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# **New Ideas or False Hopes? :**

## **International, European, and Irish Climate Change Law and Policy After the Paris Agreement**

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21 April 2016

### **1 Introduction**

This article is an overview and summary of recent developments in international, European and Irish climate change law and policy. It places the recently-concluded Paris Agreement in the context of the US-China Deal on climate, announced in late 2014, which indicate that while bilateral and small-scale agreements are still important, the large multilateral United Nations treaty track is by no means as moribund as some commentators have thought. It also considers present and future European Union measures on climate, particularly the so-called ‘20/20/20’ target, the ‘2030 Framework’, and the action plan for 2050. It discusses the first dedicated Irish legislation on climate change, the Climate Action and Low-Carbon Development Act 2015, outlining its main provisions and highlighting its weaknesses. Finally, it surveys climate change litigation globally, focusing on the Dutch *Urgenda* case and the Pakistani *Leghari* case, concluding by assessing the likelihood and desirability of similar litigation in Ireland.

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## **2 US-China Deal on Climate, 2014**

In November 2014, the United States of America and China unveiled an agreement which was somewhat of a surprise. In a bilateral treaty, they agreed that the US to reduce its greenhouse gas emissions by 26-28% below 2005 levels by 2025, while China is to aim to provide 20% of its energy needs from renewables by 2030 and to begin reducing its emissions from 2030. The key technological supports for the ‘deal’ are nuclear power and renewables, together with collaboration between the parties on carbon capture and storage.<sup>1</sup> Although the deal does not contain binding targets, it is nonetheless important for the momentum which it injected into the international negotiations,<sup>2</sup> particularly as it involved a major economy (China) voluntarily assuming greenhouse gas emissions restrictions which it was not subject to under the United Nations Framework Convention on Climate Change (UNFCCC) or the Kyoto Protocol.

## **3 Paris Agreement, December 2015**

Although the Paris Agreement was negotiated in public and with considerable media interest, its successful conclusion was also somewhat of a surprise as there had been some speculation that the process would fail. The French government carefully managed the Conference of the Parties in Paris in order to ensure that a universally acceptable document would emerge. The Agreement is, however, the result of many years of work on the ‘Durban Platform for Enhanced Action’, which was a response to the failure of the

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<sup>1</sup> Robert Stowe, ‘The U.S.-China Deal on Climate Change: Minilateralism at Work’ (*The Energy Collective*, 2014) <<http://www.theenergycollective.com/robertstowe/2156196/us-china-deal-climate-change-minilateralism-work>> accessed 19 April 2014.

<sup>2</sup> Daniel Bodansky, ‘A Big Deal on Climate?’ (*Opinio Juris*, 2014) <<http://opiniojuris.org/2014/11/16/guest-post-big-deal-climate/>> accessed 19 April 2016.

Copenhagen conference in 2009. It was opened for signature on 22 April 2016 and is expected to come into force in 2020.<sup>3</sup>

The final document has a number of significant key features: it regards any global warming as dangerous (whereas the United Nations Framework Convention on Climate Change and the Kyoto Protocol had spoken only of ‘dangerous anthropogenic climate change’); it explicitly recognises the human rights implications of climate change; aims to limit global warming to ‘well below 2C and to pursue efforts to limit the temperature increase to 1.5C above pre-industrial levels’; and calls for a peaking of greenhouse gas emissions ‘as soon as possible’. The range of temperature increase targets is the result of a compromise between different interest groups,<sup>4</sup> and ‘as soon as possible’ may be far in the future, perhaps too far. The Agreement is therefore weak (from a legal perspective) from the outset.

### **3.1 Key Features**

From a legal perspective, it introduces some new aspects, seeking to achieve ‘a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’. It abandons the relatively rigid distinctions with regard to commitments, obligations, and particularly emissions reductions between developed and developing countries.<sup>5</sup> It also requires parties to put forward Intended Nationally Determined Contributions (INDCs) on mitigation, adaptation, and finance, which are not binding but aspirational only.<sup>6</sup>

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<sup>3</sup> Ralph Bodle, Lena Donat and Matthias Duwe, ‘The Paris Agreement: Analysis, Assessment and Outlook’ (2016) 5  
<[http://ecologic.eu/sites/files/event/2016/ecologic\\_institute\\_2016\\_paris\\_agreement\\_assessment.pdf](http://ecologic.eu/sites/files/event/2016/ecologic_institute_2016_paris_agreement_assessment.pdf)> accessed 7 April 2016.

