The *Urgenda case*: the dutch path towards a new climate constitutionalism

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Abstract: Il *caso Urgenda*: il cammino olandese verso un nuovo costituzionalismo climatico – At the end of December 2019, the Supreme Court of the Netherlands ruled in the case brought by Urgenda against the Dutch State. The outcome of this procedure was that the Dutch State is obliged to reduce its greenhouse gas emissions by the end of 2020 with 25% as compared to 1990 levels. The Supreme Court used scientific data, fundamental human rights deriving from the ECHR and the common ground method to establish a minimum norm to which the Dutch State is legally bound. This article outlines how the Supreme Court has dealt with the various aspects of this case. These include the juridical value of scientific data, human rights, the collective nature of Urgenda's claim and the (political) question whether or not the courts are allowed to order the State to take measures to counter dangerous climate change and if this infringes the principle of separation of powers. In addition, consideration will be given to the other climate procedures that have been or are still being conducted, such as the People's climate case.

Keywords: Urgenda; Climate change; Human rights; Climate litigation; Class action.

1. Introductory remarks: who is liable for climate change?

Who is liable for climate change? Who should take responsibility for taking action to counter one of the greatest dangers to humanity? In the last years, these questions have concerned many jurists around the globe, and not only them, and continue to be the most controversial topic pertaining to climate protection law and its consequence on individuals, natural resources and the entire planet.

The suits against governments, to force them to do more to protect their citizens against the risks that arise from the climate change, have been introduced allover the world.

As a result, today it is commonly accepted, and confirmed by the 5th Report of the Intergovernmental Panel on Climate Change, that climate change is happening and caused anthropogenically. The fight against climate change constitutes a global challenge that can only be met if a political and legal approach is adopted that is multilateral, cooperative and based on a multi level governance, including both fast and ambitious action by States and strong support within civil society.

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In this context, on Friday 20 december 2020 the Supreme Court of the Netherlands rendered its judgment in the Urgenda case[1]. The Supreme Court concluded that Urgenda's claim, which entailed a court order directing the Dutch State to reduce the emission of greenhouse gases at least of 25%, compared to 1990 levels by the end of 2020, was upheld, therefore rejecting the appeal in cassation of the Dutch State.

This article aims to highlight the most innovative aspects of the Urgenda ruling for the climate change litigation field. For this purpose, after introducing the background of the case, the following aspects will be analysed:

a) the human rights perspective (§3);

b) the use of class action for human rights claims (§4);

c) the legal nature of the reduction target for 2020 and the role of scientific data (§5);

d) the constitutional lawfulness of the court order (§6).

Subsequently we will examine the value of the argumentation of the Dutch Supreme Court in the Urgenda case in European context (§7) and its global impact (§8).

2. The Urgenda climate litigation: background

Urgenda[2], whose name is a portmanteau of the words 'urgent' and 'agenda', is a foundation under Dutch law[3] engaged in developing plans and measures to prevent risk of climate change [4]. The objective of Urgenda is aimed at stimulating and accelerating the transition processes towards a more sustainable society, starting in The Netherlands. Because Urgenda is of the opinion that the Dutch State is doing not enough to prevent dangerous climate change, it initiated proceedings before the Dutch Courts.

In these proceedings Urgenda has requested a court order by vitue of article 3:296(1) DCC[5] that instructs the Dutch State to limit the volume of greenhouse gas emissions in the Netherlands such that this volume would be reduced by 40% by the end of 2020, or at least by a minimum of 25%, compared to the volume in 1990.

Urgenda has based its claims on the following grounds:

[1] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007 (English text). The judgment can be accessed on www.rechtspraak.nl. For the Dutch text see Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006.

[2] www.urgenda.nl/

[3] Dutch Civil Code, art. 2:285.

[4] For a more detailed description of the bankground of Urgenda see para. 2.1 of the judgment of the The Hague District Court of 24 June 2015, ECLI:NL:RBDHA:2015:7196 (English text). The judgment can be accessed on www.rechtspraak.nl. For the Dutch text see ECLI:NL:RBDHA:2015:7145.

