Transnational Legal Theory

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rtlt20

Urgent agenda: how climate litigation builds transnational narratives

Phillip Paiement

To cite this article: Phillip Paiement (2020) Urgent agenda: how climate litigation builds transnational narratives, Transnational Legal Theory, 11:1-2, 121-143, DOI: 10.1080/20414005.2020.1772617

To link to this article: https://doi.org/10.1080/20414005.2020.1772617

TRANSNATIONAL LEGAL THEORY
2020, VOL. 11, NOS. 1–2, 121–143
https://doi.org/10.1080/20414005.2020.1772617

Routledge
Taylor & Francis Group

Urgent agenda: how climate litigation builds transnational narratives

Phillip Paiement

Assistant Professor, Tilburg Law School, Tilburg University, Tilburg, the Netherlands

ABSTRACT

This article draws on the notion of co-production to assess the construction of transnational narratives in climate change litigation. Using the examples of recent cases from the Netherlands, Norway, and Ireland, the article identifies a common narrative regarding the temporal dimension of climate change and its governance. Litigants are shown to develop a notion of urgency for national climate policies with the help of symbols and discourses—including pathways, crossroads, milestones, thresholds and carbon budgets—in order to attribute meaning to complex models of the future climate, and the immediate responsibilities of states to limit future global warming. In response, states offer depictions of the future in which technological and economic evolutions render our current climate crisis less challenging and costly. This narrative approach helps make sense of the transnational legal strategies through which our understanding of responsibility and climate justice is unfolding.

KEYWORDS Climate litigation; narrative; climate change; co-production; transnational environmental law

1. Introduction

Since 2015, environmental lawyers have been emboldened by the affirmative judgments from the Dutch courts in the *Urgenda* case,[1] in which the State of the Netherlands has been ordered to pursue a more ambitious reduction of greenhouse gas emissions by 2020 than its climate policy had offered. The case provides a powerful example of how the courts could be used to demand adequate climate change mitigation policy. More importantly, it has been a rallying call for strategic climate litigation around the world. Tessa Khan, a co-director of the Climate Litigation Network, describes the importance of these litigation actions for the activists and attorneys involved:

CONTACT Phillip Paiement p.m.paiement@tilburguniversity.edu

[1] Rechtbank Den Haag, 24 juni 2015, ECLI:NL:RBDH:2015:7145. An unauthoritative English translation of the decision has also been provided by the court: The Hague District Court, 24 June 2015, ECLI:NL:RBDH:2015:7196. Hereinafter referred to as '*Urgenda* District Court decision'.

> Litigation that is driven by those most affected has personalized abstract injustices, put facts on the public record, and exposed misinformation and political spin … For the global movement for climate justice, these cases also help to drive *a clear narrative of responsibility*: as much as we have been made to grapple with our individual guilt, the truth is that governments and the fossil fuel industry bear the real responsibility for this crisis.[2]

Climate litigation is thus a tool used by the global climate justice movement to gradually develop narratives of responsibility, science, right, and wrong. Above all else, it involves the building of narratives about time, the future, timelines for action and consequences, and the urgency with which societies should responsibly mitigate global warming, given the inevitable costs and difficult decisions that mitigation efforts will entail.

This article draws on the notion of co-production from science and technology studies, in order to demonstrate how climate litigation is involved in the creation of shared narratives about time and climate governance. Focusing on recent cases from the Netherlands, Norway and Ireland, the article explores how the litigants have developed a narrative of urgency which unfolds through a particular framing of both climate science and legal texts. At its core, the narrative demands that any State which has obliged itself to prevent more than 2°C warming in the long term also holds an obligation to substantially reduce emissions and the production of oil as soon as 2020 and 2030. The discussion below also illustrates how their narrative runs counter to depictions of the future, provided by the three States involved in the litigation, in which currently undiscovered technologies and strategies of mitigation and adaption will resolve our climate crisis. By approaching the current proliferation of climate litigation through the formation of narratives, the article offers a lens for making sense of such cases as elements of transnational legal strategy.

2. Methodological nationalism in climate change litigation research

In the past two decades both the amount of litigation concerning the causes and effects of climate change and the attention given by legal scholars to this litigation has quickly proliferated. Climate change litigation databases include records of more than 1100 cases from the United States (US),[3] and another 349 cases from other countries, figures which likely under-

[2] Tessa Khan, 'Litigation is a Powerful Tool for Holding Those Responsible for the Climate Crisis to Account' *Time Magazine* (25 September 2019) <https://time.com/5686087/courtroom-climate-change-litigation/> accessed 13 October 2019 (emphasis added).

[3] See the US Climate Change Litigation database maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP, online: <http://climatecasechart.com/> accessed 2 April 2020.

report the actual number of cases.[4] Likewise, Setzer and Vanhala's literature review on climate change litigation from 2019 found 130 scientific articles from the period 2000–2018.[5] Amid the growing field of climate change litigation, legal scholars have made exceptional progress in understanding the variety of types of cases which can be brought forward to contest, or push for, mitigation and adaptation policies, as well as to challenge measures that contribute indirectly to climate change. The impressive breadth of this scholarship extends well beyond the limits of this article. Despite the broad attention given to litigation of this complex global environmental challenge, the transnational character of climate change litigation has been largely overlooked. Instead, methodological nationalism permeates the literature, including comparative analyses and evaluations of litigation in supranational institutions.[6]

Early scholarship on climate change litigation featured in-depth analyses of case law from single jurisdictions or individual, high-profile, cases.[7] A 'second wave' of literature then focused more broadly on categorising climate change from a single jurisdiction, or comparatively across jurisdictions, and developing typologies about case properties, such as the nature of claims and whether they were focused on climate change mitigation or adaptation.[8] A 'third wave' has since shifted attention towards evaluating the regulatory impact of climate change litigation, both in single jurisdictions as well as comparatively.[9] At the same time, scholars have suggested that the current wave of litigation is best characterised by the increasing tendency to base claims on human or constitutional rights.[10] Notably, litigation from jurisdictions in the Global South may be leading this turn to rights-based claims.[11]

[4] See the Climate Change Laws of the World database maintained by the Grantham Research Institute on Climate Change and the Environment, online: <https://climate-laws.org/> accessed 2 April 2020.

[5] Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *WIREs Climate Change* e580.

[6] On the shortfalls of methodological nationalism, see Eve Darian-Smith and Philip C McCarthy, *The Global Turn: Theories, Research Designs, and Methods for Global Studies* (University of California Press 2017) 154–8.

[7] This is sometimes referred to as the 'first wave' of literature on climate change litigation. Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 14; Setzer and Vanhala (n 5) 5.

[8] Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 7) 14.

[9] For example, Lin identifies how it can be used for three purposes in broader climate governance: to press for regulation, to regulate existing regulatory responses, and to articulate marginalised concerns. Jolene Lin, 'Climate Change and the Courts' (2012) 32 *Legal Studies* 35; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 7); Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia' (2013) 35 *Law & Policy* 150.

[10] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37; Setzer and Vanhala (n 5) 10–11.

