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SYMPOSIUM ARTICLE

Fuzzy Universality in Climate Change Litigation[Ψ]

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Abstract
Climate change litigation is developing rapidly and pervasively, emerging as a space for legal innovation. Until now, this process has occurred mainly in national courts. The result is a decentralization of the interpretation of human rights relating to climate change. This article argues that such decentralization could, in principle, have a destabilizing impact on claims to the universality of human rights. However, close examination of this litigation shows that a prototype is emerging, certain features of which are becoming 'hard wired' through the process of judicial dialogue. By exploring the content of this prototype, its decentralized development, and its self-reinforcing nature, we see a legal space emerging in which environmental human rights sit between the universal and the contextual.

Keywords: Climate change; Human rights; Universality; Decentralization; Litigation; Judicial dialogue

1. Introduction

Climate change litigation is developing rapidly and pervasively, emerging as a space for legal innovation. This is occurring mainly in national courts, particularly in cases involving the interpretation of human rights and constitutional provisions. The result is a decentralization of the practice of interpretation, a phenomenon that is alluded to but not addressed directly in the existing literature.[1] Such decentralization could have a destabilizing impact on claims to the universality of human rights. However, close examination of this litigation shows that a 'prototype' is emerging, which, through the process of judicial dialogue, is becoming increasingly settled in its content

[Ψ] This contribution is part of a collection of articles growing out of the ELTE-Aarhus Joint Workshop on 'Future Generations Litigation', held at the ELTE University in Budapest (Hungary) on 8–9 June 2023.

[1] A huge amount has been written about the relationship between climate change and human rights. Particularly notable is the special issue on international climate change litigation of the *Review of European, Comparative and International Environmental Law* (2023) 32(2), and various pieces in *Transnational Environmental Law*. However, the majority of these pieces focus either on individual cases or the international law dimension, rather than considering, in a collective sense, activity in national courts. One exception is J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, which noted the 'rights-based' model as an emerging phenomenon. Our article aims to take that argument further by examining this rights trend through the lens of (non)universality.

and approach.[2] By exploring the content of this emerging prototype for litigation, the decentralized development of the approach, and its self-reinforcing nature, we see a legal space emerging in which environmental human rights sit between the universal and the contextual. Our aim is to explore how the tension between the universal and the contextual is managed within this prototype and whether this tension helps to explain some of the (increasingly settled) features of this prototype.

We demonstrate this, firstly, by exploring how claims of universality are managed through judicial techniques designed to make room for differentiated or contextualized applications of rights in general, with reference to Altwicker's examination of non-universal argumentation.[3] Section 2 explains the ways in which courts can accommodate a middle ground between universal and non-universal standards in relation to human rights. One such technique is the decentralization of the interpretation of rights standards, and we examine instances of climate litigation to explore how this decentralization operates so as to balance the universal and the contextual.

In Section 3 we argue that there is an emerging 'prototype' in climate litigation. We understand this prototype to consist of three main features which are becoming fixed over time, although areas of development and innovation remain. The litigation (i) founds its claim in rights language, (ii) foregrounds impacts upon youth/future generations, and (iii) relies on reports of the International Panel on Climate Change (IPCC) as its evidential basis. After a period of experimentation,[4] these strategies have become one of the 'go-to' approaches to climate litigation.[5] The prototype's successes have inspired similar lawsuits in multiple jurisdictions,[6] which in turn have led judicial actors to engage in cross-jurisdictional dialogue and mutual citation practices. As a result, the prototype is becoming hard-wired and 'reuniversalizes' decentrally.

Importantly, by referring to a 'prototype' we do not mean that this litigation model is superior to other approaches, or that it is directly and homogeneously applied across different contexts. Rather, relying on previous studies, we show that this is one of the more successful experiments arising from the innovative space configured by

[2] As explained below, the primary goal of this article is not to demonstrate empirically the existence of this prototype, but to discuss certain features of the prototype and explain their emergence. For empirical assessments demonstrating that these features appear regularly in the case law see D. Bertram, '"For You Will (Still) Be Here Tomorrow": The Many Lives of Intergenerational Equity' (2023) 12(1) *Transnational Environmental Law*, pp. 121–49; and E. Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11(2) *Transnational Environmental Law*, pp. 263–89.

[3] T. Altwicker, 'Non-Universal Arguments under the European Convention on Human Rights' (2020) 31(1) *European Journal of International Law*, pp. 101–26.

[4] The range of climate-based human rights litigation is visible in the Columbia University Sabin Centre for Climate Law database, available at: https://climatecasechart.com.

[5] J. Peel & R. Markey-Towler, 'Recipe for Success? Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases' (2021) 22(8) *German Law Journal*, pp. 1484–98.

[6] At the time of writing there are pending cases in a huge range of jurisdictions, as well as before the European Court of Human Rights (ECtHR): e.g., *Verein KlimaSeniorinnen Schweiz* v. *Switzerland*, Appl. no. 53600/20; *Carême* v. *France*, Appl. no. 7189/21; and *Duarte Agostinho* v. *Portugal*, Appl. no. 39371/20. For a discussion see O.W. Pedersen, 'Climate Change Hearings and the ECtHR', *EJIL:Talk!*, 4 Apr. 2023, available at: https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr.

climate litigation.[7] The claim being made here is not directly empirical. The argument is not that this is the only or the dominant approach to climate litigation, although the work of Donger and Bertram, among others, demonstrates that our prototype does appear in a number of jurisdictions. Instead, we argue that in cases where it is utilized, we can explore how context and universality interplay.

In Section 4 we provide some explanations for the pattern that we demonstrate in Section 3. While much of what is apparent in the case law is driven by claimant tactics (and this too has the tendency for self-reinforcement given the visibility and publicity of successful cases), the practice of mutual citation, in particular, requires further exploration. Even if judicial dialogue does not explain the number of cases being brought that share these features, the fact that courts feel the need to cite each other in reaching their conclusions suggests that dialogue is significant in the outcome of such litigation, at the very least.

