Climate constitutionalism of the UK Supreme Court

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The proposed expansion of London's Heathrow airport by way of a third runway is one-part infrastructure, two-part national soap opera. Legal controversy has been present from the first. The Heathrow site, previously orchard land, was acquired using emergency wartime powers in 1946, prompting decadal litigation.[1] Plans for a third runway have a similar saga-like quality. Policy papers came and went, with the issue finally handed by Prime Minister David Cameron to a newly established Airports Commission in 2012.[2] Guided by both the safe hands of Howard Davies (McKinsey, Bank of England, LSE, Man Booker Prize etc), the Commission issued interim and final reports in 2013 and 2015, both recommending the north-west third runway option at Heathrow.[3] After a parliamentary vote in 2018,[4] it became the policy of the planning authority (the Secretary of State for Transport) to approve the expansion, a decision which became the basis of the instant challenge.

On 27 February 2020 the Court of Appeal of England and Wales handed down its judgment, on the administrative challenge to the Secretary of State's decision.[5] Being one of the first appellate courts globally to be seised of a case requiring the interpretation of Article 2 of the Paris Agreement (PA), the decision appeared to give a steer as to how it could be deployed in domestic courts.[6] Note that the UK government ratified the Paris Agreement on 17 November 2016, but that the treaty remains unincorporated. As such, obligations imposed on the UK Government by the Paris Agreement *eo ipso* have no effect in domestic law.[7] However, pursuant to section 5(8) of the UK Planning Act 2008, policies such as those which purported to authorize the Heathrow extension, must give reasons for their decisions, including "an explanation of how the policy set out in the statement *takes account of Government policy* relating to the mitigation of, and adaptation to, climate change. [italics added]" The question for the Court was whether the temperature target contained in Article 2 PA, or the UK Government's policy commitment to introducing a net zero target, formed any part of relevant government policy within the meaning of that provision.

1. PT Sherwood, *Heathrow: 2000 Years of History* (The History Press 2009) 87-8.
2. https://www.gov.uk/government/organisations/airports-commission/about#responsibilities
3. https://www.gov.uk/government/news/airports-commission-releases-final-report
4 HC Deb 25 June 2018, vol 643, col 649
5. Plan B Earth and Others v. Secretary of State for Transport. [2020] EWCA Civ 214.
6 See generally, Navraj Singh Ghaleigh, 'Paris Agreement, Article 2: Aims, Objectives and Principles' in G Van Calster and L Reins (eds), *Research Handbook on Climate Change Mitigation* (Edward Elgar Publishing Ltd 2021).
7. J. H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry [1990] 2 A.C. 418, and see n4 ¶192, 230.

The Court of Appeal held that the Government erred by not taking the Paris Agreement and attendant policy explicitly into account. It was careful to make clear that the Secretary of State was not required to act in accordance with any particular policy, even the government's own stated policy. [231] However, an ordinary construction of the Planning Act did require it "to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case." [226] Moreover, the Court agreed with Plan B that the UK Government's "commitment to the Paris Agreement was clearly part of 'Government policy'...this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016 [and] there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers." [228]

The Court of Appeal's conclusions had a mixed reception. It will be recalled that Prime Minister Boris Johnson was a long-standing opponent of the third runway, promising when Mayor of London to "lie down" in front of bulldozers to stop the project. Accordingly, the Government decided not to appeal the Court of Appeal's decision, but Heathrow Airport Ltd ("HAL") which owns Heathrow Airport did.

The Supreme Court's comprehensive reversal of the Court of Appeal was contained in a single, joint judgment of Lords Hodge and Sales. The personnel are somewhat noteworthy. There was a shiver of excitement amongst some in the climate community when in 2019 Lord Sales gave a lecture to the Anglo-Australasian Law Society entitled, 'Directors' duties and climate change: Keeping pace with environmental challenges.' The lecture ranged across materials well known to many readers of JEL - the tragedy of the commons, stranding risks, Task-Force on Climate-Related Financial Disclosures, and their implications for company law and the various duties of directors. The argument, as might be expected, was exceptionally close and clear, and even trod lightly on the field of legislative reform. Sales was not the first Supreme Court justice to opine extra -judicially on climate law - Lord Carnwath, lectured the Chancery Bar Association on "Climate Change and the Law after Paris" in 2016 - but here was the undisputed intellectual star of the Supreme Court taking on a topic of some arcana, even in legal academia. To mangle Dr Johnson, the importance of the lecture for climate lawyers was not that it was well done (it certainly was), but that it was done at all.

