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Judicial Remedies for Climate Change

Kent Roach

Abstract

The first part of this article outlines remedies granted in climate change litigation directed towards governments in domestic and supra-national courts. It concludes that courts including the German Constitutional Court have tended to grant focused and modest remedies. Attempts to secure more ambitious remedies have generally not been successful. They may have caused North American courts to hold human rights claims based on climate change to be non-justiciable. The second part examines the range of available judicial remedies. It identifies interim relief, the declaration plus, and remedies directed towards laws that violate human rights as more promising remedial strategies. The third part proposes a number of remedial principles. It argues for a two-track remedial approach that combines immediate remedies directed at particular harms with dialogic and interactional remedies in which courts engage with other institutions and parties to produce longer term systemic remedies that will curb emissions in the future. It also suggests that courts should explicitly use proportionality reasoning when factoring in competing social interests and remedial modesty in confronting polycentric problems. They Bi-jural remedies that combine human rights and Indigenous law are also promising. Litigants should expect that no one case will remedy the threatening tides of climate change. They should pursue cycles of remedies where new and more intense remedies are used to respond to remedial failures and continued violations of human rights related to global warming.

Introduction

Judges do not decide whether a claim is justiciable or rights have been violated without worrying about remedies. The United States Supreme Court could not agree that racially segregated schools violated equality rights until they had (behind the scenes) reached agreement on a gradual "all deliberate speed"[1] approach to achieving desegregation. At the same time, this incremental remedy was too late for many. When the courts were prepared to enforce desegregation in the 1960s, white flight from many cities to the suburbs and private schools made it difficult to integrate public schools, and subsequent restrictions on remedies made it often impossible. The existential harms of climate change are in many respects the 21st century equivalent of the battle against apartheid. It is thus critical that those who litigate and decide climate changes cases appreciate the full range of remedies available and exercise wisdom in selecting remedies

This article will examine judicial remedies that can be ordered to address climate change in human rights litigation against governments in domestic and supra-national courts. Despite the

• I thank Olivia Eng, Jenna Kara and two anonymous reviewers for helpful comments on an earlier draft.

[1] *Brown v. Board of Education II* 349 U.S. 294(1955). See Michael Klarman *Brown v. Board of Education and the Civil Rights Movement* (New York: Oxford University Press, 2007) ch 3; Mark Tushnet "What Really Happened in *Brown v. Board of Education"* (1991) 91 Colum L Rev. 1867 at 1921.

dire and urgent threat that climate change presents, I will argue that litigators should resist the temptation of going for a remedial home run. They should be prepared to seek less drastic remedies when necessary to convince courts that climate change is justiciable.
At the same time, litigators and judges must be aware of the *Brown v. Board of Education II* problem: namely that incremental remedies that do not change governmental behaviour may simply come too late to be effective.

At least since the legal realists, it has been recognized that judges do not decide whether matters are justiciable or whether rights have been violated without worrying about the manageability of remedies. Compare two recent cases from supra-national courts. The first case sought a strong and immediate remedy by asking for invalidation of three European Union directives and an injunction against its 40% reduction in greenhouse gas emissions from 1990 to 2030. The European Court of Justice rejected this claim on the questionable basis that the plaintiffs from multiple countries did not have standing because they did not suffer any special harm distinct from the public-at-large.[2]

The second case sought no immediate and enforceable remedies because it was a request by Colombia for an advisory opinion from the Inter-American Court of Human Rights. It resulted in that Court declaring the existence of rights to a sustainable environment and duties on member states to monitor and regulate emissions in accordance with precautionary principles and to co-operate with other states in dealing with transnational environmental harms.[3] The latter case, especially in light of high rates of non-compliance with Inter-American Court of Human Rights judgments, begs the questions of whether it will be ignored. At the same time, it also provides a foundation for subsequent litigation. Mitigating the harms of climate change requires a generational commitment and a long-term litigation strategy.

A. Outline

In part one of this article, I will examine the remedial record to date. The record, including the two cases outlined above, suggests that courts from the global South are taking more seriously

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[2] *Armando Ferrão Carvalho and Others v. The European Parliament* Judgment of the Court (6th Section) 25 March 2021 at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment-1.pdf The European Court of Justice has in a number of cases applied narrow standing rules that are not suitable to climate change litigation or other litigation brought on behalf of the public at large. See for example EU Biomass Fuels v. European Union, Judgment of the Court (8th Chamber) 14 Jan 2021 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210114_8766_judgment.pdf . The German Constitutional Court has also in a recent climate change case held itself bound by this rejection of public interest standing and denied standing to two environmental associations. **Englische und französische Pressemitteilungen zum Beschluss vom *Neubaurer v. Germany* 24. März 2021 zum Klimaschutzgesetz, Order of the First Senate 24 March 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at paras 136-137 at** https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html As James Thornton and Martin Goodman have written: "No one has a unique interest in the protection of the environment. The interest is always shared. So under the courts' medieval logic, there can never be a citizen who has a right to come to court. No one will ever have an unique interest. The worse and more widespread the harm, the weaker your putative right becomes. It is the perfect way to deny citizens environmental justice." James Thornton and Martin Goodman *Client Earth* (Melbourne: Scribe, 2017) at 156.
[3] *Advisory Opinion OC-23/17* Nov 15, 2017 at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115_OC-2317_opinion-2.pdf

the traditional promise of where there is a right, there should be an effective and if necessary innovative remedy, as compared to western courts.[4] This is a pattern that is also observed in other forms of human rights litigation, most notably socio-economic rights where courts in Colombia, India, and South Africa have become the global leaders. I will also suggest that the most successful cases to date including a 2021 German Constitutional Court case stress remedial modesty but sometimes have neglected the importance of retention of jurisdiction, requirements of public reporting, and deadlines.

Part two of this article will examine the strengths and weaknesses of a range of remedies targeting governmental action and inaction and laws in relation to climate change. In particular, I will suggest that interim relief in the form of an injunction or stay of legislation pending a full trial can be an effective means to focus on immediate harms such as the construction of pipelines. I will also suggest that an intermediate remedy – the declaration plus – responds to some of the weaknesses of either declarations or injunctions. Finally, I will suggest that remedies can be sought with respect to inadequate and underinclusive laws that govern state responses to climate change and those which attempt to preclude state responses to climate change.

The third and final part of the article will examine some principles and conceptual approaches that may be useful for judicial remedies for climate change. I will suggest that litigators and courts should follow a two-track approach to remedies that is concerned about both individual remedies for living plaintiffs and systemic remedies to prevent future harm. They should follow the practice of some supra-national courts and a few domestic courts by making increased use of interim relief and by using a "declaration plus" which combines the generality of declarations with the public monitoring that comes from judicial retention of jurisdiction. Courts should require that governments justify limits on climate change remedies on the basis of proportionality principles with special attention to the overall balancing stage of proportionality reasoning. Courts should also defer to the ability of governments to select the precise means and trade-offs for dealing with the polycentric nature of efforts to reduce global warnings. This deference should also include initial deference to the ability of Indigenous governments applying Indigenous law to address climate climate and the idea of bi-jural remedies that respect both Indigenous and human rights as promoted by Article 40 of the United Nations Declaration of the Rights of Indigenous Peoples. Finally, litigators and judges should be responsive to remedial failure by triggering remedial cycles in response to continued violations of rights.[5]

I. Lessons from the Current Remedial Jurisprudence

Like much of human rights scholarship, much of that on climate change litigation focuses on questions of about how rights should be interpreted and whether they are violated. This neglect

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[4] This is not to say that all countries in the global South are able to litigate these claims. For an account of how some small island states have to face the dilemma of extinction through climate change or losing aid from large emitters such as China and the United States see Maxine Burkett "A Justice Paradox: Climate Change, Small Island Developing States and the Absence of an International Legal Remedy" in Shawkat Alam et al. *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015).

[5] See Kent Roach *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021) ch 2 outlining the basis of the two-track approach and ch 3 outlining an aggressive approach to the use of interim remedies. The new remedy of a declaration plus is discussed at 384-395 and the role of proportionality in remedial decision-making is discussed at 60-71.

of remedies is unfortunate especially in areas where courts may be resistant to accepting the justiciability of rights claims that are challenging to modern capitalist societies. One way to counteract the tendency to ignore remedies as practical and even "dirty"[6] is to pay attention to successfully litigated cases and to compare their remedial strategies with cases where litigation has failed.[7]

A. Remedial Modesty

It will be suggested below that the cases that conclude that climate change raise justiciable issues of rights violations and that have resulted in judicial remedies to combat climate change have been characterized by remedial modesty. What is remedial modesty? Remedial modesty refers both to the remedies that litigants request and that courts grant. A remedially modest approach will depend on the particular context. Nevertheless, it generally will focus on articulating the desired outcomes of remedies as opposed to dictating the means to achieve this outcome. This responds to concerns about judicial competence and allows both the executive with its expertise and the legislature with its direct democratic legitimacy to shape the means to achieve the outcome.

Remedial modesty may also require a modest choice of desired outcomes in the sense that courts will select outcomes that are supported by a broad scientific consensus, but that may not be the most ambitious possible. Remedial modesty also favours more limited and narrowly defined remedies compared to comprehensive ones that seek to address all aspects of climate change policy for present and future generations.

As outlined more fully in the third part of this paper, remedial modesty also will employ interactive and dialogic approaches that allow governments, ideally in consultation with litigants and experts, to select the precise means to achieve systemic remedies such as emission reduction targets. Another approach consistent with renedial modesty is to allow Indigenous governments applying Indigenous laws to select the precise means to respect living things and future generations. Finally, remedial modesty allows for judicial balancing of competing interests when devising remedies. In the third part of this article, it will be suggested that proportionality reasoning is the best means for courts to use to balancing the conflicting interests in climate change litigation.

B. The *Urgenda* Success?

One of the most successful climate change cases so far, *Urgenda v Netherlands*, resulted in orders by Dutch courts that the Netherlands reduce its gashouse emissions by 25%. Although the case is widely viewed as a success, it is characterized by remedial modesty.

In *Urgenta,*the Netherlands Supreme Court declared that it was not ordering the creation of climate change legislation or even a climate change policy, but it was simply exercising its duties

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[6] Daryl Levinson "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum. L.Rev. 4.
[7] Steven Budlender, Gilbert Marcus and Nick Ferreira *Public Interest Litigation and Social Change in South Africa* (New York: Atlantic Philanthropies, 2014)

under Article 13 of the European Convention on Human Rights to provide effective remedies.[8] Consistent with a remedially modest focus on outcomes as opposed to means, it stressed that "the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned."[9] This follows more recent thinking about public law litigation which has moved away from command and control strategies to those focused more on broad policy targets and publicity.[10] This Dutch litigation was also conducted in the shadow of possible recourse to the European Court of Human Rights. The wide-ranging jurisdiction of that Court and its increased attraction to complex enforcement suggests that it will play an important role in future climate change litigation. Indeed, it has one pending and fast-tracked case where youth have brought an action against 33 different governments in relation to climate change.[11]

A disappointing aspect of the Dutch litigation, however, is that the court refused the public interest plaintiff's request for an "information order" that would require the state to monitor and report on progress in meeting emission reduction goals. The District Court concluded:

> The manner in which the State chooses to inform society about the risks of climate change and the climate policy to be pursued – within the bounds of law – is entirely at the sole discretion of the State. There is no cause for assuming beforehand that the State will not find an appropriate way of informing society, within these margins. This means that the court has no role to play here.[12]

Publicity about progress (or lack thereof) towards broad goals is a key component of dialogic[13] or interactional[14] approaches to laws that recognize that effective remedies are a result of how actors other than simply the courts respond to judicial decisions. The failure of *Urgenda* to convince the court about the necessity of an information order may have been related to the court's perception that it was being asked to micro-manage how the government engaged in communication. Here again remedial modesty in the sense of focusing on goals as opposed to dictating means is a good strategy. What ultimately matters is not the specifics of how the government publicizes information, but the fact that the necessary information is communicated

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[8] The Supreme Court held: "this order does not amount to an order to take specific legislative measures, but leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020. This is not altered by the fact that many of the possible measures to be taken will require legislation, as argued by the State. After all, it remains for the State to determine what measures will be taken and what legislation will be enacted to achieve that reduction." *Netherlands v. Urgenda* Jan 13, 2020 at 8.2.7 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

[9] *Urgenda v. Netherlands* District Court June 24, 2015 at 4.101 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf.