<sup>4</sup> *ibid* 8.

<sup>5</sup> *ibid* 24.

<sup>6</sup> *ibid* 8.

However, while it is a treaty in international law, much of it is not legally binding.<sup>7</sup> This was deemed necessary in order for it to be ratifiable by the US without Congressional approval.<sup>8</sup> Of more real concern, it was clear at the time of the Paris meeting that existing national contributions were not sufficient to achieve its goals.<sup>9</sup> A particular issue for developing countries, particularly those very vulnerable to issues such as sea level rise, is that it includes an article on ‘loss and damage’ but does not make this a basis for compensation or liability claims.<sup>10</sup>

Its primary compliance and enforcement measure, as one might expect from an international agreement that cannot impose strong obligations on its signatories, is weak but nonetheless innovative and may prove effective in time, if governments work with its spirit rather than to the letter. It is an application of the concept of ‘regulation through transparency’—an example of reflexive regulation in a global instrument. This involves five-year reviews of INDCs, starting with a preliminary inventory (or ‘stocktake’) in 2018 and periodic assessments (including a technical review) which are intended to be progressively more demanding (a ‘ratchet’) from 2023 on.<sup>11</sup> Unfortunately, the INDCs are not all on the same timeframe, which will make them difficult to compare with each other.<sup>12</sup> This mechanism has significant potential to achieve change but ultimately depends on global political will (perhaps encouraged by civil society actors).

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<sup>7</sup> Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (*Available at SSRN* 2735252, 2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735252](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735252)> accessed 5 April 2016.

<sup>8</sup> Wolfgang Obergassel and others, ‘Phoenix from the Ashes—An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change’ (2016) 12–4 <[http://wupperinst.org/uploads/tx\\_wupperinst/Paris\\_Results.pdf](http://wupperinst.org/uploads/tx_wupperinst/Paris_Results.pdf)> accessed 7 April 2016.

<sup>9</sup> *ibid* 18.

<sup>10</sup> *ibid* 27–8.

<sup>11</sup> *ibid* 33–4.

<sup>12</sup> Bodle, Donat and Duwe (n 3) 9.

## 3.2 Practical Issues

Some long-standing issues in international climate change negotiations were not significantly advanced. There were no significant developments on Reducing Emissions from Deforestation and Forest Degradation (REDD+), but the issue is at least explicitly mentioned in the Agreement.<sup>13</sup> There was also no agreement on including international aviation and shipping although these sectors are significant polluters.<sup>14</sup> So-called ‘co-operative approaches’ (market-based mechanisms, such as cap-and-trade) to be enhanced,<sup>15</sup> and adaptation is to be prioritised.<sup>16</sup> Finance is still a contentious issue.<sup>17</sup> Finally, a Compliance Committee is to be established.<sup>18</sup>

On balance, while the Agreement is a missed opportunity on many levels, it has the potential for a significant impact on law and policy, and therefore on the climate itself,<sup>19</sup> through ‘small but decisive steps’.<sup>20</sup>

## 4 European Union Measures

The European Union has tried to position itself as a global leader on climate.<sup>21</sup> From a legal perspective, present efforts in this regard are focused on what is known as the

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<sup>13</sup> Obergassel and others (n 8) 19–20.

<sup>14</sup> *ibid* 20–1.

<sup>15</sup> *ibid* 21–2.

<sup>16</sup> *ibid* 22–6.

<sup>17</sup> *ibid* 29–31.

<sup>18</sup> *ibid* 36.

<sup>19</sup> Bodle, Donat and Duwe (n 3) 21.

<sup>20</sup> *ibid* 28.

<sup>21</sup> Suzanne Kingston, ‘II. Surveying the State of EU Environmental Law: Much Bark With Little Bite’ (2013) 62 *International and Comparative Law Quarterly* 965, 966.

‘20/20/20 Target’: to achieve by 2020 a simultaneous 20% emissions reduction and 20% use of renewables across the Union.