[11] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *The American Journal of International Law* 679, 711–14; Joana Setzer and Lisa Benjamin,

The three waves of climate change litigation scholarship have been largely defined by their methodological nationalism.[12] 'Big' cases that set influential precedents or extensively challenge existing regulatory frameworks have been the subject of overwhelming, some might say 'obsessive', attention.[13] Such isolated assessment of litigation tends to focus on problems of institutional failure that are particular to the jurisdiction in which it arises, as well as the doctrinal possibilities and constraints in the jurisdiction that gave rise to the case.[14] In addition, there has been a large bias in the literature towards litigation from the US, Australia, and the United Kingdom, as well as a small number of other jurisdictions in the Global North.[15] When studies have taken a comparative approach to analysis, they have often treated national jurisdictions as isolated spaces in which different models of litigation occur with varying degrees of success and regulatory consequences. Comparison allows for assessment of which 'models' of litigation succeed in which contexts, with an eye towards identifying opportunities for the transplantation or diffusion of strategies.[16] To use a scientific metaphor, such a comparative analysis treats each jurisdiction as an independent petri dish in which experimentation takes place, in order to then evaluate how litigation models interact with other independent variables found in the jurisdiction.[17] While these in-depth, single jurisdiction and comparative analyses have been undoubtedly helpful in developing our understanding of the potential, limitations, and

'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77.

[12] Darian-Smith and McCarthy (n 6) 154–8.

[13] See, for example, Fisher's review of the extensive attention given to the US Supreme Court's decision in *Massachusetts v. EPA*: Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35 *Law & Policy* 236.

[14] Fisher labels these the 'institutional failure' and 'legal reasoning' narratives of climate change litigation. ibid 240–2.

[15] For example, Peel and Osofsky's comprehensive monograph is limited to a comparative analysis of Australian and US litigation. Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 7). Setzer and Vanhala note that the concentration of studies on a small number of jurisdictions in the Global North largely reflects the concentration and location of climate change lawsuits. Setzer and Vanhala (n 5) 5.

[16] See, for example, the discussion of the '*Urgenda* model' of litigation in Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 10) 61–4. See also the prescription of different litigation strategies for small and vulnerable countries in Setzer and Benjamin (n 11) 90–1. Although legal transplants are more often associated with the diffusion and transfer of positive law (eg model contracts or particular codes or statutes), or architectural features of a legal system (eg *ombudsman* or specialised courts), types of behaviour of both legal officers and laypersons have also been assessed within the conceptual terminology of a legal transplant. See, for example, the transplantation of public interest litigation strategies in Noga Morag-Levine, 'The Politics of Imported Rights: Transplantation and Transformation in an Israeli Environmental Cause-Lawyering Organization' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001) 334. For more on the use of transplants in the development of global environmental legal norms, see Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 2000–2001 *Ecology Law Quarterly* 1295; Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 *Journal of Environmental Law* 187.

[17] Peel and Osofsky describe their comparative analysis as 'opening up opportunities for testing explanations of the broader regulatory impact of climate change case law'. Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 7) 24.

challenges of using litigation to effect change in climate governance, they have also largely overlooked the transnational character of climate change litigation.

While the predominant lines of inquiry in climate change litigation scholarship have focused on nation states as the principal units of analysis, there are exceptions which have begun to employ transnational approaches. First, a number of studies have concentrated on international climate change litigation, with particular focus towards complaints brought to international human rights bodies,[18] the coordination of requests submitted to the World Heritage Committee to list climate change-affected sites under an 'in danger' classification,[19] and the Court of Justice of the European Union.[20] While these efforts pursue regulatory change within supranational bodies, their innovative coordination of petitioners from multiple national jurisdictions makes them particularly relevant for transnational[21] accounts of climate change litigation.[22] Second, and related to the previous cases brought by plaintiffs spread across jurisdictions, various scholars have noted the role of transnational communities (sometimes referred to as transnational advocacy networks) in fostering and supporting climate change litigation, as well as developing political campaigns the mobilise alongside their litigation activities.[23] For example, Peel and Lin identified the role of transnational advocacy networks in driving litigation in the Global South, including South-South and South-North advocacy collaborations.[24] Third, Osofsky discussed the role that climate change litigation plays in fostering regulatory

[18] Consider, for example, the 2005 petition from Inuit communities from the US and Canada to the Inter-American Commission on Human Rights. Hari M Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectices of Climate Change and Indigenous Peoples' Rights' (2007) 31 *American Indian Law Review* 675; Lin (n 9) 53–4.

[19] In particular, a coordinated petition effort concerning glacial sites, coral reef, and coastal regions took place between 2007 and 2009. See, for example, 'Petition to the World Heritage Committee: The Role of Black Carbon in Endangering World Heritage Sites Threatened by Glacial Melt and Sea Level Rise', 29 January 2009. For scholarly commentary, see Erica J Thorson, 'On Thin Ice: The Failure of the United States and the World Heritage Committee to Take Climate Change Mitigation Pursuant to the World Heritage Convention Seriously' (2008) 38 *Environmental Law* 139; Lin (n 9) 54–6.

[20] The 'Peoples' Climate Case', currently under appeal to the Court of Justice of the European Union, includes petitioners from both EU Member States as well as non-member states who argue that the EU's current emissions reductions are insufficient in light of international and European environmental and human rights law. Case T-330/18, *Carvalho and Others* v *European Parliament and Council of the European Union*, ECLI:EU:T:2019:324. For commentary, see Gerd Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 *Transnational Environmental Law* 137.

[21] Note that the scholarly distinction between international public law and transnational law has been fluid over time. Philip Jessup's 1956 essay provides one of the broadest definitions of transnational law as 'all law which regulates actions or events that transcend national frontiers'. Philip Jessup, *Transnational Law* (Yale University Press 1956) 2.

[22] For an excellent overview of transnational cases involving parties or jurisdictions in the Global South, see Peel and Lin (n 11) 726.

[23] David Ciplet, 'Contesting Climate Injustice: Transnational Advocacy Network Struggles for Rights in UN Climate Politics' (2014) 14 *Global Environmental Politics* 75.

[24] Peel and Lin (n 11).

dialogues diagonally across multiple scales of governance—local, national and supranational—as well as across horizontal divisions of governance.[25] Likewise, Peel and Lin identified the growing body transjudicial dialogues in climate change jurisprudence, although it has yet to be the subject of comprehensive analysis.[26] These transnational dimensions of climate change litigation are unsurprising given its 'multiscalar' character, composed of actors, norms and procedures from subnational, national and supranational levels of governance.[27] Yet, these analyses are often limited to the transnational character of single, isolated cases, describing multiscalar interactions in the case, rather than the transnational character of litigation that permeates throughout a collection of cases.

The notion of 'co-production', as developed in science and technical studies, offers an analytic framework for describing the transnational character of climate change litigation writ large, including cases that are *prima facie* domestic cases in substance, parties, procedure and jurisdiction. Such a framework provides transnational and socio-legal scholars the vocabulary and concepts to identify how seemingly isolated litigation attempts in (sub-)national cases, as well as international and transnational cases, may be related and engaged in joint governance activities. It allows legal scholars to move beyond describing litigation 'models' for transplantation to other jurisdictions, and instead treats them as shared endeavours of combined legal, political and scientific strategy. If climate change is a localised globalism[28] *par excellence*, then the analysis of climate change litigation ought to aspire towards grasping the transnational character of its local manifestations, even if that requires legal scholars to break with the comfortable frames of the nation-state.[29]

3. Co-production as a transnational approach to litigation

In her 2013 article on the famous US climate case *Massachusetts v. EPA*, Fisher described a line of scholarship which analysed the case as 'a site for

[25] For a discussion of the transnational characteristics of such 'diagonal regulatory dialogue' see Hari M Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585, 634–7.

