

**Climate Change in New Zealand:
Constitutional Limitations on Potential Government
Liability**

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Introduction

Climate change litigation is growing in popularity around the world following the historic ruling by the District Court of the Hague in *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment) (Urgenda)* where, for the first time, a judge ordered a State to increase its climate change mitigation targets.¹ The success of *Urgenda* was partly due to the tort law of the Netherlands, which, while significantly different to that in New Zealand, will not be discussed here. Instead the object of discussion will be the manner in which the Dutch Court managed to reconcile their Constitution with a potentially conflicting order to impose greater responsibility for climate change on the State. This raises the question of whether climate change litigation would be possible from a constitutional standpoint in New Zealand, and particularly whether an action such as *Urgenda* would succeed here.

In order to determine this, it is essential to examine the case of *Urgenda* so as to gauge whether the differences in constitutional arrangement would prevent a similar case from being run in New Zealand. In the event that such a case would be unlikely to succeed here, an investigation will be made into the causes of the constitutional variance so that a possible solution can be realised.

A second climate change case growing in its renown is that of *Kelsey Cascade Rose Juliana; et al., v The United States of America; et al. (Our Children's Trust)*, where a group of children and young adults are bringing an action against the United States of America.² Again this will be examined to ascertain whether constitutional differences between New Zealand and the United States of America would prevent such a case from succeeding in New Zealand. A large focus of this case is the public trust doctrine and an effort will be made to discuss this in a New Zealand context.

¹ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] Case C/09/456689/HA ZA 13-1396 at 1.

² *Kelsey Cascade Rose Juliana; et al., v The United States of America; et al.*, [2016] Case 6:15-cv-01517-TC at 1 [*Our Children's Trust*].

Following this, an investigation into climate change litigation already occurring in New Zealand will take place, with Sarah Thomson's impending judicial review claim against the Minister for Climate Change Issues as the object of the discussion.³ As a part of this, the limitations of judicial review will be analysed with regard to its practical application in the region of climate change mitigation.

Finally, options to improve the success of climate change litigation in New Zealand will be considered, with attention being paid to their practicality and likelihood of occurring.

³ Jamie Morton "Student sues Government over climate targets" (12 November 2015) NZ Herald <www.nzherald.co.nz>.

CHAPTER ONE:

A World First - Successful Climate Change Litigation Against the State: *Urgenda v Netherlands*

1. URGENDA'S CLAIMS

On the 24th June 2015 the District Court of The Hague made a historic ruling in *Urgenda*, ordering that the State of the Netherlands (the State) reduce its greenhouse gas (GHG) emissions to at least 25 per cent of the level in 1990 by the year 2020.⁴ This is significant as it was the first instance of a Court ordering a state to reduce GHG emissions within its territory.⁵

Urgenda, a non-government organisation, claimed that the State is liable for the joint volume of GHG emissions in the Netherlands. They also claimed that the State acts unlawfully if it fails to reduce GHG emissions within the Netherlands by 40 per cent, or at least 25 per cent, relative to the 1990 level by 2020 or in the alternative of 40 per cent by 2030. This was based on their assertion that the otherwise excessive GHG emissions of the State would be in breach of a duty of care that the State owes to Urgenda, and more generally Dutch society. The breach of duty occurs as such emissions would lead to, or threaten to lead to, global warming of over two degrees celsius and the potential for disastrous consequences to accompany it. Finally, Urgenda unsuccessfully claimed that the State wrongly exposes the international community to dangerous climate change if it fails to reduce its GHG emissions as stated.⁶ This last claim failed due to a lack of standing.⁷

2. CLIMATE CHANGE

In order to assess the facts, or climate science, of the case the Court looked to the Intergovernmental Panel on Climate Change (IPCC). The IPCC is a scientific body with 195 countries as members, including the Netherlands. The IPCC gathers and assesses climate research from around the world and publishes it in a report every five or six years.⁸ In the two

⁴ *Urgenda Foundation v The State of the Netherlands*, above n 1, at 1.

⁵ Elbert de Jong "Dutch State Ordered to Cut Carbon Emissions" (2015) Eur J Risk Reg 448 at 448.

⁶ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [3.1].

⁷ At [4.42].

⁸ IPCC "Assessment Reports" <www.ipcc.ch>.

latest reports, 2007 and 2013, it was established that the earth is warming due to a human induced increase of carbon dioxide in the atmosphere. The reports also state that if the average temperature on earth is allowed to increase by more than two degrees celsius, relative to pre-industrial levels, then highly dangerous and potentially permanent effects are likely to be felt.⁹ If the world continues on its current trajectory then average temperatures will rise by 3.7 to 4.8 degrees celsius by 2100.¹⁰

The Court also deemed it relevant that The Emissions Database for Global Atmospheric Research (EDGAR) recorded that the Dutch only emitted 0.42 per cent of global emissions in 2010. However, their per capita emissions rate was one of the highest in the world.¹¹

The State did not debate these facts. Their argument arose in regard to the rate at which emissions reductions had to be implemented, believing that their current rate of 20 per cent by 2020, 40 per cent by 2030 and 80 per cent by 2050 was acceptable. This differs to Urgenda's claim and the targets set out for Annex I developed nations, such as the Netherlands, by the IPCC of 25-40 per cent by 2020 and 80-95 per cent by 2050.¹²

3. INTERNATIONAL LEGAL CONTEXT

Due to the monist system of law in the Netherlands, whereby international obligations agreed to by the State are legally binding in domestic courts, the Court had to assess the relevant international legal framework in order to determine the State's legal obligation to Urgenda.¹³

The first of these was the United Nations Framework Convention on Climate Change (UNFCCC) of which the Netherlands is a member. The UNFCCC, and the IPCC which it established, give the general principles and basis of knowledge on which further climate agreements are reached during conferences of the parties (COPs), such as the Kyoto Protocol. However, despite the monist system in place the Court found that the UNFCCC principles and

⁹ Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change "Climate Change 2014: Synthesis Report" (November 2014) at 8; *Urgenda Foundation v The State of the Netherlands*, above n 1, at [2.12] and [2.18].

¹⁰ At [2.21].

¹¹ At [2.27] and [2.28].

¹² At [4.32] and [4.34].

¹³ At [2.34], [4.11] and [4.36]; Sanne Taekema and others *Understanding Dutch Law* (Boom Juridische Studietoeken, The Hague, 2004) at 20.

relevant COP agreements could not be directly relied upon by Urgenda. This was due to the UNFCCC and COP agreements only containing obligations to other states and not to citizens.¹⁴

This being said, the Court applied the Dutch legal principle that laws of any kind should not be applied in a manner requiring the State to breach an international obligation, unless there is no other possible interpretation. As such the UNFCCC and COP agreements could be used contextually to interpret domestic legal standards that have no one clear meaning.¹⁵ This is also the case with the “no harm” principle, that states States should not act in a manner likely to cause harm to another territory, and the principles within the Treaty on the Functioning of the European Union (TEFU).¹⁶

Finally, the Court assessed the European Convention on Human Rights (ECHR), specifically Articles 2 and 8. They found that Urgenda could not directly benefit from the rights contained in either Article as they did not meet the definition of an individual application under Article 34. This is because, as a legal person, neither Urgenda’s physical integrity can be violated, nor can its privacy be interfered with.¹⁷ However, the Court again found that the ECHR could be used to interpret domestic law.¹⁸

With this in mind the Court was willing to accept that Article 2 provides the protection of the right to life, not just in relation to the direct actions of the State, but also to actions not connected with the State. This has previously been seen in cases of natural disasters. Article 8 was also found to be relevant where environmental factors “directly and seriously affect private and family life”.¹⁹

4. NATIONAL LEGAL CONTEXT

Article 21 of the Dutch Constitution (DC) provides the right to a habitable and protected environment, which forms a duty of care owed by the State. However, the discretion of how

¹⁴ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.42].

¹⁵ At [4.43].

¹⁶ At [4.44].

¹⁷ At [4.45].

¹⁸ At [4.46].

¹⁹ At [4.49] and [4.50].

this duty is fulfilled is left to the State.²⁰ It was therefore deemed not to be sufficient to create a legal obligation Urgenda could rely upon here. However this provision was again able to provide context that can be used to interpret domestic law.²¹

5. THE DUTY OF CARE

Following its conclusion that no legal obligation to Urgenda could be found in the relevant international law or under Article 21 DC, the Court turned its attention to domestic law, in particular Book 6, s 162 of the Dutch Civil Code (DCC). In its definition of a tort, s 162 describes an unwritten standard of due care observed in society that the Court recognised the doctrine of hazardous negligence falls within.²² With this understanding the question became whether the State had breached this standard of due care by failing to take adequate action to prevent hazardous climate change.²³ In determining this it became crucial for the Court to establish the scope of the duty and the level of discretion the State had in fulfilling it.²⁴

As previously seen, Article 21 DC offers the State a far-reaching discretion in the exercise of their environmental protection policy. However, the global nature of climate change and the all-inclusive action needed to adequately reduce GHG emissions lead the Court to find that this discretion was not unlimited. Instead they held that the international legal context, discussed above, should be considered in determining the scope of the duty in a bid to satiate the global element of the issue.²⁵

To establish the scope of the duty the Court examined six different factors.²⁶ The first three of these; (1) the nature and extent of the damage from climate change, (2) the knowledge and foreseeability of the damage, and (3) the chance that hazardous climate change will occur, were quickly dealt with by the Court. As seen from the IPCC reports, the nature and extent of the damage from climate change, if allowed to occur unchecked, was deemed to be severe and life

²⁰ At [4.36].

²¹ At [4.52].

²² At [4.53]; KJ de Graaf and JH Jans "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change" (2015) 27 JEL 517 at 519.

²³ At 520.

²⁴ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.53].

²⁵ At [4.55].

²⁶ At [4.63].

threatening.²⁷ As to the second and third factors, it was neither contentious that the State was aware of this potential damage, nor that if global warming surpasses two degrees celsius it is highly likely that dangerous climate change will ensue.²⁸

The fourth factor examined was the nature of the State's acts or omissions, here the failure to mitigate GHG emissions within the Netherlands. The Court rejected the argument that the State should not be liable for the emissions of third parties. Instead they held that, as sovereign, the State has the power to control the GHG emissions of third parties through regulation. Additionally, the Court felt that the State had taken responsibility for third party GHG emissions within the Netherlands when they signed up to the UNFCCC and negotiated on behalf of the Dutch people at COPs.²⁹

Next the onerousness of taking precautions was assessed by the Court. Here they evaluated the cost of precautionary measures compared to the possible damage, as well as the effectiveness of those measures. The reasoning being that if the precautionary measures were disproportionately expensive and unlikely to remedy the situation, there should be no obligation to take them. However, in 2009 the State was committed to a higher emissions reduction target of 30 per cent, deeming it cost effective, before reducing it to their current target of 20 percent. The Court held that it therefore stood to reason a similar target should still be cost effective. In fact, Urgenda, the IPCC and the United Nations Environment Programme (UNEP) posited it to be more cost effective to set the higher reduction target for 2020. The effectiveness of mitigating GHG emissions to avoid dangerous climate change was not questioned.³⁰

Finally the Court rejected the State argument that future developments in technology would support the claim that lower emission reductions now, followed by greater reductions in the future would be more cost effective. This was due to the uncertainty of future technological advances and therefore they could not to be relied upon.³¹

²⁷ At [4.64].