[10] Charles Sabel and William Simon "Destablization Rights: How Public Law Litigation Succeeds" (2004) 117 Harv. L.Rev. 1016.

[11] *Youth for Climate Justice v. Austria* et al at http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/.

[12] *Urgenda v. Netherlands* District Court June 24, 2015 at 4.107.

[13] Kent Roach "Dialogic Remedies" (2019) 17 I Con. 860.

[14] Jutta Brunee and Stephen Toope *Legality and Legitimacy in International Law: An Interactional Approach* (Cambridge: Cambridge University Press, 2010).

to the public.[15] Detailed reporting and increased public awareness about climate change is also promoted by Articles 4 and 6 of the UN Framework Convention on Climate Change. Information and reporting orders facilitate rather than impinge democracy by providing more information to inform voters and civil society.

Another disappointing aspect of the *Urgenda* litigation is that it contains no reporting back mechanism or deadlines. Retention of jurisdiction by the courts is especially important in climate change litigation because courts may have to respond and adjust their remedies in response to new evidence and new science. The Dutch courts somewhat unscientifically selected the bottom range – 25% of the estimated 25-40% required emissions reductions, targets that themselves may have to change as more evidence about global warming is collected. A limit of declaratory relief is that it may require new litigation should unexpected issues emerge and/or the government fails to satisfy either the court's goals or the parties' expectations.[16] The traditional distinguishing feature between declaratory and injunctive relief is that only in the latter does the court retain jurisdiction and has the power to change relief in response to changed circumstances.[17]

Subject to these reservations, the *Urgenda* case is a testament to the utility of declarations that set minimal goals while allowing governments complete freedom to determine how the goals are satisfied. Another significant but often neglected factor is that the public interest group Urgenda ("Urgent Action") received a special costs order upon victory.[18] Climate change litigation is public interest litigation brought on behalf of diffuse groups and often the public at large. Such litigation may require courts to depart from the ordinary rules of litigation including costs rules that discourage innovative and risky litigation without the prospect of large damage awards.[19] Much more attention needs to be paid to the political economy of climate change litigation.

C. The 2021 German Climate Change Act Case

A March 24, 2021 decision of the German Constitutional Court followed the *Urgenda* path of remedial modesty, It essentially remanded to the legislature the task of devising more specific emissions goals for the period 2031 to 2050 by the end of 31 December 2022. This remedial modesty is also reflected in the applicants remedial request that the Court:

> declare that the Federal legislature is obliged to ensure, within a period of time to be set by the Federal Constitutional Court, by means of a new statutory regulation of the reduction quotas for greenhouse gases, that greenhouse gas emissions in the Federal

[15] For arguments that reporting requirements in the South African litigation on preventing mother to child HIV transmission could have saved lives see Kent Roach and Geoff Budlender "Mandatory Relief and Supervisory Jurisdiction" (2005) 122 S.A.L.J. 325.
[16] *Little Sisters v. Canada* [2000] 2 SCR 1120. *Little Sisters v. Canada* [2007] 2 SCR 38 as discussed in Roach *Constitutional Remedies in Canada* 2nd ed (Toronto: Thomson Reuters, 2013 as updated) at 12.630-12.660.
[17] Owen Fiss "Dombrowski" (1977), 86 Yale.L.J. 1103 at 1112. For arguments in favour of a declaration plus see discussion of this remedy infra Part III and in Roach *Remedies for Violations of Human Rights* supra at pp. 384-394.
[18] *Urgenda v. Netherlands* District Court June 24, 2015 at 4.110 departing from usual cost rules.
[19] James Thornton and Martin Goodman *Client Earth* supra at 73, 96-97; Findings of the Aarhus Convention Compliance Committee ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom of Great Britain and Northern Ireland); Kent Roach "Joe's Justice: Joseph Arvay's Contribution to Public Interest Standing, Costs and Remedies" (2021) S.C.L.R.(2d) (forthcoming).

> Republic of Germany are kept as low as possible on the basis of more comprehensible forecasts and taking into account the principle of proportionality. [20]

The German Constitutional Court refused to declare all of the 2019 Climate Change Act to be unconstitutional. It found no violations of rights based on the Paris targets[21] and no violation of rights of applicants who live in Bangladesh and Nepal as opposed to Germany.[22] The Court also held that environmental associations had no standing and it would not consider the rights of future generations. Instead, the Court focused more narrowly on the personal and property rights of the youthful litigants who lived in Germany with the Constitutional Court stating:

> The complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights ([...]; on objective protection, see para. 146 below). Rather, the complainants are invoking their own fundamental rights.[23]

The Court's remedy was also quite deferential in requiring emissions goals to be reduced through legislation for the period from 2031 without dictating either the precise amount of reduction. It also used a suspended declaration of invalidity of parts of the 2019 Climate Change Act that only required emission targets for 2030 to 2050 to be formulated in 2025. The Court gave the legislature until the end of 2022 to develop more precise targets presumably after consulting and deliberating.[24]

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[20] Constitutional Complaint Neubauer et al v. Germany (unofficial English translation) at para 2 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf.

[21] The Court concluded: "it cannot be claimed that the legislator has taken no measures whatsoever to limit climate change or has only adopted provisions and taken measures that would be manifestly unsuitable or completely inadequate for achieving the required protection goal (see para. 154 ff. above). In particular, Germany has ratified the Paris Agreement and the federal legislator – as declared in § 1 third sentence KSG – has based the Federal Climate Change Act upon the obligation to observe the Agreement and upon the commitment made by the Federal Republic of Germany to pursue the long-term goal of greenhouse gas neutrality by 2050. § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 specify concrete reduction targets for the period up to 2030. Numerous other laws set out measures for limiting climate change." Englische und französische Pressemitteilungen zum Beschluss vom 24. März 2021 zum Klimaschutzgesetz, Neubauer v. Germany Order of 24 March 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at para 180 at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

[22] For criticism of this part of the judgment as insufficiently "cosmopolitan" see *Jasper Mührel* All that Glitters Is Not Gold: The German Constitutional Court's Climate Ruling and the Protection of Persons Beyond German Territory Against Climate Change Impacts , *Völkerrechtsblog,*03.05.2021, doi: 10.17176/20210503-111345-0.

[23] Neubauer v. Germany supra at para 109 at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

[24] The Constitutional Court also imposed a deadline that "the legislator would have to place the authority under the obligation to come up with a first updated plan before 2025 or to at least adopt statutory provisions at a significantly earlier date specifying how far into the future the 2025 plans must extend. If the legislator takes on the full task of updating the reduction pathway, it must itself set down all the necessary aspects in good time, extending sufficiently far into the future." Englische und französische Pressemitteilungen zum Beschluss vom 24. März 2021 zum Klimaschutzgesetz, Neubauer v. Germany Order of 24 March 20211 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

The suspended declaration of invalidity of parts of the German climate change legislation seemed designed o facilitate increased "democratic dialogue" [25]about climate change. The remedy required the legislature and not simply the executive to be involved in formulating a workable emission strategy for the 2031-2050 period.[26] Consistent with the concept of remedial modesty discussed above, the Constitutional Court stressed that "the legislator has a certain amount of design leeway"[27] in terms of crafting its response. As with the *Urgenta* case, the remedy ordered by the German Constitutional Court could have been more robust. The Constitutional Court did not appear to retain jurisdiction or require the public reporting of information. The German climate change case illustrates that courts require legislatures to be more active and precise with respect to their responses to climate change, but also that courts will continue to be reluctant to specify precise emissions reduction standards.

At the same time, the Court hinted that it could find more violations of human rights in the future in the light of evolving scientific findings. Although courts traditionally aim for finality in the resolution of disputes, the evolving science of climate change will require them to be prepared to re-visit past findings as the evidence of climate change evolves.

The Court's remedy appears already to have been effective but in a manner that reveals the considerable leeway that the Court afforded to the government. Well before the end of 2022 deadline the German Cabinet on 12 May 2021 approved plans, yet to be enacted in legislation, to increase the emission reductions for 2030 from 55% to 65% of 1990 emissions even though the Court had not struck down the 2030 target. It also proposed an 85% reduction target in 2040 and carbon neutrality to be achieved by 2045 instead of the 2050 target in the 2019 Climate Change Act.[28] These plans have not yet as required by the Court been codified in legislation and may change depending on German federal elections in the fall of 2021.

D. The Importance of Retaining Jurisdiction and Setting Deadlines

A good example of the utility of retention of jurisdiction and deadlines is seen in a case decided by the "Green Bench" of the Lahore High Court in Pakistan. In that case, the court set deadlines for the preparation of action plans by multiple ministries. The Court also ordered the creation of a commission to require these ministries to work with both non-governmental organizations and technical experts.

[25] For my defence of a democratic dialogue approach that avoids the extremes of judicial or legislative supremacy and allows the courts to require legislatures and the executive to pay more attention to issues that they may prefer to avoid see Kent Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* rev'ed (Toronto: Irwin Law, 2016).

[26] The Court's remedial order stated "the legislative process cannot be replaced by a reduced form of parliamentary involvement in which the *Bundestag* merely approves the Federal Government's ordinances. This is because it is precisely the special public function of the legislative process that makes the adoption of parliamentary legislation necessary here." Final Order para 5 at https://www.bundesverfassungsgericht.de/e/rs20210324_1bvr265618en.html.

[27] Englische und französische Pressemitteilungen zum Beschluss vom 24. März 2021 zum Klimaschutzgesetz, Order of 24 March 20211 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at para 249 at https://www.bundesverfassungsgericht.de/e/rs20210324_1bvr265618en.html.

[28] Sam Eastwood et al "ESG litigation: German Federal Constitutional Court rules that the German Federal Climate Change Act is partially unconstitutional" June 4. 2020 at https://www.mayerbrown.com/en/perspectives-events/blogs/2021/06/esg-litigation-german-federal-constitutional-court-rules-that-the-german-federal-climate-change-act-is-partially-unconstitutional.