[5] Article 3:296(1) DCC stipulates that unless it follows otherwise from the law, from the nature of the obligation or from a legal act, he who is obliged to give, to do or not to do something as regards another may be sentenced to do so by the court at the request of the person to whom the obligation is owed.

a) the green house gas emissions from the Netherlands are contributing to a dangerous change in climate;

b) the share of the Netherlands in worldwide emissions (per capita) is excessive in both absolute and relative terms;

c) this means that Dutch emissions, for which the Dutch State as a sovereign power has systemic responsibility, are unlawful, since they violate the Dutch State's duty of care to those of whose interests are represented by Urgenda by virtue of article 6:162(2) DCC[6], as well as articles 2[7] and 8[8] of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR);

d) also in view of article 21[9] of the Dutch Constitution the Dutch State can be held accountable for this;

e) under both national and international law, the Dutch State therefore is obliged, in order to prevent dangerous climate change, to ensure the reduction of the Dutch emissions level. This duty of care, according to Urgenda, entails that in 2020 the Netherlands must achieve a reduction of greenhouse gas emissions of 25-40% compared to the emission levels of 1990, in accordance with the target referred to in AR4 (the Fourth IPCC Assessment[10] Report of 2007). A reduction of this magnitude is necessary in order to maintain the prospect of achieving the 2°C target and is also the most cost-effective option.

The Dutch State has contested Urgenda's claim and put forward that:

a) the requirements of neither article 3:296 DCC (the court order as sought by Urgenda) nor article 6:162 DCC have been met;

b) There is no legal basis in either national or international law that requires the Dutch State to take measures to achieve the reduction targets as sought by Urgenda;

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[6] Article 6:162 DCC is the Dutch article on unlawful act (tort law) and stipulates that he who commits a wrongful act against another person, which can be attributed to him, is obliged to compensate the damage suffered by the other person as a result of it. (2) A violation of a right and an act or omission in violation of a statutory duty or of what is customary in society according to unwritten law shall be regarded as a wrongful act, subject to the presence of a justification. (3) A wrongful act may be imputed to the perpetrator if it is due to the perpetrator's fault or to a cause attributable to him under the law or generally accepted practice.

[7] ECHR, art.2: «1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection».

[8] ECHR, art.8: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

[9] Dutch Constitution, art.21: «It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment».

[10] The Intergovernmental Panel on Climate Change.

c) the target as laid down in AR4 is not a legally binding standard and furthermore the articles 2 and 8 ECHR do not imply an obligation for the Dutch State to take mitigating or other measures to counter climate change;

d) if the reduction order sought by Urgenda would be granted this would in essence come down to an impermissible order to create legislation and would contravene the political freedom falling to the government and parliament and, thus, the system of separation of powers.

On 24 June 2015, the District Court of The Hague (hereinafter District Court) delivered its judgment and granted Urgenda's claim therefore ordering the Dutch State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have been reduced by at least 25% at the end of 2020 compared to the year 1990[11].

Firstly the District Court rejected Urgenda's reliance on the articles 2 and 8 ECHR because Urgenda could not be considered a direct or indirect victim, within the meaning of article 34 ECHR[12]. The District Court considered that unlike with a natural person, a legal person's physical integrity could not be violated nor could a legal person's privacy be interfered with. Therefore, Urgenda itself could not directly rely on articles 2 and 8 ECHR[13].

Subsequently the District Court considered that the Dutch State could act unlawfully by violating its duty of care to prevent dangerous climate change. It concluded that due to the severity of the consequences of climate change and the great risk - if mitigating measures are not taken - of hazardous climate change will occur, the Dutch State has a duty of care to take mitigation measures. The District Court ruled that the State did not make sufficient efforts to reduce greenhouse gas emissions and failed in its duty of care and therefore acted unlawfully. Furthermore the District Court concluded that the claim of Urgenda did not constitute on order to create certain legislation or to adopt a certain policy and that the Dutch State retained its freedom in how it would comply with the court order.

Both the Dutch State and Urgenda lodged an appeal with the The Hague Court of Appeal (hereinafter Court of Appeal) against the judgment of the District Court. The Dutch State appealed against the judgment of the District Court as a whole. Urgenda's appeal was solely directed against the opinion of the District Court on article 34 ECHR which entailed that Urgenda could not invoke the

[11] The Hague District Court, 24.06.2015, ECLI:NL:RBDHA:2015:7196.

[12] ECHR, art. 34: «The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right».