²⁸ At [4.65].

²⁹ At [4.66].

³⁰ At [4.67]-[4.73].

³¹ At [4.72].

The final factor to be considered was that of the State's discretion to execute public duties. Here, the wide discretion afforded by Article 21 DC was discussed in regard to the potentially limiting principles of the UNFCCC and TFEU. Of these principles, the principle of fairness stood out. The Court held that it created an obligation to future generations to enforce a higher reduction target for 2020 so that a disproportionate financial burden was not placed upon them, as the IPCC and UNEP have stated would likely occur with the lower 2020 target.³²

Other relevant principles included the precautionary principle, not delaying precautionary measures to seek absolute scientific certainty in the face of great danger, and the principle that prevention is preferable to a cure. To justify departing from these limiting factors on State discretion, the Netherlands argued that increasing the emission reduction targets would have a negligible effect on global climate change. However, this was rejected as climate change was held to be a global issue requiring "global accountability". The Court therefore concluded that the State did have a wide discretion but that it was not unlimited. They were therefore obliged to apply sufficiently effective protective measures.³³

As a result of this discussion on these six factors, the Court held that the scope of the duty the State owed to Urgenda, and more broadly Dutch society, meant increasing their GHG emission target for the year 2020 to 25 percent relative to 1990 levels. Any more than this was deemed more than the minimum necessary to fulfil the duty and an interference on the State's discretionary powers.³⁴

6. THE SEPARATION OF POWERS

The State disputed this ruling on the basis that the Court was overstepping its role outlined by the separation of powers. The Court agreed that there are situations involving policy where they needed to show restraint, or even abstain from passing judgment. However, this depends on the nature of the debate and the level of impact on the structure and organisation of society.³⁵

³² At [4.74]-[4.82].

³³ de Graaf and Jans "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change", above n 19, at 521; *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.74]-[4.82].

³⁴ At [4.83]-[4.86].

³⁵ At [4.94]-[4.96].

However, the Court did not see the Dutch separation of powers as a full separation, instead it created a balance between the powers. This means that each has its own tasks and responsibilities, with the Judiciary's being to provide legal protection and settle disputes. In doing this the rule of law ensures that political bodies must sometimes be subject to a Court's judgment. However, in such a situation a Court must remain within the task of applying the law and not slip into the political domain. A further point made to illustrate this balance was that judges, whilst not democratically elected, have a quasi-democratic quality as the legislation that empowers them is democratically enacted.³⁶

The fact that the object of debate here is one of political decision making was not reason enough to abstain from a judgment, the Court said, although any political point of view should not, and was not, within the Court's contemplation. However, restraint must be shown due to the nature of the debate surrounding policy and the fact that any ruling will affect the State's ability to negotiate at future COPs. The Court believed that the order given here attested to the bare minimum that was needed to apply the law and meet the duty of care, but no further. They also noted that there was no order to enact specific legislation or policies.³⁷

³⁶ At [4.95] and [4.97].

³⁷ At [4.98] and [4.100]-[4.102].

CHAPTER TWO:
***Urgenda* in New Zealand:**
A Different View of Sovereign Power

The interesting question for us in New Zealand, arising from *Urgenda*, is whether a similar action could be successful here. Unfortunately, the answer to this appears to be negative due to a number of differences between Dutch law and the law of New Zealand. While one of these factors is undoubtedly a disparity in tort law, this article will avoid that topic of discussion focussing instead on the variance in constitutional law that limits such claims in New Zealand.

1. INTERNATIONAL LEGAL CONTEXT

The Netherland's monist system of law made little difference in *Urgenda*, compared with how New Zealand's dualist system would have behaved, as the international law considered was held not to be able to sustain an action, rather it was deemed only persuasive in nature.³⁸ However, there is a discrepancy in the relevance of certain international treaties and conventions to the two countries. This is a result of the Netherlands being a party to certain European agreements that New Zealand, not being a part of Europe, is not, namely the TEFU and ECHR. Although this would not be fatal to a claim in New Zealand, it does reduce the persuasiveness of the principles contained in such agreements when using them to provide context to New Zealand's domestic law.³⁹

In addition to this New Zealand did not commit to the second commitment period effected by the Doha amendments of the Kyoto Protocol and as a result we lack yet more contextual factors that could be drawn upon to support an *Urgenda*-like claim.⁴⁰

³⁸ Taekema and others *Understanding Dutch Law*, above n 13, at 20; *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.42]-[4.44].

³⁹ Duncan Webb, Katherine Sanders and Paul Scott *The New Zealand Legal System: Structures and Processes* (5th ed, LexisNexis, Wellington, 2010) at 97.

⁴⁰ Ministry for the Environment "New Zealand and the United Nations Framework Convention on Climate Change" <www.mfe.govt.nz>.

2. THE SEPARATION OF POWERS

A different issue that could prove fatal to an action in New Zealand is that of the separation of powers. In *Urgenda* it was held that the judgment given was not in breach of this doctrine as it was the minimum needed to fulfil the Court's role of applying the law and it therefore did not stray over the political boundary into the non-justiciable realms of the executive and legislature.⁴¹ Such a view is possible in the Netherlands due to the distinction between the doctrine of the separation of powers and the doctrine of the balance of powers.⁴²

The separation of powers is a strict divide between the three powers; the judiciary, executive, and legislature. It is a division of both the functions of these bodies, as well as the people fulfilling those functions. Within the doctrine judges are able to examine the acts of the other public bodies for their legality, however they cannot go as far as to indicate the attractiveness of certain public policies above others.⁴³ The doctrine of the balance of powers still provides that the functions of the three authoritative bodies remain separate, however those performing the functions are only made independent to the point that they can control each other and “balance the influence of power”.⁴⁴ To act in accordance with this doctrine, judges should avoid interfering with public policy, unless it is essential in order to protect highly significant legal interests, such as those guaranteed in a constitutional bill of rights. The balance of powers is a more practical doctrine where the competition between authorities is exactly what limits their individual influence.⁴⁵ An example of this can be seen in the American legal system where the President, representing the executive limb of the government, can veto legislation put forward by Congress, the legislature. Then, in turn, Congress can overrule the “veto” through a two thirds majority.⁴⁶

Both of these doctrines are present in the law of the Netherlands, however it is the influence of the balance of power that the Court is alluding to in *Urgenda* when it describes Dutch law as not having a “full separation of state powers”.⁴⁷ Each power has its own tasks and

⁴¹ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.86] and [4.94]-[4.102].

⁴² Taekema and others *Understanding Dutch Law*, above n 13, at 83.

⁴³ At 83.

⁴⁴ At 84.

⁴⁵ At 85.

⁴⁶ At 84.

⁴⁷ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.95].

responsibilities, the courts' is to settle legal disputes. The judiciary must fulfil this responsibility in order to comply with the rule of law, and can do so even when one of the parties is a political body.⁴⁸ It is the influence of the doctrine of the balance of powers that softens the harsh line taken in the separation of powers so that the judiciary can use its own power to limit the individual influence of the executive. This being said, the functions of each power are still separate and therefore the courts must show restraint so as not to enter the political domain and undertake the tasks and responsibilities of the executive.⁴⁹ The Court in *Urgenda* was mindful of this and abstained from ordering specific legislation or requiring a standard of care higher than the absolute minimum required by the law.⁵⁰

In New Zealand the balance of powers operates differently with the executive and the legislature sharing a close relationship that benefits from substantially more power than the judiciary due to the doctrine of parliamentary sovereignty. However, our separation of powers is not a complete one, which allows the blurring of lines in certain areas. This is particularly evident in the interrelations of the executive and legislature.⁵¹ In relation to judicial interference on matters of policy, where to draw the line of “too political for a court to consider” has not been provided for in any explicit manner. As such it is often left to the Judge’s sense of propriety in any given case, with the appellate system working to contain any overly bold decisions.⁵² This said, in the context of climate change the courts have shown a disposition to leave all decision making to Parliament as a policy consideration. In *West Coast Ent Inc v Buller Coal Ltd* (*West Coast v Buller*) the Supreme Court held that local councils cannot consider the effect on climate change of GHG emissions from activities when appraising such an activity for consent under the Resource Management Act 1991. There is only one exception to this, which is when the council is considering the advantages of a renewable energy development project.⁵³ This removal of local authorities’ ability to consider the negative effects of activities, such as mining, on climate change, along with the Court’s rejection of the cogent purposive approach described by the Chief Justice Dame Sian Elias in her dissent, indicates the courts’ disposition to leave any decisions of positive climate change mitigation to Parliament as a consideration of policy. Elias CJ’s dissent stipulated that terms of the Resource

⁴⁸ At [4.95].

⁴⁹ Taekema and others *Understanding Dutch Law*, above n 13, at 84-85.

⁵⁰ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.101].

⁵¹ Webb, Sanders and Scott *The New Zealand Legal System: Structures and Processes*, above n 39, at 124.

⁵² At 128-129.

⁵³ *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [172]-[173].

Management (Energy and Climate Change) Amendment Act 2004 only removed the possibility of local government contemplating activities' effects on climate change in relation to air discharge permits as opposed to all types of consent.⁵⁴ This can be seen as a signal of judicial intent that in future decisions on climate change, where a legal remedy is seemingly available against the government, as in *Urgenda*, the issue of climate change mitigation would be too based in policy for a court to comfortably deal with. Therefore, the judiciary would likely take the position that holding the government responsible in situations such as *Urgenda* would be to enter the political zone in breach of the separation of powers.

3. JUDICIAL DISCRETION AND NOVEL CIRCUMSTANCES

Following on from the alternate method of handling the separation of powers, the judiciary in the Netherlands also has a wide discretion when applying the law, particularly in novel situations, when compared with the New Zealand judiciary.⁵⁵ This is partly due to the nature of codified law, as it will have to be adapted when circumstances previously not in the minds of the legislators arise. This issue was acknowledged by the writers of the Dutch Civil Code and as a result there are many general clauses that leave the application of law in specific situations open to the courts' discretion.⁵⁶ This allows judicial flexibility in individual cases that are not directly catered to by the Code.⁵⁷

The second part to this alternative perspective is due to the predominance the principle of good faith has in Dutch law.⁵⁸ In practice, Book 6, Article 2 of the Dutch Civil Code, the good faith clause, allows the Courts to depart from any legislation if, in the individual circumstances, adhering strictly to it would create an overtly unjust situation.⁵⁹ In addition to this, there is no "binding precedent rule" in Dutch law, therefore, while judges must consider the rulings of higher courts, how they do so it is left to their discretion.⁶⁰

⁵⁴ At [4], [69] and [85]; Nathan Jon Ross "Climate Change and the Resource Management Act 1991: A Critique of *West Coast ENT Inc v Buller Coal Ltd*" (2015) 46 VUWLR 1111 at 1113.

⁵⁵ Arthur S Hartkamp "Judicial Discretion Under the New Civil Code of the Netherlands" (1992) 40 Am J Comp L 551 at 568.

⁵⁶ At 568.

⁵⁷ At 569.

⁵⁸ At 556-7; Dutch Civil Code, Book 6 Article 2.

⁵⁹ Hartkamp "Judicial Discretion Under the New Civil Code of the Netherlands", above n 55, at 556 and 557.

⁶⁰ Taekema and others *Understanding Dutch Law*, above n 13, at 68.

