# Antipolycentric minimalism in climate change litigation.

*The case for a transnationally inclusive approach*

Nijenhuis, L.M.; Uzman, J.; Wewerinke-Singh, M.J.

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**Antipolycentric minimalism in climate change litigation:**
**The case for a transnationally inclusive approach**

Laurien Nijenhuis, Jerfi Uzman and Margaretha Wewerinke-Singh♣

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## Abstract

*Domestic courts increasingly adjudicate climate change policy enforcement, spotlighting the role of courts within the separation of powers framework and raising scholarly debates worldwide. Groundbreaking Dutch cases, like Urgenda v State of the Netherlands and Milieudefensie v. Shell, exemplify this trend. Lon Fuller's polycentrism objection, suggesting courts cannot fully grasp consequences in complex, society-wide issues like climate change, frequently arises in these debates. Consequently, courts often adopt an approach one might call 'antipolycentric minimalism', narrowly framing judgments to avoid overstepping judicial prudence.*

*This paper critiques one aspect of antipolycentric minimalism in climate change cases: domestic courts' tendency to downplay or exclude states' obligations vis-à-vis inhabitants of other states. Given the global nature of climate change, acknowledging both domestic and global interests, and upholding reciprocal state duties under international law, is essential. The universality of human rights underlines this call for a broader approach. We propose a reinterpretation of Dutch domestic procedural law to include these international obligations, encouraging coherent application worldwide. The goal: a transition to zero emissions that is not just nationally, but globally just, highlighting the importance of rule of law in maintaining justice and equity in a complex, interconnected world.*

♣ PhD-fellow and junior lecturer, Professor, and Associate Professor at the department of Constitutional & Administrative Law, University of Amsterdam respectively. Corresponding author: l.m.nijenhuis@uva.nl.

## I. Introduction

Climate change litigation has proliferated worldwide in recent years, with over 2,000 cases filed since 1990[1]. This trend reflects the inability of the political process alone to deliver adequate climate action, prompting citizens to turn to the courts for policy enforcement and accountability.[2] Landmark cases like *Urgenda v State of the Netherlands*, where the Dutch Supreme Court upheld a mandatory emissions reduction target for the government, demonstrate courts' willingness to adjudicate climate responsibilities.[3] Other cases, such as *Milieudefensie v Shell*[4] and *Juliana v United States*[5] in the U.S., have similarly placed scrutiny on major corporate and government contributors to climate change.[6]

This policy enforcement role asked of the judiciary both underscores courts' duties to uphold justice, and provokes debates on the proper role of courts within the separation of powers. Courts are increasingly called upon to review the reasonableness of climate policies, spotlighting their function in safeguarding the rule of law and protecting fundamental rights.[7] However, climate change is a complex, multi-faceted issue, requiring nuanced policymaking which balances environmental, social and economic concerns. This has raised objections over whether courts possess adequate technical expertise or democratic legitimacy for such a far-reaching role.[8]

One specific objection concerns the 'polycentric' aspect of this type of litigation.[9] Coined in the 1970's by legal theorist Lon Fuller, polycentricity refers to the idea that some issues are ill-suited for judicial adjudication. A polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors.[10] A polycentric dispute is thus 'many centred' in that pulling on one part of the spider's web creates new centres of tension somewhere else along its pattern of lines. It is clear, as such, that climate litigation displays many elements of polycentricity, given the huge range of parties affected by (the lack of sufficient) emission reductions and the interests involved.

Seemingly in response to (or anticipation of) objections such as Fuller's, many courts have adopted an 'antipolycentric minimalism' approach in the adjudication of climate cases, narrowly framing climate change judgments to avoid overstepping their judicial remit.[11] One aspect of this approach is courts' tendency to downplay or exclude states' obligations vis-à-vis inhabitants of other states. While understandable, we argue that this approach is untenable in

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[1] United Nations Environment Programme (UNEP), 'Global Climate Litigation Report: 2023 Status Review' (UNEP 2022) 5.

[2] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37, 38.

[3] The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, ECLI:NL:HR:2019:2007, Supreme Court of the Netherlands, 20 December 2019.

[4] Milieudefensie et al v Royal Dutch Shell plc (ECLI:NL:RBROT:2021:5339), District Court of The Hague, 26 May 2021.

[5] Juliana v United States, 947 F.3d 1159 (9th Cir 2020).

[6] UNEP (n 1).

[7] Peel and Osofsky (n 2); Julian Eule, 'Judicial Review of Direct Democracy' (1990) 99 (7) The Yale Law Journal 1503, 1525.

[8] Ibid 395.

[9] Gerhard van der Schyff, 'The Urgenda Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism' (2020) 6(2) Constitutional Review 210, 222.

[10] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353, 394. The term polycentricity as such was not coined by Fuller. He borrowed the idea from Micael Polanyi's book *The Logic of Liberty.* Unline Polanyi, who focused on economic government planning, Fuller operationalised the term in the context of legal adjudication.