[13] Even if Urgenda's objectives were explained in such a way as to also include the protection of national and international society from a violation of article 2 and 8 ECHR, this did not give Urgenda the status of a potential victim within the sense of article 34 ECHR. However, according to the District Court, both articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, could serve as a source of interpretation when detailing and implementing open private-law standards, such as the unwritten standard of article 6:162 DCC.

articles 2 and 8 ECHR. In its judgment of 9 October 2018, the Court of Appeal confirmed the District Court's judgment, however on different grounds[14].

With regard to the articles 2 and 8 ECHR, the subject of Urgenda's appeal, the Court of Appeal ruled that the Dutch State has a positive obligation to protect the lives of citizens within its jurisdiction under article 2 ECHR, while article 8 ECHR creates the obligation to protect the right to home and private life. According to the Court of Appeal this obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the Dutch State must take precautionary measures to prevent infringement as far as possible.

Based on scientific data, accepted as established fact and which was not disputed between the parties, the Court of Appeal ruled that it was appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life and that it followed from articles 2 and 8 ECHR that the State has a duty to protect against this real threat.

Subsequently, the Court of Appeal ruled on the question whether the Dutch State acted unlawfully by not reducing greenhouse gas emissions by at least 25% compared to 1990 levels by the end of 2020. The Court of Appeal concluded that this was the case.

In short, the Court of Appeal considered that the Dutch State had done too little to prevent a dangerous climate change and is doing too little in the short term and that the targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now. The Court of Appeal furthermore considered that the Dutch State could not hide behind the reduction target of 20% by 2020 at EU level, as the EU also deemed a greater reduction in 2020 necessary from a climate science perspective and the EU as a whole is expected to achieve a reduction of 26-27% in 2020, which is substantially more than the agreed on 20%.

The Court of Appeal also took into account that in the past the Netherlands acknowledged the severity of the climate situation time and again, and for years assumed a reduction of 20-45% by 2020, with a concrete policy objective of 30% by that year, and that after 2011, this policy objective was adjusted downwards to 20% by 2020 at the EU level, without any scientific substantiation and despite the fact that more and more became known about the serious consequences of greenhouse gas emissions for global warming.

Based on the foregoing, the Court of Appeal was of the opinion that the State failed to fulfil its duty of care pursuant to articles 2 and 8 ECHR by not wanting

[14] The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2610 (English text). The judgment can be accessed on www.rechtspraak.nl. For the Dutch text see ECLI:NL:GHDHA:2018:2591.

to reduce emissions by at least 25% by the end of 2020 and that a reduction of 25% should be considered a minimum.

The Court of Appeal rejected the Dutch States' argument that the reduction of the joint volume of Dutch greenhouse gas emissions as ordered by the District Court could only be achieved by adopting legislation made by parliament or lower government bodies and that the court is not in the position to impose such an order on the State.[15] The Court of Appeal ruled that District Court correctly considered that the claim of Urgenda was not intended to create legislation and that the State retains complete freedom to determine how it will comply with that order and that even if it were correct to hold that compliance with the order could only be achieved through creating legislation the order in no way prescribed the content of such legislation and that for this reason alone, the order was not an 'order to create legislation'.

At this point, the Dutch State instituted an appeal in cassation against the decision of the Court of Appeal. In cassation the Dutch State contested the Court of Appeal's interpretation of the articles 2 and 8 ECHR and argued that there were various reasons why Urgenda could not derive protection from these provision and that the Court of Appeal also failed to recognise that the ECtHR leaves the national states a margin of appreciation in the application of these provision. Furthermore the rights under the articles 2 and 8 ECHR do not lend themselves to being combined as is required for instituting a (collective) claim pursuant to article 3:305a DCC[16] because they only protect individual rights and do not protect society as a whole. Therefore the Court of Appeal should have deemed Urgenda's claim inadmissible.

Subsequently the Dutch State asserted that it is was not bound to a reduction target of 25% in 2020. The Court of Appeal failed to appreciate that it is up to the Dutch State to determine which reduction path it follows and the Court of Appeal wrongfully impinged on the discretionary leeway to which the Dutch State is entitled.

The Dutch State also argued that the District Court order, which was upheld by the Court of Appeal, was equal to an order to create legislation, which is impermissible under Supreme Court case law and that it is not for the courts to make political considerations necessary for a decision on the reduction of greenhouse gas emission.