This Pakistani case follows a pattern of public interest litigation in using litigation as a means to give expert administrators within government more resources and to require that others in government listen and act on their advice. In this case, officials in a new Ministry of Climate Change effectively complained that they were not receiving co-operation from other ministries.[29] Following a trend also seen in Indian public law litigation with respect to the right of food, the Pakistani court subsequently focused on more discrete items from the array of relevant issues. For example, it singled out water strategy and achieving international financing to assist with climate change mitigation.[30] Similarly, the Colombian Supreme Court set 4- and 5-month deadlines for various Ministries, municipalities and authorities "with the active participation of the plaintiffs, affected communities, scientific organizations or environmental research groups, and interested population in general"[31] to prepare various action plans to combat climate change. These cases also fit into a pattern of courts in the global South generally being more inclined to order robust remedies than western courts. The recent German Constitutional Court decision discussed above also established deadlines for the legislature to respond with detailed emissions targets. It differs somewhat for the Pakistani and Colombian cases in requiring the legislature and not simply the executive to address climate change issues. As suggested above, this may be helpful in encouraging democratic dialogue and engagement about climate change.[32]

E. The North American Battle with Justiciability and Public Law Litigation

The leading American case of *Juliana v. the United States*[33] reveals how demands for extensive remedies can create an incentive for courts to hold that climate change litigation is non-justiciable. A majority of the otherwise liberal and often activist 9th Circuit Court of Appeals concluded that "it was beyond the power" of a Federal Court "to order, design, supervise or implement the plaintiff's requested remedial plan"[34] that included "an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."[35] The Court's conclusion ignored that the plaintiffs did not ask the court to design a plan and as such suggests that the court took a somewhat pretextual approach in rejecting the claimant's claim. Judges may

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[29] *Leghari v. Pakistan* (August 31, 2015), Lahore W.P. No. 25501/2015 No. 1 (HC Green Bench, Pakistan) [''Leghari #1"], online: <sys.lhc.gov.pk/greenBenchOrders/WPEnvironment-25501-15-31-08-2015.pdf>; (4 September 2015) Order Sheet Lahore High Court at para 3.
[30] [''Leghari #7"], online: <sys.lhc.gov.pk/greenBenchOrders/WP-Environment-25501-15-13-04-2016.pdf>; (14 December 2016) [''Leghari#8"], online: <sys.lhc.gov.pk/greenBenchOrders/WP-Environment-25501-15-04-01-2017.pdf>; and (28 February 2017).
[31] *Future Generations v. Ministry of Environment and others* April 5, 2018 Colombian Supreme Court English translation at https://www.informea.org/sites/default/files/court-decisions/Colombia%20-%20Future%20Generations%20v%20Ministry%20of%20Env%20and%20Others%20%28unofficial%20English%20trans%29.pdf.
[32] For arguments that courts may be helpful in promoting such dialogue especially when they do not attempt to prescribe final results see César Rodríguez-Garavito, and Diana Rodríguez-Franco *Radical Deprivation on Trial: The Impact of Judicial Activism in Socio-economic Rights in the Global South* (New York: Cambridge University Press, 2015).
[33] 947 F.3d. 1159 (9th Cir. 2020).
[34] Ibid at 1171.
[35] Ibid at 1170.

have an incentive to overstate remedial demands when deciding, as they frequently do, that climate change is not justiciable, or that standing or causation[36] has not been established.

Litigants must be aware of the danger of overly robust remedial claims defeating rights. They should stress that the remedy is manageable. At the same time, they must resist watering down remedies to the point where they are not effective. In any event, the majority of the 9th Circuit was clearly scared off at the prospect that it would have to retain jurisdiction and supervise the case for decades. It was also concerned that the court would have to evaluate the adequacy of an emission reduction plan, including trade-offs made to protect the economy or national security. It will be suggested in the third part of this article that direct application of proportionality reasoning can be helpful in evaluating the inevitable trade-offs and balancing in climate change litigation.

As Judge Staton noted in her dissent, however, American Federal Courts have retained jurisdiction for decades in desegregation and prison cases. [37] She, like the Dutch court, cited the incremental remedial approach taken in *Brown v. Board of Education II*[38] in support. She also hinted that "courts routinely grant plaintiffs less than the full gamut of requested relief…"[39]. This suggests that climate change litigators should propose a range of remedies and be prepared to accept that courts may be more comfortable with less ambitious remedies. If a more gradual approach remedial approach is taken, however, it will be important that courts retain jurisdiction so that relief can, if necessary, become more demanding over time in response to either new evidence and/or governmental failures in crafting effective responses to climate change.

Unlike the United States, the Canadian courts have rejected the idea of non-justiciable political questions in the early days of the *Canadian Charter of Rights and Freedoms*.[40] At the same time, Canadian courts do not embrace public law litigation, often wrongfully dismissing it as a misguided American import even though it has been accepted in many other parts of the world. Despite the Supreme Court's rejection of a political question doctrine, Canadian courts have dismissed much climate change litigation as non-justiciable.

In 2008, the Federal Court held that claims of whether Canada complied with the Kyoto agreement were non-justiciable because they require:

> an ongoing process of review and adjustment within a continuously evolving scientific and political environment. It refers to cooperative initiatives with third parties including provincial authorities and industry. These are not matters that can be completely controlled by the Government of Canada such that it could unilaterally ensure Kyoto compliance within any particular timeframe. [41]

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[36] *St Bernard Parish v. United States* 887 F. 3d. 1354 reversing $5.6 million awarded to compensate for flooding in New Orleans after Hurricane Katrina as an impermissible taking under the 5th Amendment of the Bill of Rights on the basis that causation not established.
[37] See also "Case Comment" (2021) 134 Harv.L.Rev. 1929.
[38] 349 U.S. 294 (1955).
[39] 947 F.3d. 1159 at 1189.
[40] *Operation Dismantle v. Canada* [1985] 1 SCR 441
[41] *Friends of the Earth v. Canada* 2008 FC 1183 at para 35 aff'd 2009 FCA 297.

The Court also concluded that the courts could not provide a meaningful remedy because "It is undeniable that an attempt by the Court to dictate the content of the proposed regulatory arrangements would be an inappropriate interference with the executive role."[42] The Federal Court took a rigid approach to the separation of powers that refused to recognize that courts may be required to assume tasks otherwise performed by the executive should the executive be incapable or unwilling to prevent violations of legal rights. The majority of the Supreme Court would subsequently endorse such a flexible approach to the separation of powers in *Doucet-Boudreau.* [43] Unfortunately, courts today seem attracted to the more absolutist and bright line approaches to the separation of powers articulated by the minority in that case.

Canadian courts fear appearing in any way to usurp the role of the executive and legislature in crafting wide-ranging and polycentric policies. Canada's nascent and largely unsuccessful climate change litigation closely tracks a similarly dismal judicial record in recognizing socio-economic rights. In both contexts, courts have struck out on a preliminary basis attempts to require governments to make policies.[44] Attempts to obtain class action damages have similarly failed in both contexts.[45]

A better approach in Canada may be to challenge concrete governments actions such as proposed new pipelines or to argue that existing laws or programs violate Charter rights. It is also significant that Supreme Court judges who have been prepared to recognize socio-economic rights have not been prepared to order large amounts of damages for their violations. Consistent with remedial modesty, they have employed gradual remedial strategies such as an 18-month suspended declaration of invalidity.[46]

F. Administrative Law Challenges

The focus of this article is on remedies for climate changes in human rights litigation, but it should also be noted that climate change challenges are being brought in a variety of judicial review proceedings. The Irish Supreme Court has recently held a plan introduced under Irish climate change legislation to be illegal on administrative law grounds because of its lack of specificity. The Court was much more comfortable deciding this case on administrative law as opposed to constitutional grounds. Indeed, it held that the public interest group that brought the litigation did not have standing to claim a constitutional violation.[47] Litigators should not ignore that courts may be comfortable in issuing administrative law remedies as opposed to those tied to human rights and especially constitutional litigation.

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[42] *Friends of the Earth v. Canada* 2008 FC 1183 at para 39.
[43] [2003] 3 SCR 3
[44] *Tanudjaja v. Canada* 2014 ONCA 852 and *LaRose v. Canada* 2020 FC 1008 striking out claims for government to create and implement housing and climate change policies respectively.
[45] *Gosselin v. Quebec* 2002 SCC 84 and *Environnement Jeunesse c. Procureur général du Canada*, 2019 QCCS 2885 dismissing class action claims on behalf of younger people in relation to reduced social welfare payments and climate change respective
[46] *Gosselin v. Quebec* 2002 SCC 84 per Bastarache J in dissent using an 18-month suspended declaration of invalidity and dismissing class action damages.
[47] Friends of the Irish Environment v. Ireland Appeal no 2015/19 At 6.46-6.48 July 31,2020

Nevertheless, there is a danger that questions of rights and ultimately human survival may be lost in a toxic haze of judicial deference to the administrative state. For example, the UK Supreme Court has allowed the proposed extension of Heathrow Airport to go ahead on the basis that the government did not act unreasonably in the weight it gave to concerns about climate change.[48] Hopefully, increased integration of proportionality reasoning in administrative law has a potential to make courts more attentive to the dangers of ignoring or discounting the harms of climate change. As will be discussed in the third part of this article, proportionality reasoning is attractive in remedial decision-making because it is a form of evidence-based practical reasoning that is also attentive to the harms that may result from rights violations.

II. The Range of Judicial Remedies

One of the lessons from climate change and other types of complex public interest litigation is that remedial demands may impact the willingness of courts to find that rights have been violated. It is also important to think long-term, as most complex remedies should be seen as part of an iterative enforcement process that may involve domestic courts, domestic governments and various supra-national bodies. Climate change litigators should be nimble and be prepared for the next step whether they win or lose.

A. Interim Pre-Trial Relief

Interim relief in the form of injunctions or stays of legislation until a full trial on the merits is emerging as an important remedy for human rights violations in both supra-national and domestic law. Supra-national courts including the European Court of Human Rights and the Inter-American Court of Human Rights grant interim relief solely on the basis of irreparable harm without an explicit balancing of interests. Domestic courts tend to balance competing interests and consider the public interest before granting interim relief.[49]

An American federal court has issued a preliminary injunction that requires prison officials in Texas to take steps to mitigate extreme heat in prison that threatened the human rights of the inmates. It held that there was a risk of irreparable harm and that the public interest favoured granting the relief.[50] The Indian Supreme Court in 2019 halted the development of a new airport in the State of Goa because of concerns that it would not accord with India's commitments under the Paris Accord. It subsequently lifted the ban in 2020 after the government committed to building a "carbon-neutral" airport.[51] Carefully tailored requests for interim relief in relation to

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[48] *R. v. Heathrow Airport Authority* 2020 UKSC 52. See also *R. (on application of ClientEarth) v. Secretary of State* [2020] EWHC 1303 (Admin) upholding approval of Europe's largest gas plant and deferring to Minister's balancing of competing interests; *Thomson v. Minister of Climate Change* 2017 NZHC 733 at paras 168, 179 deferring to the executive assessments of the cost consequences of measures and no reviewable errors.

[49] Kent Roach *Remedies for Human Rights Violations* ch. 3.

[50] *Cole v. Collier* US District Court Southern District of Texas at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170719_docket-414-cv-01698_memorandum.pdf.

[51] *Aroska v. Union of India* Civil Appeal no. 12251 of 2018 Judgment of the Supreme Court of India March 29, 2019 at para 147 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190329_13170_judgment.pdf; Aroska v. Union of India Civil Appeal no. 12251 of 2018 Judgment of the Supreme Court of India Jan 16, 2020 at paras 46-49 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_13170_judgment.pdf.

those whose health and life are threatened by climate change may offer some prospects for success.