We posit three contributory explanations for why courts, through this process of decentralized interpretation and mutual citation, may have found points of commonality within this particular prototype for climate litigation. Firstly, courts are attempting to grapple with a tension between the universal and the contingent when it comes to climate change adjudication. The approach within the prototype is one that allows them to transform some questions of fact into questions of law, providing a partial solution to this conundrum. Secondly, an increasing focus on the interconnectedness of environmental and climate harm allows for extra-referential approaches (references beyond the jurisdiction itself) and mutual citation. Finally, the comparative law method of mutual reliance allows courts to make fairly radical decisions without appearing to stray into the realm of political decision making. We do not seek to persuade the reader that these approaches are legitimate or otherwise; the aim is simply to seek explanations for the phenomena that we describe.

2. Argumentative (Non)Universality

The starting point for our discussion is the claim to universality in relation to human rights. Claims to the universality of human rights norms are deeply contested.[8] As Goodale explains, however, the foundation of universality is an essential part of the story we tell ourselves regarding the legitimacy and power of human rights.[9] The truth or otherwise of such claims is not central to our argument. Rather, what is important are the ways in which courts, in particular, have to manage the tension between the legitimizing effects of claims to universality and the day-to-day realities of litigation and human rights in practice, which will often require non-universal applications. We focus on the ways in which this universality conundrum has been

[7] See Donger, n. 2 above; Bertram, n. 2 above.

[8] For an overview of these arguments see J. Nickel, 'Human Rights', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2021 edn), available at: https://plato.stanford.edu/archives/fall2021/entries/rights-human.

[9] M. Goodale, 'The Myth of Universality: The UNESCO "Philosophers' Committee" and the Making of Human Rights' (2018) 43(3) *Law and Social Inquiry*, pp. 596–617, at 599.

managed in climate litigation cases. Before delving into the case law, however, this section discusses the tension between universality and context in general and the techniques which can be used to alleviate it, before zooming in on one particular technique – decentralized interpretation. We argue that the process of decentralized interpretation of norms in relation to climate change litigation is both a means to address and a consequence of the tension between the universal and the contextual.

2.1. The Tension between Universality and Context – And Why Does it Matter?

Altwicker has developed an analytical framework to understand the range of claims relating to the universality, or non-universality, of human rights, and the consequences for human rights adjudication. In particular, he identifies the different forms that non-universality arguments may take,[10] and the techniques that courts use to maintain a balance between the claim to universality entailed by human rights documents, on the one hand, and contextual arguments of non-universality, on the other.

Before turning to these techniques, it is important to clarify what is meant by 'universality' here. Human rights standards are not applied universally in practice. That much is a given. At the very least, different states have different practical capacities to facilitate the fulfilment of human rights standards, and a range of interests in so doing (or not, as the case may be). For individuals, the degree to which their human rights are fully realized is highly contingent upon their personal circumstances and the circumstances of the state within which they find themselves.

When we refer to universality in this article, therefore, we are referring to normative universality.[11] This posits that each individual is entitled to the same level of protection, via norms which are abstract, inclusive, and rational, simply by virtue of their status as human.[12] This normative universality forms a central part of the legitimizing project of international human rights organizations, and is the justification for human rights charters and treaties.[13] In the literature, however, there are few sustained defences of this position.[14] Few authors contend that the list of rights contained within international treaties is perfectly universal.[15] To found a defence of the entire list on the basis of, for

[10] Altwicker, n. 3 above, p. 105–9.
[11] Ibid., p. 104.
[12] Ibid.
[13] E.g., Universal Declaration of Human Rights (UDHR), United Nations General Assembly Resolution 217, 10 Dec. 1948, Preamble, available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights; International Covenant on Civil and Political Rights (ICCPR), New York, NY (United States (US)), 16 Dec. 1966, in force 23 Mar. 1976, available at: https://www.ohchr.org/sites/default/files/ccpr.pdf; American Convention on Human Rights (ACHR), San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978, available at: https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm; and Council of Europe (COE) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: http://www.echr.coe.int/pages/home.aspx?p=basictexts.
[14] One recent example is J. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2009). For a critique see J. Nickel, 'Review of *Inherent Human Rights: Philosophical Roots of the Universal Declaration*' (2013) 35(2) *Human Rights Quarterly*, pp. 528–31.
[15] Nickel, ibid.

example, human dignity,[16] autonomy[17] or utility[18] is challenging to say the least. This is not to say that such a justification is impossible, but it is difficult to justify and explain the *current* list of rights found in international human rights treaties on the basis of any universal feature of the human experience. Universality has, in this way, become more of a foundation myth than it is a robust position from which to develop human rights through law.

Furthermore, universality has also been the source of sustained criticism even in this 'foundation myth' form. Here, scholars (and often, political figures) argue that the universality of human rights is not only flimsy but also illegitimate and dangerous. For instance, the foundation myth is contested by those who advocate human rights nationalism[19] or cultural relativism;[20] by critical legal scholars who point to the non-objective nature of human rights discourse;[21] and by scholars who advocate a pluralistic approach to law.[22] The detail of these objections is not the focus of this article, but it is important to note here that both the reasons for, and the consequences of, normative non-universality expressed through these different approaches will vary. Indeed, the range of objections to universality is as important as the nature of those objections precisely because any response to such objections by those interpreting human rights standards requires accommodating very different arguments. Even if courts, in practice, recognize or make concessions for the practical non-universality of human rights standards, the way in which this becomes operationalized will not be the same in all contexts, and this is the critical argument of this article. How the tension between the universal and the contextual is managed is hugely significant.

From this starting point, Altwicker identifies a range of techniques in the judicial arsenal that can be used to create 'fuzziness'[23] around the concept of universality. This fuzziness allows room for human rights standards to be applied and operate more or less smoothly without having to face head-on the challenges created by reliance on universality as the legitimization for the entire project. In short, he shows that '[t]he non-universality of human rights can be deliberately created through acts of interpretation'.[24]

[16] P. Gilabert, *Human Dignity and Human Rights* (Oxford University Press, 2018).
[17] J. Griffin, *On Human Rights* (Oxford University Press, 2008).
[18] P. Schofield, 'Jeremy Bentham's "Nonsense upon Stilts"' (2003) 15(1) *Utilitas*, pp. 1–26.
[19] Z. Jay, 'Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights' (2017) 19(4) *British Journal of Politics and International Relations*, pp. 842–60.
[20] S. Greer, 'Universalism and Relativism in the Protection of Human Rights in Europe: Politics, Law and Culture', in P. Agha (ed.), *Human Rights Between Law and Politics* (Hart, 2017), pp. 17–36.
[21] Among many others see D. Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal*, pp. 101–25; M. Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press, 2016), pp. 165–83.
[22] Again, among many others see, e.g., H. Quane, 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?' (2013) 33(4) *Oxford Journal of Legal Studies*, pp. 675–702.
[23] This term is employed in this article to refer to the ambiguous universality relied upon by courts in relation to climate change.
[24] Altwicker, n. 3 above, p. 109.