On 20 December 2019 the Supreme Court rendered its judgment and concluded that Urgenda's claim was upheld, therefore rejecting the appeal in cassation of the Dutch State[17]. In essence the Supreme Court ruled as follows:

a) Articles 2 and 8 ECHR oblige the Dutch State to take measures to counter climate change;

[15] The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 68.
[16] The article establishes that a legal entity (a foundation or association) can institute a legal action on behalf of other persons with the same interests, to the extent that it looks after these interests under its bylaws.
[17] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007.

b) the protection that arises from the articles 2 and 8 ECHR is not limited to specific persons but extended to society as a whole;

c) the articles 2 and 8 ECHR oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible, however it is not permitted that they result in an impossible or disproportionate burden being imposed on a state;

d) pursuant to article 13 ECHR[18], national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national states must be able to provide effective legal protection;

e) the articles 2 and 8 ECHR applied to the global problem of climate change and required the Dutch State to take measures to counter the genuine threat of dangerous climate change;

f) based on the articles 2 and 8 ECHR, the Dutch State therefore is obliged to do 'its part' to counter climate change and to take adequate measures to reduce greenhouse gas emissions from Dutch territory;

g) based on the fact there is a great degree of consensus in the international community and in climate science on the urgent necessity for the Annex I countries, including the Netherlands, to reduce the greenhouse gas emissions by at least 25-40% in 2020, the Supreme Court considered that the Dutch State in any event should adhere to the reduction target of 25% by 2020 as compared to 1990, which in the context of the positive obligations of article 2 and 8 ECHR can be regarded as minimum;

h) there is an obligation for the Dutch State to take appropriate measures against the threat of dangerous climate change, which is an obligation that Urgenda can invoke on behalf of the individuals it represents in its collective action based on article 3:305a DCC;

i) the Netherlands are bound to the ECHR and the Dutch courts are obliged under the Constitution to apply its provisions. The protection of human rights provided by the courts is an essential component of a democratic state under the rule of law.

In conclusion, the Supreme Court held that the policy of the Dutch State was clearly not it in accordance with the generally excepted need to reduce greenhouse gas emissions by at least 25% in 2020 and therefore was not meeting the requirements pursuant to the articles 2 and 8 ECHR to protect the residents of the Netherlands from dangerous climate change. Therefore the Court of Appeal was allowed to rule that the State in any case was obliged to achieve a greenhouse gas emission reduction of 25% by 1990.

[18] ECHR, art.13: «Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity».

3. The Human rights perspective in Urgenda case

In this case, Urgenda based its claim on the human rights enshrined in articles 2 and 8 ECHR, directly applicable in the Dutch constitutional system which attributes constitutional value to the Convention on the basis of article 93[19], and article 21 of the Dutch Constitution according to which it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment[20].

The Supreme Court considered, substantiated with extensive references to ECtHR case law, whether or not reliance on the aforementioned provisions of the ECHR imposed an obligation on the Dutch State to take measures to counter dangerous climate change. The Supreme Court first gave a general explanation of the scope of articles 2 and 8 of the ECHR, then raised the question whether these articles of the ECHR also apply in the event of a global problem such as the danger of climate change.

On the grounds of established ECtHR case law[21], the Supreme Court considered that article 2 ECHR encompasses a contracting State's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction. Moreover the States are obliged to take appropriate measures, in situations involving environmental disasters if there is a real and immediate risk to persons and the state is aware of that risk.

The Supreme Court considered that the term "real and immediate risk" had to be understood to refer to a risk that is both genuine and imminent in the sense that it the risk doesn't have to materialise in short term but in the sense that it is directly threatening the persons involved. As result, article 2 ECHR therefore also covers risks which only materialise in the longer term. With regard to the applicability of article 8 ECHR the Supreme Court considered that it also relates to environmental issues, although the ECHR does not entail the right to protection of the living environment.

The Supreme Court deduced from established ECtHR case law, that protection may be derived from article 8 ECHR in cases in which the materialisation of environmental hazards may have direct consequences for a person's private live and are sufficiently serious, even if that person's health is not in jeopardy and that from this case law follows that there is a positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment[22].

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[19] Dutch Constitution, art.93: «Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published».

[20] The part of the claim that is based on the unlawful act (article 6:162 DCC) will be left aside here as it was not the subject of the procedure in cassation.