[11] Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v EPA' (2013) 35(3) Law & Policy 236, 237.

light of climate change's inherently global nature. More specifically, given the universal threat climate change poses, and the global cooperation required, courts should consider transnational interests and reciprocal state duties under international law when adjudicating climate cases.[12] A reinterpretation of procedural law to recognize these obligations, while upholding judicial prudence, would encourage coherent worldwide application of climate justice.

## II. The Dutch approach: innovative litigation but with a classic twist

### *A. Climate litigation in the Netherlands: admissibility and scope*

In recent years, the Netherlands has clearly become a forerunner in climate change litigation. Landmark decision *Urgenda v State of the Netherlands*, in which the Dutch government was ordered to reduce 25% emissions by 2020 compared to 1990 levels, marked the first time a national government was ordered to reach a mandatory reduction target. In a similar way, *Milieudefensie v Shell* became the first case in which a specific reduction order (45% by 2030, compared to the levels of 2019) was imposed on a corporate actor. Both decisions were portrayed as remarkable moments in legal history[13] and acclaimed for 'speeding up and enforcing the obligations negotiated within the UNFCCC process.'[14]

A notable feature of the Dutch climate cases is that they were decided in civil courts.[15] Section 3:305a, of the Dutch Civil Code allows public interest organizations such as Urgenda and Milieudefensie to bring actions for the civil court in the public interest. In first instance, both injunctions[16] were based on the claim that respectively the Dutch government and Shell had breached their duty of care under Section 6:162 of the Dutch Civil Code. The standard of care arising from that provision is an open-ended norm that is for the courts to assess on a case-to-case basis. The civil court's task to determine the appropriate standard of care became particularly sensitive in climate change litigation, as the court needed to decide on the public issue of climate policy.[17] Although the appeal and Supreme Court judgements in *Urgenda v State of the Netherlands* were not based on the standard of care but directly adopted a positive obligation for the government on the basis of art. 2 and 8 ECHR, the civil court still interfered with the government's climate policy by imposing the reduction order. For these reasons, the decisions have not only been welcomed, but also criticized for possibly overstretching constitutional boundaries.[18] This criticism, however, seemingly ignores the fact that the rulings were in some respect also characterized by a rather reluctant or even conservative court attitude. That becomes visible in the court's practice of narrowing down the case to domestic interests.

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[12] Christina Voigt, 'The Role of National Courts in the Law of International Responsibility' (2020) 11(1) Asian J Int'l L 1, 3.

[13] K.J. de Graaf and J. H. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', Journal of Environmental Law, Vol. 7, Issue 4, 2015; R. Hösli, 'Milieudefensie et al. V. Shell: A Tipping Point in Climate Change Litigation against Corporations?' (2021) 11 *Climate Law*, 195.

[14] C. Miacchi and J. Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell', (2021) 30 RECIEL, p. 414.

[15] As opposed to, for example, cases in France and Germany that were decided in constitutional and administrative courts (Conseil d'État, 1 July 2021, N° 427301 *(Grande-Synthe*); Tribunal administratif de Paris 3 February 2021, nrs. 1904967, 1904958, 1904972 en 1904976/4-1; BVerfG, 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618).

[16] The provision on injunctions is Book 3, Section 296 of the Dutch Civil Code.

[17] M. Peeters, 'Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25 RECIEL 123, p. 124.

[18] L. Besselink, The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives' (2022) 18 European Constitutional Law Review, 155; C. Miacchi and J. Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell' (2021), 30 RECIEL, p. 414.

In *Urgenda v State of the Netherlands* and *Milieudefensie v Shell*, the interests of inhabitants from other states were mainly excluded on formal grounds. Therefore, the next section will provide some background on formal requirements in Dutch procedural law that may encourage a minimalist approach.

### B. *Formal rationales for a minimalist approach*

In order to protect courts from pointless claims, Section 3:303 of the Dutch Civil Code prescribes that an individual or legal person is only entitled to bring an action to the civil court if he has sufficient own, personal interest in the claim.[19] This provision contains a procedural and a substantive interest requirement, indicating that the claimant needs to be positively affected by granting the claim *and* may not be of too little interest.[20] The interest requirement is of particular importance in claims for injunctive relief, as the claimant's financial interest in claims for damages is quite obvious.[21]

In public interest actions, Section 3:305a of the Dutch Civil Code is of additional importance. According to that provision, foundations and associations with full legal capacity may bring an action to the court pertaining to the protection of similar interests of other persons, insofar as the foundation or association represents these interests based on the objectives formulated in its by-laws. Accordingly, it provides for an exception to the rule that claimants are only entitled to adjudicate on the basis of their own interest.[22] Although full representativity between the public interest organization and the persons it represents is not required, the promoted interests must be 'similar' in nature. The Dutch Supreme Court has determined that this requirement is met when the interests that serve the claim are suitable for bundling, in order to promote an efficient and effective legal protection.[23] There's no need for interests to be identical and a lack of consent among members of the represented group not necessarily precludes fulfilling the requirement.[24] The formal 'similar interest' requirement is closely related to the substantive relativity requirement,[25] that requires the bundled interests to be protected by the alleged breached standard.[26] The next section will elaborate on the role these formal requirements (and to some extent, the related substantive relativity requirement) played in minimalizing foreign interests in the Dutch climate change cases.