These factors combine to give the Dutch judiciary, particularly in novel situations, a large discretion to act in the manner they deem fair and reasonable. This contrasts with the common law system in New Zealand whereby the courts apply legislation to novel situations using either the literal meaning of the text or by considering the purpose of Parliament when the Act was drafted. For guidance in this there is often a purpose section included in Acts. Then, in later cases, judges are bound by the precedent of that decision if it was made by a superior court. In this manner, the common law is designed to develop incrementally, slowly developing to meet new situations and never making great leaps of reasoning, which are instead left to those democratically elected in Parliament.⁶¹

This affords the New Zealand judiciary less discretion than its counterpart in the Netherlands when ruling on novel claims such as the one brought in *Urgenda*. There is room for the Dutch courts to interpret widely general clauses in the Dutch Civil Code, such as the unwritten standard of care in *Urgenda*. Whereas the New Zealand courts are bound by any specific relevant legislation, or are limited to incrementally advancing the common law.

4. A RIGHT TO A HABITABLE AND PROTECTED ENVIRONMENT

New Zealand does not have a right to a protected or habitable environment or indeed any right comparable to Article 21 of the Dutch constitution. Again this is not fatal to a claim as Article 21 was held not to grant a legal obligation that *Urgenda* could use to sustain their action. However Article 21 does create a duty of care that the State of the Netherlands owes to its citizens. While the manner in which this duty is fulfilled is left to the discretion of the State, therefore removing the possibility of a legal obligation, it does produce context in which the Dutch State is viewed as a protector of both the Dutch people and the environment within the Netherlands.⁶²

5. A DIFFERENT APPROACH TO STATE AND SOVEREIGN POWER

This leads to the overriding reason a case like *Urgenda* is unlikely to succeed in New Zealand, which is the different ways that the Crown is perceived in each country. The sovereign in the

⁶¹ Richard Scragg *New Zealand's Legal System: The Principles of Legal Method* (Oxford University Press, Melbourne, 2005) at 24, 42 and 43.

⁶² *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.52].

Netherlands is seen as an almost maternal entity with a positive obligation to protect its people. Whereas the sovereign in New Zealand is viewed as a powerful authority that needs to be continually shackled to prevent it from encroaching on the rights of its citizens. These different perspectives explain why the Dutch have protective rights such as the Article 21 of the Dutch Constitution. It means that when the Dutch people are aggrieved, as in cases such as *Urgenda*, there are legal means to ensure adequate protection is restored. It also explains why, in New Zealand, it is unlikely that the responsibility to protect New Zealanders from a force other than the Crown, such as climate change, can be legally attributed to the State.

In the Netherlands, the Dutch monarch has very little effective power and operates entirely under ministerial responsibility.⁶³ Contrastingly, but for convention, Queen Elizabeth II could exercise a vast degree of power in New Zealand.⁶⁴ This demonstrates the core divide in constitutional tradition that limits the ability to hold the State of New Zealand responsible in a case like *Urgenda*. Of the two constitutional monarchies, the Dutch have a placated, protective sovereign, while New Zealand has an individual, detached sovereign that represents its own interests and respects the operation of the liberal free market so that the New Zealand people can support themselves.

The reasons for this Dutch approach to sovereign power can be taken from their constitutional history.⁶⁵ The first instance of this was when, after gaining independence from the Spanish monarchy in the 80 years' war, the Dutch state became the Republic of the Seven United Provinces.⁶⁶ During this time there was no monarch, only *Stadhouders* who acted as executive functionaries, and very little centralisation due to the semi-independent nature of the seven provinces.⁶⁷ There was a large amount of religious tolerance and freedom of expression compared to the rest of Europe and the army was kept under close control, being denied political power.⁶⁸ Additionally, the cities were run pragmatically by an elite class of merchants, rather than on a principled basis by professional politicians.⁶⁹

⁶³ Taekema and others *Understanding Dutch Law*, above n 13, at 80.

⁶⁴ Webb, Sanders and Scott *The New Zealand Legal System: Structures and Processes*, above n 39, at 116-117..

⁶⁵ Taekema and others *Understanding Dutch Law*, above n 13, at 79.

⁶⁶ At 43 and 79.

⁶⁷ At 80.

⁶⁸ At 79.

⁶⁹ At 80.

The influence of this structure can be seen in the modern day Netherlands and is part of what distinguishes it from New Zealand, whose own constitutional history is rooted in the absolute monarchies of medieval England.⁷⁰ When a monarch was introduced to the Netherlands in 1813 it was not predicated by hundreds of years of absolutist rulers and their abuses of power.⁷¹ Here, instead, there was a monarchy that had in its foundations the tight control of military powers that have since developed into a system of checks and balances to limit the institutional power of any one authoritative body above the rest. There was a political culture of compromise and rational thinking developed from a dominant merchant class and a system that emphasises human rights based on the religious tolerance and freedom of expression present in present in the 15th century. Even during this period where an absolute monarch did rule in the Netherlands, it was done so without the abuses of power and tyranny that were all too common to England during the middle ages.⁷²

In the 19th century, through the influence of the Napoleonic rule, the liberal ideals of universal human rights from the French and American Revolutions were realised in the first written Dutch Constitution.⁷³ This continued the trend of emphasising the protection of human rights in the Netherlands. In 1848 the Dutch Constitution was amended to introduce a parliamentary system of government, which significantly limited the power of the monarch. The system of an absolute monarchy, that had ruled since the defeat of Napoleon, became that of a constitutional monarchy.⁷⁴ Even including the rule of the Napoleonic Empire, the Netherlands was only ruled absolutely by a single person for a period of 42 years. Contrast this to England where the first King of Wessex, Egbert, began his rule in 827 and it was not until the Bill of Rights 1689, some 60 monarchs and 872 years later, that the absolute monarchs ceded and converted to a constitutional monarchy.⁷⁵

A period of dominant liberal ideals then commenced in the Netherlands that continued into the 20th century.⁷⁶ However during the 20th century social values began to influence the context in which liberal rights were seen.⁷⁷ The State began to take responsibility for liberal values to

⁷⁰ At 80.

⁷¹ Taekema and others *Understanding Dutch Law*, above n 13, at 80.

⁷² At 54.

⁷³ At 81.

⁷⁴ At 54 and 92.

⁷⁵ Ben Johnson "Kings and Queens of England and Britain" Historic UK <www.historic-uk.com>.

⁷⁶ Taekema and others *Understanding Dutch Law*, above n 13, at 81.

⁷⁷ At 96.

ensure the guarantee of fundamental rights. This culminated in the 1981 amendment to the Dutch Constitution where a number of social rights were incorporated, including the right to a protected and habitable environment in Article 21. However, the inclusion of these rights was no more than a continued development of a maternally perceived sovereign, as opposed to a comprehensive proclamation of unqualified rights. The wording of each right included indicates the State should strive to fulfil the right's parameters by creating laws and policies with it in mind. However, the State should not be liable on the sole basis of these rights should they not be comprehensively fulfilled.⁷⁸ They are “declarations of intent rather than enforceable individual rights” as can be seen with the discussion of Article 21 in *Urgenda*.⁷⁹ This represents a shift of the Netherlands as a liberal state, towards becoming a welfare state and the social rights included in the Constitution demonstrate the areas in which State intervention is intended.⁸⁰

These three main factors; the republican roots of the Netherlands, the relatively short period spent under the rule of an absolute monarchy, and the beginnings of a shift towards a welfare state, are in stark contrast with England's, and therefore New Zealand's, development of sovereignty. The history of absolutist monarchs acting on behalf of their own interests ties neatly together with the liberal ideas of the free market and individuals paving their own way without state intervention in the “private zone”. The private zone describes what classical liberals view as the area that should be free from State interference. It pronounces the division of the public, political realms from the private and economic.⁸¹ The cumulative effect of this is that the State in New Zealand does not take responsibility for individual social rights in the same way that the Dutch State does. Constitutional tradition does not deem it to have a positive obligation to protect its people. This explains why the tools used by *Urgenda* in *Urgenda*, such as an unwritten duty of care owed to society or an environmental protection right, are not present in the law of New Zealand.

⁷⁸ At 96.

⁷⁹ At 96; *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.36].

⁸⁰ Taekema and others *Understanding Dutch Law*, above n 13, at 97.

⁸¹ John B Thompson *Ideology and Modern Culture: critical social theory in the era of mass communication* (Stanford University Press, California, 1990) at 238-241.

CHAPTER THREE:
Climate Change Litigation in the United States of America:
The Public Trust Doctrine

I. A LANDMARK CASE IN AMERICA

Following the success of *Urgenda*, an organisation called Our Children’s Trust (OCT), on behalf of 21 individuals between the ages of eight and 19, has commenced their own climate change litigation against the United States of America (US).⁸² In addition to the US, a number of organisations representing the fossil fuel industry also act as defendants after successfully intervening the action.⁸³

The US government, along with the fossil fuel industry, brought a motion to dismiss OCT’s claims in the preliminary hearing *Our Children’s Trust*. After examination, the motion to dismiss was rejected as a result of the promising nature of the claims requiring a “further development of the record” before a final decision could be reached.⁸⁴

2. OUR CHILDREN’S TRUST’S CLAIMS

In order to evaluate the motion to dismiss, the Court considered each of the plaintiffs’ claims in turn. These were that the defendants’ infringed their right to life and liberty in violation of their substantive due process rights and denied them the same protection afforded to previous generations by favouring the short term economic interest of certain citizens contravening their equal protection rights within the Fifth Amendment to the US Constitution.⁸⁵ The Fifth Amendment is known as a due process clause and states that no one shall, “be deprived of life, liberty, or property, without due process of law”.⁸⁶ They further claimed that the defendants’ impeached their right to a stable climate and an ocean and atmosphere free from hazardous levels of carbon dioxide, an implicit right within the Ninth Amendment. The Ninth Amendment

⁸² *Our Children’s Trust*, above n 2, at 1.

⁸³ *Kelsey Cascade Rose Juliana; et al., v The United States of America; et al.*, [2016] Case 6:15-cv-01517-TC at 9-10 [*Intervention Case*].

⁸⁴ *Our Children’s Trust*, above n 2, at 23.

⁸⁵ At 2.

⁸⁶ United States Constitution Amendment V.

states that, “the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”.⁸⁷ Finally, they claimed a breach of the public trust doctrine (PTD) by denying future generations essential natural resources.⁸⁸

3. ISSUES OF STANDING

For their claim to be successful OCT had to demonstrate their standing by fulfilling three requirements: that they had suffered an injury; that the injury could be linked to the defendants’ conduct; and that there was a substantial likelihood the injury will be remedied by a favourable decision.⁸⁹

These requirements were satisfied. The suggested injury was excessive and persisting carbon dioxide in the atmosphere that would negatively impact on future generations.⁹⁰ The causal link to the defendants’ actions came via the government’s ability to regulate, and therefore control, the carbon dioxide emissions.⁹¹ The Court, citing *Urgenda*, also understood that the global nature of climate change meant reducing emissions in the US, along with already occurring global reductions, may lead to a sufficient redress of the alleged harms.⁹²

The counter issue to standing was whether the claims were too political for the courts to consider.⁹³ The Court here was content that, instead of ordering specific legislation, they could direct the authorities to reach the appropriate standards as they saw fit. Therefore the claims were not dismissed as non-justiciable due to political nature, however, with the caveat that it was too early in proceedings to determine whether a ruling in favour of OCT would prove disrespectful to the executive branch of government.⁹⁴

⁸⁷ United States Constitution Amendment IX.