The grant of interim relief can help publicize the present harms of climate changes in a dramatic fashion that can capture the public imagination. One of the reasons for litigating climate change is to place a “human face” [52] on harms that are often depicted in terms of science that people do not understand or perhaps do not want to understand. Seeking interim relief is also a lower cost litigation strategy than seeking relief after a full trial. If a request for interim relief is denied at the domestic level, thought should be given to seeking interim relief from a supra-national body including the United Nations Human Rights Commission. States affected by environmental damage by other states can also seek interim relief at the International Court of Justice pending a full decision on the merits.

The granting of interim relief also establishes an ongoing relationship between the litigants and the courts. Courts such as the Indian Supreme Court in the Goa airport case and the Inter-American Court of Human Rights often have follow-up hearings to judge compliance with interim relief. This can provide a focal point both for government and civil society engagement. It also can make the court more familiar with climate change issues and with retaining jurisdiction over a case.[53] Most international courts now characterize interim relief as a mandatory measure. The European Court of Human Rights have assessed fines for even quite minor violations of its interim measures. Even if interim measures are not always obeyed, their violation can help publicize and crystallize governmental misconduct.

In Canada, the courts have drawn a distinction between interim relief that requires positive action and that which prohibits governmental action. Applicants for positive relief must establish “a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful…”.[54] With respect to the latter, all that has to be established is a serious question that the *Charter* will be violated that is not frivolous and vexatious.[55] This may make the seeking of prohibitive injunctions against resource extraction and expansion of pipelines a more attractive target than positive measures to reduce greenhouse gas emissions.[56] At the same time and as Robert Sharpe has warned, applicants for interim relief should always make the strongest legal case possible given that courts in the common law tradition will balance the applicant’s case that rights will be violated, and irreparable harm caused against competing interests.[57]

Canadian courts have stressed that while existing legislation or governmental action that is challenged in an application for interim relief pending trial will be presumed to be in the public interest, that presumption is rebuttable. Some applicants for interim relief, including those representing Indigenous peoples, may be able to establish that their claim is in the public interest,

[52] Daniel Bodansky, Jutta Brunee and Lavanya Rajamani *International Climate Change Law* (Oxford: Oxford University Press, 2017) at 300.
[53] On the use of interim relief as a template for other remedies see Roach *Remedies for Human Rights Violations* supra at 171-2.
[54] *R v CBC*, 2018 SCC 5 at para 18.
[55] *RJR Macdonald v Canada* [1994] 1 SCR 311.
[56] But for criticism of this approach see *Karounis c. Procureur général du Québec*, 2020 QCCS 2817 at para 12.
[57] Robert J. Sharpe “Interim Remedies and Constitutional Rights” (2019) 69 Supp 1 UTLJ 9.

especially in cases where they seek more narrow exemptions from laws as opposed to wholesale suspensions as a form of interim relief.[58]

The public interest is an important and often decisive factor in determining whether the balance of convenience favours granting interim relief. Even though a request for interim relief may focus on the present harms of climate change, future harms to younger generations and the planet itself could be an important determinant of the public interest. Alas, there is evidence that Canadian courts have taken a majoritarian and monetized approach to the balance of convenience when denying interim relief. In other words, they have often placed economic interests served for resource extraction over the rights of Indigenous people to preserve land for themselves and future generations.[59] As I have argued elsewhere, courts can and should discipline and make more transparent the process for determining the public interest through proportionality reasoning.[60] The application of such reasoning will favour narrower and better tailored relief that provides some accommodation for competing economic interests. That said, the overall balancing stage of proportionality reasoning can frequently be expected to favour applicants for interim relief against climate change. This is because the economic benefits of development are not that important if the planet is no longer habitable.

Applicants must be prepared to move on to trial or settlement when interim relief is ordered. Interim relief can be changed by the courts in light of new evidence or concerns about delay in preparing for the eventual trial on the merits. At the same time, both government and resource extraction companies may be prepared to enter into more meaningful negotiations in the face of interim relief that imposes economic costs on them. Interim relief only provides relief pending a full trial or a settlement, but it should not be dismissed as a potentially effective remedy in climate change litigation.

B. Declarations

Declaratory relief was first used by supra-national courts as a means to prevent violations of international law.[61] It has now been accepted as part of domestic law often serving in Crown Liability Acts[62] as a functional substitute for an injunction against the government. The main shortcoming of declarations is that they end the court's jurisdiction over the case. This can require successful litigants to commence new litigation should disputes arise over the meaning of and/or compliance with the often general pronouncements of legal entitlements made in a declaration.

The majority in *Juliana v. the United States*[63] disparaged a declaration as something less than a real remedy when it states that a "declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further

[58] *Manitoba v Metropolitan Stores,* [1987] 1 SCR 110.
[59] *Gros Louis v Societe de development de la Baie James,* (1973) 8 CNLR 414 (Que.C.A.); *Haida Nation v. British Columbia* [2004] 3 SCR 511 at para 14.
[60] Roach, *Remedies for Human Rights Violations* supra at 160-166.
[61] Edwin Borchard *Declaratory Judgments* 2nd ed (Cleveland: Banks Baldwin, 1941).
[62] RSC 1985 c.C-50, s.22.
[63] 947 F.3d. 1159 (9th Cir. 2020).

court action."[64] Such an interpretation discounts the meaning of declarations as a judicial remedy that is designed to influence conduct and to record past violations of rights and prevent future ones.[65] It also discounts the possibility under the procedural rules of the American Federal Courts that courts can retain jurisdiction after issuing a declaration,[66] an innovation that I will defend below as a declaration plus. The dissent in *Juliana* could have been strengthened by referencing this possibility which allows the court to wait for matters to be fleshed out before making crystallized legal orders.

Citing the Supreme Court of Canada's substitution of declaratory relief for injunctive relief in *Khadr v. Canada*[67], the Ontario Superior Court refused to strike out a climate change action on the basis of a lack of remedy in *Mathur v. Ontario*. The court stated: "The *Khadr* case suggests that it is possible for courts to avoid venturing into questions of public policy – one of Ontario's assertions on this Application – by limiting the available remedy to declarations and by leaving it to the government to determine the best means forward."[68] This affirms that declarations are often a preferred remedy for innovative causes of actions. They were used, for example, in *Eldridge v. British Columbia,*[69] one of the rare cases where courts have explicitly required governments to take positive actions and spend money in order to comply with *Charter* rights. At the same time, there is a danger that declarations may not always be effective. As in the *Little Sisters* litigation targeting homophobic conduct by the customs bureaucracy, they may require under-resourced plaintiffs to re-litigate when they are not satisfied with how the government has responded to the declaration.[70]

Governments prefer declaratory relief to injunctive relief because courts do not retain jurisdiction after issuing a declaration and they do not face the risk of being held in contempt of court. Recent amendments to New Zealand's climate change legislation specifically limit courts to only issuing declaratory relief if they find that a 2050 target or an emissions budget is not met.[71] This legislative attempt at limiting remedies may be a response to the remedial creativity of New Zealand courts in enforcing that country's statutory bills of rights. The legislation attempts to ensure some political response by requiring a commission to report on annual targets and requiring the Minister to present any judicial declaration and the government's response to the declaration to the legislature. Declarations can play an important role in climate change litigation, but as will be suggested below, compliance and follow-up to declarations need to be carefully monitored. Consistent with the model of democratic dialogue, civil society engagement and vigilance is required to ensure that remedies are effective.

[64] Ibid at 1170.
[65] *Evers v. Dwyer* 358 U.S. 202 at 202-04 (1958); *Utah v. Evans* 536 U.S. 452, 463-4 (2002). See also Samuel Bray "The Myth of the Mild Declaratory Judgment" (2014) 63 Duke L.J. 1091.
[66] 28 U.S.C. s.2202 (2012).
[67] [2010] 1 SCR 44.
[68] *Mathur v. Ontario*, 2020 ONSC 6918 at para 257.
[69] [1997] 3 SCR 624.
[70] *Little Sisters v. Canada* [2000] 2 SCR 1120; *Little Sisters v. Canada* [2007] 2 SCR 38.
[71] Climate Change Response (Zero Carbon) Amendment Act, 2019 No 61 of 2019, s. 5ZM. The legislation also contemplates that courts may make costs awards along with the declaration.

C. Injunctions

The Supreme Court of Canada held in *Doucet-Boudreau v. Nova Scotia*[72] that s. 24(1) of the *Charter* authorizes the use of injunctions against the government and the retention of jurisdiction even in the face of statutes or rules of court that attempt to preclude the use of such remedies. In my view, the constitutional basis of the remedial powers of Canadian courts should preclude the type of legislation in New Zealand that has placed strict limits on the remedial discretion of courts in *Charter*-based climate change litigation. As the Supreme Court of Canada stressed in *Doucet-Boudreau*, the courts themselves should determine how to accommodate competing social interests and respect the separation of powers when making remedial decisions. This recognizes that both separation of powers at the domestic level and subsidiarity at the supra-national level are relative concepts. The judicial role can expand should the state be unwilling or unable to respect rights and provide effective remedies for their violations.

Despite *Doucet-Boudreau*, Canadian courts have been extremely reluctant to use injunctions and retention of jurisdiction as a constitutional remedy. For example, in one climate change-related litigation, the Court struck out the claim including a request for the court to obtain supervisory jurisdiction on the basis that:

> If the Court granted this remedy, it would assume an almost regulatory or tribunal role to ensure legislation was passed and targets are met by that legislation. That is not the role of the Court (see *Canada (Attorney General) v Jodhan*, 2012 FCA 161 [*Jodhan*])…. Climate change is a complex and multifaceted problem, with a host of provincial, municipal and international actors making supervision impossible or meaningless in this case. While it is possible that type of remedy is appropriate in some cases, this is not the case…. The issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government.[73]

One factor has been the Court's increased emphasis on the need for terms of injunctions to be clear and enforceable. The dissent in *Doucet Boudreau* expressed concerns that the trial judge's order that Nova Scotia make "best efforts" to construct minority language educational facilities was not fair or enforceable. Similar concerns have been echoed in a 2014 decision by the Supreme Court of Canada [74] and by the Federal Court of Appeal in *Jodhan* and the Indigenous rights case of *Canada v. Long Plain First Nation*.[75]

The requirement that injunctions be specific and enforceable places trial judges in a bind or a Catch-22 especially when dealing with novel issues such as climate change. Judges will often lack the information or confidence to place specific and enforceable demands on governments through injunctions. One exception, where the Supreme Court issued an injunction to compel a reluctant executive to allow a safe injection to continue to operate on Vancouver's Downtown

[72] [2003] 2 SCR 3.
[73] *Dini Ze' Lho' Imggin,* 2020 FC 1059 at paras 64-65, 77.
[74] *Thibodeau v Air Canada,* 2014 SCC 67.
[75] 2015 FCA 177 at paras 150, 152. For criticism of this line of cases see Roach *Constitutional Remedies in Canada* 2nd ed at 13.1300-13.1362.

Eastside, may not be helpful in the climate change context because the court premised its use of injunctive relief on the basis that all of the evidence supported the strong measure.[76] In contrast, in most cases injunctive relief to combat climate change will harm some competing social and economic interest.

Canadian public law continues to favour declaratory over injunctive relief.[77] The generality of declaratory relief, however, may result in disputes about the meaning and compliance with the declaration. This is what occurred in Canada after the Court declared in 2000 that customs officials had violated the expressive and equality rights of a bookstore that catered to sexual minorities. Disputes continued and new litigation was started only to be thwarted in 2007 when the Supreme Court refused to grant the small bookstore advance costs that were necessary to finance the case.[78] The result is that Canadian litigants and judges often find themselves in a Goldilocks dilemma. Declarations that end the court's jurisdiction are ineffective while injunctions that require clear and specific orders place excessive demands on the court's competence.