#### **4.1 20/20/20 Components**

This is made up of a number of components: reform of the Emissions Trading Scheme (ETS), together with national targets for non-ETS emissions; national renewables targets; the development of carbon capture and storage (CCS) (including a legislative framework); and the so-called Effort Sharing Decision (406/2009/EC) which imposes binding targets for emissions reductions on Member States. The Irish target under the latter is a 20% reduction in emissions by 2020; as will be discussed in the next section, it is unlikely to meet this. This will be enforced by the imposition of penalties on a Member States for exceeding its annual allocation. These include a deduction in the following year of 108% of the excess, a requirement that a ‘corrective action plan’ be submitted to Commission within 3 months, and temporary suspension of the State’s eligibility to transfer its emission allocation to other States. (The Effort Sharing Decision allows for the use of Certified Emission Reductions and Emission Reduction Units or obtaining allocations from other Member States in order to meet emissions targets.) In addition, the State could be subject to an infringement action from the European Commission.

#### **4.2 ETS Phase 3 (2013 — 2020)**

The principal European Union measure for reducing GHG emissions is the emissions trading scheme (EU ETS). This is the largest cap-and-trade system in the world, regulating the activities of producers in various manufacturing and energy industries. The ETS applies to a number of different industries: energy activities (such as coke ovens), the production and processing of ferrous metals, the mineral industry and pulp and paper plants; but only to their emissions of carbon dioxide. A full discussion of the functioning of the ETS is outside of the scope of this article.<sup>22</sup> For the ‘20/20/20’ period, there are a

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<sup>22</sup> See, for example, Javier de Cendra de Larragán, ‘From the EU ETS to a Global Carbon Market: An Analysis and Suggestions for the Way Forward’ (2010) 19 *European Energy*

number of significant features to be aware of: there will now be a single EU-wide cap, with at least 40% of allowances to be auctioned, rising annually, and the numbers of industrial sectors and gases to be considered will be expanded. Allowances are to be set aside for renewables and CCS. The ETS now includes aviation within the EEA, something which has been very controversial and has led to litigation on the part of US airlines. However, it does not include shipping, despite this being a significant source of greenhouse gas emissions.<sup>23</sup>

### **4.3 2030 Framework**

The European Council agreed the 2030 Framework in October 2014. This imposes binding targets for 2030 on Member States to reduce GHG emissions by 40% on 1990 levels, which will be made up of a 43% reduction in ETS emissions and 30% elsewhere. The European energy mix will also change, with the goal of achieving 27% renewable energy use, a 27% increase in energy efficiency.<sup>24</sup> There is also a roadmap to a low-carbon economy by 2050, with an 80% reduction in greenhouse gas emissions.<sup>25</sup>

The Commission is also responding to the conclusion of the Paris Agreement. It will prioritise proposals for climate legislation, particularly Effort-Sharing Decisions for sectors not covered by the ETS and on land use, land use change and forestry, the development of a reliable and transparent climate and energy governance mechanism, a

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and Environmental Law Review 2; Gerd Winter, 'The Climate Is No Commodity: Taking Stock of the Emissions Trading System' (2010) 22 Journal of Environmental Law 1.

<sup>23</sup> Bodle, Donat and Duwe (n 3) 19.

<sup>24</sup> Directorate-General for Climate Action, '2030 Climate & Energy Framework' (2016) <[http://ec.europa.eu/clima/policies/strategies/2030/index\\_en.htm](http://ec.europa.eu/clima/policies/strategies/2030/index_en.htm)> accessed 19 April 2016.

<sup>25</sup> 'A Roadmap for Moving to a Competitive Low Carbon Economy in 2050' (European Commission, 2011) Communication COM/2011/0112 final.



regulatory framework which will put energy efficiency first, and supports for renewable energy (which is being labelled as a ‘new market design’).<sup>26</sup>

What this could mean for Ireland is not entirely clear. The most recent Environmental Protection Agency projections on greenhouse gas emissions

... estimate that by 2020 non-ETS emissions will at best be 11% below 2005 levels compared to the 20% reduction target. Emission trends from agriculture and transport are key determinants in meeting targets, however emissions from both sectors are projected to increase in the period to 2020.’<sup>27</sup>

In 2014, the Climate Change Evaluation Vote Section of the Department of Public Expenditure and Reform (operating on the assumption that Ireland would not meet its targets under European and international law) put the costs at in the region of €90 million for non-ETS sectors, and perhaps between €140 and €600 million for not meeting the 2020 Renewable Energy Sources targets. Costs beyond 2020 ‘could have a cumulative total in the billions’.<sup>28</sup> The costs to the exchequer could therefore be substantial.