### C. *Formal rationales in Dutch climate cases*

In both Dutch climate cases, Section 3:303 of the Dutch Civil Code was not assessed on its own, but incorporated in the assessment of how and whether claimants met the conditions as set out in Section 3:305a. In that regard, foreign interests were considered. In *Urgenda*, the issue was only directly addressed in the District court's ruling in first instance. In its defence, the Dutch State argued that Urgenda had no standing insofar it claimed to represent the rights or interests of current or future generations *in other countries*.[27] The District court noted that Urgenda primarily but not solely protects Dutch interests, as the interest that follows from its

[19] A similar requirement is applied in administrative law, where one needs to be a person of interest ('belanghebbende'), according to art. 1:2 of the Dutch General Administrative Law Act.
[20] T. Bleeker, 'Voldoende belang in collectieve acties: drie maal is artikel 3:303 BW, NTBR 2018/20', p. 140-141.
[21] Ibid., p. 143.
[22] Ibid., p. 145.
[23] Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, par. 4.2.
[24] Ibid.
[25] Which can be found in Section 6:163 of the Dutch Civil Code.
[26] Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007, par. 3.5.1.
[27] The Hague District Court 25 June 2015, ECLI:NL:RBDHA:7145, par. 4.5.

by-laws – 'a sustainable society' – is inherently international and transboundary.[28] Therefore, Urgenda's claim could at least be *partially* based on the fact that Dutch emissions also have consequences for persons outside the Dutch national borders, according to the District court.[29] Consequently, the State's objection against the partial transboundary nature of Urgenda's claim was no obstacle in terms of standing. The District court's emphasis on the fact that Urgenda *mainly* promotes Dutch interests suggests a different outcome had Urgenda solely promoted the interests of non-Dutch persons. The Court of Appeal and the Supreme Court ultimately refrained from addressing the question whether Urgenda could act on behalf of non-nationals or the international community at large, since Urgenda's claim was already admissible insofar as it acted on behalf of Dutch nationals.[30] The interests of Dutch nationals were regarded sufficiently similar to be handled in one claim.[31]

In its substantive assessment of the case, the District court had to determine whether the State committed a tort against Urgenda by breaching its duty of care under Book 6, Section 162 of the Dutch Civil Code. In that respect, the District court had to assess whether Urgenda met the requirement of relativity, meaning that the breached standard – exercising due care in combating climate change – had to serve Urgenda's interests. According to the District Court, 'the government's care for a safe living climate at least extends across Dutch territory.'[32] Since Urgenda promotes the interests of persons living on the Dutch territory, Urgenda meets the relativity requirement.[33] As to the question whether Urgenda's claim could also be successful insofar as it promotes the rights of persons *from other countries*, the District court found no decision necessary, as there was no need for Urgenda's claim to be successful in that regard.[34] The State's unlawful acts towards Dutch inhabitants already established a successful claim for Urgenda.[35] Accordingly, the District court conveniently left unspoken the issue whether the Dutch government has a duty of care to protect persons outside the Dutch territory from dangerous climate change.

In *Milieudefensie v Shell* the District court comes to a different conclusion on the matter of standing, as it decided that the interests of current and future generations of *the world's population* are not suitable for bundling.[36] The court notes that 'although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO2 emissions.'[37] Consequently, the claims were only admissible insofar they served the interests of Dutch residents and the inhabitants of the Wadden Sea area, since these were considered suitable for bundling. The practical consequence of this approach was that ActionAid, one of the associations that filed the claim, was not admissible in this action. According to the District court, ActionAid protects a very broadly formulated, global interest, with a specific focus on Africa and mainly conducts activities in developing countries.[38] The other associations that filed the claim were admissible, since they sufficiently promoted the

[28] Ibid., par. 4.7.
[29] Ibid., par. 4.7.
[30] The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA2018:2610, par. 37; Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, par. 5.9.2.
[31] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, par. 5.9.2.
[32] Ibid., par. 4.91.
[33] Ibid., par. 4.91.
[34] Ibid., par. 4.92.
[35] Ibid. par. 4.92.
[36] The Hague District Court 26 mei 2021, ECLI:NL:RBDHA:2021:5337, par. 4.2.3.
[37] Ibid., par. 4.2.3.
[38] Ibid., par. 4.2.5.

interests of Dutch residents and the inhabitants of the Wadden Sea area.[39]