D. The Declaration Plus

Fortunately, there is an intermediate remedy between a general declaration and a specific injunction that may often be just right. This alternative remedy is what I call a "declaration plus" because it combines the generality of the declaration with the court's retention of jurisdiction.[79] The Supreme Court's decision in *Doucet-Boudreau* can be seen as a declaration plus because it would have been difficult and unfair to enforce the trial judge's "best efforts" remedy by holding the Nova Scotia government or responsible Ministers or official guilty of contempt of court for the violation of such a vague order. Although judges in Canada determine the extent of their remedial discretion, they remain bound by the rule of law especially when they wield their own coercive powers of holding people in contempt. The best efforts order was too vague to provide fair notice or limit enforcement discretion. [80]

Nevertheless, the trial judge's retention of jurisdiction after his best efforts order in *Doucet-Boudreau* worked. It produced an effective province-wide remedy of French language educational facilities so that the case was effectively moot when the Court heard the appeal a few years after the trial judge's innovative remedy.[81] The remedy was effective in part because the trial judge retained jurisdiction and required the government to file progress reports by means of affidavits that could then be subject to challenge through competing affidavits and in open courts by the applicants. Such an approach would have advantages in the climate context as it would

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[76] *Canada v PHS Community Services Society,* 2011 SCC 44.

[77] Roach "Remedial Consensus and Dialogue" (2002) 35 U.B.C. Law Rev. 211.

[78] *Little Sisters v. Canada* [2000] 2 SCR 1120; *Little Sisters v. Canada* [2007] 2 SCR 38.

[79] Roach *Remedies for Violations of Human Rights* at 384-394; Roach *Constitutional Remedies in Canada* 2nd ed at 12.700-12.910.

[80] The Court has held that excessively vague or overbroad laws that fail to give fair notice or limit enforcement discretion violate the principles of fundamental justice. *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606.

[81] *Doucet Boudreau* at para 17 noting that "The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary."

recognize the need for governments to make public their progress on reducing greenhouse gas emissions while at the same time providing a public forum for other evidence to be examined and for public awareness of climate change to be promoted. As Jutta Brunnée and Stephen Toope have argued, remedies "can operate effectively without being formally binding," provided that they meet "the requirements of interactional law" so "that a strong practice of legality evolves."[82] The practice of legality will require the parties to respond in good faith to the declaration and for the declaration to be clear, non-contradictory, and possible to implement. Over time, there should be congruence between the declaration and the actual state practice.[83] In other words, compliance with a declaration in complex cases is often a process that requires attention to the evidence and publicity.

The declaration plus approach is capable, if required, into evolving into more specific forms of injunctive relief. As the dissenting judge pointed out in *Juliana v. the United States*, structural injunctions in the United States are typically only ordered after a preliminary plan submission phase which educates the trial judge about the details of school or prison administration. The specificity of some structural injunctions often emerges from the details of competing plans submitted by the parties and sometimes by experts or masters enlisted by the trial judge to provide technical assistance. Sometimes injunctions are changed to ensure that they respond to emerging new evidence and do not order the impossible. This type of approach seems suitable for climate change litigation.

Although the declaration plus is a novel remedy, it finds support in the practice of domestic and especially supra-national courts. For example, the Nigerian Court of Appeal combined general declaratory relief in declaring constitutional rights to a healthy environment with an injunction that Shell cease flaring gas emissions.[84] The Inter-American Court of Human Rights also administers complex remedies in a manner similar to the declaration plus. It frequently orders general relief that allows the state to select the precise means of implementation while retaining jurisdiction over cases for years and conducting extensive public and evidence-based compliance hearings. [85]

The European Court of Human Rights, while formally restricted to the award of damages, has created a complex enforcement mechanism that allows the Court to state what is required to comply with rights in general terms while the Council of Europe's Committee of Ministers negotiates the details of general measures designed to prevent repetitive rights violations.[86] Although not as open as the Inter-American Court of Human Rights' practice, the Committee of

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[82] Jutta Brunnee and Stephen J. Toope *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 204.
[83] This follows from Lon Fuller's elements of legality. Lon Fuller, *The Morality of the Law* (New Haven: Yale University Press, 1969) ch. 2.
[84] *Gbemre v. Shell Petroleum et al* Federal High Court of Nigeria Nov 14 2005 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051130_FHCBCS5305_judgment-1.pdf.
[85] Alexandra Huneeus "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts" (2015) Yale Int L.J. 1.
[86] Helen Keller and Cedric Marti "Reconceptualizing Implementation: The Judicialization and Execution of European Court of Human Rights Judgments" (2016) 26 E.J.L. 829.

Ministers publicizes many of the state's responses and the responses of opposing parties and third-party interveners.

As with *Doucet-Boudreau*, all of these approaches feature a transparent and fair process that starts with a general declaration of a general goal but then allows the state, ideally in consultation with the parties, to decide the best means to achieve the goal of the general declaration. The adjudicator retains jurisdiction and can order supplemental forms of relief when new evidence is produced (subject to adversarial challenge) about the progress (or lack thereof) in achieving a goal that is associated with compliance. As Abram Chayes observed almost 50 years ago, this means that the details of injunctions are often negotiated between the parties.[87] The fact that more detailed remedies emerge from negotiation between the parties does not mean that judges or tribunals abdicate their role. They should ensure that a fair, public, and evidence-based process is followed even as the parties grapple with complex polycentric problems.

The declaration plus approach fits well with what Charles Sabel and William Simon have argued is the trend in second generation public law litigation to place less emphasis on the command-and-control strategies that seem to be required under Canadian law for injunctions. They support courts placing more emphasis on requiring governments to establish goals and targets and to collect and make public information to allow both the court, the parties, and the public to determine the progress towards those goals and targets.[88] Such an approach seems consistent with the multi-year targets that have been set for reducing emissions.

Nevertheless, some may despair at the incremental approach promoted by the declaration plus given the urgency of climate change. One problem, however, is that judges, especially in Canada, are likely to remain reluctant to take a bolder approach by issuing broad-based permanent injunctions that run the risk of taking over or appearing to take over the government's climate change policies. It is also not clear whether such a monological or judicialized approach would be optimal. Even courts that accept that climate change produces justiciable issues are likely to be cautious. For example, the much-praised Dutch litigation resulted in the court insisting on decreases in carbon emissions at the low level of the scale. The 2021 German climate change case demonstrates that judges on the German Constitutional Court were unwilling to resolve disputes about the targets in the Paris accord. The Court gave the government an end of 2022 deadline to address post 2030 emissions, but also left the government a significant degree of leeway.

Litigation should aim to establish minimal outcomes while leaving the choice of systemic means to governments. It can also remedy and publicize specific harms of climate change and require the government to make public reports measuring climate change, the damage it is causing and the adequacy of a government's responses. Hopefully such information will assist in the election of governments committed to going well beyond the minimum standards presented by human rights laws in combatting climate change. Courts can play a role in climate change but they will require much assistance from legislatures, the executive and civil society

[87] Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L.Rev. 7.
[88] Sabel and Simon "Destabilization Rights"

A declaration plus where courts retain jurisdiction, and when necessary, issue more detailed and forceful remedies, is perhaps the best that can be expected from courts.[89] It is also a process that could draw more public attention to climate change. It could help provide minimum standards that no elected government – even one that denies climate change or subordinates it to the economy – could fall below.

E. Damages

Damages could play some role in climate change litigation,[90] but care needs to be taken. One danger is that compensatory damages require proof of causation which may be difficult in cases of multiple concurrent causes.[91] A request for damages may invite a frequent judicial response in climate change litigation which is to assert that the damage sought to be remedied will not make a significant difference in global warming. Critics of this type of reasoning have denounced it as "scientifically incorrect" and a manifestation of the "tragedy of the commons phenomenon at the heart of the climate crisis."[92] Adopting probabilistic approaches to causation seem to be necessary in such cases.[93]

Damages can be defended as a form of general deterrence that allows those who have to pay to select among the best ways to minimize the prospect of similar damage awards in the future.[94] At the same time, concerns have been raised that governments may be far from the rational actors that can be expected to respond in a cost effective manner to damage awards.[95] The same may be true of corporations that could be bankrupted if damages for extensive costs related to flooding, food, and health care costs caused by climate change were actually awarded.

It has been suggested that "courts are well used to assessing the value of conventional claims based on personal injury, property damage or economic loss" and they may have to develop the 'new metrics' of human, social and natural capital (as well as financial and manufactured capital) and valuation of ecosystems and human rights".[96] This is true, but it may be a mistake to ask for billions of dollars in damages through class actions if the legal realist insight is accepted that judges will not decide whether rights are violated without worrying about the consequences of the ensuing remedies. For example, the Supreme Court rejected a case trying to establish socio-economic rights under the *Charter* with even more sympathetic judges in dissent observing that the proposed class action requested over $380 million in class action damages.[97] Unfortunately, a very similar strategy has been attempted in Quebec climate change litigation and the courts have

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[89] Possible exceptions that may be even more effective are remedies that restore Indigenous land to Indigenous governance and remedies that alter legislation in a manner that promotes immediate relief from climate change.
[90] Richard Lord et al *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012).
[91] *Native Village of Kivalina v ExxonMobil Corp*, 663 F.Supp.2d 863 aff'd 696 F.3d. 849 (9th Cir. 2012)
[92] Scott Novak, "The Role of Courts in Remedying Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously" (2020) 32:4 Geo Envtl L Rev 743 at 752-53.
[93] Margaretha Wewerinke-Singh "Remedies for Human Rights Violations Caused by Climate Change" (2019) 9 Climate Law 224 at 232-3.
[94] Peter Schuck *Suing Government* (New Haven: Yale University Press, 1983)
[95] Daryl Levinson "Making Governments Pay" (2000) 67 U.Chi.L.Rev.2.
[96] Jutta Brunée et al "Overview of Legal Issues Relevant to Climate Change" in Lord et al *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012) at 45.
[97] *Gosselin v Quebec* at paras 152, 297.

again recoiled against recognizing a class action on behalf of the young that requested $300 million in punitive damages.[98] To be sure, class actions may be the most practical way of financing public interest litigation, but such strategies may continue to backfire if courts continue to reject such claims.

Another concern is that high damage awards are unlikely to remedy climate change. They could divert limited governmental and corporate resources from investments in technologies and other measures that may limit emissions. Neither the traditional remedial goals of restitution or compensation alone will remedy climate change. What is required is cessation of unlawful activities and prevention of the repetition of continuing violations. This may suggest that damages awards should be focused on narrowly defined harms and should generally be modest. Damages can play a symbolic role in underlying the present harms of climate change. As traditional and limited remedies, damages may also help courts to rule that claims of rights violations stemming from climate change are justiciable and valid.

Like human rights strategies to climate change in general, one of the chief advantages of damages as a remedy is that they put "a human face"[99] on the complex and predictive science that often dominates debates about climate change. In this vein, a recent United States Supreme Court case upholding the ability to grant nominal damages for the violation of a right in a Bill of Rights is promising.[100] Although damages by themselves will not likely be an effective remedy,[101] they can provide an anchor that will help make climate change litigation justiciable. It will be suggested in the third part of this article that damages can play a role in a two-track approach to remedies that assesses damages for past harm while more dialogically engaging with governments, the parties, and the public so that reasonable and proportionate measures are taken to reduce future harm.