[26] Peel and Lin (n 11) 724. The concept of 'transjudicial dialogues' was first developed in Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99.

[27] Hari M Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 *Washington University Law Quarterly* 1789. The focus on this analytic triad corresponds with the transnational legal methodology developed in Peer Zumbansen, 'Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back' (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 161.

[28] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, And Emancipation* (2nd edn, Butterworths LexisNexis 2002) 179–82.

[29] On breaking frames in transnational legal theory see Gunther Teubner, 'Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria' (2002) 5 *European Journal of Social Theory* 199.

co-production of understandings of the climate change problem and how it should be addressed by the socio-political order'.[30]

According to Fisher, the Supreme Court's decision presented simultaneously an authoritative account of the 'factual matrix' of climate change science, affirming the roles of different institutions and actors and their climate modelling, as well as 'an understanding of how regulatory responses are developed in response to specific factual situations'.[31] This notion of co-production provides an analytic framework for assessing 'how the social order and physical world are constructed in climate change cases'.[32] This section explores how the approach could be used not only within cases, but also across them as a method of transnational and socio-legal analysis. It focuses on the role of narratives (or 'frames') in co-production, and how they can be used to analyse the role that litigation plays in conceptualising the many transnational environmental problems related to climate change.[33]

The concept of 'co-production', developed by Jasanoff, embraces the mutually constructive relationship between descriptive science and the normative ordering of society:

> [C]o-production is shorthand for the proposition that the ways in which we know and represent the world (both in nature and society) are inseparable from the ways in which we choose to live in it. Knowledge and its material embodiments are at once products of social work and constitutive of forms of social life; society cannot function without knowledge any more than knowledge can exist without appropriate social supports.[34]

According to Jasanoff, co-production occurs in both constitutive and interactional forms, concerning, respectively, 'the emergence of new facts, things and systems of thought' and the 'knowledge conflicts within worlds that have already been demarcated, for practical purposes, into the natural and the social'.[35] By focusing on the instruments of identities, institutions, discourses and representations, the analysis of co-production processes 'sweeps back into the analyst's field of vision connections between natural and social orders that disciplinary conventions often seek to obliterate, thereby doing injustice to the complexity as well as strangeness of human experience'.[36] Narratives can play

[30] Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (n 13) 250. Her primary reference in this line of scholarship was Sheila Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (2013) 40 *Boston College Environmental Affairs Law Review* 439.

[31] Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (n 13) 251.

[32] ibid 256.

[33] Elizabeth Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1 *Transnational Environmental Law* 43, 50–1.

[34] Sheila Jasanoff, 'The Idiom of Co-Production' in Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004) 2–3.

[35] Sheila Jasanoff, 'Ordering Knowledge, Ordering Society' in Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004) 18–19.

powerful roles in processes of co-production, as they seize upon existing instruments, adjust them for new purposes, and recognise new forms of scientific authority and social order that could lead to the emergence of new instruments of co-production.[37]

Climate change stands to dramatically reconfigure our world as we understand it today, both descriptively and normatively. Jasanoff has described how, through processes of abstraction, scientific representations of climate change have also been joined with new representations of communities, polities, spaces and time.[38] For example, scientific accounts of climate change inevitably engage in questions about the representation of how various places are linked to both the cause of climate change (through the emission of greenhouse gases) as well its consequences. Likewise, the science of climate change 'invites humanity to play god with time' by impressing new questions of: the past (when did humanity begin altering the course of global climatic systems and what does that tell us about historic responsibility for the current state of global warming?); the present (what is the significance of our current actions and decisions, and what evaluations of risk should we take into account?); and the future (whose future interests should be taken into consideration, and what future version of the world are we able to offer?).[39]

Climate change litigation is situated at the intersection of legal institutions and the 'disruptive'[40] character of climate change, where a focus on processes of co-production can help us make sense of what litigants and courts are doing:

> For legal scholarship … climate change offers a site not merely to consider how enforceable obligations may be constructed around trades in greenhouse gases, but also to reflect on deeper questions of rights and responsibilities, the criteria and correlates of citizenship, and the rebuilding of constitutional norms around a threat that cuts at the foundations of all civilized societies.[41]

This account of what is at stake in climate change litigation also extends beyond constitutional norms to include issues of tort law (eg public nuisance), administrative law (eg environmental impact assessments), and environmental law (eg public trust doctrine, precautionary principle),

[36] ibid 42.

[37] ibid 40–1. See also Sheila Jasanoff, 'Restoring Reason: Causal Narratives and Political Culture' in Bridget Hutter and Michael Power (eds), *Organizational Encounters with Risk* (Cambridge University Press 2005). The analysis of co-production shares characteristics of Boyd White's narrative analysis of law

> as a language and a community—a world, made partly by others and partly by ourselves, in which we and others shall live, and which will be tested less by its distributive effects than by the resources of meaning it creates and the community it constitutes.

James Boyd White, 'Law as Rhetoric, Rhetoric as Law' (1985) 52 *University of Chicago Law Review* 684, 699.

[38] Sheila Jasanoff, 'A New Climate for Society' (2010) 27 *Theory, Culture & Society* 233.

[39] ibid 241–2.

[40] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *The Modern Law Review* 173.

[41] Jasanoff, 'A New Climate for Society' (n 38) 249.

among others. Climate litigation is stretched across these multiple fields because it is an area of 'hot' law, as Fisher describes, in which there are mutually incompatible understandings of the fundamental bases of both scientific knowledge and legal norms.[42] These areas of law each present possible frameworks—for creating agreements, establishing consequences of (in)action, and creating modes of responsibility—and 'no frame controls and contains everything'.[43] As a 'hot' situation, climate litigation offers a site where narratives can 'make climate change "real" within communities', through disputing both scientific descriptions of it and a society's normative responses to it, with judges providing closure to these disputes.[44]

The notion of co-production has been used already within the context of single climate change cases. As noted above, both Fisher and Jasanoff have used this framework in their analyses of the court's opinion in *Massachusetts v EPA*.[45] Likewise, Vanhala used co-production in her analysis of the Center for Biological Diversity's reframing of climate change as a biodiversity threat in their petitioning efforts in the US to protect the polar bear as an endangered species.[46] Her analysis illustrates the fruitfulness of applying co-production beyond single cases to examine the use of narrative and framing across a series of petitions. Notably, her combined approach of legal opportunity structures and co-production also shifts focus to include the strategies and actions of litigants, in addition to judges. This shift provokes us to consider how mutually incompatible narratives are presented at the site of litigation, narratives that offer different ways of 'organiz[ing] certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions'.[47] The proposal, therefore, is to extend the application of co-production transnationally onto groups of climate cases from different jurisdictions, in order to assess how common narratives about the science and governance of climate change are built by the litigants.[48] As a transnational method, co-production can aide in understanding how struggles

[42] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25 *Journal of Environmental Law* 347, 350–1. Fisher is borrowing the concept of 'hot situations' from Michel Callon, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology' in Michel Callon (ed), *The Laws of the Markets* (Blackwell 1998).