### D. *Critique*

As discussed in paragraph II, the issue of incorporating interests of inhabitants of other states was mainly incorporated in the assessment of Section 3:305a of the Civil Code. In *Milieudefensie v Shell*, the 'similar interest' requirement arising from that provision blocked the inclusion of global interests. However, a broader analysis of the case law of Dutch courts on Section 3:305a illustrates that this refusal of extraterritorial interests can hardly be called imperative. The case law is really one of a case by case basis. Public interest organization Clara Wichmann for instance, in filing a claim against the Dutch State for not acting against political party SGP's refusal to allow women to stand for election, was for example admissible since its claim concerned its main interest – the public interest of all Dutch inhabitants to be able to exercise their fundamental right to an equal treatment.[40] On the contrary, in a procedure about advance payment of damages for healthcare employees that suffered from post-COVID health issues, the court ruled that the interests of healthcare employees were too diverse to be bundled in one claim, as the damages suffered, and the liability of the state may differ from case to case.[41] These differences are readily explainable, given the specific circumstances of the cases. The court's rejection of similar interests in *Milieudefensie v Shell* is seemingly harder to grasp. Why would inhabitants of other countries have a different interest in mitigating climate change than Dutch inhabitants? There may be differences in the time and manner in which the global population at various locations will be affected by global warming, as the court argued, but that does not change the fact that fast and profound emission reductions benefit the entire world population. In fact, this position was seemingly adopted by the District court in *Urgenda v State of the Netherlands*. In case the claim had involved a request for certain adaptation measures, interests of inhabitants of different countries might actually have differed, but the case solely involved a request for mitigation. Different cases show that the 'similar interest' requirement is of flexible nature and subject to judicial interpretation. No formal requirement prevents the courts from pursuing a broader approach with regard to the interests of inhabitants from other states. As was discussed in paragraph IV, such an approach is desirable.

## III. The substantive rationale for judicial minimalism: anti-polycentricity?

Having discussed the two main 'Dutch climate cases', one element is striking, which is that the Court in *Milieudefensie/Shell* and to a lesser extent, the courts in *Urgenda* were either unwilling to broadly construe Section 3:305a of the Civil Code in order to include the international community, or to even discuss this possibility in any meaningful manner. We now turn to a possible explanation, a substantive rationale for this rather reserved attitude of the Dutch courts. This attitude, we argue, follows from what we call anti-polycentricity, a mix of the legal-theoretical concepts of polycentricity and judicial minimalism. Let us first elaborate a bit more about these two concepts and their interrelationship.

### A. *Polycentricity and Judicial Minimalism*

Although originally a concept of political-economic theory, polycentricity gained traction amongst legal circles when it was (posthumously) advanced by Lon Fuller in the 1970's.[42] This

[39] Ibid., par. 4.2.5.
[40] Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, par. 4.3.2.
[41] The Hague District Court 8 March 2023, ECLI:NL:RBHDHA:2023:2686.
[42] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353.

was a time that was marked by the emergence of public interest litigation as a distinct mode of legal adjudication.[43] Typical of this new type of litigation, which gained prominence with the well-known U.S. desegregation judgments of the U.S. Supreme Court in *Brown v. Board of Education of Topeka,* is that it focuses on the enforcement (or realisation) of substantive constitutional values as its main purpose.[44] Departing from the more classic mode of adjudication, public interest litigation has its eye on the future rather than the compensation of past harms. Moreover it is multipolar in the sense that both the party structure and the matter in controversy are more amorphous than in a traditional civil law suit, which is marked by its adversarial structure as 'an organized contest between two individuals' diametrically opposed, 'to be decided on a winner-takes-all basis'.[45]

It is this fundamental indeterminacy of the parties involved in the subject-matter of public law litigation, that moved Fuller to stress the essential characteristics, and the limits, of judicial adjudication. For Fuller, the most important characteristic, indeed the *essence* of adjudication is the mode of participation it accords to the affected parties. Adjudication for Fuller, is a distinct form of social ordering alongside other forms such as elections and contracts. The participation in adjudication is to be contrasted with the types of participation in those other forms of social ordering, in the sense that it is 'the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor […]. Whatever destroys that participation destroys the integrity of adjudication itself'.[46] The classic divide between judicial and administrative or legislative forms of decision-making is thus that whereas the latter works on the basis of collaboration towards a unified goal, the former focuses on reciprocity.

Fuller brought in the concept of polycentricity from political economic theory, to describe those disputes which cannot be resolved adequately by adjudication. He defines a polycentric problem as '*a situation of interacting points of influence*' which, when possibly relevant to adjudication, normally, although not invariably, '*involves many affected parties and a somewhat fluid state of affairs*'.[47] " He stressed the 'complex repercussions' of intervention in such situations, famously picturing the polycentric situation as pulling a strand of a spider's web, triggering a tensions of a complicated pattern throughout the web as a whole. 'Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions'.[48] The theory of legal polycentricity thus serves the function of facilitating a separation of powers perspective on the adjudicative function. For Fuller, the polycentric aspect of the case warranted the exercise of executive or legislative power as the political institutions of governance where better equipped to meet the demands of polycentric policy-making. These types of cases should, due to limited judicial capacity, be left to either the legislature or public agencies.[49]

Fuller's theory of polycentricity has hugely influenced both legal theory and practice. The argument of polycentricity was instrumental in the construction of a doctrine of non-

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[43] Ground-breaking: Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) The Harvard Law Review 1281.

[44] Chayes 1976, 1284; Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009), 102; Jerfi Uzman & Geerten Boogaard, 'Make it a Better Place': Transnational Public Interest Litigation and the Separation of Powers', in: Hans-Martien ten Napel et al (eds.), *The Powers That Be. Rethinking the Separation of Powers* (Leiden University Press 2016), 295, 299.