[21] The Supreme Court refers to the following ECtHR cases: See, inter alia, ECtHR 28 March 2000, no. 22492/93 Kiliç v Turkey, and ECtHR 17 July 2014, no. 47848/08, Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania.

[22] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007, para. 5.2.3.

Based on case law by the ECtHR, the Supreme Court found that article 8 ECHR was violated in various cases involving environmental harm and the obligation to take measures exists if there is a risk that serious environmental contamination may effect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, which risk need not to exist in the short term[23].

The Supreme Court considered that protection offered by the articles 2 and 8 ECHR is not limited to individuals persons but reached out to the population as a whole: from these articles arise an obligation for the State to take appropriate measures to counter danger, even in case the materialisation of that danger is uncertain, which is consistent with the precautionary principle.

Furthermore the Supreme Court found that, if it is clear that the actual and immediate risk exists, States are obliged to take appropriate steps without having a margin of appreciation.

In this instance States have only discretion in choosing the steps to be taken, that have to be reasonable and suitable and can be realize in both mitigation and adaptation measures. However this may not result in an impossible or disproportionate burden being imposed on the state.

In this context should also be considered the article 13 ECHR which requires States to provide an effective protection to all persons in the way of effective remedies in case of violation of rights and freedoms under the ECHR. The extent of this obligation depends on the nature of the violation and the remedy that is provided for and must be both practical an legally effective. This means that the remedies must provide for prevention or redress, or in case of more serious violations both.

Regarding the question whether the articles 2 and 8 ECHR also applied to the global danger of climate change, the Supreme Court found that, given its earlier findings, the Dutch State is required pursuant to articles 2 and 8 ECHR, to take measures to counter the genuine threat if this were merely a national problem because there is a real and imminent risk that the lives and welfare of Dutch residents could be seriously jeopardised.

That this risk will only be able to materialise in a few decades from now and that it will not impact specific persons or a specific group but the whole population, does not mean that the articles 2 and 8 ECHR can't offer protection. This conclusion is also consistent with the precautionary principle and with the obligation for the Netherlands to do 'its part' in order to prevent dangerous climate change, even if it is a global problem.

In this case the Supreme Court based its judgment firmly in the case law of the ECtHR with regard to articles 2 and 8 of the ECHR.

It showed in which way the ECtHR used the positive obligations that follow from the articles 2 and 8 ECHR for protection against environmental hazards.

[23] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007, para. 5.2.3., reference is made to the following cases: Cf. ECtHR 10 November 2004, no. 46117/99,Taşkin et al.v Turkey, ECtHR 27 January 2009, no. 67021/01, Tătar v Romania.

Furthermore the Supreme Court made use of the precautionary principle. The precautionary principle is an important principle of international environmental law which provides guidance in situations where there is scientific uncertainty[24]. A clear definition of the precautionary principle has not been drawn up[25]. In general terms, the principle boils down to it that in the event of an intention to engage in an activity which is not scientific demonstrated that it will remain without irreversible consequences (for the environment), the activity should (in principle) not be exercised[26]. The Court of Justice of the European Union held that the principle constitutes a general principle of EU law[27].

The precautionary principle could be interpreted as a risk-management and assessment tool that leads to the establishment of precautionary measures that are «proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on examination of the potential benefits and cost of action or lack of action, and subject to review in the light of new scientific data»[28]. This principle should be used in situations where «preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level chosen for the ⌈EU⌉»[29].

What is a new aspect in this case is that the Dutch Supreme Court interpreted articles 2 and 8 of the ECHR in such a way that these provisions give rise to a protection against a global phenomenon such a climate change. The uncharted territory of this judgment was acknowledged by the Supreme Court itself as it asserted that the ECtHR had not yet issued judgments regarding this topic.

The cases as dealt with by the ECtHR so far always focused on clearly identifiable local or regional environmental hazards, such as in the cases Öneryildoz v Turkey (gas explosion at a landfill), Budayeva et al. v Russia (life-threatening mudslide), Kolyadenko et al.v Russia (outflow of a reservoir because of exceptionally heavy rains) and Lopez Ostra v Spain (health risks due to waste-treatment plant), and not environmental hazards of a global nature[30].