[43] Fisher, 'Environmental Law as "Hot" Law' (n 42) 350.

[44] Fisher, Scotford and Barritt (n 40) 198.

[45] Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (n 30); Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (n 13).

[46] Lisa Vanhala, 'Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization' *Law & Policy* forthcoming.

[47] Jane B Baron and Julia Epstein, 'Is Law Narrative?' (1997) 45 *Buffalo Law Review* 141, 147.

[48] For example, Hilson has traced political populist narratives in climate change litigation across numerous jurisdictions, albeit without the notion of co-production. Chris Hilson, 'Law, Courts and Populism: Climate Change Litigation and the Narrative Turn' in Susan M Sterett and Lee Demetrius Walker (eds), *Research handbook on law and courts* (Edward Elgar 2019).

over understanding and ruling the problems of climate change occur across jurisdictions, while keeping in account the diverse national cultures of risk, science and law.[49]

4. The 'urgent agenda' narrative in climate change litigation

In this section, we assess the narratives presented in three recent climate change cases from the Netherlands (*Urgenda Foundation v The State of the Netherlands*), Norway (*Greenpeace and Nature & Youth v The Government of Norway*) and Ireland (*Friends of the Irish Environment v The Government of Ireland*). The assessment focuses on co-production process in the litigants' arguments and the judicial decisions, through which scientific claims about climate change and connected with normative positions about the appropriate legal governance of climate change. In particular, the discourse and representation of time and timelines for mitigation are highlighted, to illustrate continuities across these three cases and jurisdictions and highlight how they serve as an example of a shared, transnational legal narrative that frames climate change and its corresponding legal framework. The cases were not selected to be representative of global climate change litigation writ large, an impossible goal for this short article. Instead, they were chosen to illustrate how continuities across jurisdictions can be identified despite considerable differences. The cases are based in tort, constitutional, and administrative law, and each challenge different actions taken by the corresponding national governments. There are notable similarities as well, including that they each come from the Global North and address climate change mitigation, rather than adaptation.[50]

4.1. Urgenda Foundation v State of the Netherlands (Ministry of Economic Affairs and Climate Policy

The *Urgenda* case in the Netherlands was one of the first successful climate change cases to gather worldwide attention. Following its initial success, it went on to spark a series of litigation attempts throughout a number of European countries (the '*Urgenda* effect').[51] Among the three cases reviewed here, it is received the most attention from legal scholars.

[49] For the importance of national legal and scientific culture when using co-production as a transnational legal methodology, see Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (n 33) 49–50; Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (n 30) 446–7.

[50] It is noteworthy that the literature on climate change litigation has been overwhelmingly focused on common law jurisdictions from the Global North, leaving both civil law jurisdictions and the jurisdictions from the Global South largely overlooked. The latter group has recently been the subject of growing attention. Setzer and Vanhala (n 5) 4; Setzer and Benjamin (n 11).

[51] Setzer and Vanhala (n 5) 3; Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 10) 61. For coverage of a comparable case in Switzerland, see Cordelia Christiane Bähr and others,

In 2013, the Urgenda Foundation (its name derived from a portmanteau of 'urgent agenda') first filed a claim against the State of the Netherlands, in which they sought an order for the State to take necessary measures to reduce national emissions of greenhouse gases to 25–40 percent below the 1990 level by 2020.[52] The Foundation was created in 2008 with the purpose of 'accelerating the transition process to a more sustainable society, beginning in the Netherlands', and as a litigant it represents the shared interests of 886 Dutch citizens.[53] Their argument was premised on the stated importance of maintaining at least a 50 percent possibility of limiting global warming to 2°C, as agreed upon at the 2010 United Nations' (UN) Conference of Parties (COP) 16 under the Framework Convention on Climate Change (UNFCCC)[54] and later formalised in the 2015 Paris Agreement,[55] after the *Urgenda* case had been initiated.[56] Referring to UN's Intergovernmental Panel on Climate Change (IPCC) models, they claimed that a maximum threshold of 450 parts per million (ppm) CO_2-equivalent is essential for maintaining the 50 percent likelihood of preventing more than 2°C warming.[57] Urgenda referred to the IPCC's Fourth Assessment Report in its finding that, in order to remain under the 450 ppm threshold, Annex I countries (industrial economies and economies in transition, including all of the European Union (EU)) would need to reduce emissions in 2020 by 25–40 percent of the 1990 levels.[58] Notably, they also illustrated how these reductions had been endorsed by both the EU[59] and the Dutch government[60] in earlier years. Despite those earlier endorsements, by 2011 the Dutch State's policies

'KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation' (2018) 9 *Journal of Human Rights and the Environment* 194.

[52] Unofficial transnational of the Summons in the case of *Urgenda Foundation v The State of the Netherlands*, filed with the District Court of the Hague on 20 November 2013, §45.

[53] *Urgenda* District Court decision (n 1). Note that the case has received much attention both in the Netherlands and abroad for its many controversies, including: its impact on the separation of power, the role of judicial law-making, the application of European human rights law for the consequences of climate change, questions of standing, and the European human rights law as indicative of duties of care under tort law. For more on these dimensions of the case, see: Floor Fleurke and Anne de Vries, 'Urgenda: Covergentie Tussen Klimaat En Mensenrechten?' [2016] Milieu & recht Article 42; Marc Loth and Rob van Gestel, 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?' [2015] Nederlands Juristenblad 2598; Laura Burgers and Tim Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands' in JE Nijdam and WG Werner (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law* (Asser Press 2018); Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34 *Journal of Energy & Natural Resources Law* 165; Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands' (2019) 34 *Journal of Energy & Natural Resources Law* 143.

[54] (adopted 9 May 1992, entered into force 21 March 1994) (1993) UNTS vol 1771 p 107 <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

[55] (adopted 12 December 2015, entered into force 4 November 2016) (2015) FCCC/CP/2015/10/Add 1 <http://unfccc.int/paris_agreement/items/ 9485.php>.

[56] *Urgenda* Summons (n 52) §358–63.

[57] ibid.

[58] ibid [363].

[59] *Urgenda* District Court decision (n 1) [2.63]–[2.64].