The techniques that he identifies are (i) asymmetric protection,[25] (ii) context as a difference-making fact,[26] and (iii) decentralized interpretations of human rights provisions.[27] Asymmetric protection occurs in situations of positive discrimination. Historically, disadvantaged groups receive differential treatment to correct existing factual equalities. Courts treat context as a difference-making fact, for example, by relying on historical cultural features of a particular state (for example, the role of the Catholic church in Italy) to allow for unequal treatment in state institutions (for example, the presence of crucifixes in public schools).[28] This is a technique which facilitates recognition of cultural context into how human rights operate in practice but will result, inevitably, in differentiated interpretation when considered internationally. Finally, decentralized interpretations, through techniques such as subsidiarity, deference or margins of appreciation, will also allow rights interpretations to develop subtle differences over time.[29] This process can be controlled by international human rights courts allowing more or less deference depending upon the right in question.[30] Equally, it can be achieved through allocations of responsibility between national and international or regional courts for the day-to-day enforcement and interpretation of rights.[31] In relation to human rights, this need for decentralization of interpretation is clear and part of the very design of the process whereby national courts are deputized to adjudicate on international agreements.

2.2. Decentralized Interpretation

This last technique is our focus in this article, precisely because the emerging prototype for climate litigation is one that has been developed by national courts. The international human rights courts have been 'overtaken' by developments in national jurisdictions through the role of national courts as 'day-to-day' adjudicators in relation to such rights. This is not to say that the international courts do not have a role to play – the decisions in *Sacchi* v. *Argentina*[32] and the pending (at the time of writing) European Court of Human Rights (ECtHR) jurisprudence[33] all influence the 'room for manoeuvre' within these national interpretations, but the decentralization in interpretation is critical for the operation of human rights in practice. How international human rights documents have been interpreted in such courts, either directly or in conjunction with national constitutional provisions, determines how those rights play out in practice.[34]

[25] Ibid., pp. 110–3.
[26] Ibid., pp. 113–6.
[27] Ibid., pp. 116–9.
[28] Ibid., p. 115.
[29] Ibid., p. 117.
[30] Ibid., p. 118.
[31] Ibid.
[32] Communication to the Committee on the Rights of the Child, *Chiara Sacchi et al.* v. *Argentina et al.*, 23 Sept. 2019, Communication No. 104/2019, UN Doc. CRC/C/88/D/107/2019, available at: https://juris.ohchr.org/casedetails/2952/en-US.
[33] At the time of writing, the decision in *Duarte Agostinho* (n. 6 above) is pending.
[34] For an overview see R. Luporini & A. Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32(2) *Review of European, Comparative and International*

Critically, this strand of jurisprudence involves courts both relying on and discounting universality in their approach to climate change-related human rights.

This development in national jurisdictions reflects the fact that there are, potentially, 'different coexisting interpretations of human rights norms that are equally legitimate'.[35] Thus, the duties emerging for the German state from its own national constitutional human rights, derived from the European Convention on Human Rights, can be interpreted differently from the Irish interpretation of the Irish Constitution, also derived from the European Convention, without calling into question the core of universality in the rights in question. Obvious as this may be, the German interpretation of what rights to life mean for the German legislature and its climate change response can be different from the Irish interpretation of the same, to a certain extent. This room for differentiation is often obscured when courts mutually reference each other.

As Dothan argues, this process of mutual citation and dialogue should eventually lead to the emergence of a more or less common consensus as to interpretation.[36] We contend that this is exactly what we are seeing in relation to human rights and climate change. While there is a decentralized and differentiated approach to interpreting rights to life and health in the light of climate change, we can already discern a convergence of judicial opinions in this respect. What this process produces is what we refer to as 'fuzzy universality'.

3. Networks of Mutual Influence: Emergence and Features of the Prototype

To understand how fuzzy universality is taking shape, it is necessary to take a closer look at the reasoning relied upon by courts in climate litigation. A consensus is apparent through what we call here the prototypes for climate litigation. To emphasize, the argument is not that this model is the only way in which climate litigation is being conducted. Rather, it is (one of) the prototypes for climate litigation which is gaining ground internationally, and which is characterized by the key features we have identified. Both before and following *Urgenda*,[37] a variety of legal tactics were advanced before the courts, including litigation by elderly populations,[38] by individuals particularly vulnerable to the effects of climate change,[39] and through

Environmental Law, pp. 267–78. Both the ECtHR (in *Duarte Agostinho*, n. 6 above) and the Inter-American Court of Human Rights (in *Advisory Opinion requested by the Republic of Chile and the Republic of Colombia*) have ongoing proceedings, so this centralized leadership may emerge through those actions.

35 Altwicker, n. 3 above, p. 121.

36 S. Dothan, 'Judicial Deference Allows European Consensus to Emerge' (2018) 18(2) *Chicago Journal of International Law*, pp. 392–419.

37 *The State of the Netherlands* v. *Stichting Urgenda*, Hoge Raad, Civil Division [Dutch Supreme Court], Judgment 20 Dec. 2019, No. 19/00135, ECLI:NL:HR:2019:2007 (*Urgenda*).

38 *Verein KlimaSeniorinnen Schweiz et al.* v. *Federal Department of the Environment, Transport, Energy and Communications*, Judgment 1C_37/2019, 5 May 2020.

39 *Fliegenschnee* v. *Federal Ministry for Digitalisation and Business Location*, E 1517/2022-14, 27 June 2023, Administrative Court of Vienna (Austria).

claims relating to interpretation of national legislative provisions.[40] More recently, however, this variety has narrowed into a prototype characterized by youth-led litigation alleging that the actions of national governments breach either international human rights norms or their own national constitutions, by failing to support rights to life.[41] Furthermore, because many of these claims involve predictions of future outcomes rather than allegations of current harm, their evidential basis rests in the IPCC findings on the effects of climate change on human health.[42]

The increasing prominence of these features is reinforced by judicial dialogue and mutual citation, whereby a court cites a sister court from another jurisdiction as part of its justification for addressing the claims before it. This has two effects. Firstly, it popularizes this prototype in the global legal landscape.[43] Claimants who see a particular approach succeeding in one jurisdiction are more likely to adopt that approach in their own jurisdiction; and courts which see that approach as a useful approach, and which cite successful litigation under that approach, are more likely to support the claimants in their reasoning.[44] Furthermore, even if the litigation fails, the *questions asked* become homogenized.