## **5 Climate Action and Low-Carbon Development Act 2015**

After several false starts, the Oireachtas passed the Climate Action and Low-Carbon Development Act 2015, which was signed into law by the President of Ireland on 10 December 2015.

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<sup>26</sup> ‘The Road from Paris: Assessing the Implications of the Paris Agreement and Accompanying the Proposal for a Council Decision on the Signing, on Behalf of the European Union, of the Paris Agreement Adopted Under the United Nations Framework Convention on Climate Change’ (European Commission, 2016) Communication COM(2016) 110 final.

<sup>27</sup> Environmental Protection Agency, ‘Greenhouse Gas Emission Projections to 2020 – an Update’ (2016)  
<[http://epa.ie/pubs/reports/air/airemissions/2020\\_GHG\\_Projections\\_2016\\_Bulletin.pdf](http://epa.ie/pubs/reports/air/airemissions/2020_GHG_Projections_2016_Bulletin.pdf)>  
accessed 30 April 2016.

<sup>28</sup> Department of Public Expenditure and Reform, ‘Future Expenditure Risks Associated with Climate Change/Climate Finance’ (2014) 4.

## 5.1 Overall Goal

Its aim is to enable ‘the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050’. This is known as the ‘national transition objective’. To this end, the Minister for the Environment is required to ‘make and submit to the Government for approval’ two plans: a national mitigation plan, and a national adaptation framework.<sup>29</sup>

## 5.2 Five Year Plans for Mitigation and Adaptation

These plans are intended to cover a period of 5 years. The national low carbon mitigation and transition plan will consist largely of

the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective<sup>30</sup>

while the national adaptation framework is a national strategy

... for the application of adaptation measures in different sectors and by a local authority in its administrative area in order to (i) reduce the vulnerability of the State to the negative effects of climate change, and (ii) avail of positive effects of climate change that may occur, and (b) take into account any existing obligation of the State under the law of the European Union or any international agreement<sup>31</sup>

These are supplemented by sectoral adaptation plans, which are drawn up by individual Ministers as deemed relevant by the cabinet and which detail ‘the adaptation policy measures the Minister of the Government concerned, having regard to the approved national adaptation framework, proposes to adopt’.<sup>32</sup> All of these plans and frameworks,

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<sup>29</sup> Climate Action and Low-Carbon Development Act 2015 s 3(1).

<sup>30</sup> *ibid* s 4(2).

<sup>31</sup> *ibid* s 5(2).

<sup>32</sup> *ibid* s 6(2).

whether national or sectoral, must be open for public consultation for a period of at least 2 months.

All plans and frameworks must be approved by the Government before implementation.<sup>33</sup>

When deciding whether to approve national plans or frameworks, the Government shall ‘have regard to’:

- (a) the ultimate objective specified in [the UNFCCC] and any mitigation commitment entered into by the European Union ...,
- (b) the policy of the Government on climate change,
- (c) climate justice,
- (d) any existing obligation of the State ..., and
- (e) the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the [Environmental Protection] Agency.<sup>34</sup>

The Act also specifies other matters which the Minister and Government ‘shall take account of’:

- (a) the need to have regard to —
  - (i) any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2,
  - (ii) likely future mitigation [or adaptation] commitments of the State and the economic imperative for early and cost-effective action, and
  - (iii) the requirement to be able to act quickly in response to economic and environmental occurrences and circumstances;
- (b) the need to promote sustainable development;
- (c) the need to take advantage of environmentally sustainable economic opportunities both within and outside the State;

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<sup>33</sup> *ibid* s 4(10), s 5(7), and s 6(9).

<sup>34</sup> *ibid* s 3(2).