[60] ibid [2.72]–[2.74].

had been reduced to a target of 20 percent decrease in emissions compared to 1990 levels.[61] According to Urgenda, the Dutch State's failure to pursue a 25–40 percent reduction target by 2020 amounted to a tortious (or 'unlawful') act, and offered four grounds for its unlawfulness: the violation of the general 'no-harm' principle under international law; the violation of its obligations under the UNFCCC and COP agreements (and later, the 2015 Paris Agreement); the violation of its obligations under Articles 2 (right to life) and 8 (right to respect of private and family life) of the European Convention on Human Rights (ECHR);[62] and the torts of nuisance and endangerment in Dutch private law.[63] The Dutch State, however, argued in defence that its emissions reduction target was consistent with its obligations under EU law, that it opted to pursue a more ambitious reduction for 2030 and 2050 when mitigation measures would be least costly, and that the separation of powers prevents the Urgenda Foundation from ordering the Dutch State to take specific regulatory or legislative measures with respect to climate change policy.[64] The timing of reductions is the crux of the dispute, with the Dutch State positing ambitious 40 percent reductions by 2030 and 80–95 percent reductions by 2050 as 'milestones' that are 'sufficient for ensuring the 2°C target',[65] and Urgenda arguing that this delayed set of 'milestones' results in a greater amount of overall emissions and, therefore, an elevated risk of failing to remain under 450 ppm and 2°C warming in comparison to a pathway of 25–40 percent by 2020.[66]

The Hague District Court ruled in favour of the plaintiffs in 2015, ordering that the Dutch government must reduce the joint volume of Dutch annual greenhouse gas emissions by at least 25 percent by the end of 2020.[67] According to the Court, failing to meet this level of reduction, although nowhere explicitly prescribed by Dutch or EU legislation, amounted to a violation of the State's duty of care regarding mitigation measures. Notably, the court agreed that the 'postponement' of the reduction timeline was unacceptable in light of '*the scientifically proven and acknowledged* higher reduction path of 25–40% in 2020'.[68]

The Dutch government appealed the case to the Court of Appeal. In the interim period, the 2015 Paris Agreement came into effect, committing its signatories (including the Netherlands) to the goal of preventing global warming

[61] Gerechtshof Den Haag, 9 oktober 2018, ECLI:NL:GHDHA:2018:2591, 30. An unauthoritative English translation of the decision has also been provided by the court: The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2610, [47]. Hereafter referred to as '*Urgenda* Appellate decision'.
[62] (adopted November 1950, entered into force 3 September 1953) (1950) ETS 5 https://www.echr.coe.int/Documents/Convention_ENG.pdf>
[63] *Urgenda* Summons (n 52) [312].
[64] *Urgenda* District Court decision (n 1) [3.3].
[65] ibid [4.33].
[66] ibid [4.32].
[67] ibid [5.1].
[68] ibid [4.85], emphasis added.

from eclipsing 2°C, with the stated ambition of a maximum of 1.5°C.[69] Furthermore, it requires each signatory to submit 'Nationally determined contributions' which lay out their intended path towards preventing the maximum global warming limit.[70] Within this framework, the European Union, on behalf of all of its Member States, committed to a 40 percent reduction of emissions by 2030 (compared to 1990).[71] For the Netherlands, this corresponds to a 36 percent decrease in emissions by 2030 (compared to 2005)[72] and a 16 percent decrease in emissions by 2020 (compared to 2005 levels).[73]

Before the Court of Appeal, the State argued that much of the emissions reductions should, and will, come in the 2020–2030 and 2030–2040 periods, with emphasis on the latter, when mitigation technologies are more advanced:

> There is no absolute need to reduce emissions by 25–40% by end-2020. The State's scope for policymaking includes, after considering all interests involved, such as those of the industry, finances, energy-provision, healthcare, education and defence, to choose the most appropriate reduction path.[74]

The state also suggested that the IPCC's 5th Assessment Report demonstrated that there were reduction pathways in which a 25–40 percent reduction by 2020 was not necessary. In its judgment, the Court of Appeal acknowledged the diversity of reduction pathways as projected by the IPCC, and noted that the linear reduction path used by the State to calculate its 2030 (49 percent) and 2050 (95 percent) reduction goals, 'would result in a 28% reduction by 2020', a far more serious reduction than the State's 2020 target.[75] It also noted that pathways which diverge from the 25–40 percent target for 2020 rely on the future use of CO_2 removal technologies that do not currently exist, and thus cannot be considered a realistic option. Furthermore, the Court acknowledged the IPCC's finding that the maximum 2°C warming equates to a maximum concentration of 450 ppm of CO_2 in the atmosphere in 2100, and that Annex I countries must reduce emissions by 25–40 percent by 2020 to realistically maintain a 'more likely than not' chance of remaining under the 450 ppm threshold.[76] In conclusion, the Court of Appeal found the State's current climate reduction policy amounted to a contravention of

[69] Paris Agreement (n 55), Art 2(1)a.
[70] Paris Agreement (n 55), Art 4(2).
[71] 'Submission by Latvia and the European Commission on behalf of the European Union and its Member States: Intended Nationally Determined Contribution of the EU and its Member States', 6 March 2015.
[72] Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] L 156/26, Annex 1.
[73] Decision (EU) 406/2009/EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] L 140/136, Annex II.
[74] *Urgenda* Appellate decision (n 61) [30].
[75] ibid [47].
[76] ibid [48]–[50].

Articles 2 and 8 of the ECHR, that it was therefore deemed unlawful, and that the State must reduce emissions by at least 25 percent by 2020.[77]

The Supreme Court heard the case on appeal in cassation and issued its decision to uphold the appellate ruling in December 2019.[78] The Supreme Court's ruling clarified that, despite the lack of an explicit obligation under national or European Union climate law, the Dutch State was required to pursue a 25–40 percent reduction by 2020, and that failing to do so amount to a violation of Articles 2 and 8 of the ECHR. The Supreme Court decided the evolution of international climate change law and science was indicative of a 'common ground', shared by all societies, that the ECHR requires its signatories to limit climate change to a maximum 2°C warming in the long term.[79] This, in turn, requires at least a 25 percent reduction of emissions by 2020. Ultimately, the Urgenda Foundation successfully mobilised the IPCC's climate science, European human rights law, and Dutch tort law to compel the State to pursue a 25 percent reduction of emissions by the end of 2020, under the forecast that, 'otherwise it would be too late'.[80]

4.2. Greenpeace Nordic Association and Nature & Youth v Government of Norway (Ministry of Petroleum and Energy)

In 2016, the Norwegian branch of Greenpeace and Nature & Youth (*Natur og Ungdom*) challenged the constitutionality of a Royal Decree which awarded oil production licenses for forty new blocks in the Barents Sea.[81] The Decree offered Norway's first expansion of oil exploration and production into new territories since the turn of the twenty-first Century. The two environmental organisations sought to have the Decree invalidated, arguing that the expansion of oil exploration would amount to a violation of the

[77] ibid [76].

[78] Hoge Raad, 20 december 2019, ECLI:NL:HR:2019:2006. An unofficial English translation of the judgment has been provided by the Supreme Court: ECLI:NL:HR:2019:2007.

[79] ibid [5.4.1]–[5.4.3]. The Supreme Court stated:

> [I]t follows once again that there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25–40% by 2020 compared to 1990 levels, in order to achieve at least the two-degree target, which is the maximum target to be deemed responsible. This high degree of consensus can be regarded as common ground … [which] must be taken into account when interpreting and applying the ECHR. [7.2.11]

[80] Considerable attention within Dutch legal scholarship has been spent on discussing whether these judgments violate traditional conceptions of the separation of powers. Loth & van Gestel convincingly suggest, however, that the more pressing question is whether the 'otherwise it will be too late' reasoning in the case is sufficient for judicial intervention. See Loth and van Gestel (n 53).