From this point however, there were some missteps. There were conference conversations that Sales was 'one of us', that the tide of climate litigation was turning with a new generation of senior judiciary attuned to the climate crisis, that the Heathrow decision was in safe hands. Such views, which see law as a by-product of politics and policy without its own dynamics, have a long legal tradition. Horwitz

termed them 'Progressive Legal Thought', to be contrasted with 'Classical Legal Thought'.[8] The latter, a species of formalism, is characterised by a mechanical application of legal rules without reference to external criteria or influences, the former is a more 'realist' attitude skeptical [sic] of strict divisions between legal and moral discourse. These models of public law adjudication have been exhaustively dissected, with their coexistence and shifting patterns being emphasised by scholars such as Duxbury, Stewart, Feldman.[9] In UK studies of public interest litigation, including environmental, these arguments are best known from chapter four of *Pressure Through Law*.[10] Whatever one's preferences as to judicial style – formalist or activist – instrumentalising judges as receptacles for particular ideologies is a risky business, not least since it strips law of its core characteristic, disinterested justice.

And so it proved. The Supreme Court was decisive in its departure from the Court of Appeal's key findings. With reference to the requirement that the ANPS (the relevant national policy framework) must give reasons for the policy adopted, the Court rejected Plan B's contention that those reasons must refer to the Paris Agreement. Although ratified, the Paris Agreement did not represent government policy, a term of art to be carefully construed: "For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning" [105]. As to the status of unincorporated treaty law, "ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty" [108]. Through the operation of the Climate Change Act however, the Paris Agreement had been well accounted for in the ANPS process. As is well known, the Climate Change Act 2008 [CCA] sets a national carbon target (s.1), requires Government to establish carbon budgets for the UK (s.4), and allows for adjustment of said targets and budgets (ss.2 and 5) as circumstances, including knowledge, change. Moreover, s32 establishes the Committee on Climate Change, an independent and expert advisory public body. Understood in this framing, although the mechanisms of the CCA "masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State" [126], the Secretary of State's decision not to have further regard to the Paris Agreement beyond the CCA was not irrational [132]. Furthermore, and at various points, the Supreme Court emphasised that future developments in climate science and policy would be considered at the Development Consent Order (DCO) stage [132, 138, 155 et seq].

The DCO is now the stage onto which the Heathrow drama moves. This is significant for both the

8. Morton J Horwitz, *The Transformation of American Law 1870 - 1960* (Oxford University Press USA 1994).
9. Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press 1995); Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667, David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 The Modern Law Review 44.
[10] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992).

framing of the litigation in terms of democratic principle, but also for the future of the project. The failure of the Plan B litigation to achieve its goal does not mean that the DCO process will move inexorably to the bulldozer stage, with all that that may entail for the Prime Minister. Readers will recall the dismissal of Client Earth's challenge to the Secretary of State's decision to grant a DCO for the construction of new gas-fired units at the Drax Power Station.[11] Nonetheless, weeks after their success in the Court of Appeal, Drax scrapped their plans for new gas owing to "the capital costs involved in building [which] would have been quite high and you're really taking a long-term bet on where you think the power market is going to go."[12] The new economics of energy[13] are succeeding in forcing fleet decarbonisation where law has failed. In a post-Covid world, who would bet against similar capital cost challenges for Heathrow?

On a more principled level, the forum shift for the future determination of Heathrow's fate keys into a familiar debate in constitutional law concerning the respective positions of political, expert, and judicial determinations. Social democratic visions of public law have always been leery of judicial decision making. Putting to one side the substance of social and economic objectives, they should be incorporated *politically* with courts being marginalised whilst democratically mandated public administrations and parliaments (in the Westminster model) pass laws, take decisions, and scrutinise executives.[14] This is commonly framed in terms of political constitutionalism (which privileges *political* forms and institutions of accountability) arrayed against legal constitutionalism (which privileges *legal* forms and institutions of accountability). Says Tomkins: "political constitutionalists tend to think that accountability is best secured through political institutions such as Parliament, by political actors such as parliamentarians and electors, and through political means such as debate, questioning, and investigative scrutiny, both in Parliament and through the media. Legal constitutionalists tend to think that accountability is best secured through the legal institution of the courts, by judges, and through the legal means of adjudicative litigation."[15]

Given the often febrile relationship between UK courts and the executive (and indeed publics) in