⁸⁸ *Our Children’s Trust*, above n 2, at 2.

⁸⁹ At 4 and 11.

⁹⁰ At 5.

⁹¹ At 10.

⁹² At 11 and 12.

⁹³ At 13.

⁹⁴ At 14.

4. CONSTITUTIONAL CLAIMS

The defendants argued, in relation to OCT's constitutional claims, that a constitutional right to be free from carbon dioxide emissions did not exist, that no appropriate classification for an equal protection claim was put forward and that there were no substantial rights arguable under the Ninth Amendment. Therefore, plaintiffs' claims should be dismissed as they had no basis.⁹⁵

The Court describes this as an overly simplistic view of the claims. Instead of arguing a constitutional right to be free from carbon dioxide emissions, the plaintiffs claim that government actions in regard to carbon dioxide emissions have violated their substantive due process rights in favour of older generations' economic interests.⁹⁶ The principle of "substantive due process" asks whether a government action that deprives individuals of the right to life, liberty or property is justifiable, with conduct that "shocks the conscience" violating it.⁹⁷ While this is normally only applicable in limiting the government's ability to act, rather than preventing a general harm, there is an exception where the danger is created by the government and they display deliberate indifference to it. This is precisely what OCT argue that the US government has done by ignoring the "overwhelming" scientific evidence for climate change after generating excessive carbon dioxide emission via their regulations.⁹⁸

The Court held that this argument the plaintiffs allege, of a government action that creates the threat of an imminent harm and their subsequent deliberate indifference to it, is enough to reject the motion to dismiss. The question of whether their conduct "shocks the conscience" will be decided later in the proceeding.⁹⁹

5. THE PUBLIC TRUST DOCTRINE

The PTD refers to the idea that certain natural resources are owned in common by all citizens and that the governing bodies hold these natural resources on trust for them.¹⁰⁰ Therefore any

⁹⁵ At 15.

⁹⁶ At 15.

⁹⁷ Erwin Chemerinsky "Substantive Due Process" (1999) 15 *Touro L Rev* 1501 at 1501; *Our Children's Trust*, above n 2, at 15.

⁹⁸ At 16.

⁹⁹ At 17.

¹⁰⁰ Nicola Hulley "The public trust doctrine in New Zealand" (2015) *RMJ* 31 at 31.

given State must manage the resources sustainably so as to meet the fiduciary duties of being a trustee.¹⁰¹ Regarding the PTD, the Court stated that the due process clause in the Fifth Amendment, that provides for substantive due process rights, also allows for a substantial right under the PTD.¹⁰² The current case was distinguished from past cases, where causes of action under the PTD were rejected, as the relevant natural resources in the current case, the ocean and atmosphere, have not been transferred to the ownership of an individual state, which in this case would have been Oregon.¹⁰³

The PTD's relevance to the current case comes from the US' alleged actions producing the purported rise in sea level, ocean acidification and atmospheric change.¹⁰⁴ Precedent has been set in restricting the US government's actions on tidelands via the PTD, while the Department of the Interior has suggested the same could apply for the sea.¹⁰⁵ In addition to this, the Court did not believe the government would be able to privatise areas of its territorial seas without breaching core principles of the Constitution.¹⁰⁶ As a result, the Court could not state that the PTD does not allow for at least some substantial due process protections for the plaintiffs. Therefore the motion to dismiss was rejected.¹⁰⁷

¹⁰¹ At 31.

¹⁰² *Our Children's Trust*, above n 2, at 17.

¹⁰³ At 18.

¹⁰⁴ At 20.

¹⁰⁵ At 21 and 22.

¹⁰⁶ At 23.

¹⁰⁷ At 23.

CHAPTER FOUR:
***Our Children's Trust* and the Public Trust Doctrine in New Zealand:**
A Less Promising Outlook

For *Our Children's Trust* to be relevant to New Zealand the claims made must be investigated as to whether they would be successful in a New Zealand context. If their success appears unlikely then the reasoning of why this is, is crucial to determine what is restricting climate change litigation in New Zealand. Then, following that determination, it can be considered what would need to change in order for successful climate change litigation to become possible and whether the current climate change predicament merits such change.

I. CLAIMS BASED IN THE NINTH AMENDMENT

The Ninth Amendment states that, “the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”.¹⁰⁸ This has been interpreted to mean that there are fundamental rights found in “tradition” and the “conscience of the people” that cannot be breached simply due to their lack of inclusion in the US constitution. It is the courts’ duty to decide if the right in question is so engrained that breaching it would infringe upon the “fundamental principles of liberty and justice”.¹⁰⁹ It is from here that OCT claim the right to a stable climate and an ocean and atmosphere free from hazardous levels of carbon dioxide.¹¹⁰

Whether this argument succeeds in the US will be decided as the case progresses, however it is clear that such a claim would be unlikely to succeed in New Zealand. This is a result of our comparable provision, s 28 of the New Zealand Bill of Rights Act 1990 (NZBORA), referring only to “existing rights” derived from the likes of other legislation, the common law, or international human rights law and not fundamental principles found within the traditions and conscience of New Zealand. In short, NZBORA, s 28 does not provide for the finding of rights

¹⁰⁸ United States Constitution Amendment IX.

¹⁰⁹ Thomas R Vickerman “The Ninth Amendment” 11 SCLR 172 at 174.

¹¹⁰ *Our Children's Trust*, above n 2, at 2.

in the manner claimed by OCT, instead it protects rights clearly sourced in tangible locations other than the NZBORA.¹¹¹

It is also notable that the Ninth Amendment is part of an entrenched constitution, giving it a higher status than other legislation and therefore greater protection for the rights implied within it.¹¹² In contrast the NZBORA is deferential in power to the properly enacted legislation of New Zealand meaning that if such a right, as claimed by OCT, could be derived from s 28, then it would be subject to any legislation enacted on the issue.¹¹³

2. CLAIMS BASED IN THE FIFTH AMENDMENT

The Fifth Amendment states, in what is known as a due process clause, that no one shall “be deprived of life, liberty, or property, without due process of law”.¹¹⁴ This principle of substantive due process limits government action where it deprives the right to life, liberty or property in a manner that “shocks the conscience”.¹¹⁵ Implicit within the Fifth Amendment due process clause is also the substance of the Fourteenth Amendment equal protection clause, however here it is applicable to the federal government as opposed to merely state or local government. This provides that every individual should receive the same protection before the law.¹¹⁶ It was under these two facets of the Fifth Amendment that OCT based their claim that government action in regard to carbon dioxide emissions had violated their substantive due process rights in favour of older generations’ short term economic interests.¹¹⁷

Whether this argument is successful in the US remains to be seen, however such a claim has the possibility to be successful in New Zealand although it remains unlikely. Section 8 NZBORA provides that “no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles fundamental justice”.¹¹⁸ It is therefore conceivable that you could use this to claim that a government action in relation to climate

¹¹¹ Lorraine Smith and Barbara Hunt “Is moral involuntariness an element of fundamental justice?” (2016) NZLJ 196 at 199; *Akulue v R* [2013] NZSC 88.

¹¹² “The Constitution” The White House <www.whitehouse.gov>.

¹¹³ Webb, Sanders and Scott *The New Zealand Legal System: Structures and Processes*, above n 39, at 167.

¹¹⁴ United States Constitution Amendment V.

¹¹⁵ United States Constitution Amendment V; *Our Children’s Trust*, above n 2, at 15.

¹¹⁶ *Bolling v Sharpe* 347 US 497 (1954) at 498-499.

¹¹⁷ *Our Children’s Trust*, above n 2, at 2.

¹¹⁸ New Zealand Bill of Rights Act 1990, s 8.

change had breached your right to life. In such a scenario, a decision such as that in *West Coast v Buller*, which allows for the escalation and continuation of climate change, would represent the “government action” threatening your life. Following the Supreme Court decision in *West Coast v Buller*, s 6 NZBORA, which provides that enactments should be interpreted consistently with the NZBORA wherever possible, could be used to show that the RMA should have been interpreted consistently with the right to life under s 8 NZBORA.¹¹⁹ Therefore, Elias CJ’s dissent in *West Coast v Buller* would represent the appropriate interpretation. In her dissent she stated that consent authorities were only barred from considering GHG emissions in cases that involved air discharge permits under the Resource Management (Energy and Climate Change) Amendment Act 2004 and that examination of GHG effects on climate change remained authorised in all other “planning and consent processes”.¹²⁰

However, such an argument is unlikely to succeed as s 8 of the NZBORA has never been interpreted so broadly as to include such an indirect threat to life as allowing the continuation and escalation of climate change through the regulation, or lack thereof, of GHG emissions. An analogy to this can be seen in *Lawson v Housing New Zealand* where it was held that s 8 will not be applicable unless there is a clear and unbroken connection between the omission of, or reduction in, services provided and the death of a person.¹²¹ Even if this broader interpretation was possible the claim is still unlikely to be successful. Going back to the example of *West Coast v Buller*, this is because the majority decision could be established as a reasonable limitation of the NZBORA that can be “demonstrably justified” under NZBORA, s 5.¹²² This would be a result of it otherwise interfering with the New Zealand Emissions Trading Scheme (ETS), affirmed in the Climate Change Response Act 2002 (CCRA), which has been designed to solely regulate GHG emissions in New Zealand.¹²³

Although, in such situations consideration should be given to the three stage test of proportionality set out in *Hansen v R* for judging whether a limitation of the NZBORA is demonstrably justifiable. This includes whether the limit is greater than reasonably necessary

¹¹⁹ *West Coast v Buller*, above n 53, at [172]-[173].

¹²⁰ New Zealand Bill of Rights Act 1990, ss 6 and 8; *West Coast v Buller*, above n 53, at [94]; Resource Management (Energy and Climate Change) Amendment Act 2004, ss 70A and 104E.

¹²¹ *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC) at 494.

¹²² New Zealand Bill of Rights Act 1990, s 5.

¹²³ Climate Change Response Act 2002, s 3(1)(b).

to meet the legislative objective.¹²⁴ Therefore this could result in a declaration that the Amendment Act in *West Coast v Buller* runs contrary to the NZBORA, if it was held that the objective of the CCRA, in regard of the ETS, can be fulfilled by a lesser limitation of the NZBORA.¹²⁵ However, before making such a decision the Court should have regard to the fact that the legislation was enacted by a democratically elected body and they therefore should not make a detailed investigation into whether there was a less limiting option available to Parliament out of a “margin of appreciation”.¹²⁶

Again the final limitation of this argument in New Zealand is that the NZBORA is not part of an entrenched constitution. Therefore, in circumstances where a Court did rule in favour of such a claim, there is nothing legally preventing Parliament from overruling that judgment through legislation.¹²⁷

3. THE SEPARATION OF POWERS

The Court in *Our Children’s Trust* discusses the idea that making an order in favour of OCT’s claims could potentially be disrespectful to the executive branch of government and therefore the issue would be too political for the Court to consider.¹²⁸ The approach taken, that by ordering general standards to be met by the government but leaving the specific regulation to the legislature, is similar to that in *Urgenda*. Therefore, as discussed in chapter two, it seems unlikely a New Zealand Court would take the same approach given the lack of judicial activism in regard to climate change seen in *West Coast v Buller*.¹²⁹

¹²⁴ *Hansen v R* [2007] 3 NZLR 1, (2007) 23 CRNZ 104 (SC) at [104].