[45] Chayes 1976, 1282.

[46] Fuller 1978, 364.

[47] *Ibid.,* 395.

[48] *Ibid*.

[49] See e.g. Jonathan Sumption, 'The Limits of Law', in: N.W. Barber et al (eds.) *Lord Sumption and the Limits of of the Law* (Bloomsbury 2016), 15-26.

justiciability, i.e. judicial acknowledgment of the fact that institutional concerns constrain the adjudicative function.[50] At some point, even whole areas of law were considered to be principally beyond judicial reach because of the supposedly high degree of polycentricity that marked them.[51] One propelling factor in this development was there is a tendency to confuse polycentricity with complexity or impact.[52] Indeed, as Jeff King has remarked, complexity is not the same as polycentricity, and neither is impact. A problem, such as a question of science, can be highly complex without being polycentric in any way; the answer may affect one person only. Nor does impact alone make a legal issue polycentric. Rather 'a problem is polycentric if the best answer demands comprehension of a highly complex range of cause-and-effect relationships entailed by the potential solutions'.[53] This is particularly relevant for climate litigation, where governments frequently argue that the (scientific) complexity of a case, or its impact on a wide range or parties, as such gives rise to the problem of polycentricity. As we will see, there is an element of polycentricity in this type of cases, but we need to be more specific in identifying it.

The separation of powers element in Fuller's argument about polycentricity bears close connection to another theory of judicial law-making, which is *judicial minimalism*.[54] Minimalism advocates judicial modesty in deciding constitutional cases, recognizing the limits to the judicial capacity in terms of expertise and displaying a preference for democratic deliberation. It basically comes in two flavours. Procedural minimalism calls for courts to avoid taking on certain types of cases by narrowly interpreting their jurisdiction or the parties standing, whereas substantive minimalism allows courts to decide these cases on the merits while advocating 'narrow and shallow' judgments which leave it to the political process and future court decisions to sort out most aspects of the larger issue.[55] Polycentricity may play a role in both forms of minimalism, but particularly substantive minimalism is motivated by Fuller's theory.[56] Minimalist approaches thus display a tendency to what we might call 'antipolycentricity': the attempt to clear a case as much as possible from polycentric aspects. Courts under an antipolycentric approach will go for minimalistic definitions of the problem presented before them, presenting the case as relatively clear-cut.

### B. *Anti-polycentricity in the Netherlands*

The concept of polycentricity is not uncontroversial. As Jeff King has aptly stressed, it was largely abandoned in the United States, mainly because its pervasive nature. Indeed, as Fuller to some extent already recognised, almost – if not – any legal question to some extent already inherently carries with it, a polycentric aspect.[57]

Still, the theory has greatly influenced legal thinking on the other side of the Atlantic, and the Netherlands has not been an exception in this respect. With respect to the separation of powers, for instance, polycentricity is visible in the justification of the outright refusal of Dutch civil courts to issue positive legislative injunctions ('wetgevingsbevelen').[58] Traces of the

[50] E.g. Jeff King. *Judging Social Rights* (Cambridge University Press 2012), 130.
[51] See Jeff King, 'The Pervasiveness of Polycentricity ' [2008 ] Public Law 101.
[52] *Ibid.*
[53] King 2012, 194.
[54] See e.g. Cas R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).
[55] Neal Devins, Rethinking Judicial Minimalism. Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government' (2019) 69 Vanderbilt Law Review 935, at 941.
[56] *Ibid.*, 942.
[57] King 2008; King 2012, 192-193; Fuller 1978, 398.
[58] E.g. Geerten Boogaard, *Het wetgevingsbevel. Over constitutionele verhoudingen en manieren om een wetgever tot regelgeving aan te zetten* (Wolf Legal Publishers 2013), 78-80.

theory are, albeit implicitly, also discernible in the case law of the Dutch courts on the limits of judicial law-making. A relatively clear example is provided by the *Post-Salduz* litigation on the right to legal counsel at police questioning.[59] In interpreting the ECtHR's case law and its obligations to implement that case law, the Dutch Supreme Court distinguished between a narrow reading of the European case law, and (the desirability of) a broader approach. In view of concerns about the many policy aspects involved in the broader approach, the Court ruled that it would only offer a very limited ruling, thus implicitly adopting a minimalist approach to the issues raised by the Strasbourg Court. Indeed, the polycentric element constituted a major rationale later on, for the Supreme Court to persist in its refusal to recognize a general right to legal counsel at police interrogations, again citing the many policy choices that were involved with re recognition of such a right, and leaving it – albeit for the time being – to the legislature to remedy any potential conflict with international obligations.[60]

