court and the robust features of the ensuing climate Act. However, there is a strong correlation between the outcome of **FIE** and the appetite for enhanced climate action measures. Minister Ryan referred to a consensus among the public about the need for climate action and that this conviction will ensure that the country becomes a biodiversity-rich, climate-resilient and climate-neutral economy by 2050.

An indirect but important consequence of **FIE** is that it has had an 'agenda-setting effect'.⁵² The high-profile Supreme Court ruling was a significant background presence during the pre-legislative scrutiny of the new legislation and was highlighted during the testimonies of several witnesses before the JOCCA. It demonstrates the extent to which Climate Case Ireland influenced the deliberations and outcome of Ireland's updated climate law framework.

German Climate Policy Outcomes following Neubauer

The German Government's response to the **Neubauer** judgment was immediate and significant. The Federal Government was given until the end of 2022 to improve its Climate Protection Act. However, less than two weeks after the ruling, the cabinet launched its reforms of the Act, and Parliament took

just two months to legislate for the necessary changes. The changes are substantial: Germany will now target 65% emissions reduction by 2030 and 88% by 2040, leading to net-zero emissions by 2045.⁵³

To meet the augmented 2030 targets, the energy industry will have to adapt rapidly to clean solutions. Instead of 175 million tonnes CO₂ equivalent – the current target – it will only be permitted to emit 108 million tonnes.⁵⁴ While this will place an undoubted burden on the industry, it also presents an important opportunity to accelerate the development of emerging clean technologies which are not yet at market. Clean hydrogen, for instance, will play a major role in the 'Next Generation EU' recovery plan. At present, Europe has a relative competitive advantage in necessary technologies and, as costs fall, the hydrogen economy will grow.⁵⁵

In May 2021, the German Government announced it will invest €8 billion in 62 large-scale hydrogen projects as part of the country's bid to decarbonise and become a world leader in the fuel technology.⁵⁶ The clean hydrogen economy has an important role to play in meeting the enhanced decarbonisation targets set for 2030 and 2045 but it also serves as an investment framework to create jobs, and boost economic growth and resilience as the EU emerges from the depths of the COVID-19 pandemic.

Germany's hydrogen strategy pre-dates **Neubauer**, but the commitment to clean hydrogen and other emerging clean and carbon-lean technological solutions can only become stronger given the now updated legal framework.⁵⁷

⁵² Wonneberger, A. (2021) 'Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government' *Environmental Communication* vol.15:5, pp.699-714.

⁵³ <https://www.cleanenergywire.org/news/cabinet-decide-climate-law-reform-tougher-sector-emission-budgets-expected>

⁵⁴ Ibid.

⁵⁵ O Callaghan-White, L. (2020) 'Course Correction: China is going Carbon Neutral' Institute of International and European Affairs, <https://www.iiea.com/publications/course-correction-china-is-going-carbon-neutral>

⁵⁶ <https://www.euractiv.com/section/energy-environment/news/germany-to-invest-e8-bn-in-large-scale-hydrogen-projects/>

⁵⁷ <https://www.swp-berlin.org/en/publication/the-international-dimensions-of-germanys-hydrogen-policy>

However, there remains criticism from NGOs that the updated law is insufficient and that steeper levels of emission reductions are needed to align Europe's largest economy with its climate obligations.⁵⁸ Further citizen-led legal action in Germany may well emerge, catalysing an ever more sufficient policy response from the Federal Government.

The climate emergency is at the forefront of the ongoing election campaign in Germany, where federal elections scheduled for 26 September 2021. In July 2021, devastating floods swept through western Germany killing at least 140 people and wreaking havoc and destruction. A spokeswoman for the government made clear that the authorities considered climate change to be the chief cause of the floods.⁵⁹ Outgoing Chancellor Angela Merkel conceded that efforts to counter climate change during her tenure were "not sufficient".⁶⁰ In ways, the case reflects the public's desire for greater political will to limit the frequency of extreme weather events and to counter the chaos of sustained warming.

Section IV: The Domino Effect of Climate Cases

The Grantham Global Trends in Climate Litigation 2021 report⁶¹ observes that the number of climate cases seeking to achieve a broader societal shift is dramatically on the rise, and that the cumulative number of climate change-related cases has more than doubled since 2015.⁶² The report shows how climate litigation has become a critical means to enforce and enhance climate commitments made by governments.

The cases examined in this paper are part of a now widespread discourse on the need to

limit global temperature increases in line with the commitments of the Paris Agreement.

With each successful climate case taken against a state, the corpus of international jurisprudence grows. In this sense, there is a domino effect to climate litigation. The **Urgenda** Case was cited throughout the **FIE** ruling, and the **Neubauer** judgment referred to both prior cases. Each judgment adds to the repository of case law that may be cited in the future and may motivate citizens to commence legal action.

It is expected that the incidence of climate change litigation will continue to grow and that this will reflect the increasing urgency with which the climate crisis is viewed by the public. Furthermore, states without serious long-term emissions reduction strategies, underpinned by concrete pathways and effective short-term commitments, face the prospect of being challenged by their citizens through legal action in the courts.⁶³

Climate litigation provides citizens with the opportunity to scrutinise and supervise government action through court intervention, heightening the sensitivity of policymakers to continuing and increased evaluation of government action (and inaction) on climate change – beyond the electoral cycle. Citizen engagement in court action on climate can enhance the level of public discourse and generate greater transparency on the part of governments. Perhaps the most striking example of this nexus between citizen engagement and government action comes from the Netherlands. The Urgenda Foundation developed and implemented a comprehensive strategy of public advocacy, conducting extensive interaction with 750 organisations and businesses to develop 50 measures that would be sufficient to close

⁵⁸ <https://climateactiontracker.org/>

⁵⁹ <https://www.ft.com/content/66aa44bf-0c35-40be-9e02-b94881e8995c>

⁶⁰ <https://www.irishtimes.com/news/world/europe/merkel-admits-her-efforts-to-counter-climate-change-not-sufficient-1.4628004>

⁶¹ op. cit.

⁶² Ibid

⁶³ Ibid

the emissions gap to which the judgment relates.⁶⁴ The success of climate litigation, in this respect, can be seen in the level of engagement with climate issues by Dutch policymakers – both in 2015 following the initial ruling, and in 2019 at the time of the Supreme Court decision.⁶⁵

Conclusion

The volume of climate cases brought against national governments is on the rise. In many such cases, courts have found in favour of those endeavouring to force states to radically improve on commitments to tackle the effects, and limit the extent, of anthropogenic climate change. While caution is always necessary when comparing court judgments across jurisdictions where legal systems and legal standards may differ, the three climate cases examined in this paper confirm the emergence of a strong interventionist trend in the approach of domestic courts in Europe to the issue of climate change.

As we have shown, climate litigation can lead to the implementation of significant policy changes. Data and precedent suggest that such climate cases will continue to be an effective means of ensuring that governments, across the planet, recognise and meet essential climate commitments.

⁶⁴ Ibid

⁶⁵ Ibid