¹²⁵ *West Coast v Buller*, above n 53, at [172]-[173]; Climate Change Response Act 2002, s 3(1)(b); *Hansen v R*, above n 124, at [104].

¹²⁶ At [113]-[119]; *Mangawhai Ratepayers’ and Residents’ Association Inc v Kaipara District Council* [2014] NZHC 1147, [2014] 3 NZLR 85 at [96] and [97].

¹²⁷ Webb, Sanders and Scott *The New Zealand Legal System: Structures and Processes*, above n 39, at 167.

¹²⁸ *Our Children’s Trust*, above n 2, at 14.

¹²⁹ *West Coast v Buller*, above n 53, at [172]-[173].

4. THE PUBLIC TRUST DOCTRINE

The PTD poses an interesting question as it has never been discussed in a New Zealand context. While this does mean that the doctrine has no development within New Zealand, it does not necessarily mean the doctrine cannot be found within New Zealand law.¹³⁰

The PTD's origins lie in Roman civil law, whilst it can also be found in early English common law and, significantly, the Magna Carta.¹³¹ This gives it a constitutional base in New Zealand, albeit a somewhat tenuous one, via s 3 of the Imperial Laws Act 1988.¹³² New Zealand also has a shared legal foundation with a number of other jurisdictions that incorporate the PTD, which could therefore be drawn on. Most notably, in addition to the US, India has made strong commitments to the PTD, whilst Canada has laid out the foundations to recognise the doctrine.¹³³ In *British Columbia v Canadian Forest Products Ltd* the Supreme Court of Canada, in *obiter dictum*, stated that there are public rights in the environment held by the Crown on behalf of Canadian citizens.¹³⁴ The common resources described to come within these public rights included running water, air and the sea. In discussing these rights "rooted in the common law" the Court referred to scholarly articles on the PTD. They also cited US PTD cases, stating that they were all part of the common law.¹³⁵ This provides a basis through which New Zealand could find the PTD within the common law. There has also been a firm recognition of the doctrine in Sri Lanka and Kenya, which both share elements of the common law in their legal systems.¹³⁶

Arguments also arise for the PTD to be reintroduced in England and to be pioneered in Hong Kong.¹³⁷ In England the duty arises from the combination of the sovereign having the capacity to protect the resources and the necessity for those resources to be protected.¹³⁸ The argument against the PTD's reintroduction to England is that the issues it deals with, specifically in relation to climate change, are already addressed in legislation, such as the Climate Change

¹³⁰ Hulley "The public trust doctrine in New Zealand", above n 100, at 32.

¹³¹ Freedman and Shirley "England and the public trust doctrine" (2014) 8 JPL 839 at 841.

¹³² Imperial Laws Act 1988, s 3.

¹³³ Berry Fong Chung Hsu "A Public Trust Doctrine for Hong Kong" (2011) 15 NZJEL 89 at 103 and 104.

¹³⁴ At 107; *British Columbia v Canadian Forest Products Ltd* [2004] 2 SCR 74 at [12].

¹³⁵ Chung "A Public Trust Doctrine for Hong Kong", above n 133, at 107.

¹³⁶ At 103.

¹³⁷ Freedman and Shirley "England and the public trust doctrine", above n 131, at 847; Chung "A Public Trust Doctrine for Hong Kong", above n 133, at 90.

¹³⁸ Freedman and Shirley "England and the public trust doctrine", above n 131, at 839 and 847.

Act 2008. However, the counter to this is that this legislation is actually an attempt to fulfil the fiduciary duties arising in the PTD. However, the mere fact that the issue is legislated upon is not necessarily enough to fulfil those duties, certain standards would still need to be met.¹³⁹

On the other hand, the finding of the PTD in Hong Kong would be slightly more convoluted as it is not part of the historical law of the country.¹⁴⁰ Due to the nature of the Legislative Council in Hong Kong, who benefit from a similar concept to that of parliamentary supremacy in New Zealand, it would be necessary to find a “home” for the PTD within the constitution in order to impose a fiduciary duty on the government without the legislature having the ability to simply overrule it if they so desired.¹⁴¹ It is claimed this is found in the environmental protection provisions of Basic Law and the Chinese Constitution. Basic Law also includes within the law of Hong Kong common law from the colonial era, as long as it does not contradict the current Basic Law, and it is therefore a possible source in which to find the PTD.¹⁴² However, in order to find the PTD in this way it is necessary for the judiciary of Hong Kong to accept foreign common law precedents such as *British Columbia v Canadian Forest Products Ltd*, and US cases where the PTD has been formally recognised such as *Illinois Central Railroad Company v Illinois*, to describe the PTD as being “rooted in the common law”.¹⁴³ A similar method of finding the PTD could be realised in New Zealand, although, contrary to the situation in Hong Kong, even if a home for the PTD is found in New Zealand’s constitution, there is nothing to prevent Parliament from overruling it through legislation. It is also worth noting that the Magna Carta does not possess the same strength as a source for the recognition of the PTD within the constitution of New Zealand as the environmental protection provisions of the Chinese Constitution and Basic Law do in Hong Kong.¹⁴⁴ However, slight encouragement can be taken from the New Zealand judiciary’s willingness to consider cases involving the management of natural resources.¹⁴⁵

¹³⁹ At 845.

¹⁴⁰ Chung “A Public Trust Doctrine for Hong Kong”, above n 133, at 90.

¹⁴¹ At 99.

¹⁴² At 108.

¹⁴³ *British Columbia v Canadian Forest Products Ltd*, above n 134, at [12]; *Illinois Central Railroad Company v Illinois* 146 US 387 (1892) at 404; Chung “A Public Trust Doctrine for Hong Kong”, above n 133, at 108.

¹⁴⁴ At 109.

¹⁴⁵ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67; Hulley “The public trust doctrine in New Zealand”, above n 100, at 31.

However, there are arguments against the PTD in New Zealand. The most obvious of these refer to the lack of a solid constitutional basis and previous development. There would also undoubtedly be conflicts between the PTD and private property rights that would need to be resolved.¹⁴⁶ For instance, where the privatisation of natural resources, that runs contrary to the PTD, has occurred prior to the PTD's introduction. However, as stated in *Our Children's Trust*, this is unlikely to be an issue for resources that have never been privatised, such as the sea or atmosphere.¹⁴⁷ Finally, there is the claim that the doctrine is not needed as the Crown has already seized and protected New Zealand's essential natural resources through legislation.¹⁴⁸ However, this is rebuttable via the argument that this ownership and protection has always been a part of the fulfilment of duties under the dormant PTD.

While there are these arguments against it, the influence of the PTD's growing acceptance in other common law jurisdictions does allow for the possibility that it could be found in New Zealand. However, even if this is the case, it is highly unlikely to be in a climate change context. This is due to the sensitive circumstances surrounding the unprecedented idea of climate change litigation within New Zealand. Such a radical decision, making leaps on two fronts, would run contrary to incremental nature of the common law as well as the conservative attitude the Judiciary has thus far shown towards the issue of climate change. Although it is important to note that this is not a certainty.¹⁴⁹

¹⁴⁶ Chung "A Public Trust Doctrine for Hong Kong", above n 133, at 95.

¹⁴⁷ *Our Children's Trust*, above n 2, at 22-23.

¹⁴⁸ Freedman and Shirley "England and the public trust doctrine", above n 131, at 845.

¹⁴⁹ Scragg *New Zealand's Legal System: The Principles of Legal Method*, above n 61, at 24, 42 and 43.

CHAPTER FIVE:

Climate Change Litigation in New Zealand – The Limits of Judicial Review: *Thomson v The Minister for Climate Change Issues*

1. *THOMSON V THE MINISTER FOR CLIMATE CHANGE ISSUES*

Sarah Thomson, a recent graduate of the University of Waikato, began proceedings for the judicial review of decisions made by the Minister for Climate Change Issues (the Minister), previously Tim Groser and now Paula Bennett, in 2015.¹⁵⁰ In doing this she raised four causes of action, each of which the Minister has denied. The information below is limited to that which is publically available at this time, with the trial yet to begin.

(1) Failure to review the target following IPCC assessment report five

The first of causes of action was the failure of the Minister to review New Zealand’s GHG emission reduction target (the target) in accordance with s 225 of the Climate Change Response Act 2002 (CCRA).¹⁵¹ Under s 225 the Minister must review the target following the publication of an IPCC Assessment Report, which was not done so after the fifth assessment report was published in 2013 and 2014.¹⁵²

Thomson also claims under this first cause of action that, in the exercise of target setting power, the Minister was required , but failed , to meet New Zealand’s obligations under the UNFCCC.¹⁵³ This was due to s 3 of the CCRA outlining the purpose of the Act, which includes enabling “New Zealand to meets its international obligations” under the UNFCCC.¹⁵⁴ The UNFCCC provisions of note are Article 2, the object of the UNFCCC, to stabilize GHGs at a level that will prevent dangerous climate change, and Article 4, to implement, publish and update programmes in order to mitigate climate change through GHG emission reductions,

¹⁵⁰ Jamie Morton “Student sues Government over climate targets”, above n 3.

¹⁵¹ *Thomson v The Minister for Climate Change Issues* (10 November 2015) Statement of Claim (HC) at [91] [Statement of Claim]; Climate Change Response Act 2002, s 225.

¹⁵² Climate Change Response Act 2002, s 225; Working Groups I, II and III to the Fifth Assessment Report of the IPCC “Climate Change 2014: Synthesis Report”, above n 9.

¹⁵³ *Statement of Claim*, above n 151, at [88]-[91]; Climate Change Response Act 2002, s 3

¹⁵⁴ Section 3.

whilst also exhibiting New Zealand's leadership in climate change mitigation as an Annex 1 country. Additionally, Thomson argues that Article 3 should have been considered, which sets out principles to aid in meeting the convention objective. The first of these states that New Zealand, as a Party to the Convention, should protect the climate system for the benefit of current and future generations on an equitable basis and in accordance with their responsibility and capability. Other Article 3 principles state that full consideration should be given to the circumstances of developing nations and parties that bear a disproportionate burden under the Convention. A final principle states that precautionary measures should be taken to mitigate climate change.¹⁵⁵

Thomson claims that the amalgamation of these articles requires the Minister to set a target that, if adopted by all Annex 1 countries along with developing nations also implementing suitable targets, would stabilize GHGs at a level to prevent dangerous climate change.¹⁵⁶ In not doing so, Thomson claims, the Minister is in breach of s 225 of the CCRA. This is because the current target confirmed under the CCRA, a 50 per cent reduction in GHG emissions from 1990 levels by 2050 set in 2011, fails to meet this standard.¹⁵⁷

Under this first cause of action Thomson seeks a declaration that the Minister has breached s 225 of the CCRA by failing to review the target following the publication of the IPCC's fifth assessment report and by failing to set a new target that, if adopted by all Annex 1 countries with developing nations also implementing suitable targets, would stabilize GHGs at a level to prevent dangerous climate change. Additionally Thomson seeks an order obliging the Minister to set a target that would meet such standards.¹⁵⁸

The Minister's response, in her statement of defence, admits that she is required to act in accordance with the purpose of the CCRA when setting a target under the CCRA. This encompasses setting a target that allows New Zealand to meet its international obligations, such as those under the UNFCCC.¹⁵⁹ However, the Minister denies that there is any obligation to set

¹⁵⁵ *Statement of Claim*, above n 151, at [88]; United Nations Framework Convention on Climate Change 1771 UNTS 169 (opened for signature 4 June 1992, entered into force 21 March 1994), arts 2 and 4.