[81] Oslo District Court, Decision of 4 January 2018, *Föreningen Greenpeace Norden, Natur og Ungdom v Norges Rejgering, Olje- og energideapartementet*, 16-166674TVI-OTIR/06 (hereafter referred to as '*People v Arctic Oil* District Court decision', the moniker given to the case by the plaintiff organisations). The references in this text refer to an unofficial translation of the decision <https://www.greenpeace.org/norway/pressemelding/544/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court/> accessed 20 April 2020. For background on the case see Ivar Alvik, 'The First Norwegian Climate Litigation' (2018) 11 *Journal of World Energy Law and Business* 541.

new Article 112 'right to an environment' added to the Norwegian Constitution in 2014:

> Every person has the right to an environment that is conductive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations.

Briefly summarised, the plaintiffs argued that the State's issuance of oil production licenses to previously unexploited zones amounted to a violation of their Article 112 rights, and posed a more 'traditional' climate litigation argument about procedural inadequacies in the impact assessment that preceded the Decree.[82]

Unlike the *Urgenda* case, this complaint targeted the role of the Norwegian State in the production, rather than consumption, of carbon-based energy. The plaintiffs' argument was premised on the notion of a global 'carbon budget', which corresponds to the amount of CO_2 emissions for which there is still 'room' in the atmosphere, before hitting the 450 ppm threshold to maintain a 50 percent likelihood of 2°C maximum warming.[83] Noting that, as of 2011, only 35 percent of a 2°C threshold carbon budget remained, the plaintiffs argued that the plans of long-term oil extraction associated with the exploration of new oil fields was inconsistent with Norway's Article 112 obligations, interpreted in light of the precautionary principle and Articles 2 and 8 of the ECHR.[84] They emphasised the confronting fact that 'there is not even room for emissions from discovered oil and gas reserves in the [global] carbon budget'.[85] As such, they demanded that a future with a limited or depleted carbon budget be given more weight in assessing the environmental impact of immediate decisions regarding oil exploration:

> The fact that the climate threat must be taken seriously, and that changes are urgently required to quickly reduce the climate threat can hardly be denied after the IPCC's report from 2014 … Calculations of the carbon budget show that there probably will not be 'space for' petroleum produced in the maritime areas in question.[86]

In effect, their strategy sought to include emissions caused abroad after export within the environmental assessment of Norwegian oil and gas exploration.

For its part, the Norwegian government, citing the framework for emissions reductions established under international climate change law, denies responsibility for emissions abroad that are associated with Norway's oil

[82] *People v Arctic Oil* District Court decision (n 81) [6]–[9].
[83] Greenpeace Nordic Association and Nature & Youth, 'Notice of Proceedings in Oslo District Court', 18 October 2016, [6.4.3].
[84] ibid [9.2.2]–[9.2.5].
[85] ibid [3.1].
[86] ibid [9.2.6].

and gas exports.[87] Likewise, it opposed the use of the 'carbon budget' for understanding its constitutional obligations, noting the many uncertainties of the future which could affect such a budget calculation. These uncertainties included both the development of future technologies to remove and store emissions, as well as the volume and type of oil and gas that may be discovered through exploration of the new fields, and therefore how it would factor into a carbon budget.[88]

In its decision, the District Court appeared largely sympathetic with the plaintiffs' concerns, and acknowledged the 'crossroads' in climate governance where we currently stand:

> [The plaintiffs] have pointed out that these are the first licenses granted after there is reliable knowledge that the world's proven fossil fuel resources exceed what can be burned in order to reach the goals in the Paris Agreement. They have also emphasized that the Decision opens the way for petroleum activities further east and north than ever and have alleged that the purpose is to maintain petroleum production at the current level despite the fact that emissions must be reduced at a dramatic pace. They have also argued that the Decision [or "Decree"] contributes to extensive investments and technology development that contribute to increased fossil fuel production (the path argument) and that we are confronting a crossroads (the crossroads argument). They have pointed out that there is not even room for emissions from discovered oil and gas reserves in the carbon budget.[89]

Yet, the Court ultimately found that the State could not be held responsible for emissions resulting from oil and gas exports, and that the social and environmental consequences of Norway's domestic emissions, and the conservation risks associated with opening the new area for oil production, were too limited to constitute a violation of the plaintiffs' constitutional right.[90]

At the Court of Appeal, the plaintiffs were again unsuccessful.[91] Yet, the Court of Appeal engaged in a lengthy discussion about carbon budgets, acknowledging in more alarming terms how pressing the issue of emissions reductions has become:

---

[87] The Government of Norway, 'Notice of Defence to Oslo District Court', 14 December 2016, [5.3].

[88] ibid [1].

[89] *People v Arctic Oil* District Court decision (n 81) [28]. The Court also critiqued these arguments in stating,

> none of these arguments are relevant in the assessment of whether the Decision [or 'Decree'] violated Article 112 of the Constitution. In part, it is talk of possible impacts from the Decision that are too remote in relation to the risk that is relevant to assess, and in part the issues involve overall assessments that are better assessed through political processes that the courts are not suited to reviewing.

[90] ibid [18]–[25].

[91] Borgarting Court of Appeal, Decision of 23 January 2020, *Föreningen Greenpeace Norden, Natur og Ungdom v Norges Rejgering, Olje- og energideapartemente*, 18-060499ASD-BORG/03 (hereafter refered to as '*People v Arctic Oil* Appellate decision'). An unofficial translation of the Court of Appeal's decision <http://www.xn--klimasksml-95a8t.no/en/2019/10/31/legal-documents-in-english/> accessed 15 April 2020.

> With annual emissions of approximately 42 GtCO2, this [carbon budget] means that there is only room for approximately 15 years of today's emissions before the world must switch to zero net emissions, ie not emitting more than the natural environment can absorb. With a gradual reduction, it will be approximately 30 years before the switch is required.[92]

While the Court of Appeal upheld the initial judgment, it also opened slightly towards to the plaintiffs' arguments, acknowledging that emissions associated with exported oil and gas should be included in the assessment of the Decree's conformity with Article 112 of the Constitution.[93] The appellate judgment, however, also downplayed the consequences of such calculations, in suggesting that, 'there is a greater likelihood that cuts in production will actually be significant the further into the future these arise, as it must be assumed that alternative energy sources will constitute a steadily larger competitor'.[94] Taking into account this future of uncertainty—about levels of emissions, rates of reduction, the size of oil reserves under exploration, technological mitigation possibilities, the competitiveness of alternative energy, and the impact of climate change for the Norwegian—the Court of Appeal found that there were not sufficient grounds to rule the Decree unconstitutional, in violation of the ECHR, or procedurally invalid.