Charter damages that are deemed necessary to vindicate the values of *Charter* rights or to deter future *Charter* violations should not require proof of a causal connection between damage suffered by the plaintiff and the *Charter* violation. As Chief Justice McLachlin recognized in *Ward v. Vancouver,*[102] what is required is a functional need for vindication and deterrence. Any concern that such *Charter* damages will be extravagant can be dealt with by the government discharging its onus to demonstrate that the requested damage award will itself harm good governance. Again, it will be suggested in the third part of this article that courts should employ proportionality and require governments to justify the limits that they request on damages and other remedies. Damage claims for harms caused by constitutionally inadequate legislation will require proof of governmental fault in enacting the legislation[103], though this is not the case with

[98] *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885 at para 123. Another problem with the case is that it did not attack any specific law or regulation. Ibid at para 53.
[99] Daniel Bodansky, Jutta Brunnee and Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017) at 300.
[100] *Uzuegbunam v Preczewski*, US Supreme Court March 8, 2021.
[101] Dustin Klaudt argues "climate change is an urgent problem requiring direct remedial relief. The indirect effect of tort law to modulate regulation of a market would likely be insufficient on its own. This holds true for other potential private law actions." "Can Canada's 'Living Tree' Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" 31 C.J.E.P 185 at 230
[102] [2010] 2 SCR 28.
[103] *Mackin v. New Brunswick (Minister of Finance)* [2002] 1 SCR 105.

respect to harms that are caused by policies that are enacted by the executive and not passed by the legislature.[104]

F. Remedies for Unconstitutional Legislation

Writing in 1972, Christopher Stone wrote a provocative article called: "Should Trees have Standing?"[105] He correctly noted that "each time there is a movement to confer rights onto some new "entity" [including Black people, women, children etc.], the proposal is bound to sound odd, frightening or laughable."[106] In a subsequent defence of his original article, Stone expanded his argument towards acceptance of legal and moral pluralism.[107] This could include accepting the ability of Indigenous people and perhaps others to litigate on behalf of water and trees. Stone's arguments were ahead of their time. Hopefully, it will not be too late when they are eventually accepted in our law.

Litigants in Canada can take advantage of broad public interest standing provided they can attach their challenge to an existing law under s. 52(1) of the *Constitution Act, 1982*. They can then challenge a law as insufficient or underinclusive in its approach to climate change. In *Mathur v. Ontario*,[108] the Ontario Superior Court refused to strike out a challenge to various policies on climate change grounds largely on the basis that the litigants had specified and targeted existing legal authorities. Unlike in the housing rights case of *Tanudjaja* and the climate change case of *La Rose*, the litigants did not ask the court to require the government to create new "housing" or "climate change" policies respectively from scratch.

Litigation that targets existing legal authority falls into what Jolene Lin characterizes as litigation aimed at "regulating the regulatory response." As Professor Lin predicts, it will be easier for litigation to attach itself to existing regulations as more countries enact such framework legislation.[109] For example, a group of youths has successfully challenged Germany's federal Climate Protection Act on the basis that its greenhouse gas reduction targets after 2030 have not been adequately specified and unreasonably transfer the burdens of emission reduction to future generations.[110] At the same time, a challenge to legislation is not a guarantee of remedial success. The Federal Court has held that Canada's failure to comply with Kyoto targets was non-justiciable because the *Kyoto Protocol Implementation Act*[111] was not directly enforceable.[112]

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[104] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13. I acted as counsel for the David Asper Centre for Constitutional Rights that intervened in support of the damage award.
[105] (1972) 45 S.Cal.L.Rev. 450.
[106] Ibid at 455.
[107] Christopher D Stone, "Should Trees Have Standing Revisited: How Far Will Law and Morals Reach--A Pluralist Perspective" (1985) 59:1 S Cal L Rev 1.
[108] 2020 ONSC 6918
[109] Jolene Lin "Climate Change and the Courts" (2012) 32:1 Legal Stud 35.
[110] Englische und französische Pressemitteilungen zum Beschluss vom 24. März 2021 zum Klimaschutzgesetz Neubauer v. Germany Order of 24 March 20211 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html. For more information on the litigation see *Neubaurer et al v. Germany* at http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/.
[111] S.C. 2007 c.30.
[112] *Friends of the Earth - Les Ami(e)s de la Terre v. Canada (Governor in Council)*, 2008 FC

Any attempt to exclude climate change considerations in planning environmental assessment laws would also be ripe for a constitutional challenge arguing that severance of such exclusions is required. Although courts may extend laws that violate rights either by severance or reading in (depending on how the law is drafted), remedial modesty is still required. Canadian courts remain reluctant to extend underinclusive laws without examining whether doing so is consistent with the original intent or purpose of the legislation, as well as supported by the human rights in question. In making this determination, courts will consider the budgetary implications of expansions of legislation.[113] It remains to be seen whether recent signals by the Court that they may be less willing to suspend declarations of invalidity[114] will hasten a process of remedial deterrence[115] discussed above where courts reject rights (or even deny standing) to avoid what they fear will be drastic remedial consequences. Again, the lesson is that manageable remedies are important to the advancement of novel and demanding rights.

III. Remedial Principles and Approaches

This final section will outline some general principles and conceptual approaches that can guide requests for remedies and remedial decision-making in climate change litigation. As suggested above, litigators and judges should at first embrace remedial modesty and try to anchor climate change litigation in relatively narrow remedies attached to specific governmental actions and laws. At the same time, courts should retain jurisdiction and engage more dialogically to achieve broader and more systemic remedies. Courts should generally focus on outcomes to be achieved while leaving the selection of precise means to achieve outcomes to governments. This includes Indigenous governments who may apply Indigenous laws as they relate to the preservation of animals, trees and water. Following the 2021 German climate change case and theories of democratic dialogue, courts may be justified in requiring or facilitating legislative and public engagement with climate change by requiring legislation to be enacted and/or requiring governments to publish information that will place the public in a better position to make informed choices about what their governments are doing about climate changes.

Courts should not shy away from the reality that there are many competing interests when devising remedies to mitigate climate change. Climate change is a multi-faceted and polycentric problem. As will be argued below, this reality does not mean that climate change is not justiciable. Courts can recognize and discipline the competing interests by requiring governments to justify limits on climate change as proportional including with respect to the overall balance of the harms caused by a remedy and the harms caused by not granting successful applicants the remedy they request. Courts should retain jurisdiction and use declarations or tentative decrees in order to adjust remedies in response to new evidence.

1183, (sub nom. Friends of the Earth c. Canada (Governor in Council)) [2009] 3 F.C.R. 201 (F.C.), affirmed 2009 CarswellNat 5337 (F.C.A.), leave to appeal refused 2010 CarswellNat 666 (S.C.C.).

[113] *Schachter v. Canada* [1992] 2 SCR 679.

[114] *Ontario (Attorney General) v. G* 2020 SCC 38. But for a use of 12 month suspended declaration to allow the legislature to select among different means to comply with the constitution see Reference re *Code of Civil Procedure* (Que.), art. 35, 2021 SCC 27 at paras 155-6.

[115] Levinson "Rights Essentialism"; Sonja Starr "Rethinking Effective Remedies and Remedial Deterrence in International Courts" (2008) 83 N.Y.U.L.Rev. 693.

Finally, litigators and courts should accept that truly important remedies will often fail. The remedies sought for climate change should be designed to acknowledge that the global community may very well fail to reduce emissions sufficiently and that iterative and increasingly drastic remedies may be necessary in the future. Increased focus on remedies may require all of us to focus on the practical reality of governmental failures and not simply to focus on more abstract and perfectionist concepts associated with human rights. Human rights are high-minded ideals. Alas we need more practical and even "dirty" remedies to deal with a planet that is becoming hotter and less habitable. Finally, we should recognize that the struggle for more climate justice is a long-term and generational struggle.

A. The Two-Track Remedial Process

The Indian Supreme Court has often taken a purely systemic approach in its public law cases. For example, in a very recent case raising concerns about the cutting down of trees that would could cause irreparable harm, the Indian Supreme Court did not order a specific remedy that some trees not be cut. Rather it focused on the systemic remedy of appointing a seven-member committee and a friend of the court to examine and propose guidelines to govern future deforestation and appropriate compensation for trees that are cut down.[116] To be sure, systemic remedies are required in what I have defended elsewhere as a two-track approach to remedies for violations of human rights. Systemic remedies are crucial in climate change litigation. Nevertheless, courts make distinct contributions and become more comfortable in confronting novel problems when they provide some tangible remedy that provides an immediate benefit including remedies such as damages and interim remedies that if used alone would be inadequate in combatting climate change.

What would a two-track approach to remedies look like in the context of climate change litigation? It might involve as in the 2021 German climate change case the use of a suspended declaration of invalidity to require the legislative to develop more effective systemic remedies in the form of emission target reductions and plans to achieve them. But it might also include damages or interim injunctions as remedies for successful litigants in order to illustrate the damage already caused by climate change or to prevent imminent damage. The individual remedy will not in itself by adequate, but it will allow the courts to play their traditional role in providing remedies for litigation while engaging more dialogically with other institutions and perhaps other countries to formulate systemic remedies.

In other work, I have defended s a "two-track" approach to remedies that borrows from the frequent distinction that supra-national adjudicators make between specific measures that provide remedies (often damages) for individual litigants and more ambitious, dialogic, and interactive systemic remedies to prevent continuing or new violations. I have argued that a single-track approach to remedies will produce remedial pathologies.[117] Specifically, an approach that simply provides remedies for the individual litigant will often fail to prevent new

[116] *Assn for the Protection of Democratic Rights v. State of West Bengal* Special Leave Petition no. 20547 of 2018 Decision of Supreme Court of India, 25 March, 2021 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_SPECIAL-LEAVE-PETITION-CIVIL-NO.-25047-OF-2018_order-1.pdf.

[117] Roach *Remedies for Human Rights Violations* supra ch. 2.

violations and will ignore that the modern state often violates human rights through the actions and inactions of bureaucracies. This seems particularly true with respect to rights that are violated as a result of a failure to mitigate the adverse effects of climate change. Conversely, courts that simply focus on systemic reform may often be at an institutional disadvantage compared to governments. They also risk losing legitimacy as courts to the extent that the ability to provide effective remedies is an important component of judicial legitimacy. As suggested in the first part of this article, requests for robust systemic remedies that judges may fear will not be manageable or exceed their institutional role may cause judges to rule, as they often have in North America, that climate change is not justiciable.

As in other parts of human rights litigation, it is generally easier to find examples of creative and innovative remedial approaches that use a two-track approach in the global South than in the west. For example, both Article 70 of Kenya's 2010 Constitution and s. 23 of its *Climate Change Act*[118] contemplate a two-track approach. Plaintiffs are allowed to obtain damages in relation to climate change (i.e. an individual first track compensatory remedy) while at the same time, the court can order more systemic second track remedies to stop and prevent actions that may cause climate change harms in the future.[119]

Another example of a two-track approach is the Filipino writ of kaliksan. It is only available with respect to constitutional environmental rights when "the actual or threatened violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces." [120] This seems to contemplate something like an interim injunction to stop specific harm as a first track remedy. At the same time, this writ can also result in continuing mandamus or structural injunction as a more gradual systemic remedy in cases where public officials have failed to exercise their lawful duties. An immediate remedy against a tangible harm can help capture the public imagination and build public support. The courts can help bring fairness and transparency to more gradual and incremental systemic reform processes. They can help ensure that the people harmed by climate change both receive some concrete remedy and have a voice in the process of systemic reform.