This last case did, however, indicate that Dutch courts approach the matter of polycentricity as a substantive, and – perhaps more importantly – as a contextual and relative matter. There are limits to the legal persuasiveness of anti-policentricity in the context of the separation of powers. When the other branches of government, in this case the legislature, fail to act in a timely and correct manner, the judiciary may – be it cautiously and reluctantly – adopt a more robust approach.[61] Polycentricity, in other words, is not an absolute maxim, and anti-polycentricity is expressly limited by the duty of courts to provide effective legal protection. Indeed, it is a broader trait of the Dutch approach to reviewing domestic legislation against international law, that separation of powers concerns are weighed against the right to an effective remedy as enshrined in the human rights conventions[62] and, more recently also in Article 17-1 of the Dutch Constitution.[63] And as some authors have observed, it seems at least likely that the growing importance of the principle of effective legal protection is at least to some extent an incentive for courts to depart from anti-polycentric minimalism, at least when it comes to the interpretation of procedural roadblocks against polycentricity.[64] This was, for instance apparent in a very recent case about genderneutrality and gender designation in birth certificates before the Amsterdam Court of Appeal.[65]

### *C. Anti-polycentricity in climate cases: the good, the bad, and the ugly…*

Climate litigation is essentially polycentric. To some extent, that is an inescapable conclusion because of the uncharted territory climate change confronts the courts with. Regardless of their legal context, climate cases regularly display a sense of novelty and uncertainty in view of both the scientific uncertainties surrounding climate change and the unfamiliarity of the legal discipline to value and cope with scientific interpretations in the field.[66] Moreover, climate

[59] NL Supreme Court (HR) 30 June 2009, ECLI:NL:HR:2009:BH3079, (*Post-Salduz I*), para 2.4-2.5.
[60] HR 1 April 2014, ECLI:NL:HR:2014:770, para 2.5.3.
[61] See para 2.5.4: '*It cannot be excluded that the failure to enact legislation will, at some point, lead the Court to reach a different conclusion* [in balancing separation of powers concerns against the need to offer effective legal protection]. [translation LN, JU & MWS].
[62] Mainly Articles 13 ECHR and 2-3 ICCPR.
[63] See e.g. Jerfi Uzman, 'Upstairs, Downstairs. Morales-Santana and the Right to a Remedy in Comparative Law' (2018) 9 ConLawNOW 139; Jerfi Uzman, '"Which in our case we have not got". Naar een nationaal beginsel van effectieve rechtsbescherming?', in: J.E. van den Brink et al (eds.), *Bestuursrecht in het echt* (Kluwer 2021), 255.
[64] Giesen & de Jong (preadvies).
[65] Judgment of 23 May 2023, ECLI:NL:GHAMS:2023:1266.
[66] Basil Ugochukwu, 'Litigating the Impacts of Climate Change: The Challenge of Legal Polycentricity' (2018) 7 Global Journal of Comparative Law 91, 110.

litigation generally has impact on regulatory policies and affects large groups of citizens and entities.[67]

Although the District Court of The Hague in the *Urgenda* litigation expressed some sensitivity towards the polycentric nature of the case, underscoring the need to exercise restraint because of its limited picture of the 'magnitude and meaning of the consequences'[68], it seems, at least at first sight, that this awareness of the polycentric aspect of the litigation did not lead them to be either overtly deferential or minimalistic. In *Urgenda*, the Dutch courts rejected both the contention of the government that the case was non-justiciable, nor did they, as Gerhard van der Schyff has aptly stressed, accept the accommodation of interests that the Netherlands achieved when it agreed to a common EU-wide reduction of 20%, which was itself the product of international negotiation in the context of the Kyoto Protocol. Instead of deferring to political bargaining and inter-state accommodation, the Courts favoured adjudication as the most appropriate solution.[69] Nor did the polycentric nature of the *Urgenda* case substantially affect the intensity of judicial review. As Van der Schyff has noted, all three courts exercised what can only be described as strict scrutiny in finding that the state was in breach of its duty of care to protect the environment. Moreover, the fact that the case was without precedent, and that a ready-made legal framework was lacking in solving it, did not temper the Courts in holding the state to account.[70]

Last but not least, polycentricity was also not used as an argument to exercise remedial restraint. Although both the Supreme Court and the Court of Appeal stressed that the order to the Dutch State to reduce greenhouse gas emissions by at least 25% annually as compared to the level of 1990, was not intended to compel the State to take specific legislative measures or adopt a certain policy and that it was up to the political institutions to determine how to comply with the order, it was hard to see how any prospective measure would not require legislative backing. In so doing, the courts pushed established Supreme Court case law on the separation of powers and the limits of the civil courts power to order injunctive legislative relief, to the limits.[71] Indeed, the Supreme Court 'clarified' its earlier case law, in which it categorically denied any power to offer injunctive relief by ordering legislation, to mean that the courts are only not permitted to issue any order to create legislation *with a particular, specific content*.[72]

Still, as we have seen, the element of polycentricity did have some effect on the scope of the case as such, and (with it) the extent of the duty of care the courts formulated, namely in *Milieudefensie/Shell*, where – as we have outlined above – the Court refused to consider the claims of non-residents on the basis that global interests were not necessarily compatible with the interests of Dutch residents. This unwillingness to include non-residential interests into the formal judicial decision-making process, may very well have been motivated by the Court's desire to keep the polycentric aspects of the case somewhat limited and therefore the scope of the case judicially manageable. Allowing foreign actors in the process to raise non-residential interests, the Court may have thought, could easily have led to an extra layer of complexity with the number of potentially affected parties increasing exponentially. Judicial minimalism, here takes the shape of clear anti-polycentricity: a strategy of minimizing the number of affected parties and interests in order to keep the case judicially manageable.