[24] E. MORGERA, *Environmental law*, in C. BARNARD, S. PEERS (eds), *European Union Law*, Oxford, 2017, 667.
[25] E. BAUW, *GS Onrechtmatige daad VIII.6.3.10*, Kluwer online, 2020.
[26] E. BAUW, *GS Onrechtmatige daad VIII.6.3.10*, Kluwer online, 2020.
[27] P.J. KUIJPER, F. AMTENBRINK ET AL. (eds.), *The Law of the European Union*, Alphen aan den Rijn 2018, 1172. See also the cases, European Court of Justice, T-74/00, T-76/00, Artegodan v. Commission.
[28] E. MORGERA, *Environmental law*, in C. BARNARD, S. PEERS (eds), *European Union Law*, Oxford, 2017, 667. See also Commission, Guidelines on the Precautionary Principle, COM(2000) 1, para. 6.
[29] E. MORGERA, *Environmental law*, in C. BARNARD, S. PEERS (eds), *European Union Law*, Oxford, 2017, 667. See also Commission, Guidelines on the Precautionary Principle, COM(2000) 1, para. 3.
[30] ECtHR 30 November 2004, no. 48939/99, Öneryildiz v Turkey; ECtHR 20 March 2008, no. 15339/02 (Budayeva et al.v Russia); ECtHR 28 February 2012, no. 17423/05, Kolyadenko et al.v Russia; ECtHR 09 December 1994, no. 16798/90, Lopez Ostra v Spain.

The articles 2 and 8 ECHR themselves do not explicitly state that they offer protection against environmental damage[31]. The ECtHR remarked in the past that there is no explicit right in the ECHR to a clean and quiet environment and considered that neither article 8 ECHR, nor any of the other articles of the ECHR were specifically designed to provide general protection of the environment as such[32]. The case law of the ECtHR led to a widening of the of article 8 ECHR and resulted in protection against breaches of the right to respect of the home also come to include noise, emissions, smells and other forms of interference[33]. However there are limits to its reach. Environmental hazards inherent to life in every modern city are not deemed to fall within the scope of the article[34]. As it seems, the scope of protection of the ECHR is clearly widening as time passes. In this respect it is notable that the ECtHR itself, in 1978 in the case Tyrer v United Kingdom said that the ECHR is a living instrument which must be interpreted in the light of present-day conditions[35]. Although the decision of the Supreme Court seems to follow logically from the earlier case law of the ECtHR it should be recognised that it is a significant step made by the Supreme Court to extend the scope of the articles 2 and 8 ECHR from protection against local environmental hazards, as in the aforementioned caselaw of the ECtHR, to protection for a global phenomenon as dangerous climate change[36].

An aspect of the claim of Urgenda, which received less attention and was almost completely left out of the judgment of the Court of Appeal and the Supreme Court, was that in view of article 21 of the Dutch Constitution the Dutch State could be held accountable for its contribution towards causing dangerous climate change.

Article 21 of the Constitution stipulates that it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment. So, the question can be asked why Urgenda's claim could not be attributed primarily to the State's duty of care arising from this article. There are several reasons for this which will be set out below.

Article 21 is part of the first chapter of the Constitution which contains the fundamental rights (articles 1-23). In these fundamental rights, a distinction can

[31] This has for example been noted by Spijkers in an article in which he discusses, among other things, the judgment of the The Hague Court of Appeal in this case: O. SPIJKERS, *Urgenda tegen de Staat der Nederlanden: aan wiens kant staat de Nederlandse burger eigenlijk?*, in Ars Aequi 2019, 195.

[32] D.J.HARRIS, M.O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Law of The European Convention on Human Rights*, Oxford, 2018 (fourth edition), 561; ECtHR 22 May 2003, no. 41666/98 Kyrtatos v Greece.

[33] D.J.HARRIS, M.O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Law of The European Convention on Human Rights*, Oxford, 2018 (fourth edition), 561.

[34] ECHR, Guide on article 8 of the European Convention of Human Rights (version 30 April 2019), point 26 et seq.

[35] ECtHR 25 April 1978, no. 5856/72 Tyrer v United Kingdom. See also C. ECKES, *De Urgenda uitspraak doet júíst recht aan het EVRM*, euexplainer.nl/2018/10/de-urgenda-uitspraak-doet-juist-recht-aan-het-evrm/.