¹⁵⁶ *Statement of Claim*, above n 151, at [89]; United Nations Framework Convention on Climate Change, above n 155, art 2.

¹⁵⁷ *Statement of Claim*, above n 151, at [91].

¹⁵⁸ At [91].

¹⁵⁹ *Thomson v The Minister for Climate Change Issues* (17 December 2015) Statement of Defence (HC) at [88] [*Statement of Defence*].

a target that, if adopted by all other Annex 1 countries with developing countries also adopting suitable targets, would stabilize GHGs at a level to avoid dangerous climate change.¹⁶⁰ She also denies that there was a failure to review the target following the publication of IPCC assessment report five or to set a new target. This is because the target the Minister set, in accordance with the CCRA, was set under s 224 and therefore is not governed by the s 225 requirements.¹⁶¹

(2) *Failure to consider relevant factors when setting New Zealand's INDC*

Thomson's second cause of action arises from the Minister's failure to consider relevant factors in setting New Zealand's intended nationally determined contributions (INDC).¹⁶² INDCs contain information on UNFCCC Parties' strategies to mitigate climate change, including a target, and were to be declared prior to COP 21 by each Party so that an international agreement could be agreed on their basis.¹⁶³ The idea was that, following COP 21, Parties' INDCs become NDCs as countries ratify the Paris agreement.¹⁶⁴ NDCs, or nationally determined contributions, publically set out the contributions each Party has agreed to under the Paris agreement.¹⁶⁵

Thomson admits that the Minister did examine extensive economic modelling for the costs of reducing GHG emissions. However, she claims that the Minister, in setting New Zealand's INDC, did not have regard to the cost of dealing with climate change in a "business as usual scenario".¹⁶⁶ This would run contrary to Article 3 UNFCCC that requires "full consideration" of the circumstances of developing countries and parties that bear a disproportionate burden under the Convention.¹⁶⁷ Additionally, Thomson claims New Zealand's INDC is not enough to stabilize GHGs at a level that will prevent dangerous climate change according to the scientific consensus.¹⁶⁸ Since Thomson made her claim, New Zealand has confirmed its "provisional target" of reducing GHG emissions by 30 per cent below 2005 levels by 2030,

¹⁶⁰ At [89].

¹⁶¹ At [91].

¹⁶² *Statement of Claim*, above n 151, at [96]; "UNFCCC Opens Portal for Countries to Submit Climate Plans" (22 January 2015) UNFCCC Newsroom <newsroom.unfccc.int>.

¹⁶³ *Statement of Claim*, above n 151, at [78]-[87]; "UNFCCC Opens Portal for Countries to Submit Climate Plans", above n 162.

¹⁶⁴ "Interim NDC Registry Launched" (6 May 2016) UNFCCC Newsroom <newsroom.unfccc.int>.

¹⁶⁵ "Interim NDC Registry Launched", above n 164.

¹⁶⁶ *Statement of Claim*, above n 151, at [96].

¹⁶⁷ At [94] and [95].

¹⁶⁸ At [96].

which is equivalent to 11 per cent below 1990 levels, as its INDC and presented it at the 2015 COP 21 Paris Agreement. The agreement is due to be ratified by the end of the year at which stage it will become New Zealand's NDC.¹⁶⁹

Thomson seeks relief in the form of a declaration that the decision to set the INDC in its current form is *ultra vires*. She also seeks to have the decision quashed and remade by the Minister, taking into account all relevant considerations.¹⁷⁰

The Minister responds to this by stating that a “business as usual scenario” was not modelled as any negative effects felt by New Zealand from climate change depend on the GHG emissions of the whole world and therefore such a model would be worthlessly uncertain. She also states that there was no legal obligation to run such a model.¹⁷¹ Following from this, the Minister denies that there is a scientific consensus on the required level New Zealand's INDC needs to be in order to prevent dangerous climate change. Instead she states that INDCs are specifically “nationally determined” as, in addition to climate science, there are social, political and economic factors specific to different Party regions that have to be accounted for.¹⁷²

The Minister further denies the claim that she failed to fully consider the circumstances of developing Parties and Parties that bear a disproportionate burden, referring to UNFCCC Article 3 for its full terms and effects. Finally she notes that the obligation of the Parties in regard to INDCs was merely limited to an invitation to communicate an INDC, with the goal of fulfilling the purpose of the UNFCCC, well before the commencement of COP 21 that represented “a progression beyond the current undertaking of that Party”.¹⁷³

(3) *An irrational INDC decision*

In a third cause of action, Thomson claims that scientific consensus demonstrates New Zealand's INDC, if adopted by all other Annex one countries with developing countries also adopting suitable targets, would not adequately stabilize GHGs at a level to avoid dangerous

¹⁶⁹ “New Zealand to ratify Paris agreement this year” (17 August 2016) Beehive <www.beehive.govt.nz>.

¹⁷⁰ *Statement of Claim*, above n 151, at [96].

¹⁷¹ *Statement of Defence*, above n 159, at [93.1]-[93.3].

¹⁷² At [96].

¹⁷³ At [96]; UNFCCC “Report of the Conference of the Parties on its nineteenth session” (11 November 2013), Decision 1/CP.19 at 3.

climate change. She therefore claims that the Minister's decision to set the INDC target in such a way was completely unreasonable. Consequently, Thomson seeks a declaration that the INDC decision was unlawful and further orders quashing the decision and ordering it to be remade.¹⁷⁴

In response the Minister denies the claim, reiterating her response from the second cause of action in regard to the Parties' obligation in regard to INDCs and a scientific consensus regarding New Zealand's INDC. In doing so she emphasises that INDCs are nationally determined and that there was no expectation for other Parties to adopt New Zealand's INDC. Nor, in fact, was any Party's INDC adopted by other Parties at COP 21 in December 2015.¹⁷⁵

(4) *A lawful INDC decision*

Finally, Thomson claims that there is only one way to set the INDC lawfully. This is to establish the target at a level that, if adopted by all other Annex 1 countries along with developing countries setting appropriate targets, would stabilize GHGs at a level to prevent dangerous climate change. Thomson therefore seeks a *mandamus* order for the Minister to remake the INDC decision accordingly.¹⁷⁶

Again, in response, the Minister refers to her refutations of the second and third causes of action presented by Thomson.¹⁷⁷

2. THE QUESTION OF STANDING

The first issue to arise as to Thomson's claims is whether or not she has standing. It could be arguable that Thompson is not significantly connected to the decisions made by the Minister to bring the case. This could in fact be a potential bar for anyone trying to judicially review climate change related decisions in New Zealand, despite the fact that a "liberalising trend" in relation to standing has emerged in New Zealand.¹⁷⁸

¹⁷⁴ *Statement of Claim*, above n 151, at [97].

¹⁷⁵ *Statement of Defence*, above n 159, at [97]; "What Was COP21?" COP21 <www.cop21.gouv.fr/en>.

¹⁷⁶ *Statement of Claim*, above n 151, at [98].

¹⁷⁷ *Statement of Defence*, above n 159, at [98].

¹⁷⁸ *Great Christchurch Buildings Trust v Church Property Trustees* [2013] 2 NZLR 230 (HC) at [69].

This trend has developed to mean that public law issues, that affect New Zealand's reputation overseas on highly significant issues, can receive standing even if the individual bringing the action can only claim a weak link of association to the decision.¹⁷⁹ This is especially so where there is no one else available to bring the claim.¹⁸⁰

In Thomson's case, the only connection distinguishing her from everyone else in New Zealand in regard to the INDC and GHG emissions target decisions is the potential for climate change to negatively affect her to a greater degree than others as she is a member of a younger generation.¹⁸¹ However, as she will be directly affected by climate change if nothing is done to prevent it, and because climate change mitigation is a highly significant issue that will effect New Zealand's reputation overseas, as well as the circumstance that if she is barred from bringing the action there will be no one with stronger standing available to bring such a case, it seems likely that she would be granted sufficient standing to bring her case.

3. REVIEW OF THE INDC

INDCs are Parties' intended strategies to mitigate climate change and were to be declared prior to COP 21 so that an international agreement could be reached.¹⁸² If the object of review, here the INDC, is simply an exercise of prerogative power by the executive in their negotiation of an international agreement, such as the Paris Agreement, then it will likely be held as non-justiciable due to its political nature. This is because it would not be "susceptible of determination by any legal yardstick".¹⁸³

However, it appears that the setting of New Zealand's INDC is performed by the Minister under the power granted in s 224(2) of the CCRA.¹⁸⁴ Section 224(2) states the Minister may set a target, or amend or revoke an existing target, at any time.¹⁸⁵ Despite this, it still seems highly unlikely a court would be comfortable in dealing with the issues Thomson raises with regard to the INDC. To start with, this is because the INDC is a "provisional target" for the purpose

¹⁷⁹ *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) at 11.

¹⁸⁰ *Great Christchurch Buildings*, above n 178, at [79].

¹⁸¹ *Our Children's Trust*, above n 2, at 5.

¹⁸² UNFCCC "Intended Nationally Determined Contributions (INDCs)" <unfccc.int>.

¹⁸³ *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [28].

¹⁸⁴ Climate Change Response Act 2002, s 224(2).

¹⁸⁵ Section 224(2)

of negotiating an international agreement and does not become a full target until the Paris Agreement is ratified by Parliament, at which stage it would have the authority of Parliament and not be amenable to judicial review.¹⁸⁶ Therefore this is a review of a provincial target only and a court may be wary of the fact that it could still be subject to change.

Secondly the INDC is concerned with matters pertaining to the whole of New Zealand, which courts are far less comfortable with than cases involving the rights and circumstances of individuals.¹⁸⁷ Additionally, difficulties in climate change claims arise in the review of discretionary decisions, such as setting the INDC under s 224(2), as a court must consider the nature and subject matter of the decision, as well as the constitutional role of the decision maker.¹⁸⁸ In that consideration, the higher the policy content is, the less likely a court is to review it.¹⁸⁹ This is because it is not the courts' job to determine what is and is not in the national interest.¹⁹⁰ Here, with the setting of an emissions target for New Zealand, the policy content is extremely high.

Finally, any claim that the INDC is irrational or unreasonable is unlikely to succeed due to the very high standard set in *Associated Provincial Picture Houses v Wednesbury Corporation*. There it was stated that a decision must be so unreasonable that no reasonable authority could have come to it, for it to be classed as irrational.¹⁹¹ In this context such a standard might be met if the Minister decided that no GHG emissions targets should be set.¹⁹² However short of that it is highly unlikely a claim on the grounds of unreasonableness would succeed.

4. THE LIMITED POTENTIAL FOR SUCCESS WITH JUDICIAL REVIEW

The issue with Thomson's approach to climate litigation in her first cause of action is not with the likelihood of success or failure of her argument. Instead it is the substance of judicial review in New Zealand that poses the greatest problem. Judicial review is the readily available tool in New Zealand to challenge decisions made by those in positions of authority when it is thought

¹⁸⁶ Ministry for the Environment "New Zealand's 2030 climate change target" <www.mfe.govt.nz>.

¹⁸⁷ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 178.

¹⁸⁸ At 197-198.