Secondly, it may have the future effect of creating a path dependency in the sense that claimants deprioritize alternative strategies,[45] taking us from an era of litigation innovation to one of harmonization. Admittedly, further empirical work would be needed to determine whether this step has occurred. For the purposes of this article, we focus on examining the above-outlined prototype which, at the very least, has had demonstrable success in a number of jurisdictions.

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[40] *R (Friends of the Earth Ltd)* v. *Heathrow Airport Ltd* [2020] UKSC 42.

[41] Many judgments are referred to throughout this article. They include *D.G. Khan Cement Company Ltd* v. *Government of Punjab*, C.P.1290-L/2019, Supreme Court (Pakistan); *PSB et al.* v. *Brazil* and concurring decision (ADPF 708), Federal Supreme Court (Brazil); *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, Supreme Court (Canada); *KHO:2023:62*, Korkein hallinto-oikeus [Supreme Administrative Court], ECLI:EN:KHO:2023:62 (Finland); *Future Generations* v. *Ministry of the Environment*, STC4360-2018, 5 Apr. 2018, Corte Suprema de Justicia [Supreme Court of Justice] (Colombia), unofficial translation available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf; *Shrestha* v. *Office of the Prime Minister*, Decision no. 10210, NKP, Part 61, Vol. 3, Supreme Court (Nepal); *Friends of the Irish Environment* v. *Ireland*, Appeal No. 205/19, Supreme Court (Ireland); *Held* v. *Montana*, CDV-2020-307 (Montana, US); and *Neubauer* v. *Germany* 1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20, Bundesverfassungsgericht (BvR) [Federal Constitutional Court] (Germany), official translation available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

[42] All IPCC reports are available at: https://www.ipcc.ch/reports.

[43] The identification of the emerging rights model by Peel and Osofsky (n. 1 above) shows the ways in which this hard-wiring occurs. See also O.W. Pedersen, 'Human Rights in a Changing Environment', in V. Heyvaert & L.-A. Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar, 2020), pp. 340–51.

[44] For an assessment of such trends see S. Iyengar, 'Human Rights and Climate Wrongs: Mapping the Landscape of Rights-Based Climate Litigation' (2023) 32(2) *Review of European, Comparative and International Environmental Law*, pp. 209–309, and J. Setzer & C. Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot', June 2023, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy.

[45] Pedersen, n. 43 above.

In the following, we outline how the prototype is being cemented through (i) temporal hard-wiring, (ii) rights hard-wiring, and (iii) evidential hard-wiring. We argue that the crystallization of these features within the prototype is self-reinforcing via mutual citation and judicial dialogue.

3.1. Evidence of Mutual Citation

Before examining these three points of hard-wiring, it is important to set out the parameters of our argument as well as the methodology by which we develop that argument. This is not an exhaustive survey of case law measuring 'how often' cases succeed (or are brought) which share the three features of our prototype. Rather, we look at the incidence of these features, particularly within the climate jurisprudence of supreme and constitutional courts, to examine whether there is evidence for a self-reinforcing pattern. This evidence would be found not simply in judges referring to rights, future generations or an IPCC report, but whether they seem to find support in those references by referring to decisions of courts from other jurisdictions.

We are looking for two elements: the hard-wired features and the comparative reasoning. Notably, in so doing it is necessary to be selective as to the aspects of the cases considered. Rather than engaging in depth with judicial reasoning, the aim of this discussion is simply to show that the courts are working within the prototype, and that they do so in a comparative fashion. The details of their engagement, of course, vary to some degree depending on the precise question before the court, the prevailing judicial technique and legal culture, and, very importantly, the arguments presented to the court by the parties themselves.

We selected cases by reading all those listed in the Sabin database of climate cases as pertaining to higher courts.[46] We focused on supreme and constitutional courts only because of their significance in driving national interpretations. While much development and innovation is taking place in first instance courts, our interest was how apex courts 'work together' (sometimes via the tactics of the litigants themselves – it need not be a conscious alliance, nor indeed need it be driven by the judicial officers themselves), and the consequences this has for how 'big questions' about the interpretation of rights to life in relation to climate change are being resolved. Whether or not litigants themselves are driving the direction of these legal developments through their choices and framing, the fact that courts cite each other, and find mutual support in the outcomes they reach in so doing, is a critical factor for the legal outcome.

Secondly, we were agnostic as to the choice of jurisdiction. Our selection criteria considered only whether there is mutual citation supporting the prototype's features to explain how the tension between universality and context is managed. The presence of mutual citation is particularly important because we are examining the process of decentralized interpretation. It is notable, however, that the examples in which such mutual citation occurs sit across legal traditions and across the global north/south divide. Indeed, the commonality of language notwithstanding historical and cultural

[46] Columbia University Sabin Centre for Climate Law database, n. 4 above.

differences is in itself telling. Because we are interested in the consequences of and explanations for the emergence of the three features we are examining within the prototype, cases that did not contain such features were not relevant to our analysis, and were discounted. The latter category included, for instance, emerging case law with a focus on duties of care and tort, or utilizing the Paris Agreement as the foundation stone for challenging state and non-state actors for their response to the climate crisis.

To give an example of mutual citation, consider this excerpt of a ruling by the Supreme Court of Canada:

> I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government's argument that projected increases in other countries' emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change … Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that '[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere' and thus contributes to the global harms of climate change … In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project's proponent that the project's GHG emissions would not make a meaningful contribution to climate change.[47]

Here, the Canadian Supreme Court grounds its own arguments in the reasoning of other courts. We argue below that this technique of 'judicializing' certain arguments allows courts to side-step the political questions raised by climate change, but it also means that for future cases there is a clear international precedent – not only for the result, but for the result being supported by mutual citation.[48] The technique thereby becomes self-reinforcing.

Critically, this self-reinforcing technique has played an important role in establishing the temporal, rights-based, and evidential aspects of our litigation prototype, and thus in how that prototype balances the tension between universality and context. It is to these features that we now turn.