[36] See in this way L. BURGERS, T. STAAL, *Climate action as positive human rights obligation: The appeals judgment in Urgenda v The Netherlands*, Centre for the Study of European Contract Law Working Paper Series No. 2019-01.

be made between the so-called 'classic fundamental rights' (articles 1-17), such as the right to equal treatment (article 1), the freedom of religion (article 6), and the right to respect for privacy (article 10), and 'social fundamental rights' (articles 18-23), such as article 19 which stipulates that it shall be the concern of the authorities to promote the provision of sufficient employment, and the aforementioned article 21[37].

Unlike classical fundamental rights, which can be enforced directly in the courts for a violation, this is not possible in the case of social fundamental rights. The reason for this is that these fundamental social rights are generally regarded as an instruction standard addressed to the public authorities, as these are the provisions that formulate public policy objectives and the provisions that oblige the government to take measures by law or otherwise in specified policy areas[38].

Of article 21 of the Constitution it is said that, in principle, it has no legal significance[39]. Furthermore the Constitution does not give any indication as to how the interests set out in this article should be pursued and how they should be weighed up in concrete terms[40]. Therefore, fundamental social rights do not play a significant role in legislation and administration[41]. The aforementioned is reflected in the judgment of the District Court that inter alia considered that article 21 of the Constitution imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment. However this rule and its background do not provide certainty about the manner in which this duty of care should be exercised, nor about the outcome of the consideration in case of conflicting stipulations and that the manner in which this task should be carried out is covered by the government's own discretionary powers.

In view of all of this, the Dutch Supreme Court has gone a long way towards anchoring climate change issues to human rights, inaugurating is own and broad interpretation of articles 2 and 8 ECHR. In this way the Supreme Court has brought climate litigation to a constitutional level with effective protection. This gives the problem of climate change a human face, calling the State to be individually responsible to its citizens and to protect their fundamental rights.

[37] Incidentally, the literature casts doubt on whether this distinction can be made so sharply. See on this subject, with references C.W.VAN DER POT, *Handboek van het Nederlandse Staatsrecht*, Deventer, 2014, 454.

[38] J.W.A. FLEUREN, *Toetsing van wetgeving aan de sociale grondrechten van hoofdstuk 1 van de Grondwet*, Ars Aequi, 2008, 621.

[39] C.A.J.M. KORTMANN, *Constitutioneel Recht*, Deventer, 2016, 398-399; A.J. NIEUWENHUIS, M. DEN HEIJER, A.W. HINS, *Hoofdstukken Grondrechten*, Ars Aequi Libri 2017, 217. The aforementioned authors have argued that this provision (and also a few other provisions containing fundamental social rights) confers no power, limits no competence and does not standardise the division of powers between the legislator and other bodies. This means that the legislator and administration remain entirely free so it can be said that the article has no legal character.

[40] C.W.VAN DER POT, *Handboek van het Nederlandse Staatsrecht*, Deventer, 2014, 466.

[41] C.W.VAN DER POT, *Handboek van het Nederlandse Staatsrecht*, Deventer, 2014, 466.

4. The use of class action for human rights claims

The Dutch State argued that the Court of Appeal should have deemed Urgenda's claim inadmissible, to the extent it was based on articles 2 and 8 ECHR. According to the Dutch State, those provisions only guarantee individual rights and do not protect society as a whole. Consequently, an action based on art. 3:305a DCC should not be admissible[42].

The Supreme Court rejected this complaint on the grounds that, based on its ruling on the articles 2 and 8 ECHR, there is an obligation for the Dutch State to take appropriate measures against the threat of dangerous climate change, which is an obligation that Urgenda can invoke on behalf of the individuals it represents in its collective action based on article 3:305a DCC.