4.3. Friends of the Irish Environment v the Government of Ireland and the Attorney General

In July 2017, the Friends of the Irish Environment challenged the constitutionality of the Irish Government's National Mitigation Plan ('the Plan'), which was created by the Government under its obligations from the Climate Action and Low Carbon Development Act 2015.[95] As a signatory to the Paris Agreement, Ireland committed itself to the maximum 2°C warming limit and the ambition to prevent greater than 1.5°C warming. It's commitments under EU law are a 20 percent reduction by 2020 (compared to 2005 levels),[96] and a 30 percent reduction by 2030 (compared to 2005 levels).[97] Friends of the Irish Environment argued, in echo of the *Urgenda* claims, that the State is obliged to meet interim reductions of 25–40 percent (compared to 1990 levels) by 2020, in accordance with the UNFCCC's reduction goals for Annex 1 countries necessary to maintain a 2°C maximum warming.[98] They argue that the failure of the Plan to meet Ireland's international obligations places it in breach of the corresponding Act,

[92] ibid [3.1].
[93] ibid [2.4].
[94] ibid [3.3].
[95] *Friends of the Irish Environment CLG v The Government of Ireland and the Attorney General* [2017 No. 793 JR] (Hereafter '*Friends of the Irish Environment*').
[96] Decision (EU) 406/2009/EC (n 73) Annex II.
[97] Regulation (EU) 2018/842 (n 72), Annex I.
[98] *Friends of the Irish Environment* (n 95), §23.

and that the Plan is both unconstitutional and a violation of Ireland's human rights obligations under the ECHR.[99] As such, the plaintiffs requested the Court to order the Plan to be quashed and remitted for redrafting. Similar to *Urgenda*, their claim includes an, 'emphasis on the path of reduction and the necessity to reach interim emission reduction targets', and the scientific position that, 'several reduction paths with the same starting point and the same end point can vary dramatically in the amount of cumulative or aggregate emissions'.[100]

The Irish Government admitted that it was unlikely to meet its 2020 targets, and that a considerable amount of the reduction in emissions in past years was (ironically) due to a milder climate rather than effective policy.[101] Focusing on near term goals for 2020 distracts attention from the key issue of climate policy, according to the State: 'The key national policy position on climate action and low carbon development was adopted by the government and published in 2014; the object being the transition to a competitive low carbon, climate resilient and environmentally sustainable economy by 2050'.[102] For the Irish Government, the primary goal lies in 2050, and the strategy is to choose the most cost effective pathway to arrive to that goal:

> [I]t is not feasible to prescribe precisely in 2017 which measures will be put in place by government to achieve the national transition objective for 2050 … The act provides for a formal update to the Plan at least once every five years and in this context, he [the Principal Officer in the Department of Communications, Climate Action and Energy] avers that the government has recognised the high likelihood that technology and innovation will continue to evolve over the coming decades. He also refers to the requirement to recognise the need to achieve the objectives of the Plan at the least cost to the national economy and to adopt measures that are cost effective which do not impose an unreasonable burden on the exchequer.[103]

The Irish State's defence suggests that the emissions reduction targets that really 'count' are those in 2050, not 2020.

[99] ibid [12]. Notably, the plaintiff did not substantiate which convention rights were potentially violated by the Plan. They clarified that the allegedly violated constitutional rights included the rights to life, liberty, security, integrity of the person, property, children's rights, as well as an unenumerated constitutional right to a reasonable environment. ibid [24]. On the background of a right to an environment in Irish constitutional law, and its impact on climate change litigation see Eadbhard Pernot, 'The Right to an Environment and Its Effects for Climate Change Litigation in Ireland' (2019) 22 *Trinity College Law Review* 151.

[100] *Friends of the Irish Environment* (n 95) [20].

[101]

> For 2017, the national greenhouse gas emissions are estimated to be 0.9 percent lower in 2017 than 2016, although he [the Principal Officer in the Department of Communications, Climate Action and Energy] does acknowledge that the decrease is mainly due to mild weather conditions. ibid [52]

[102] ibid [45].

[103] ibid [47].

The High Court acknowledged that this is a dispute about the urgency of climate action:

> [T]he essential difference of approach between the parties is one of immediacy —what measures are required to be taken immediately in order to maintain a trajectory which will result in the achievement of the objective of a low-carbon country by 2050.[104]

The Court found the Government to have considerable discretion in the formulation of the Plan, a policy document that is intended to be routinely updated, and noted that the legislative framework in which it develops the Plan does not impose a requirement to achieve intermediate targets (or 'milestones', to use the language in *Urgenda*).[105] The Court also offers a not so subtle suggestion that the plaintiffs might better contest the objectives and provisions in the overarching legislative Act, rather than the Plan, for their inadequacy to protect the fundamental rights of the organisation's members.[106] In February 2020, the Supreme Court agreed to hear the case on appeal directly from the High Court.

4.4. The transnational co-production of urgent climate action

These three cases illustrate a common strategy for the co-production of the time and governance of climate change. In his theory-building monograph on the role of time in environmental law, Richardson astutely observes that, 'time is not something that simply exerts an influence on law, but rather law itself also structures how we perceive of time, by disciplining and normalizing the experience of time'.[107] This observation resonates with the thesis of the co-production of natural and social order, and it draws attention to the interaction between representations of time (or timelines) and legal obligations in the above cases. Richardson notes that, among the many temporalities in environmental law, 'the pull of the future is a mirage … with the present exerting far greater rein over environmental decisions and habits'.[108] With respect to climate change, Richardson identifies the importance of a 'turning point' discourse for defining timelines of action and consequences, while also noting that climate change is exemplary of 'slow violence'—characterised by remote and uncertain relationships between causes and effects—which is fundamentally difficult to adjudicate.[109] Likewise, in a review of numerous climate change cases, Hilson identified

[104] ibid [107].
[105] ibid [111]–[116].
[106] ibid [140].
[107] Benjamin J Richardson, *Time and Environmental Law: Telling Nature's Time* (Cambridge University Press 2017) 80.
[108] ibid 123.
[109] ibid 115. The term 'slow violence' was first developed in Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2013).

representations of different types of time frames, including scientific, environmentalist policy, and generational time frames.[110] Notably, Hilson's analysis reveals tensions between time frames that emphasise immediate, or urgent, climate change consequences and policy action, in contrast to time frames that situate its impacts further off in the future.

While *Urgenda* remains the only of the three cases to succeed before the courts, each contribute to a growing narrative of urgent climate action. The plaintiffs in these cases share a common framing of how we understand the future climate, and thus also how constitutional and international norms—the Paris Agreement and the European Convention of Human Rights—need to be re-interpreted to govern our current actions with respect to that future climate. Notably, the interpretations used in the *Urgenda* decision were discussed at length in the judgments of the other two cases.[111] Each case builds on a common discourse about the vital importance of a maximum 2°C global warming, the 450 ppm threshold which corresponds with the likelihood of keeping under 2°C warming, and the Annex I countries' 25–40 percent reduction target for 2020 which is necessary to remain under the 450 ppm threshold throughout the coming eight decades. This discourse is built upon the importance of the IPCC as an institution of climate knowledge, with its Assessment Reports offering an authoritative account of the possible futures available to us, and the present actions required to attain them.

In addition, the arguments in the above cases use symbols and representations in order to reduce, simplify, and bring to life complex issues of climate policymaking. For example, they reduce the seemingly endless possible climate mitigation strategies into identifiable 'reduction pathways', and assert 'milestones' at key moments for evaluation. Indeed, the crux of the *Urgenda* and *Friends of the Irish Environment* cases lies in whether 2020 is such a key milestone, or whether 2050 ought to serve as the more definitive moment for evaluating success, and hence also our shared climatic destinies. While the differences between the various pathways appear fairly minimal for the time being—with arguments revolving around whether states must pursue 20 percent or 25 percent reductions by 2020—the narrative also positions us at a 'crossroads', from which the pathways will only continue to diverge. Regardless of which path we take, however, the metaphor of a 'carbon budget' reminds us that there is only so much carbon which the atmosphere can hold before the balance is in the red, and that each pathway is associated with different levels of risk of entering into debt. Through these representations, the narrative presented in these cases builds a case for taking urgent action to reduce both emissions and the production of oil and gas

[110] Chris Hilson, 'Framing Time in Climate Change Litigation' [2018] Oñati Socio-Legal Series 1.
[111] *People v Arctic Oil* Appellate decision (n 91) [3.2]; *Friends of the Irish Environment* (n 95) [76].

immediately, in order to reduce the likelihood of verging into a pathway with greater than 2°C.