Temporal hard-wiring

The first feature of the prototype is its temporal dimension. One strand of successful climate litigation is coalescing around bringing actions on behalf of youth claimants or on behalf of future generations. The decision in *Urgenda* was an accelerator for

[47] *Reference re Greenhouse Gas Pollution Pricing Act*, n. 41 above, para. 189.

[48] In general terms, the practice of foreign citation is a controversial one; see M. Geltzer & M. Siems, 'Citations to Foreign Courts: Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62(1) *American Journal of Comparative Law*, pp. 35–86 (which gives a useful overview of the arguments for and against such citation, as well as a quantitative assessment of the impact on jurisprudence of such citation). See also M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013).

actions of this kind (alongside international decisions such as *Sacchi* v. *Argentina*),[49] but there is also a link with the rise of grassroots movements such as Fridays for Future, which bring the relationship between younger generations and climate action to the fore. Today, dozens of youth cases have been decided across various jurisdictions.[50]

One effect of *Urgenda* has been to emphasize the existential threat of climate change, and the temporal consequences of climate change-related harm, which has then been mirrored in other judgments. For example, the Supreme Court of Colombia reasons that '[t]here is a growing threat to the possibility of existence of human beings'.[51] From here, the Court reasons that the rights of future generations, being the same as the rights of current generations, are undoubtedly affected by the current lack of action in relation to the climate: '[protection through such rights] includes the unborn, who also deserve to enjoy the same environmental conditions that we have. The environmental rights of future generations are based on the (i) ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature'.[52]

Similarly, in *D.G. Khan Cement Company* v. *Government of Punjab*, the Supreme Court of Pakistan reasoned:

> The tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice. This Court should be mindful that its decisions also adjudicate upon the rights of the future generations of this country.[53]

The possibility of appealing to the rights of future generations in both cases above is predicated on the universal application of such rights not only geographically but also temporally.

The other approach to this 'future focused' climate litigation that is gaining traction, especially in the German-speaking world, is to draw the lines between the rights of current generations in terms of their liberty and freedom and those of future generations in terms of those same freedoms in the face of mandatory climate action. In both *Neubauer*[54] and *Children of Austria*[55] we can see this argument at play – although the lack of specificity in the Austrian claims ultimately led the litigation to fail. Importantly, in *Neubauer*, the Constitutional Court accepted that it could not assess the subjective rights of future generations who are not yet born. However, that did not prevent it from relying upon their 'objective' rights: that is to say, rights which are of universal application by virtue of each person's status as a human. When considering these objective rights, the Court reasons:

[49] N. 32 above.
[50] See, e.g., *Held* v. *Montana*, n. 41 above.
[51] *Future Generations* v. *Ministry of the Environment*, n. 41 above, p. 15.
[52] Ibid., p. 18.
[53] *D.G. Khan Cement Company Ltd* v. *Government of Punjab*, n. 41 above, para. 19.
[54] *Neubauer* v. *Germany*, n. 41 above.
[55] *Children of Austria* v. *Austria*, 123/2023-12, 27 June 2023, Constitutional Court (Austria).

> When Art. 20a GG [Grundgesetz] obliges the state to protect the natural foundations of life – partly out of responsibility towards future generations – it is aimed first and foremost at preserving the natural foundations of life for future generations. But at the same time, it also concerns how environmental burdens are spread out between different generations. The objective protection mandate of Art. 20a GG encompasses the necessity 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.[56]

We discuss the importance of the 'right to life' framing below, but it is useful to note here that the claim to temporal universality is made possible (or at least easier) by the rights to life approach.

In reaching these conclusions relating to the relevance of temporality to climate litigation and in examining how to handle such claims, the courts in question are relying upon each other's reasoning. For example, the Brazilian Supreme Court relied on the German Constitutional Court's decision in *Neubauer*.[57] In *Neubauer* itself, the German Court discusses and relies on the reasoning present in both *Urgenda* and the Irish Supreme Court decision in *Friends of the Irish Environment* v. *Ireland*.[58] The temporal approach thereby becomes reinforced and path dependencies are created so that a focus on the rights of future generations also pushes courts to consider the questions before them through the lens of rights to life. It is notable, indeed, that despite the different legal cultures present in the courts we have cited here, and the differentiation in terms of the immediacy of the threat posed by a changing climate for those in the global north/south, the language of existential threat is present across this divide.

Rights hard-wiring

The second common feature of the prototype is the choice for a rights 'frame' as the appropriate vehicle through which to ground state duties in relation to climate change. For example, the Supreme Court of Nepal interpreted the state's duties to maintain rights to life as mandating state action to combat the effects of climate change.[59] Furthermore, while environmental rights are relevant to judicial discussions, the primary focus has been on the right to life. This hard-wiring of a 'route' to successful litigation – youth, constitutional rights to life – arguably generates more litigation along the same lines as we have seen above not only through claimant tactics but also within judicial reasoning.

The relationship between environmental harm and rights to life is discussed explicitly in the decisions considered here. For example, the Colombian Supreme Court reasoned that '[t]he increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; it gradually depletes

[56] *Neubauer* v. *Germany*, n. 41 above, para. 193.
[57] *PSB et al.* v. *Brazil*, n. 41 above.
[58] *Neubauer* v. *Germany*, n. 41 above, para. 161. It is interesting to note that although the Irish Court did consider the reasoning of the Dutch Court, there was clear scepticism about arguments concerning rights to a clean environment: *Friends of the Irish Environment* v. *Ireland*, n. 41 above, para. 9.6.
[59] *Shrestha* v. *Office of the Prime Minister*, n. 41 above, para. 5.

life and all its related rights'.[60] Similar language is used in the decision of the Pakistan Supreme Court in *D.G. Khan Cement Company Ltd* and the Montana District Court in *Held* v. *Montana*.[61] Again, we see this parallel across jurisdictions more and less immediately affected by the effects of climate change, which goes to show how the expression of the threat posed is becoming universalized.