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[67] *Ibid.*, 110,

[68] Judgment of 24 June 2015, ECLI:NL:RBDHA:2015:7196, para 4.96.

[69] Gerhard van der Schyff, 'The Urgenda Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism' (2020) 6(2) Constitutional Review 210, 222.

[70] Van der Schyff 2020, 222-223.

[71] Jerfi Uzman & Geerten Boogaard, 'De Guldemond/Noordwijkerhout van het wetgevingsbevel? Over Urgenda en constitutioneel procesrecht' (2020) 4 Overheid & Aansprakelijkheid 8-10.

[72] HR 20 December 2019, ECLI:NL:HR:2019:2007, para 8.6.2.

The case of *Urgenda,* furthermore, shows a different form of minimalism. Here, particularly the District Court was clearly reluctant to rule on the admissibility of non-residential interests. Although the Court did not ultimately reject the admissibility of Urgenda's claim to represent the rights of persons from other jurisdictions, that was only because it found it unnecessary to go into the issue. This is very clear instance of judicial minimalism – not to decide more than is strictly required ('one case at a time'), and one that again seems motivated by keeping the case within certain modest limits. Yet although seemingly benign, this form of minimalism may ultimately prove to be less so. Indeed, the Courts nonchalant refusal to entertain the possibility of including non-residential interests because this would not supposedly be necessary to decide Urgenda's claim, did ultimately limit the range of possible claims of Urgenda, and with it the potential scope of the case.

## IV. The global nature of climate change requires transnational consideration (1500?)

Let us now turn to a normative inquiry whether this display of anti-polycentric minimalism is justified in the light of the global, multilevel legal order. We will first argue that the phenomenon of climate change substantially requires a global outlook and loyal international cooperation. We submit that this postulate to collaborate, can be firmly grounded in principles of international law as such. But we also add the human rights perspective, arguing that the universal nature of human rights provides further justification for considering extraterritorial interests in domestic climate litigation.

### *A. Climate change as a global issue requiring international cooperation*

Climate change is inherently a global phenomenon, with greenhouse gas emissions contributing to worldwide impacts regardless of their territorial source.[73] The catastrophic threats posed, from sea level rise and extreme weather to biodiversity loss and food insecurity, endanger populations across borders.[74] No state can insulate itself from these interconnected effects.[75] Successfully limiting global temperature rise to 1.5°C, in line with the long-term temperature goal agreed under the Paris Agreement, requires rapid global emission reductions through unprecedented international cooperation.[76]

Equity is an important part of this imperative. Both scientific evidence and international law recognise that states have contributed differently to climate change, and bear differentiated responsibilities to address it. Thus, the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement create differentiated obligations for states based on their historical emissions and respective capabilities.[77] These differentiated obligations reflect developed countries' greater culpability for causing climate change, and the closely related fact that these same countries possess more financial resources to invest in mitigation and adaptation.[78] Meanwhile the least developed countries often face the most severe climate impacts, while having minimal capacity to respond.[79] These ethical dimensions must factor

[73] See e.g. Phillip Williamson and others, 'Ocean Acidification' in HA Poloczanska and others (eds), Climate Change and the Oceans (Cambridge University Press 2022).
[74] Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers' in H-O Pörtner and others (eds), Climate Change 2022: Impacts, Adaptation and Vulnerability (IPCC 2022) SPM-19.
[75] Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) 6 Climate L 58, 59.
[76] IPCC (n X) SPM-38.
[77] Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016) art 2(2).
[78] Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Paris Agreement' (2016) 9(2) J Ind & Comp L 120.
[79] IPCC (n 2) SPM-20.

into assessments of state duties, including states' obligations to protect human rights from climate threats.[80]

### *B. States' reciprocal duties under international law*

States bear responsibilities towards each other under international law to cooperate on climate change mitigation and adaptation. Core principles of international environmental law, like the no-harm rule and the principle of prevention, create binding obligations to prevent transboundary harms.[81] As per these obligations, states must ensure that their territory is not used to cause damage to other states' environments or people.[82]

Likewise, the law of state responsibility mandates that states breaching international obligations must cease the wrongful act and provide reparations.[83] This obligation applies to climate inactions violating human rights or risking significant harm to other nations.[84] International human rights law also entitles foreign nationals to protection.[85] These reciprocal, interdependent duties provide justification for considering extraterritorial interests in domestic climate litigation where states fail to uphold their shared obligations.[86]

However, dilemmas arise in enforcing these obligations domestically when states dispute their responsibilities.[87] Clearer principles are needed to guide nationally appropriate contributions to the global climate effort.[88] Courts should apply international law in good faith while avoiding overstepping proper judicial boundaries.[89] But excluding foreign interests altogether neglects the interconnected, universal nature of climate threats.[90]