11. R (ClientEarth) v the Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin). Affirmed by the Court of Appeal @ CITE
12. Drax executive, reporting in Nathalie Thomas, 'Drax Drops Plan to Build Europe's Biggest Gas Plant' *Financial Times* (London, 25 February 2021).
13. On the political economy of renewables versus fossil fuels, see Navraj Singh Ghaleigh and Louise Burrows, 'Reset or Revert in the New Climate Normal' in Victor V Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (Oxford University Press 2020).
14. KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24 Industrial Law Journal 103. See generally, Alan Bogg, Jacob Rowbottom and Alison Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury Academic/Hart Publishing 2020).
15. Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 The University of Toronto Law Journal 1, 2.

recent years,[16] principally surrounding Brexit, both the Court of Appeal and Supreme Court were at pains to make clear what they had and had not done. The Court of Appeal's ruling was not, it said, a decision that there would be no third runway at Heathrow, nor that the policy statement supporting the project "was necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement."[17] Rather, in an attempt at judicial minimalism, the Court concluded that Government may exercise the opportunity to reconsider its decision "in accordance with the clear statutory requirements that Parliament has imposed."[18] The Supreme Court's decision sets yet more clear water between itself and the appearance of undue judicial intervention by declining to reduce the decision of Parliament and the Secretary of State, as upheld by the Divisional Court. Rather than following the Court of Appeal it passed the matter on for decision to an expert limb of public administration (the Planning Inspectorate) established by statute (Planning Act 2008), rather than a court.

No less importantly, the pained restraint of the Court may well be a harbinger of battles which climate litigation scholarship has yet to address. What if 'we' win? What if these actions succeed routinely and substantively? Legal scholarship has scarcely started to consider the impact of climate litigation on beneficiaries of pension funds which rely on the carbon majors, or considered the impact on workers in these defendant industries,[19] though the union for aviation workers certainly had.[20] In particular, further consideration is required of the risk of success to the systems of law and courts by litigation which is funded by philanthropic foundations which are perceived as elitist, thereby risking populist counter-movements. The implications of 'winning' need analysis and planning, which whether as a policy or scholarly matter, has yet to begin in earnest. What does climate success look like?

The dynamic review approach that the UK has taken to its climate targets, as advised by the Climate Change Committee and endorsed by this Supreme Court decision [74] also has implications for future litigation. For example, the 'Portuguese Children's Case' coordinated by the Global Legal Action Network, is currently in the pipeline of European Court of Human Rights. A full hearing is expected in

16. See generally, Neil Walker, 'Populism and Constitutional Tension' [2018] International Journal of Constitutional Law.
17. n4 ¶285
18. Ibid.
19. Navraj Singh Ghaleigh, 'Just Transitions for Workers: When Climate Change Met Labour Justice' in Alan Bogg, Jacob Rowbottom and Alison Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury Academic/Hart Publishing 2020).
20 "GMB welcomes top court's decision to give Heathrow expansion the go-ahead" GMB Press Release, 16 December 2020:
https://www.gmb.org.uk/news/gmb-welcomes-top-courts-decision-give-heathrow-expansion-go-ahead#:~:text=GMB%2C%20the%20union%20for%20aviation,future%20of%20the%20proposed%20expansion.

the first half of 2022. A central claim in that action is that emission reduction targets less ambitious than 65% (1990 baseline) amount to an infringement of the Article 2/8 rights of the applicants. Given the UK's method of adjusting its emission reduction targets over time, on the basis of detailed multidisciplinary analysis and subject to public scrutiny, it will be interesting to see whether the Strasbourg Court does not determine that the detail of emission reductions - how much, in which sectors, by when etc. - are not within the province of Contracting States' margin of appreciation.

The Supreme Court's decision on the proposed expansion of London's Heathrow airport is in many ways a quintessential example of climate law. It engages multiple different bodies of law (international environmental, planning, administrative), the interface of climate science and industrial policy, and normative issues concerning the respective positions of political, expert, and judicial determinations. Such clusters are characteristic of climate law, even inevitable. The decision of the Court gives the lie to the attitude that there is no problem of climate law that cannot be solved by the courts, and no climate law problem is truly solved until it is solved by a court.[21] Viewed through that prism, the Plan B decision is a climate catastrophe, a legal abomination. More plausible is the conclusion that the Supreme Court's decision is soundly rooted in the constitutional theory of the court as supporting and nourishing the political constitution. As such this represents a timely recalibration of climate law discourse.

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21. Paraphrasing Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 The University of Toronto Law Journal 1, 3.