Notable in this respect is the decision of the Irish Supreme Court in *Friends of the Irish Environment* in which the fact of threats to life was taken to supersede the need to rely on environmental rights. The decision in this case turned, in part, on whether there was any relevant difference between rights to life and bodily integrity, on the one hand, and rights to a healthy environment, on the other. This distinction was relevant in the case in that a corporate body (Friends of the Earth) could not found a claim on the right to life, not being a person. Counsel for the claimant, as well as the Supreme Court, both appear to accept that 'a [right to a] healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted'.[62] The superfluity of a right to a healthy environment here means that the effects of climate change are viewed through the lens of a right to life.

The choice of the right to life as an appropriate vehicle for climate litigation is symbolically significant as a signal of the seriousness of the climate problem. However, it also has two crucial legal consequences. Firstly, while many jurisdictions may lack an explicit right to a clean environment, or may operate on the basis that such a right is not justiciable, very few states, if any, do not provide in some way or another for a right to life. If a global consensus were to emerge that rights to life *encompass* rights to a healthy environment, then the problem of the source of environmental rights becomes moot, and the prototype we examine in this article becomes highly significant. Secondly, the right to life, although not absolute in all jurisdictions (such as in cases of capital punishment), nevertheless brooks very few legitimate incursions. Along with the prohibition of slavery and torture, the right to life is a foundation stone of all human rights frames. Prioritizing its analysis in the emerging climate litigation model means, therefore, that it can be easily transplanted, with little possible deference or contextual differentiation.

Evidential hard-wiring

Finally, the cases examined share a reliance on IPCC reports as their evidential basis for the effects of climate change.[63] Because these reports are reputable scientific documents with a huge amount of underpinning evidence, they allow courts to bypass their own

[60] *Future Generations* v. *Ministry of the Environment (Colombia)*, n. 41 above, p. 13.

[61] *D.G. Khan Cement Company Ltd* v. *Government of Punjab*, n. 41 above, para. 19; *Held* v. *Montana*, n. 41 above, para. 193.

[62] *Friends of the Irish Environment* v. *Ireland*, n. 41 above, para. 8.10.

[63] The general trend of the Paris Agreement being used as an interpretive tool has been discussed by Voigt. Although reliance on the IPCC reports is a variation on this theme, they share a connection in indirect reliance on international sources in the development of national law; see C. Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32(2) *Review of European, Comparative and International Environmental Law*, pp. 237–49.

evidential barriers – for instance, in terms of interrogating factual evidence on appeal – by relying simply on the IPCC report without requiring further evidential material from the claimant. Indeed, references to IPCC reports are so ubiquitous in the case law that we only cite a few examples here. In *Neubauer*, the German Constitutional Court reasoned, with reference to Dutch and Irish decisions:

> Nevertheless, the target of a 1.5°C maximum increase has become the focus of attention primarily because the IPCC Special Report indicates that this level clearly reduces the probability of so-called tipping points being crossed (cf. also Hoge Raad of the Netherlands, Judgment of 20 December 2019, 19/00135, paras. 4.2, 4.4; Supreme Court of Ireland, Judgment of 31 July 2020, 205/19, para. 3.7).[64]

As with the other features noted above, evidential hard-wiring is easily replicable because of the high level of generality of the IPCC scientific assessments and their applicability across specific impacts within specific jurisdictions and timeframes. Even in litigation that does not succeed, the relevance of the IPCC reports as an evidential base upon which to found the claim is apparent.[65] Relying on such reports, therefore, has clear consequences for the universality or otherwise of climate litigation. Just as the temporal hard-wiring of youth claimants and future generations is facilitated by prioritizing the rights to life and vice versa, reliance on the IPCC report also supports an 'objective' viewpoint on the impact of climate change on human rights as a result of its very generality.

The judicial tendency to accept IPCC reports as sufficient evidence for harm emerging from climate change is not merely coincidence; nor is it (only) a reflection of the quality of the scientific information contained therein. It is facilitated by the other features of the emerging prototype. In cases where, for example, infringements of the right to a clean environment for an existing plaintiff are invoked, the IPCC reports would not provide a solid foundation upon which to judge whether a particular claimant was experiencing such harm. Instead, judges would need to examine the current effects of a changing climate on that particular environment. However, when considering the rights of future generations, uncertainties about the exact impacts of climate change mean that it is impossible for a court to decide whether person x will be the victim of heat-related harm. Rather, the court has to make an assessment based on the overall global picture in the future, tailored perhaps to the features of a particular state (for instance, the low-lying nature of much of the inhabited areas of Bangladesh). In making that assessment, only global, big-picture evidence will support the claim – hence the role of the IPCC report. Similarly, because the right to life has become the vehicle for many of these claims, harm that has an impact upon the right to life – lack of water, food, health consequences of heat, extreme weather events, and the like – becomes the right kind of evidence to support the claim. It is precisely that type of evidence that can be found in IPCC reports. The 'usefulness' of the IPCC report then means that such claims become more attractive to litigants, and the cycle thereby continues.

[64] *Neubauer* v. *Germany* n. 41 above, para. 161.
[65] See, e.g., the dissenting judgment of Justice Tuomas Kuokkanen in *KHO:2023:62*, n. 41 above, p. 25.

4. Making Sense of Fuzzy Universalization

Hard-wiring climate litigation through national human rights adjudication serves to create a space between differentiated and universal rights protection, where the process of decentralized interpretation leads to a self-reinforcing consensus. The final piece of the puzzle is to make sense of this fuzzy universalization of climate change-related human rights standards and to explain why it might be occurring in this way. We consider three explanations for this phenomenon. Firstly, the emerging prototype allows courts to turn questions of contingent fact (will impact x or y occur) into questions of legality. This is particularly significant given that many of these developments are occurring in courts of less-affected nations where proof of harm to specific claimants may be difficult to obtain. Secondly, arguments relating to the interconnectedness of the environment and environmental harm are shaping this judicial response. Thirdly, the prototype allows courts to bypass political questions raised by climate change. These explanations are not intended either to support or renounce them as justifications, but to provide reasons for what is occurring, given that the mutual citations in this emerging jurisprudence create tensions for supreme and constitutional courts as the highest courts within a jurisdiction.

4.1. Contingency: Facts and Legality

The premise of a (real or presumed) universal human rights norm is that its mode of optimal protection will also be universal. However, in the context of climate change, neither its effects nor state capacity to act in the face of those changes are homogeneous. The Paris Agreement itself recognizes that national context must shape responses to climate change.[66] This creates a tension for the emerging litigation prototype and explains why a decentralized approach to interpretation is necessary. Making sense of this tension between the universal and the contingent is not straightforward. Courts manage this tension, in part, by transforming issues from questions of fact (will a particular impact occur?) to questions of law (is a national authority acting unlawfully by failing to act to prevent a particular impact?). The focus becomes one of state duties, not causal links.