¹⁸⁹ At 198.

¹⁹⁰ At 181.

¹⁹¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 233.

¹⁹² Incidentally such an action would also likely be grounds for illegality under s 224(1) of the CCRA.

those decisions are illegal, entirely unreasonable or made without procedural propriety.¹⁹³ However, even in a case where a court finds a claimant successful, it is understood that the Court's task is only to rule on the legality of the decision, based on the process in which the decision is made, and not on the merits of the decision.¹⁹⁴ At no stage can a Court substitute its own decision in place of the decision maker's.¹⁹⁵ This is reflected in the limited remedies available in a judicial review case; an order for *certiorari*, an order for *mandamus*, an order for prohibition, injunction and declaration.¹⁹⁶

Orders for *certiorari* and *mandamus* quash the previous decision and order it be remade, while an order of prohibition acts in a prospective manner, deeming that a forthcoming decision maker does not have the required authority to make a given decision. An injunction halts the progress of an ongoing decision and a declaration condemns a decision, putting pressure on the decision maker to rectify it but offering no legal obligation to do so. However, declarations are legally binding, so you cannot act contrary to one. There is nothing amongst these remedies to stop the original conclusion from being reached a second time, as long as the decision is remade following the correct procedure, having account for the necessary considerations. In the case of *Thomson* this means that a successful claim resulting in an order to reassess the target, due to the publication of IPCC assessment report five, could merely result in the Minister coming to the same decision following a reassessment.

The exception to this is an argument such as that, under the first cause of action, where the Minister breached s 225 of the CCRA by not setting a target that took into account the Articles of the UNFCCC. It was claimed this required a target to be set at a level that, if adopted by all Annex 1 countries along with developing nations implementing suitable targets, would stabilize GHGs at a concentration to prevent dangerous climate change.¹⁹⁷ This argument, if it were to succeed, would not allow the Minister to merely reset the target at the previous level as doing so would be *ultra vires*. However, this provides only a slim avenue for climate change litigation, given that the Minister's target would need to be held as outside the possible limits of power delegated to her by Parliament. This is especially pertinent in view of Parliament's ability to amend, or pass new, legislation as it sees necessary in response to any such ruling.

¹⁹³ Francis Cooke QC, *Judicial Review* (Wellington: New Zealand Law Society, 2012) at 1-14.

¹⁹⁴ *CREEDNZ*, above n 187, at 211.

¹⁹⁵ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [97].

¹⁹⁶ Judicature Amendment Act 1972, ss 4(1) and 4(5).

¹⁹⁷ *Statement of Claim*, above n 151, at [91].

A further limiting factor is that the remedies of judicial review are discretionary. Therefore, judges are not obligated to award them, even when the grounds for judicial review are *prima facie* met, if they can find an “extremely strong” reason not to do so.¹⁹⁸

¹⁹⁸ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26 at [60]-[61].

CHAPTER SIX:
Climate Change Litigation in New Zealand:
Looking Forward

1. CURRENT OPTIONS IN NEW ZEALAND

An examination of *Urgenda* and *Our Children's Trust* make it apparent that there are limited options available to those attempting to bring climate change litigation in New Zealand. Primary among these options is judicial review, however, there are more creative options such as entities similar to the Whanganui River, which has been granted the status of a legal person under the Whanganui River Settlement, bringing an action for breaches of the NZBORA against itself, as a person but also part of the environment.¹⁹⁹ However such a possibility raises too many further questions to be addressed here.

2. A LIMITED PATH FOR CLIMATE CHANGE LITIGATION

The result of this is that in New Zealand even judicial review, the most likely avenue for success with climate change litigation, is highly restrictive in both the types of claims that can be brought and the remedies available. This is partially due to our not having a written constitution, which would give the courts a more direct method to constrain exercises of power by the other branches of government.²⁰⁰ It also stems from our view that the sovereign is not a protective agency for the people but rather an individual entity concerned with its own interests.

This is evident in the “residual freedom” that the State has to act in any way that is not restricted by positive law. The authority to act in this manner, much like a private citizen, derives from what has been termed the “third source” of law.²⁰¹ *Hamed v R* and *Lorigan v R* are clear examples of the third source being recognised in New Zealand by the Supreme Court and Court of Appeal respectively.²⁰² These cases show that the Police, as an agent of the Crown, have the

¹⁹⁹ Elaine C Hsiao “Whanganui Rive Agreement: Indigenous Rights and Rights of Nature” (2012) 42 EPL 371 at 371.

²⁰⁰ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria university Press, Wellington, 2016) at 20 and 21.

²⁰¹ BV Harris “Recent Judicial Recognition of the Third Source of Authority for Government Action” (2014) 26 NZULR 60 at 60.

²⁰² At 60 and 61; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [24].

ability to act in any way that is not prohibited by the law, pursuant to the third source.²⁰³ The capacity for the State to act in this manner allows it to operate in ways that benefit its own interests. This can be contrasted with a State that can only act in ways positively ascribed by law, a system that is designed so that the state acts only to benefit its people. It is the difference between an independent body, comparable to a private citizen, and a body designed for the purpose of benefiting its people. In New Zealand this has resulted from many years of rule by the absolute monarchs of England followed by eventual compromise between the monarch and the people allowing limitations to be placed on their power. That limitations were only imposed by compromise is distinct from the outright victory and building of a new system from the ground up, as with the US and their declaration of independence.²⁰⁴

The result of this is that the State in New Zealand does not take responsibility for individual social rights, such as a potential environmental protection right. Therefore, the ability to enforce such social rights through litigation, for instance climate change litigation, is severely limited compared to other jurisdictions. In the context of climate change however this could prove to be a serious problem as we might be approaching a time deemed ‘unthinkable’, where Parliament and the Executive are “unwilling or unable to protect fundamental rights” in the face of environmental catastrophe.²⁰⁵

3. A WRITTEN CONSTITUTION

The first, and perhaps most obvious, option to render climate change litigation more accessible in New Zealand is a constitutional overhaul in which we develop, in a single document, a written constitution that includes within it certain social rights. For instance, the right to an environment that is not harmful to health or wellbeing.²⁰⁶ While this may seem drastic, it would be in keeping with the global norm. Only two other nations, the United Kingdom and Israel, have the elusive, dispersed constitutional system present in New Zealand.²⁰⁷

²⁰³ Harris “Recent Judicial Recognition of the Third Source of Authority for Government Action”, above n 201, at 62.

²⁰⁴ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 13.

²⁰⁵ Lord Woolf *The Pursuit of Justice* (Oxford University Press, Oxford, 2008); Ceri Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?” (22nd July 2015) OUPblog <blog.oup.com>; *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.11].

²⁰⁶ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 69-70.

²⁰⁷ At 11.

Such a constitution has recently been recommended by Geoffrey Palmer and Andrew Butler in what they term, “Constitution Aotearoa”.²⁰⁸ The proposal is to make New Zealand’s constitution more accessible by collating it into one document to resolve the current “hodgepodge” of Parliamentary Acts, international treaties, executive orders, prerogative instruments, conventions and court decisions that currently form our constitution.²⁰⁹ However, the concept is not just to restate our current constitution in a single location but to actively improve it in various areas. This is due to our current constitution no longer catering to the present “realities” of modern day New Zealand. The context of climate change is merely one example of this.

Significantly for climate change litigation, as part of their improvements, Palmer and Butler plan the addition of certain rights to those that are currently affirmed, but not entrenched, in the existing New Zealand Bill of Rights Act 1990. These include property rights, a right to education and, crucially, environmental rights.²¹⁰ The proposed environmental right states:

105 Environmental rights

Everyone has the right—

- (a) to an environment that is not harmful to his or her health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) reduce pollution and ecological degradation:
 - (ii) promote conservation:
 - (iii) pursue ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

At the least this provides a contextual right, similar to Article 21 of the Dutch Constitution.²¹¹ However it seems to go further than this as it lacks the caveat of State discretion, as to the fulfilment of the right, contained within Article 21.²¹² Instead it appears to be a genuine

²⁰⁸ At 7.

²⁰⁹ At 9; Lynda Hagen “Towards a written constitution for New Zealand” (16 June 2016) New Zealand Law Society <www.lawsociety.or.nz>.

²¹⁰ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 18.

²¹¹ *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.36].

²¹² *Urgenda Foundation v The State of the Netherlands*, above n 1, at [4.36].

enforceable right that climate change litigation could be brought within. Such a right is essential to allow for legal enforceability of environmental protection²¹³

Constitution Aotearoa also proposes to develop New Zealand into a republic by replacing the Queen, and her proxy the Governor General, with a new Head of State.²¹⁴ This would represent a move away from the individual, self-interested State, toward a more protective and responsible State.²¹⁵ This not only allows for the included environmental rights discussed above, but also presents the possibility that the State will take even greater responsibility for the environment in the future, whether that be through the use of the proposed s 105 environmental rights to impose more burdensome legislative duties in specific situations such as climate change mitigation, the legislative recognition of the PTD, or some other means. However, it should be noted that the actual power of the new Head of State would remain almost identical to that of the current Governor General.²¹⁶

Reinforcing this point is the proposed constitution's curtailing of Parliament's ability to act in the State's own interests via an increase in the courts' ability to examine legislation and therefore discourage ministers from shaping the constitution for their own political convenience.²¹⁷ The proposed entrenchment of environmental rights in the constitution achieves this by greatly restricting the ability of the political arm in New Zealand to quickly, and without public response, amend or revoke such rights.²¹⁸ This is particularly significant given that practical sovereignty has, in recent history, been in the hands of the executive branch and therefore the desire to amend or revoke these types of rights can arise from a mere shift in the political climate.²¹⁹ The result of this is that the proposed environmental rights would convey "real rights and protections on the people" as opposed to "feel good" provisions that lack practical enforceability.²²⁰ However parliamentary sovereignty, and the democratic legitimacy it provides, is preserved by the 75 per cent special majority that can override any attempt by the courts to strike down legislation.²²¹

²¹³ BoHao (Steven) Li "Joining the Aotearoa New Zealand Constitutional Debate: Constitutional Environmental Rights in a Future Constitution" (2015) 21 CLJP/JDCP 109 at 112.

²¹⁴ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 19.

²¹⁵ Taekema and others *Understanding Dutch Law*, above n 13, at 79 and 80.

²¹⁶ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 19.

²¹⁷ At 21.

²¹⁸ At 13, 14 and 18.

²¹⁹ At 21.

²²⁰ At 16.

²²¹ At 20.

There will undoubtedly be fears raised regarding such a large constitutional overhaul. For instance, that the constitution will stagnate and lose touch with the reality of New Zealand over time due to the reduction of constitutional flexibility, or that entrenchment of the constitution will confer too much power to the non-democratically elected judiciary.²²² However, these fears can be somewhat allayed through careful consideration and public debate prior to its enactment. For example, Palmer and Butler have already included a mandatory reassessment of the constitution every 10 years and the special 75 per cent majority allowing Parliament to override constitutional rulings by the judiciary.

Although further objections will surely be raised, stand out amongst those protestations already discussed is that conveyed by the age old saying, “if it ain’t broke, don’t fix it”. The 2005 Constitutional Arrangements Select Committee embodied this view stating that they were worried the introduction of a written constitution would “unsettle the status quo”.²²³ However, this said, it is clear that the issues cannot be ignored forever.²²⁴ Accordingly, it is possible that the current context of climate change might bring about a certain pressure, to make the State more accessible, accountable and responsible, and increase the urgency for the type of constitutional reform presented by Palmer and Butler.