The two-track approach could allow climate change litigators to be bolder in seeking individual remedies such as interim injunctions, damages, and other forms of just satisfaction including apologies and public acknowledgement of responsibility. At the same time, the two-track approach will require remedial modesty as discussed in the first part of this article with respect to systemic remedies. In other words, both litigants and courts should be more deferential and incremental with respect to systemic remedies. This does not mean that they should not seek and order systemic remedies but rather that these remedies should make room for governments to draw on the expertise of climate scientists, Indigenous people, and civil society. As under the

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[118] No 11 of 2016

[119] Discussed at Michael Byers, Kelsey Franks & Andrew Gage, "The Internationalization of Climate Damages Litigation" (2017) 7:2 Wash J Envtl L & Pol'y 264 at 308-9

[120] *Segovia et al v. Supreme Court of the Philippines* GR No 211010 March 17, 2017 at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170307_13017_judgment.pdf The writ in this case was not granted perhaps because the applicant attempted to hit a remedial home by asking that half of public roadways be assigned to those not using cars. A more effective remedial strategy may have involved some request to stop or compensate for the harms caused by automobiles and a more gradual approach to systemic solutions to discourage the use of private vehicles.

2021 German climate change case, governments and legislatures may have to meet deadlines established by the court, but they will also have leeway and flexibility in determining the precise means to be used in achieving outcomes. Finally, the two-track approach holds open the possibility of courts becoming more prescriptive remedies in response to new evidence and past failures of systemic remedies to prevent ongoing and future violations of human rights.

B. Bi-Jural Remedies that Respect Indigenous Rights and Laws

The litigation and enforcement of Indigenous rights holds promise as a means to address climate change. Indigenous rights in this context are not only about rights. They also inject issues of jurisdiction and self-determination and the idea that the riches of the planet are held in trust for future generations. This can enrich legal as well as political and moral debates about climate change.

The Supreme Court of Canada in *Tsilhqot'in Nation*[121] has held that one of the attributes of Aboriginal title is that it cannot be used in a manner that makes the land no longer available for use by future generations. At one level, this places a burden on Aboriginal title that is not imposed on other forms of title. At the same time, however, this understanding of Aboriginal title may also incorporate conservationist and multi-generational concerns that Indigenous land is held in trust for future generations. In some respect, it mirrors the idea that public land is held in a public trust, something that at times has been accepted by courts in the in the United States and India[122] but not Canada. [123] As Gerald Torres has explained the public trust doctrine:

> is meant to protect those resources that have an inherently public character and are not owned in the same way as traditional property. The government does not hold these natural resources in fee simple, but rather holds them in trust for the people and only for purposes that benefit the public interest. The public trust doctrine also embodies the idea that every generation has a temporary right in the resources of the Earth, and those interests are protected by the inherently limited ownership allowed in natural resources. Even those resources that must be consumed to be used must be consumed with future generations in mind.[124]

Professor Torres adds that while the trust idea is particularly strong for Indigenous groups, it should be understood as "a preexisting right for *all* persons not just tribal groups".[125] The idea that we hold our planet and our polity in trust for future generations is in his view "the fundamental attribute of legitimate authority."[126]

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[121] 2014 SCC 44.
[122] *LaRose v. Canada* 2020 FC 1008
[123] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24. Compare *Illinois Central Railroad Co. v. Illinois* 146 U.S. 387 (1892); *Mehta v. Kamal Nath* 1 SCC 388 (1997); *ML Builders Ltd v. Radhey Shayam Sahu* (1999) INSC 228.
[124] Gerald Torres "Translating Climate Change" (2015) 13 NZJPIL 137 at 148. See also Joseph Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1968) 68 Mich. L.Rev. 471 at 564 noting the courts should not approve legislative or administrative decisions about public resources "based upon ignorance; and when that factor is joined with the courts' strong feeling that diffuse public uses are both poorly represented and by their nature difficult to measure, judicial wariness is inevitably enhanced."
[125] Gerald Torres "Translating Climate Change" at 149.
[126] Ibid at 152.

One way of recognizing a public trust is by giving water and land its own legal personality. This has been done recently by legislation in New Zealand[127] and by a Constitutional Court decision in Colombia.[128] Both of these developments centred on the rights of Indigenous peoples even as they recognized legal status in land and rivers. Indigenous rights litigation can also involve claims of breach of fiduciary duties that can trigger a broad array of equitable remedial doctrines including the creation of constructive trusts to preserve land and water. Another way as suggested by Professor Gunn is to give Indigenous people more power to participate in policy-making about climate change, something that may be facilitated by implementing the duty to consult with a view of achieving consent.[129]

In focusing on Indigenous rights litigation, there are dangers of imposing colonial double-standards that force Indigenous peoples to contribute and suffer financial disadvantages in the battle against climate change that are not demanded of non-Indigenous people and the many corporations that they control. This danger is real. It can perhaps be guarded against by the vision of bi-jural remedies promoted by Article 40 of the United Nations Declaration of the Rights of Indigenous Peoples which contemplates that remedies for violations of Indigenous rights including those related in Article 27 with respect to the environment will respect both relevant Indigenous laws and human rights. Recent federal legislation in Canada provides that "the Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[130]

Truly bi-jural remedies may be more likely to come from specialized tribunals such as the Treaty of Waitangi Tribunal than from the "ordinary courts" of settler dominated societies. They would draw on rich and diverse Indigenous laws relating to the preservation of water, animals, forests and a recognition of the interdependence of humans with all living things.[131] As John Borrows has warned, we should also reject stereotypes of Indigenous people as "natural environmentalists" and must recognize the hard work necessary to respect Indigenous laws as they relate to the environment. At the same time as Professor Borrows argues respecting the environment "demonstrates affection for our children. It also shows our respect and love for the earth. It is a significant principle of Indigenous law."[132]

[127] Te Urewara Act, 2014; Te Awa Tupua Act, 2017.

[128] "The Atrato River, its basin and tributaries will be recognized as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities" *Centre for Social Justice Studies v. President of the Republic* Judgment T-622/16 at 10.2(1) translation at http://files.harmonywithnatureun.org/uploads/upload838.pdf. The judgment ordered the creation of a guardianship committee with decontamination of the river to start within a year and to create a joint action against the harms of mining and studies of mercury in the populations as well as the production of traditional foods within 6 months.

[129] Brenda Gunn "Protecting Indigenous Peoples' Rights through Indigenous Participation: A Climate Change Example" (2020) 17 McGill J of Sustainable Development Law 1.

[130] *An Act Respecting the United Nations Declaration of the Rights of Indigenous Peoples* S.C. 2021 c.14 s.5.

[131] See for example John Borrows *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); Betsan Martin et al eds. *Respon Ability: Laws and Governance for Living Well with the Earth* (London: Routledge, 2018).

[132] John Borrows "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michaal Asch, John Borrows, and James Tully *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) at 62.

There is increased emphasis, both domestically and supra-nationally, on using the government's duty to consult as a means of reconciling the competing interests of Indigenous rights and social interests in resource development. The duty to consult is promising with respect to climate change in cases where it results in Indigenous consent and agreements that respect various Indigenous laws protecting land, trees, water and animals. It is less promising if the agreements themselves result in resource extraction with some financial benefits for Indigenous peoples[133] or if the discharge of the duty to consult is part of a process in which courts accept limits on Indigenous rights in the name of economic benefits of resource extraction. Even when the duty to consult is found by courts to have been breached, the remedy ordered is too often a "do over" remedy without adequate attention to the pecuniary and non-pecuniary harms that disrespectful consultation processes cause to Indigenous people and imbalances of power.[134]

The Inter-American Court of Human Rights has been active in developing remedies for violations of Indigenous rights in a way that could be responsive to climate change. In a 2015 case, it ordered that land be restored to an Indigenous community after it had been granted to a mining company. It indicated that barriers to prior consultation in the Mining Act should be eliminated and that a $1.5 US million community development fund that it awarded in part be used to re-forest and rehabilitate the traditional lands.[135] In another 2015 case, the Inter-American Court of Human Rights ordered that mining should not take place on Indigenous lands. The state was required in collaboration with the Indigenous applicants and independent experts to develop an action plan to respond to the deforestation of Indigenous lands. The Inter-American Court of Human Rights also ordered environmental assessment of any new projects as a means to ensure the non-repetition of the Indigenous applicant's right to property.[136] Unfortunately, many South American countries have resisted the Inter-American Court of Human Rights' decisions, in part because of their economic interests in fossil fuel development. Canada as well has been too slow in recognizing Indigenous land claims and self-government. *Tsilhqot'in Nation* was finally decided in 2014, close to half a century after modern lands claims litigation and negotiation started in modern Canada. The pace of recognizing Indigenous rights at present is much too slow to be effective in combatting climate change. That said, massive restoration of Indigenous lands to be managed in accordance with Indigenous law could have the very important additional benefit of combatting climate change.

C. Proportionality and Remedial Decision-Making

One of the reasons why courts may be reluctant to hold that climate change raises justiciable issues is a concern that it will force them to evaluate the inevitable trade-offs that governments will make between taking steps to remedy climate change and pursue other important objectives including concerns about the loss of jobs, regional equity, and other objectives. Courts may be

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[133] Here John Borrows' wise warning that we should not assume that Indigenous people may be or may be able to afford to be environmentalists should be recalled. Ibid.

[134] For additional analysis see Roach *Remedies for Human Rights Violations* supra at 490-500; Brenda Gunn "Remedies for Violation of Indigenous Peoples' Human Rights" (2018) 69 (1 supp) U.T.L.J. 150; Karen Drake "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishnaabek Law" (2015) 11 J.S.D.L.P. 183; James Anaya and Sergio Puig "Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples" (2017)_67 U.T.L.J. 435.

[135] *Garifuna Punta Pietra Community v. Honduras* (2018) 41 Loy.L.A. and Int. and Comp L.Rev. 1263.

[136] Kalina and Lokono Peoples v. Suriname (2017) 40 Loy.L.A. and Int. and Comp L.Rev 1213.

inclined to hold that rights claims related to climate change are non-justiciable because they raise multi-faceted or polycentric issues related to the competing interests of economic development (and in some cases economic survival) against the claims of present and future damage caused by climate changes.

Both litigators and judges should directly confront the issue that climate change litigation will require difficult choices between economic development and remedies that may be required to mitigate global warming. Courts should use proportionality reasoning as a way to require governments to justify any limits placed on remedies to mitigate climate change.[137] In other words, courts should require governments to demonstrate that the remedies requested by successful litigants would harm an important and legitimate social objective and that some less drastic remedy will strike a more appropriate overall balance between these conflicting interests.

Concerns have been raised that proportionality-based limits on rights can encourage an overly deferential approach to rights. These concerns have less bite at the remedial stage where courts have found that the government has failed to justify the limit on the rights and are engaged in a process of practical reasoning in selecting what of alternative remedies is most appropriate in the circumstances. Although proportionality applied to rights or remedies runs the danger of undue judicial deference, proportionality's commitment to evidence-based reasoning should be a virtue in climate change litigation given the mounting evidence of the extreme harms and existential threats of climate change.