- (d) the need to achieve the objectives of a national mitigation plan [or adaptation framework] at the least cost to the national economy and adopt measures that are cost-effective and do not impose an unreasonable burden on the Exchequer;
- (e) relevant scientific or technical advice;
- (f) the findings of any research on the effectiveness of mitigation measures and adaptation measures;
- (g) [any approved adaptation or mitigation plans or frameworks]
- (i) any recommendations or advice of the Advisory Council;
- (j) mitigation measures, ...; and
- (k) [in the national mitigation plan only] the protection of public health.<sup>35</sup>

### **5.3 Climate Change Advisory Council**

The Act also places on a statutory footing the Climate Change Advisory Council,<sup>36</sup> which had been in existence since June 2015. This is to be independent in its operation.<sup>37</sup> It has 9 to 11 members, most of whom are appointed by the Minister for the Environment. The *ex officio* members are the Director General of EPA, the CEO of Sustainable Energy Ireland, the Director of Teagasc, and the Director of the Economic and Social Research Institute.<sup>38</sup> It is hosted by the EPA. It has two primary functions, to make recommendations to the Minister or to the Government in relation to plans or frameworks under the Act;<sup>39</sup> and to publish an annual review ‘of the progress made during the immediately preceding year in achieving greenhouse gas emissions reductions, and furthering transition to a low carbon, climate resilient and environmentally sustainable

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<sup>35</sup> *ibid* s 4(7) and s 7(1).

<sup>36</sup> S 8(2) *ibid* The necessary ministerial order, SI 25/2016, was signed on 13 January 2016 and the Council was formally established on 18 January 2016.

<sup>37</sup> Climate Action and Low-Carbon Development Act 2015, s 11(3).

<sup>38</sup> *ibid* s9.

<sup>39</sup> *ibid* s 11(1).

economy’.<sup>40</sup> It can also conduct ‘periodic reviews’. It must conduct a review of progress in meeting Ireland’s obligations with regard to the Effort-Sharing Decision and the ‘national transition objective’ within 18 months of being established (therefore by 18 June 2017).<sup>41</sup> It can also conduct a review of progress towards the ‘national transition objective’, the most recent approved national mitigation plan, approved national adaptation framework and approved sectoral adaptation plans, and the implementation of these plans and framework,<sup>42</sup> at its own discretion<sup>43</sup> or at the request of the Minister.<sup>44</sup>

The Minister is required to make ‘annual transition statement’ to each House of the Oireachtas. This is in three parts: an ‘annual national transition statement’, an ‘annual sectoral mitigation transition statement’, and an ‘annual sectoral adaptation transition statement’. These relate to the relevant plans and frameworks outlined above and must contain an assessment of their effectiveness in the achievement of their purpose.<sup>45</sup>

Finally, the Act imposes a duty on public bodies to ‘have regard to’

- (a) the most recent approved national mitigation plan,
- (b) the most recent approved national adaptation framework and approved sectoral adaptation plans,
- (c) the furtherance of the national transition objective, and
- (d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.<sup>46</sup>

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<sup>40</sup> *ibid* s 12(1).

<sup>41</sup> *ibid* s 13(1).

<sup>42</sup> *ibid* s 13(2).

<sup>43</sup> *ibid* s 13(2).

<sup>44</sup> *ibid* s 13(3).

<sup>45</sup> *ibid* s 14.

<sup>46</sup> *ibid* s 14.

The Minister can request a report on the measures adopted by a particular body in this regard,<sup>47</sup> and can also give a direction requiring a body to adopt measures in order to comply with the duty to have regard to the items mentioned above.<sup>48</sup>

#### **5.4 Assessment of Act**

Although the Act is an important and useful step forward in Irish climate change law and policy, it is nonetheless far from adequate, particularly in light of the seriousness of the issue, the magnitude of our obligations under European and international law, and the level of fines that we may face from the European Union for our lack of compliance with these.<sup>49</sup> The requirement that plans and frameworks must be ‘at the least cost to the national economy and adopt measures that are cost-effective and do not impose an unreasonable burden on the Exchequer’ is likely to be used as an excuse to avoid taking difficult decisions in the short-term, even if the long-term payoff could be significant. The political cycle of elections every five years (or perhaps sooner, given present uncertainties) is not well-suited to mobilising to tackle a cross-generational challenge such as climate change.

In addition, the Act will be difficult (if not impossible) for NGOs and individuals to enforce as it does not contain any duties towards specific individuals. If there is a lack of interest on the part of Ministers or public bodies, it may prove difficult to show a court that one has sufficient standing to seek an order directing compliance. The requirement that public bodies ‘have regard to’ plans is quite weak, as cases in planning law have made clear.<sup>50</sup> The ‘national transition objective’ is very difficult to quantify and there are

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<sup>47</sup> *ibid* s 15(2).