In 2005 the Constitutional Arrangements Select Committee described the likelihood of such reform actually occurring in the near future as slim, pointing to the lack of drive for change in either the general public or amongst the “constitutional elite”. In 2010 Harris reiterated this point although did state the need to begin discussing the issue. Fast-forward to 2016 and there is still no drive amongst the general public for constitutional reform, possibly a partial result of the inaccessibility of our current constitution leading to a general failure to understand or have any interest in constitutional matters.²²⁵ However, those legal professionals described as the “constitutional elite” are now beginning to show support for the idea. This is evident not

²²² BV Harris “Towards a Written Constitution?” in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Melbourne, 2010) at 99.

²²³ At 95.

²²⁴ At 99.

²²⁵ At 94-95.

just in Palmer and Butler’s proposal but in the support it has gained from institutions such as the New Zealand Law Society and New Zealand Law Foundation.²²⁶

4. BALANCING A CONSTITUTION

A second option available is one that does not display the same amount of certainty. Instead it eddies about in the murkier waters of parliamentary supremacy, the rule of law and the separation of powers. The idea is that, where the executive government along with Parliament have failed to provide “fundamental rights” in the face of environmental catastrophe, whether by conscious choice or otherwise, the courts should take up “the slack”. The aim of this is to re-establish a constitutional balance between the State and its people as required in the circumstances.²²⁷ This would entail a more accepting and expansive view of the *Rechtsstaat*, a constitutional concept where State power must be guided and constrained by the law to avoid injustice.²²⁸ A more expansive view of this would allow the Courts to develop a framework whereby things of societal value, in this case the environment, are sheltered from the exceptional circumstances, here climate change.²²⁹ At its most basic level this “taking up the slack” is a temporary warping of parliamentary supremacy and the separations of powers in extreme circumstances to allow the courts to come up with creative solutions that will require the protection of objects of societal value that are vulnerable in the given context.²³⁰

Each stage of this concept must be examined, for it raises a whole host of issues. This first of these is that of justifying a situation where the courts “take up the slack”. Is it possible to warrant a departure from parliamentary sovereignty in this way by claiming necessity of the circumstances, and a refusal or inability of the executive and legislative branches of government to protect fundamental rights? The first point to make is that the judiciary can be the catalyst for the change in a fundamental legal rule, so long as that change is accepted by

²²⁶ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200; Hagen “Towards a written constitution for New Zealand”, above n 222; The Law Foundation “Proposed constitution for NZ encourages public debate” (June 2016) <www.lawfoundation.org.nz>.

²²⁷ Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?”, above n 205.

²²⁸ Neil MacCormick *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) at 190; Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?”, above n 205; Sian Elias “Mapping the Constitutional” (2014) NZLR 1 at [26].

²²⁹ At [26].

²³⁰ Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?”, above n 205.

the other branches of government.²³¹ An example of this can be found in the English case *Macarthy Ltd v Smith* where the Court of Appeal preferred a section of European community law to that of a statute of Parliament, where a traditional view of parliamentary supremacy would not allow it.²³² *Macarthy* is an exhibition of how a “creative-minded judge, intent on constitutional reform, can achieve remarkable success without revolution”.²³³

With this in mind it seems churlish to suggest that there are no circumstances in which the courts can push the limits of parliamentary supremacy in order to change a fundamental legal rule.²³⁴ Therefore, it is less a question of justifying a move to push the boundaries of parliamentary supremacy and more a matter of weighing the risk that a change would not be accepted by the political branches of government. This is because a complete rejection of the judiciary’s ruling could create an invalidation of the courts’ effectiveness and power in the eyes of the public, therefore destabilizing the system of government.²³⁵ It thus seems possible that the courts could make such a law changing action in regard to climate change. However, it would still require the implicit assent of the political branches of government, albeit the pressure for them to accept would be far greater given the risks of not doing so, and therefore careful judicial thought must be given to “the readiness of the political climate for change”.²³⁶

Highly significant to this concept is the idea that the interference into law-making by the courts would be restoring a “constitutional equilibrium”.²³⁷ The basis of this is that not everyone has the same idea of what is important to society and, as a result, some of these objects of societal significance can be lost. In a State governed by the *Rechtsstaat*, also known as the “law-state”, the constitution is tasked with preventing these losses.²³⁸ As such it would be necessary for New Zealand to broaden its horizons with regard to the *Rechtsstaat* so that limits can be placed

²³¹ Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at 245; Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?”, above n 205.

²³² TRS Allan “Parliamentary Sovereignty: Lord Denning’s Dexterous Revolution” (1983) 3 OJLS 22 at 22-23; *Macarthy Ltd v Smith* [1979] 3 All ER 325, [1981] QB 180.

²³³ Allan “Parliamentary Sovereignty: Lord Denning’s Dexterous Revolution”, above n 232, at 33.

²³⁴ Lord Bingham “The Rule of Law and the Sovereignty of Parliament” (2008) 19 KJL 223 at 233; TRS Allan “Questions of legality and legitimacy: Form and substance in British constitutionalism” (2011) 9 ICON 155 at 155-156.

²³⁵ Goldsworthy *The Sovereignty of Parliament: History and Philosophy*, above n 231, at 245.

²³⁶ At 246; Allan “Parliamentary Sovereignty: Lord Denning’s Dexterous Revolution”, above n 232, at 33.

²³⁷ Warnock “The *Urgenda* decision: balanced constitutionalism in the face of climate change?”, above n 205.

²³⁸ McCormick *Institutions of Law: An Essay in Legal Theory*, above n 228, at 190; Elias “Mapping the Constitutional”, above n 228, at [26].

on State power to avoid these societal losses.²³⁹ However, even in a scenario where this is achieved, fears will still likely be raised as to the democratic legitimacy of the courts taking “up the slack” where they deem it necessary.

A further issue is raised in defining what is a “thing of societal value”. A high standard surely would need to be set in order to prevent an opening of the floodgates, where the courts are suddenly asked to create law on a regular basis, something New Zealand’s system of law is designed to prevent. On a similar tangent to this is the worry that even in a situation where an adequately high standard is set, over time small rational concessions will chip away at it, until, eventually, a situation is reached that would have been deemed untenable at the time of the original ruling.²⁴⁰

For a situation like this to occur it requires a high degree of judicial activism, which has not been present in New Zealand with regard to climate change.²⁴¹ It is possible that the influence of those such as Elias CJ, who are more open to judicial involvement in climate change matters, could facilitate further participation of the Supreme Court in the climate change discussion. However, there has been no indication that such an occurrence will take place. As it currently stands the majority of the Supreme Court seems more than happy to leave issues of climate change in the hands of Parliament and it seems unlikely that a drastic departure from this is on the horizon.²⁴²

This leads to a final issue. The nature of the courts’ power requires people to bring an action before they can exercise it. Therefore, for them to display the kind of activism described above in relation to climate change litigation, an appropriate case would need to be brought allowing them to advance the law in the manner discussed.²⁴³ A case of judicial review, such as Sarah Thomson’s, would not allow this due to the limitations in remedies available. As such, the courts would need to rely on a rights based action in climate change litigation being presented to them. The issue with this is that, as discussed previously, the likelihood of such an action succeeding is slim and therefore the chance of one being presented to a court, given the time

²³⁹ At [26].

²⁴⁰ Elias “Mapping the Constitutional”, above n 228, at [26].

²⁴¹ *West Coast v Buller*, above n 53, at [172]-[173].; Allan “Parliamentary Sovereignty: Lord Denning’s Dexterous Revolution”, above n 232, at 33.

²⁴² *West Coast v Buller*, above n 53, at [172]-[173].

²⁴³ CG Weeramantry *An Invitation to the Law* (Butterworths, Melbourne, 1982) at 182.

and money necessary to do so, is minimal. The result of this is that, while the courts may be unlikely to display the activism needed to act in the way discussed here, the reality is that it seems unlikely the opportunity for them to do so will arise.

5. THE NEED TO CONFRONT PARLIAMENTARY SOVEREIGNTY

The common factor between these two possible options is the need to confront parliamentary sovereignty. This is due to Parliament's, and therefore in practical terms the Executive's, seeming inability or unwillingness to act in a way capable of securing a future for New Zealand with the minimum possible negative climate change affects.²⁴⁴ As a result, without the type of measures discussed above, there are next to no options for a court to require them to act in this way and protect New Zealanders' "fundamental rights" or objects of societal value. This is due to the function of the judiciary under the separation of powers to apply the law and not create it.²⁴⁵

Finally, it is important to note that both of these options would still allow Parliament to overrule instances of successful climate change litigation, via legislation or a rejection of the given court's ruling. However, what is significant is that in both cases it will be far more difficult for Parliament to do this due to the required 75 per cent special majority needed to overrule entrenched legislation and the risks associated with rejecting a ruling of the courts.

²⁴⁴ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 200, at 21; Lord Woolf *The Pursuit of Justice*, above n 205; Warnock "The *Urgenda* decision: balanced constitutionalism in the face of climate change?", above n 205.

²⁴⁵ Scragg *New Zealand's Legal System: The Principles of Legal Method*, above n 61, at 41 and 42.

Concluding Remarks

Around the world climate change litigation is beginning to flourish as people look to secure their futures away from a potential environmental catastrophe. The case of *Urgenda* has gained global renown as the first instance of a Judge ordering a State to reduce their GHG emissions beyond their existing targets and, as such, the question has been raised as to whether climate change litigation can be successful in New Zealand. Having examined *Urgenda* and *Our Children's Trust*, it is apparent that there are various constitutional differences between the Netherlands, the United States and New Zealand that would prevent similar causes of action from being brought here.

New Zealand's distinction from the Netherlands lies in a narrower interpretation of the separation of powers and a more restricted judicial discretion in novel circumstances. Additionally, the context given by the right to a habitable and protected environment, in the Dutch Constitution, is a demonstration of a State more willing to take responsibility for individuals' social rights. This is a result of a different constitutional development centring far less around an absolute monarchy. On the other hand, the United States' differences focus on their entrenched written constitution, which comprises rights and freedoms wider than their counterparts contained within the NZBORA. Again, as in the Netherlands, a more liberal approach to separation of powers, with regard to climate change mitigation, is taken than in New Zealand.

In New Zealand we have a readily available tool, in judicial review, that could be used to bring successful climate change litigation. Sarah Thomson's claim is attempting to do just that. However, judicial review can be restricted by the policy content of cases as well as the limited remedies available to the courts. A lack of standing could also pose an issue in climate change cases.

Two possible options to render positive and practical outcomes, from climate change litigation, more accessible in New Zealand have been examined. The first is to develop a written

constitution with an entrenched environmental right that will be genuinely enforceable, making it possible to focus climate change litigation around. This would not only allow for a more expansive avenue than judicial review for climate change litigation, but would also better protect any successful claims, via constitutional entrenchment, from being overruled by Parliament. The second option is for the courts to “take up the slack” left by Parliament and the Executive in the province of climate change mitigation and balance the constitution so that “fundamental rights” and objects of societal importance, such as the environment, can be protected. This would involve a more expansive view of the *Rechtsstaat* to allow the courts to devise creative solutions that will require the protection of vulnerable objects of societal value. Unfortunately, it appears unlikely that either of these possible solutions are likely to eventuate in the near future given the current political climate in New Zealand.

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