In response, the three States in the above cases each posit their own narrative of the future. In the uncertainty of the future they see opportunity which coincidences with dramatic reductions in emissions before 2050, their prioritised milestone. These opportunities include the development of new technologies for removing emissions from the atmosphere, or geo-engineering technologies that can artificially keep warming under 2°C, despite emissions rising beyond the 450 ppm threshold, or future energy markets in which renewable sources are so competitive that they broadly outprice carbon-based sources and result in a rapid, market-driven energy transition.[112] With such an opportunistic future in mind, the corresponding States assert considerable discretion in choosing how much to sacrifice in the short term, when the costs of mitigation *might* be much less in the future.

Approaching litigation as a form of shared narrative building emphasises the underlying notion that such obligations flow not from idiosyncrasies in national or regional legislation, but from a transnational conception of (un)reasonableness with regards to the risks incurred by postponing emissions reductions. At the heart of the urgent agenda narrative is the claim that any political community which has obliged itself to prevent an excess of 2°C warming, through signing the Paris Agreement or via other instruments, has also created an obligation of urgent climate action with substantial reductions in 2020 and 2030. As seen throughout the cases above, this narrative is diffusible across jurisdictions insofar that it is a more general lens for interpreting obligations under EU climate law, international human rights law, and international environmental law.[113] For example, the Urgenda Foundation partner organisation, the Climate Litigation Network, is involved in providing legal assistance for climate change litigation throughout Europe, as well as corresponding grassroots political campaign support. One of the attorneys involved in the *Urgenda* case also provided assistance in the *Friends of the Irish Environment* case, and others spoke at events on climate litigation along with representatives from the *People v Arctic Oil* case. In pursuing these narratives through both legal and political strategies, these cases push for an evolution in the broader public understanding of the timeline of state responsibilities in addressing climate change that transcends jurisdictions.[114]

[112] See, for instance, the argument about the potential of future technological innovations which would make postponed mitigation measures far less disruptive than immediate measures; *Urgenda* District Court decision (n 1) [4.32].

[113] Roy and Woerdman highlight various 'diffusible' aspects of the *Urgenda* decision, particularly focusing on the court's interpretation of the precautionary principle in the decision. See Roy and Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (n 51).

[114] Roger Cox summarises this vision by comparing this field of litigation with the history of tobacco and asbestos litigation:

Yet, this analysis must also consider the contingency of any narrative and consider that alternative narratives in climate change governance could develop.[115] In the cases discussed above, we frequently see the urgency narrative confronted with narratives that emphasise the states' discretion in how and, more importantly, *when* to reduce emissions. Perhaps more critical, however, is the fissure within environmentalist organisations about the desirability of reifying the 2°C maximum warming threshold instead of the more stringent 1.5°C goal. For small island states, 2°C warming constitutes an existential threat to their continued existence with likely scenarios of ocean rising and severe weather patterns that would terminate the possibility of habitation on their sovereign territory.[116] If, as Cover postulates, 'legal interpretation takes place in a field of pain and death', then the interpretation of the Paris Agreement in the urgency narrative deals in the death of the small island states.[117] While environmentalists extol the success of the *Urgenda* case,[118] it also represents an uncomfortable compromise from the perspective of island states, who presumably would have argued for a far more radical 2020 reduction target and lower maximum warming threshold. It also perpetuates a (post-)colonial mentality whereby the sovereignty of small island states count for less than the national interests of European and North American states, among others. Along similar lines, the urgency narrative perpetuates a postcolonial mindset through which Global North states pass on the 'ecological debt' of their consumerism to the emissions accounts of Global South states where corresponding manufacturing occurs.[119] The failure of

> As we have seen in asbestos and tobacco lawsuits, momentum seems to be gained after an initial--and thus historic--ruling sets a precedent. It is almost a rule that more judgments will follow. Subsequent condemnatory rulings will then begin to change the public perception of the problem. Twenty years ago, the idea of a ban on smoking in cafés or public buildings would have been unimaginable. After various court rulings, however, it is now generally accepted that smokers should not be permitted to pose a risk to the health of others. It is to be hoped that cases dealing with the climate problem will follow the same course. That is why this ruling, the first of its kind in the world, is so important. It will hopefully help change the public perception of the problem and bring it in line with what climate scientists have been trying to make clear to us for so many years: climate change poses a major threat to society and states, and companies and citizens will have to do their share to stop it while the worst can still be avoided. States bear a special responsibility in this respect.
>
> Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands' (n 53) 161–2.

[115] Baron and Epstein (n 47) 177.

[116] A spokesperson for small island states put it rather bluntly during the 2009 Copenhagen Summit: 'Some countries will flat-out disappear'. Bill McKibben, 'Global Warming's Terrifying New Math' [2012] *Rolling Stone*. For a broader discussion on the impacts of the Paris Agreement on small island states, see Ian Fry, 'The Paris Agreement: An Insider's Perspective - The Role of Small Island Developing States' (2016) 46 *Environmental Policy and Law* 105.

[117] Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (The University of Michigan Press 1993) 203.

[118] See for instance, Cox (n 53); Burgers and Staal (n 53).

[119] Anna Aseeva, 'Intergenerational Climate Justice' in Thomas Cottier, Shaheeza Lalani and Clarence Siziba (eds), *Intergenerational Equity: Environmental and Cultural Concerns* (Brill Nijhoff 2019) 135–6; J Timmons Roberts and Bradley C Parks, 'Ecologically Unequal Exchange, Ecological Debt, and

the above litigation to engage critically with the injustice of this attribution scheme places the narrative at odds with the lived realities of many communities in the Global South.

5. Conclusion

This article articulated a narrative of time and urgency that was developed across climate litigation in three countries. It employed the notion of co-production to assess litigation as sites for framing both our scientific understanding of climate change and how it is to be governed. In doing so, it has illustrated how seemingly isolated litigation from different jurisdictions can be approached transnationally, in order to assess how they contribute to common or competing narratives about our future climate. The mode of analysis offers legal scholars a tool for breaking out of our discipline's methodological nationalism in order to make sense of the transnational legal strategies through which our understanding of responsibility and climate justice is unfolding. While the article has grappled with the role of time and timelines in the three cases above, it has necessarily excluded another important dimension of time for climate governance: the rights and interests of future generations. It should be incumbent for any expansion of the analysis presented here to engage more comprehensibly with the dual temporal considerations of immediate urgency and long-term intergenerational justice that often structure climate litigation.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Climate Justice: The History and Implications of Three Related Ideas for a New Social Movement' (2009) 50 *International Journal of Comparative Sociology* 385.