To explain how this technique may alleviate the tension between contingency and universality, we must return to what normative universality consists of. When considering human rights arguments (and, by extension, the individual forms of protection guaranteed through constitutional rights), normative universality 'refers to the following three qualities of individual human rights norms: abstractness, inclusiveness and rationality'.[67] However, all three of these qualities are arguably absent in relation to rights to 'a safe environment' or to life *as threatened by climate change*.

Firstly, abstractness describes the degree to which a right is ascribable to all without knowledge of context. The right to life is abstract and, in this sense, universal. However, how these rights are interpreted and translated in national legal systems and their wider

[66] Paris Agreement to the United Nations Framework Convention on Climate Change, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[67] Altwicker, n. 3 above, p. 104.

social contexts are highly contingent. Reliance on the 'translations' of other legal systems allows courts to generate a universality from a non-universal interpretation of the abstract norm.

Secondly, universal norms must be inclusive. However, climatic threats to the right to life are not totally abstract and depend not only on the nature of the extreme weather event, but also on the preparedness of the state to handle such events. As a result, a national determination of what threatens life will exclude some groups from such an assessment and may itself be discriminatory when considered on a global scale. This form of argument mirrors arguments by critical legal scholars in relation to the exclusive operation of human rights in reinforcing existing structures of oppression.[68] By foregrounding future generations and their rights to life, as well as relying on the globally relevant IPCC report, courts are able to render *more inclusive* their interpretations of national law in so far as states with no immediate threat to life from climate-related events can nevertheless envisage threats to life at some point in the future, hence including such states within the scope of mandated action.

Finally, the norm must be rational – that is, based on appropriate legal or moral argumentation rather than whim or personal preference. The evidence relied upon to generate the norm must also be reliable and sound. Without casting any doubt on the reliability of the IPPC reports, they are not geographically specific in many cases. What this means is that the universal norm is based on a universal assessment of the consequences of climate change as a whole. To translate those effects into individual jurisdictions is not at all straightforward. By talking in global terms, and by plugging into the emerging prototype, courts are able to 'aggregate' their rationality, rendering their arguments more persuasive.

Furthermore, from a judicial perspective, the risk in over-emphasizing contingency is to fall into human rights nationalism. Human rights nationalism takes the fact that the effects of rights violations will be felt differently in different contexts, and then argues that abstraction is not possible, which means that national authorities and, in many cases, legislative or executive bodies ought to have ultimate interpretative power. As Altwicker explains:

> This variant of human rights nationalism is about the problem of who should exercise the ultimate interpretive power with respect to IHRL. The problem regarding the ultimate authority of the interpretation of IHRL does not target the 'abstractness' claim but, rather, relates to the 'rationality' claim. Human rights nationalism, in its weak form, claims that, in cases of conflicting interpretations of IHRL, the ultimate authority to decide rests with domestic organs.[69]

Fears over improper abstraction may ultimately lead to a re-allocation of power away from the judicial system. Courts can counter this risk by championing their own interpretation, while at the same time universalizing what they do through mutual citation. By transforming what could be questions of fact (will the claimant before

[68] See, e.g., Mutua, n. 21 above.
[69] Ibid., p. 107.

me be affected by climate change such that their life is threatened?) into questions of law (do rights to life in general give rise to a duty resting on the state to act to limit climate change effects?), courts avoid resolving the tension between the contingent impacts of climate change and the universal quality of rights to life. This helps to explain why the litigation prototype we describe has become so pervasive.

4.2. Interconnectedness

The global narrative around climate change and environmental degradation has emphasized the interconnectedness of environmental types of harm (that is, the ways in which individual types of harm are related to and influenced by each other and, as a result, the ways in which actions to prevent climate-related harm are also connected), as does the IPCC report.[70] This is not the same as universalization, but it provides a reason for looking outside one's own jurisdictional boundaries when considering the extraterritorial impacts of environmental harm. Indeed, much recent scholarship has paid close attention to the role of legitimacy in decision making by the judiciary in respect of the environment, and how the nature of environmental problems and, in particular, their interconnectedness should shape how we envisage legitimacy in respect of that decision making.[71] This is particularly significant when we discuss the legitimacy of constitutional court cross-fertilization and cross-referencing, given the unique role that constitutional courts play in the generation of the internal legitimacy of national legal systems.

This focus on interconnectedness can also provide a justification to a court in changing its own approach to the interpretation of rights. Roth-Isigkeit gives one account of what occurs in the 'developing' jurisprudence, such that courts either embrace or reject references, or even deference to, other courts:

> One legal order stipulates a solution to a specific case, another legal order takes another path. In these cases an actor in one legal order, in most of the cases a court, has the choice: it can take either a self-referential or an extra-referential decision. Either the court decides on the basis of the law of its own legal order and produces a conflict with the 'foreign' legal order that views the case under its own jurisdiction. Or, the court decides with reference to the 'foreign' legal order and has a conflict with its own legitimacy in its original legal system. The outcome of both solutions is not satisfying.[72]

Although Roth-Isigkeit is discussing a situation involving conflicts of law, the lessons are still important in terms of human rights interpretation. Interconnectedness justifies the extra-referential decision, and therefore, the change to the status quo.

[70] 'Near-Term Responses in a Changing Climate', in IPCC (H. Lee & J. Romero (eds)), *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Switzerland, 2023), pp. 35–115, at 101.

[71] C. Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart, 2021), p. 5.

[72] D. Roth-Isigkeit, 'Promises and Perils of Legal Argument: A Discursive Approach to Normative Conflict between Legal Orders' (2014) 44(2) *Revue Belge de Droit International*, pp. 508–29, at 509.

The case of climate change does *not* represent a situation where a rule has emerged in a constitutional vacuum. Many states must have long recognized – including through judicial determinations, although sometimes obliquely – that the state is constitutionally empowered to make policy-based and legislative decisions that have detrimental impacts upon the long-term viability of the climate and environmental systems upon which life on earth relies. Thus, when a constitutional court obliges a state to take stronger climate action, this is not a response to a new situation. It is a new response to an existing (legal and practical) situation. It is a change in the law, not the creation of a new right or obligation in a previous void.