### *C. Universality of human rights obligations*

The universal nature of human rights provides further justification for considering extraterritorial interests in domestic climate litigation. Core international human rights instruments delineate rights that are inherent to all human beings, not contingent on nationality or territory.[91] As expressed in the Universal Declaration of Human Rights (UDHR), the advent of a world where human beings enjoy freedom of speech and belief, freedom from fear and want, has been proclaimed as the highest aspiration of the common people.[92] The indivisibility

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[80] Sébastien Duyck and others, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12(3) Carbon & Climate L Rev 191.
[81] Trail Smelter Arbitration (United States v Canada) 3 RIAA 1911 (1941).
[82] Philippe Sands and Jacqueline Peel, Principles of International Environmental Law (4th edn, Cambridge University Press 2018) 204.
[83] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II(2) YB Int'l L Comm'n 26, arts 30–31.
[84] Climate Action Network International v Canada (2021), Inter-American Commission on Human Rights, Petition filed 23 December 2021.
[85] See e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art 2(1).
[86] Voigt (n X).
[87] Margaret A. Young, 'Climate Change Lawsuits Against Fossil Fuel Companies: The Duties to Mitigate Greenhouse Gas Emissions and Adapt to Climate Change' (2018) 7(1) Transnational Environmental Law 89, 97.
[88] Lavanya Rajamani and Daniel Bodansky, 'The Role of Law in Implementing the Paris Climate Regime' (2019) 69(5) ZaöRV 769.
[89] Peel and Osofsky (n 2) 39.
[90] Atapattu (n 11) 29. See also Margaretha Wewerinke-Singh and Irthe de Jongh, 'Klimaatverplichtingen Buiten de Grenzen Om: Recente Ontwikkelingen in de Rechtspraak over Mensenrechten en Klimaatverandering'. Tijdschrift voor Milieu en Recht, 28(3), 172-179.
[91] Universal Declaration of Human Rights, UNGA Res 217(III) (10 December 1948).
[92] Ibid, preamble.

and interdependence of these universal rights is underscored by the recognition that their full realisation globally is a shared responsibility of the community of nations.[93]

It is also widely recognised that climate change already interferes with the enjoyment of human rights worldwide, and threatens to cause further human rights harm of an unprecedented magnitude.[94] As such, states' obligations to respect, protect, and fulfil human rights entail duties to mitigate greenhouse gas emissions and cooperate internationally.[95] The Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that states must prevent foreseeable violations of economic, social and cultural rights outside their territories caused by their own acts or omissions.[96] Where states fail to meet these extraterritorial obligations, those whose rights are infringed must have access to remedies.[97] Domestic courts adjudicating climate cases thus have a critical role to play in upholding states' human rights commitments. Excluding foreign interests inhibits fulfillment of this function.

Fundamentally, human rights treaties create legal bonds not merely between states and their individual citizens, but between states themselves.[98] Therefore upholding universal rights requires looking beyond borders. Rather than paralysing courts, climate litigation must therefore be seen as an opportunity to move towards realising human rights' global promise.

## V. Conclusion

The international legal community has largely hailed the Dutch climate cases as innovative and ground-breaking. Although the issue of polycentricity has attracted some attention with respect to the Dutch cases, most commentators tend to view the judgments in a favorable light from the perspective of climate justice. Only authors who are critical of the judgments ground their claims in the argument that the courts underestimated the polycentric aspects of the cases. We have sought to take the path less traveled by, identifying a form of anti-polycentric minimalism in both *Urgenda* and *Milieudefensie/Shell*, that has attracted relatively little attention. We have argued that both international law and the specifically the global issue of climate change fundamentally requires a different approach. Moreover we would submit that Dutch law, the case law on Section 3:305a of the Civil Code, should thus be interpreted harmoniously in light of international public and human rights law. Further research should chart and refine the possibilities of such an endeavour.

But the story should not end there. Climate change requires courts, indeed already *has* prompted courts, to abandon their traditional attitudes towards issues of separation of powers, institutional competence, and the complex but fading relationship between domestic and international law. But the issue of polycentricity, controversial as it may be, does raise some important questions about the judicial abilities, and indeed its legitimacy, in this field. We firmly believe that courts, in collaboration with political institutions, have an important role to play in the global struggle against climate change, if only to promote accountability in the complex environment of sustainability law. Anti-polycentric minimalism can ultimately be a threat, rather than a vice in that respect. But in order to avoid it, we should develop strategies for courts to handle the types of issues that Fuller's concept of polycentricity did raise.

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[93] Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986) preamble.
[94] See e.g. John H Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia J Int'l L 163.
[95] Sara L Seck, 'Climate Justice and the ETOs' in Gibney Mark and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022).
[96] UN Committee on Economic, Social and Cultural Rights, General Comment No 24, UN Doc E/C.12/GC/24 (10 August 2017) para 26.
[97] Olivier de Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (Advanced Unedited Version)' 1.
[98] Nele Matz-Lück, 'Treaties, Human Rights' in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP 2008).

Polycentricity does not require minimalism, judicial abstinence, or avoidance. It primarily requires better law-making. The challenge for the years to come, is to make it work.