<sup>48</sup> *ibid* s 15(3).

<sup>49</sup> For criticisms of an earlier draft in Bill form, see ClientEarth, ‘European Lessons for Ireland’s Climate Law’ (2015) <<http://www.clientearth.org/climate-energy/climate-energy-publications/irelands-climate-law-lessons-from-europe-2858>> accessed 30 April 2016.

<sup>50</sup> *McEvoy v Meath County Council* [2003] 1 IR 208.

no interim targets. In this regard the legislation compares unfavourably to the UK's Climate Change Act, which sets the target at an 80% reduction from 1990 levels by 2050 and has interim 'carbon budgets' on a five year basis.

## 6 Climate Change Litigation

There are several examples worldwide of 'regulation by litigation' in climate change law.<sup>51</sup> Cases where the state or an individual resort to the courts as a means of progressing an agenda that seems blocked in the political or legislative system have a long history in the United States of America.<sup>52</sup> They are becoming increasingly common in European courts (although very problematic, given the reluctance of judges to recognise the standing of individuals).<sup>53</sup> This section summarises three relevant cases, from the Netherlands, the United Kingdom, and Pakistan. It also discusses the possibilities and problems of similar litigation in Ireland.

### 6.1 Urgenda Case

A particularly striking climate change case is the *Urgenda v Netherlands* decision of the District Court in The Hague on 24 June 2015. This case was taken by a Dutch environmental NGO on the basis that it was more likely to be successful in obtaining an order requiring emissions reductions against a government rather than against a commercial entity such as an oil company.<sup>54</sup>

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<sup>51</sup> Elbert R de Jong, 'Dutch State Ordered to Cut Carbon Emissions.' (2015) 6 European Journal of Risk Regulation 449; Meredith Wilensky, 'Climate Change in the Courts: An Assessment of Non-US Climate Litigation' [2015] Duke Environmental Law and Policy Forum 131.

<sup>52</sup> Patrick Luff, 'Risk Regulation and Regulatory Litigation' (2011) 64 Rutgers Law Review 73.

<sup>53</sup> Kai Purnhagen, 'Towards a Regime of Emission Litigation Based on Science' (2015) 6 European Journal of Risk Regulation 443.

<sup>54</sup> Roger Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v the State of the Netherlands*' [2016] Journal of Energy & Natural Resources Law 323, 324–6.

The court ordered that the Dutch government must take more action to reduce greenhouse gas emissions in the Netherlands. In particular, it is required to ensure that Dutch emissions in 2020 will be at least 25% lower than 1990. The likely outcome, based on mitigation efforts to date, was 17%. The decision is based on the Dutch State's responsibility to protect its citizens and particularly the concept of 'Hazardous Negligence' in Dutch tort law. The court held that there was a 'serious duty of care' to prevent climate change, which requires the Dutch government to take rapid action even though its contribution to global emissions is comparatively small. Arguments regarding 'carbon leakage' (the movement of activity to other, less-regulated states) or the negative economic effect of the decision were rejected as poorly-founded. The court squared the circle of separation of powers in an interesting way: by acknowledging the need for restraint but basing its decision on the need to protect legal rights, and ultimately limiting its order to a 25% reduction (not the 40% sought) and not requiring specific policy measures. The decision is under appeal at the time of writing.<sup>55</sup>

It raises interesting questions regarding the source of state obligations to reduce climate change emissions and to protect citizens; in this case, these arose from domestic law, not international.<sup>56</sup> It also highlights the way in which the rule of law may cut both ways, either in limiting the powers of courts or in preventing governments from ignoring the rights of their citizens.<sup>57</sup>

## 6.2 Clientearth Case

The decision of the Supreme Court of the United Kingdom in the recent *ClientEarth* case<sup>58</sup> on the Air Quality Directive<sup>59</sup> is somewhat relevant to possible new directions in

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<sup>55</sup> De Jong (n 51) 448–52.

<sup>56</sup> *ibid* 448.

<sup>57</sup> *ibid* 453.

<sup>58</sup> *Clientearth, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.



climate change litigation. Here, the court ordered the UK government to comply with the nitrogen dioxide limits provided for in that directive.