As a result, when a right to protection against climate change is generated (i.e., the old law is changed), there is a conflict between that proposed norm, which emerges from a transnational and global legal order, and the national law position. Courts frequently resolve that conflict by bringing the national legal order in line with the global and transnational legal order. These decisions are not framed as being questions of conflict of law in terms of jurisdiction, but in practice they are conflict of the superior moral authority of the norm: the global climate change response, and the history of the nation state. By emphasizing interconnectedness, courts are able to explain why what occurs in other courts is of relevance to their home jurisdiction in a way that depends neither upon a universalist account of human rights nor on an abdication of their own responsibility.

4.3. Avoiding Politics

Finally, this approach to interpretation allows courts to frame questions that are intensely political as 'legal'. Although one might doubt whether courts are the best fora to resolve such questions, the emerging litigation prototype sits nicely with traditional judicial functions. The comparative law method 'prevents the Court from crossing the dividing line between law and politics … [T]his method provides analytical support for the discovery and development of general principles … in a pluralistic judicial dialogue, within a common constitutional space'.[73]

Shifting climatic issues onto the 'safe ground' of normative interpretation may indeed have the effect of underplaying the political aspects of such reasoning. Yet, scholars have mostly defended such judicialization.[74] As they argue, as national states are, generally speaking, not 'doing enough' to address climate change, the impetus that can emerge through litigation is both necessary and appropriate. Without casting doubt

[73] V. Bogoeski, 'Review of T. Perišin & S. Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*' (2019) 44(3) *European Law Review*, pp. 440–3, at 441.

[74] This is particularly true of writing relating to *Urgenda*. For some useful analysis see, e.g., R. Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34(2) *Journal of Energy and Natural Resources Law*, pp. 1–20; M. Wewerinke-Singh & A. McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation' (2021) 30(2) *Review of European, Comparative and International Environmental Law*, pp. 275–83; I. Leijten, 'Human Rights v. Insufficient Climate Action: The *Urgenda* Case' (2019) 37(2) *Netherlands Quarterly of Human Rights*, pp. 112–8.

on the former, however, we can still question the latter. The fact that a solution is needed does not mean that the solution that is emerging is the right one. It is not *a priori* the case that climate change litigation resulting in shifts in public policy *along the lines dictated by a court* is a 'good thing'.

To make this argument complete, however, it is also not enough to say that in the modern administrative state, decisions of 'political complexity' are more appropriately resolved through legislative fora. Rather, to understand why the courts are particularly unsuited to resolving questions relating to climate change (and therefore why the prototype is useful) we must return to what the role of the courts actually is.[75] When courts make decisions, they are first and foremost allocating winners and losers.[76] In a judicial forum there is, by definition, a party who 'wins' and a party who 'loses' (or, at least, wins less). Without this allocation of rights, obligations or remedies between the parties, the court has not made a decision. Secondly, courts are creating or interpreting more or less generalizable rules.[77] In civil law systems this generalization has only persuasive force, whereas it enjoys binding power in the common law system; in both cases, though, the court's approach is at the least a persuasive account of how specific rules should be understood within the system. Very often these two principal functions – allocating rights and creating rules – sit in tension with one another, and courts are required to balance the systemic effects of their decisions with the individual consequences.

Courts are well aware of the perceived boundaries of their roles. In cases where there may be a need to act, therefore, it is useful to present particular questions as questions of law, which brings the resolution of that dispute into comfortable territory for the court. A rights-based framework allows for the transformation of a dispute about the appropriate level of action for a state to take in relation to climate change into a rights-*versus*-duties question in relation to a specified group of individuals where the allocation of winners and losers is more straightforward. Similarly, by creating generalizable rules on the scaffolding of existing well-established structures, courts are not required to step beyond their appropriate role. If other courts are doing the same thing, this emphasizes the appropriateness of the scaffold.

In carrying out these functions, courts may have further roles. The court may 'frame' a dispute by characterizing it as being 'about' one or two issues, to the possible exclusion of others.[78] As explained above, in relation to climate change the courts have framed the disputes as being about rights to life. Similarly, the court may authorize as appropriate certain reasons for a decision (for instance, the effects of climate change expressed in the IPCC report), an authorization which is then carried forward into future decisions.

Taken together, how national courts have responded to the pressures of climate litigation and the hard-wiring of a certain litigation prototype create a means by which future courts will find it 'easier' to continue what has gone before.

[75] See E. Fisher, E. Scotford & E. Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *The Modern Law Review*, pp. 173–201; E. Lees & O.W. Pedersen, *Environmental Adjudication* (Hart, 2020).
[76] Lees & Pedersen, ibid., pp. 5–31.
[77] Ibid.
[78] Ibid., pp. 132–69.

5. Conclusions

The Colombian Supreme Court reasoned:

> Numerous regulations have emerged in the international field, hard and soft law, which constitute a global ecological public order and serves as guiding criteria for national legislation, as to resolve citizen complaints on the destruction of our habitat, in favor of the protection of the subjective rights of people, of present and future generations.[79]

This emerging consensus is driven not only by legislators and international agreements, but also by the decisions of national courts. In the absence of clear precedents from international human rights courts – although a series of pending (at the time of writing) decisions may change this – national courts have started a process of mutual citation and judicial dialogue, which has homogenized how the relationship between human rights and climate change should be understood.

The prototype that has thereby emerged has a number of hard-wired features, so that the temporal, rights, and evidential dimensions take on recognizable forms across jurisdictions. This prototype represents one way in which decentralized modes of interpretation of international human rights norms can sit between the universal and the contingent, allowing courts to accommodate the foundational myth of the human rights project while recognizing that the effects of climate change will be felt differently in various places and times. This produces a fuzzy universality, whereby the boundaries of the rights *as interpreted* exhibit subtle contextualization.

This article has suggested that it is not only claimant tactics that have encouraged this prototype to emerge. Rather, the desire to transform questions of fact into questions of law, the increasing focus on interconnectedness, and the desire to side-step the political questions to which climate change gives rise have all contributed to the patterns of litigation that have developed in the past half decade. Time will tell whether international courts affirm this fuzzy universality.

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[79] *Future Generations* v. *Ministry of the Environment*, n. 41 above, p. 23.

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