The elements of proportionality reasoning are well known to litigants and judges. Its use can bring increased discipline and transparency to remedial decision-making including the determination of the balance of convenience with respect to interim remedies and in determining whether a suspended as opposed to an immediate declaration of invalidity or reading in is justified. [138] The use of proportionality reasoning in remedies should not rehearse the government's failed argument for limits on rights. Yhe onus should be on government to demonstrate why a less drastic remedy or perhaps no remedy at all can be a justified to protect legitimate interests that may be harmed by the successful applicant's preferred remedy.[139]

What does an integration of proportionality into remedial decision-making entail? The first step is for the government to identify a compelling government objective to justify a limit on the successful applicants requested remedy. This social or governmental objective should generally not be the objective that the government invoked under any failed analysis to justify a limit on the right. The government's focus should not be allowed to re-argue the merits. It should, however, be able to introduce evidence about the social harms that can be caused by a requested remedy. Symbolic or vague objectives such as concerns about the economy should not be

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[137] Roach *Remedies for Violations of Human Rights* supra at 60-70, 330-338, 429-433 500-503.

[138] For arguments that some forms of climate change produce harms disproportionate to economic interests see Andrew Stobo Sniderman and Adam Shedletzky "Aboriginal Peoples and Legal Challenges to Canadian Climate Policy" (2014) 4 Western J of Legal Studies 1 at 6-7.

[139] The Canadian courts have recognized that it is appropriate to place an onus on governments at the remedial stage. See Ward v. Vancouver [2010] 2 SCR 28; Canada (Attorney General) v. Hislop [2007] 1 SCR 429; Ontario (Attorney General v. G.) 2020 SCC 38. Governments should be expected to collect and make public information and justify limits on remedies.

accepted because they do not allow for evidence-based application of the remaining requirements of proportionality reasoning.[140]

The precise limit that the government seeks to justify on a remedy would then have to be rationally connected to the government's legitimate objective for limiting the remedy. It would have to depart from the requested remedy (such as the default remedy of an immediate declaration of invalidity or an extension of one emission reduction scheme from one sector of the economy to another) as little as possible as to achieve the objective.

The final element of proportionality is the controversial final stage of determining the overall balance. to the harms that applicants and others would suffer by not receiving their requested remedy. As Aharon Barak has argued in his important work on proportionality, the overall balance stage can be critical to ensuring that justice is achieved.[141] It requires the court to go beyond instrumental rationality and confront the normative question of whether the limit placed (in this case on the remedy) is justified compared to the harm of the rights violation.

The overall balance at the remedial stage would involve determining whether the government has justified the limit it has requested on the applicant's preferred remedy in relation. In climate change litigation, the harm of the rights violations may be especially profound and threaten the life of humans, animals and plants. In such cases, reduced or limited remedies may not be justified even if they are necessary to recognize a legitimate competing objective such as providing jobs in an economically disadvantaged region of a country or ensuring that a country can export its resources in order to avoid trade deficits and declines in gross domestic product. In other words, the overall balance stage should require courts in appropriate cases to acknowledge and accommodate the existential threat of climate change.

The overall balance stage of proportionality reasoning may not in every case work to the advantage of the successful litigant. For example, the German Constitutional Court may have been appealing to ideas of overall balance when it upheld the current Paris based emission targets in the 2019 Climate Change legislation while also requiring the legislature to be more specific about post-2030 targets. It was concerned that the impact of both climate change and the measures required to keep the planet habitable will be especially severe on young applicants and others who may be alive after 2030.

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[140] Political or symbolic considerations should an insufficient objective under proportionality reasoning. As Justices Brown and Rowe have suggested (in dissent but not on this point), " the entrenchment of minority rights in a constitution is meant to ensure that minorities are not subjected to the whims of the majority. Accepting that a government could delay acting due to a fear of negative political consequences would contradict the very purpose of s. 23" guaranteeing minority rights *Conseil scolaire francophone* v. Canada 2020 SCC 13 at para 336. For my arguments about why symbolic and often populist slogans are not determinate enough or appropriate to facilitate full proportionality reasoning, see Kent Roach, "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffrey Sigalet, Gregoire Webber and Rosalind Dixon eds, *Constitutional Dialogue* (Cambridge: Cambridge University Press, 2019) at 300-302.

[141] Aharon Barak *Proportionality* (Cambridge: Cambridge University Press, 2012) ch. 12.

D. Proportionality and Polycentricity

Consistent with remedial modesty discussed in the first part of this article, nothing in the German Constitutional Court judgement precluded the government from going beyond the Court's focus on the post-2030 period. As discussed above, the government appears to do this be addressing both the 2030 and future targets.

The German Constitutional Court's remedy is somewhat akin to what Lon Fuller suggested was the appropriate way for courts to approach polycentric problems. Professor Fuller suggested that courts employ a "tentative decree, with something like an order to show cause why it should not be made final".[142] By avoiding judicial rulings that were "too exacting and comprehensive", courts could tackle polycentric problems in part facilitating "extra-curial processes of political adjustment and compromise" while ensuring that the overall result was still "acceptable to the court".[143] The German Constitutional Court may be able to determine in the future whether the ultimate German approach including reduced 2030 targets not required by the judgment is an acceptable response to its decision and the evolving and multi-faceted problem of climate change.

E. Protests and Civil Disobedience

What should be done if the law is unwilling or too slow in mitigating the harms of climate change? The front lines of the battle against climate change are blockades and other protests mounted by Indigenous peoples and environmental allies against the expansion of pipelines and other forms of resource extraction. These remedies of self-help and civil disobedience often reflect the reluctance of courts to grant interim or permanent injunctions to restrain such development. For example, the Supreme Court of Canada has observed that "the balance of convenience often tips the scales in favour of protecting jobs and government revenues".[144] At the same time, courts are often willing to grant injunctions to development companies and are reluctant to consider either Indigenous rights or necessity as a defence to violate anti-blockade injunctions. This raises the prospect that at present the law, the legal profession and courts may be doing more to facilitate resource development that increases climate change than they are doing to combat such climate change. Civil disobedience of unjust laws are themselves a remedy[145] and one that was used before the courts eventually joined the fight against apartheid. Such a pattern may repeat itself with respect to the climate change in the 21st century.

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[142] Lon Fuller, "Forms and Limits of Adjudication" at 389.

[143] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at p.178. On the evolution of Fuller's thought from an initial attraction to the dichotomy between corrective and distributive justice to this much more nuanced position which accepted a judicial role in dealing with polycentric problems see Kent Roach "Polycentricity and Queue Jumping in Public Law Remedies" (2016) 66 U.T.L.J. 1 at 9-12.

[144] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 311 at para 14.

[145] Roach *Constitutional Remedies in Canada* supra at 2.280-2.290; John Borrows *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) ch. 2 for a balanced examination of the advantages and disadvantages of civil disobedience.

F. Remedial Failures and Cycles

We should acknowledge that remedies often fail. Individual remedies, such as damages, often fail to truly achieve the corrective ideal of placing plaintiffs in the position they would have occupied but for a human rights violation. Systemic remedies are perhaps even more likely to fail because they are unlikely to be perfectly effective in preventing future violations. Inadequate remedies can, however, focus attention on the harms of climate change such as unnecessary deaths caused by air pollution. They can also result in cycles of litigations and increasingly drastic remedies.

Remedial failure is a pressing issue in climate change litigation. The German Constitutional Court has recently rejected arguments that it should not order remedies just because Germany's emissions constitute only 2% of the globe's emissions. It reasoned:

> the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. It is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action. Climate change can only be stopped if climate neutrality is achieved worldwide… The state may not evade its responsibility here by pointing to greenhouse gas emissions in other states … On the contrary, the particular reliance on the international community gives rise to a constitutional necessity to actually implement one's own climate action measures at the national level – in international agreement wherever possible.[146]

This statement both acknowledged the reality that no one case will fully address the harms of climate change but that this cannot justify a refusal to order some remedies. The Constitutional Court's judgment also leaves open the prospect that human rights may be more massively violated as the harms of climate change increase and as such may require more drastic remedies. In this way, there are synergies between the use of proportionality reasoning in remedial decision with an iterative approach to remedies that can result in stronger remedies should climate change get worse or and less drastic remedies should it improve.

The two-track approach to remedies can respond to remedial failures by starting new cycles of remedies that may be more intense and prescriptive. When systemic remedies fail, courts should embark on a new cycle of devising both individual and systemic remedies. They should do so with attention to past failures and to whether the government has responded in a reasonable manner to prior decision. This attentiveness to past decisions and failures can be enhanced if a particular court has retained jurisdiction as part of a declaration plus or injunction. If this is not the case, the existence of a specialized "green" bench or the intervention of public interest groups can serve as a means of ensuring that the court considers whether more demanding remedies are warranted.

[146] Englische und französische Pressemitteilungen zum Beschluss vom 24. März 2021 zum Klimaschutzgesetz, Neubaurer v. Germany Order of 24 March 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (English summary) at paras 201-202.

Supra-national courts are generally more concerned with repetitive violations than domestic courts because of their limited resources.[147] International law, like public law litigation, often requires an iterative approach.[148] An iterative approach that allows for the participation of multiple parties is suitable for much public interest litigation directed at the conduct of bureaucracies, but it seems especially appropriate with respect to climate change litigation. As James Thornton, a leading litigator, has stated, winning "is always temporary. Losing is always permanent."[149]

Conclusion

Climate change litigators ignore remedies at their peril. Rather than aim for remedial home runs that may scare judges from finding that the government has violated any rights or that climate change is justiciable, litigants should pursue a range of more modest and narrowly focused remedies while at the same time encouraging courts to retain jurisdiction while systemic remedies are developed. More narrowly focused remedies may include interim remedies to stop conduct that will aggravate climate change, challenges to laws, and damage awards. Longer term systemic remedies can be achieved through the retention of jurisdiction and the new remedy of a "declaration plus" that combines the generality of declarations with retention of jurisdiction so that declarations can be clarified and sometimes evolve into injunctive relief in a fair, transparent, and evidence-based manner. Systemic remedies can also include requirements that government collect and publish information about climate change and its harms.

Lawyers can overrate the coercive powers of injunctions and they should be aware that requests for drastic remedies may backfire. Domestic courts can learn from the gentler and often slower process of supra-national judicial bodies which often retain jurisdiction and require governments publicly to report on their remedial efforts. The retention of jurisdiction or the commencement of new litigation can require the government has to publicize its response (or lack of response) to the judicial remedies in open court. Such processes also allow the adverse parties to subject the state's response to adversarial challenge.

Indigenous rights litigation also has potential to address the harms of climate change. Interim injunctions to protect Indigenous land and recognition of Aboriginal title should be sought. Consistent with Article 40 of UNDRIP, remedies for violations of Indigenous rights should respect both human rights and Indigenous laws that may be violated by climate change. National and supra-national courts should defer to the ability of Indigenous governments using Indigenous laws to select the precise means to respond to climate change just as such courts should defer to the ability of other governments to select the means to be used. At the same time, courts should remain open to the reality that remedies may frequently fail to make adequate progress in the generational battle of addressing climate change. The answer cannot be to give up in despair. The answer for the sake of ourselves and future generations must be to formulate new and hopefully mote effective remedies to address the threatening tides of climate change.

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[147] Gerald Neuman "Bi-Level Remedies for Human Rights Violations" (2014) 55 Harv. J of Int L. 1.
[148] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge: Harvard University Press, 1996). Brunee and Toope, *Legitimacy and Legality in International Law*.
[149] Thorton and Goodman *Client Earth* supra at 84.

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