### 6.3 Leghari Case

A Punjabi farmer, Ashgar Leghari, brought a case through the Pakistani courts and was ultimately successful in obtaining an order from the High Court of Lahore requiring the government of Pakistan to implement its National Climate Change Policy (which had been outstanding since 2012), with particular attention to 734 action points, 232 of which are to be completed by 2016, and convene a Climate Change Commission to oversee and report to the Court on progress.<sup>60</sup> The Court said:

Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.<sup>61</sup>

### 6.4 *Urgenda*-style Litigation in Ireland?

The *Urgenda* case is without doubt a significant precedent.<sup>62</sup> It has inspired an effort to crowd-fund to finance similar litigation in Ireland.<sup>63</sup> However, it is not clear that this is

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<sup>59</sup> Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe 2008 (OJ) L41 52.

<sup>60</sup> Ahmad Rafay Alam, 'Pakistan Court Orders Government to Enforce Climate Law' (2015) <<http://www.thethirdpole.net/2015/09/24/pakistan-court-orders-government-to-enforce-climate-law/>> accessed 7 April 2016.

<sup>61</sup> *Ashgar Leghari v Federation of Pakistan* [2015] W.P. No. 25501/2015 (Lahore High Court) 6.

<sup>62</sup> Cox (n 54) 339.

<sup>63</sup> Sylvia Thompson, 'We the People: A Case for Climate Action' *Irish Times* (13 February 2016).

likely to succeed. There are several hurdles that would need to be overcome. Article 21 of the Dutch Constitution clearly makes environmental protection a duty of the state, stating ‘It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.’ The Irish Constitution does not contain a right to a clean, safe, or healthy environment. (There is an unenumerated right to bodily integrity,<sup>64</sup> but it is difficult to see how this could be stretched as far as would be needed to mount a successful case to force climate change action.) The Irish State has no strong duty to protect citizens and has no concept of ‘Hazardous Negligence’ in its tort laws. Causation for climate change related loss or damage would be difficult to prove. Finally, the Netherlands is a civil law country with a monist approach to international law, making it much easier to plead international obligations in a court of law.<sup>65</sup>

If such a case could be argued and won, it might not be a good idea in the long term. The idea of a court giving directions or instructions to the executive, as has happened in the Netherlands and in Pakistan, would raise significant separation of powers and rule of law issues. (The Supreme Court of Ireland has shown itself slow to grant such orders in the past.<sup>66</sup>) It would also undermine the supremacy of European law and could perhaps slow down rather than speed up international negotiations, as governments would be operating under the control of their courts, bodies which are not noted for their speed or precision in decision-making.<sup>67</sup>

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<sup>64</sup> *Ryan v Attorney General* [1965] IR 241. See also *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82 and *O’Brien v Wicklow UDC* (Unreported, High Court, 10 June 1994) on the State’s responsibility for individual health.

<sup>65</sup> For a similar analysis of the likely outcome in New Zealand law, on which this discussion is based, see Matthew Soar, ‘Would the Urgenda Case Fly in New Zealand?’ (*Deconstructing Paris*, 2015) <<http://paristext2015.com/2015/10/would-the-urgenda-case-fly-in-new-zealand/>> accessed 19 April 2016.

<sup>66</sup> *TD v Minister for Education* [2000] 3 IR 62; *Sinnott v Minister for Education* [2001] 2 IR 545

<sup>67</sup> Lucas Bergkamp, ‘The Urgenda Judgment: A “Victory” for the Climate That Is Likely to Backfire’ (*Energy Post*, 2015) <<http://www.energypost.eu/urgenda-judgment-victory-climate-likely-backfire/>> accessed 19 April 2016.

Nonetheless, if governments such as Ireland's continue to ignore or water down domestic implementation of our international obligations, we may have to re-evaluate these frameworks. Speaking extra-judicially (and not in the specific context of climate change), Chief Justice Sian Elias of New Zealand has called for freedom 'from such conceptual shackles as the doctrine of parliamentary sovereignty,' a desire 'to think less barrenly about ... the "law-state,"' and a framework provided by new constitutional map-makers that will protect items of societal value threatened by 'not [having] a shared sense of what is important.'<sup>68</sup> If the legislature and the executive continue to fail present and future generations in their response to the urgency of climate change, can we look instead to the courts for solutions, however imperfect?

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<sup>68</sup> Sian Elias, 'Mapping the Constitutional' [2014] NZ Law Review 1.