Under Dutch law article 3:305a DCC provides the opportunity for certain legal entities to institute a claim which serves to protect the similar interests of other persons. This article is intended for the joint handling of cases and therefore serves as the basis for collective actions and general interest actions[43]. In the parliamentary history concerning article 3:305a DCC it is noted that the interests that lend themselves to bundling in a collective claim can be equity interests, but also more idealistic interests[44]. In addition, it was noted that, for more idealistic interests, it is not relevant that every member of society attaches equal value to these concerns. It is even possible that the interests for which one wishes to stand up with the procedure may clash with the ideas and opinions of other groups in society and that this in itself will not stand in the way of collective action and also not in the way of the admissibility of the claim before the court[45]. It also follows from parliamentary history that through a collective action it is possible to defend so called diffuse interests, which are interests for which it is difficult to foresee the consequences of the violation for each individual[46]. By bundling these diffuse interests in a collective action, it is possible to bring the violation of a specific interest as a whole before the courts[47]. This may involve for example environmental damage. A concrete damage to the environment is usually a clear given, but the consequences for individuals are often difficult to demonstrate[48]. In view of the above, collective actions based on article 3:305a DCC therefore can be divided into group actions, in which the interest can be individualised, and general

[42] Please note that the law on collective action, inter alia this article 3:305a DCC, has been modified as per 1 January 2020. Because the Urgenda case is still fully settled under the old article 3:305a DCC which was applicable before 1 January 2020, the law as it stood at the time will serve as a starting point for this paragraph. Where necessary, additional information will be given in the footnotes about the law as per 1 January 2020.

[43] I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, 200.

[44] *Kamerstukken II* 1991/92, 22 486, nr. 3, p. 22.

[45] *Kamerstukken II* 1991/92, 22 486, nr. 3, p. 22; see also in a similar way I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, 203.

[46] *Kamerstukken II* 1991/92, 22 486, nr. 5, p. 8.

[47] *Kamerstukken II* 1991/92, 22 486, nr. 5, p. 8.

[48] *Kamerstukken II* 1991/92, 22 486, nr. 5, p. 8.

interest actions for which this is not possible[49]. Article 3:305a DCC does not only facilitate class actions in the field of private law, but also increasingly forms of public interest litigation by means of private liability law[50].

Article 3:305a(1) DCC stipulates that only an association, vereniging[51], or a foundation, stichting[52], with full legal capacity under Dutch law can institute a claim which serves to protect similar interests of other persons to the extent that it looks after such interests under its bylaws. A private individual therefore cannot institute such a collective claim[53].

The legal entity that institutes the claim is required to have included the interests it represents in its bylaws and also to carry out activities in that field. The mere description of the purpose of a legal person in the bylaws does not entitle the legal entity to bring an action before the civil courts in respect of the infringement of the interests which it has assumed to represent according the bylaws.[54]

Furthermore, the legal entity must also have an own interest, which means that the legal entity cannot institute a claim that only represents the interests of others[55]. Also, the interests that it represents have to be similar, which means the various interests can be bundled for a collective action. The requirement of a sufficiently similar interest will soon be met.

The Supreme Court ruled that the requirement of similar interest has been met if the interests for the protection of which the proceedings are intended lend themselves to bundling, so as to promote efficient and effective legal protection for the benefit of interested parties[56]. For the admissibility of the claim in court, article 3:305a(2) DCC[57] requires that the legal entity that institutes the claim, in the given circumstances, has made sufficient efforts to reach an agreement with the defendant by means of consultation. The claim is also deemed inadmissible if the interests of the persons on whose behalf the claim was instituted are not sufficiently safeguarded by that claim. Furthermore, article 3:305a(3) stipulates

[49] A.W. JONGBLOED, *GS Vermogensrecht*, Deventer, 2019, article 3:305a DCC, note 8.
[50] R. VAN GESTEL, M. LOTH, *Voorbij de trias politica – Over de constitutionele betekening van 'public interest litigation'*, Ars Aequi 2019, 647-648.
[51] Article 2:26(1) DCC stipulates that an association is a legal entity with members for a specific purpose.
[52] Article 2:285(2) DCC stipulates that a foundation is a legal entity created by a legal act, which has no members and aims to achieve an objective stated in the articles of association with the aid of assets earmarked for that purpose.
[53] I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, nr. 202.
[54] Supreme Court 27 June 1987, ECLI:NL:HR:1986:AD3741, NJ 1987/743 (Nieuwe Meer), para. 3.2.
[55] C.J.J.M. STOLKER, *T&C Burgerlijk Wetboek*, Deventer, 2019, article 3:305a DCC, note 2.
[56] Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, NJ 2011/473, rov. 4.2.
[57] From 1 January 2020, the requirements for the admissibility of interest groups have been tightened in the areas of governance, financing and representativeness of the legal entity that institutes the claim. In addition it has been determined that the claim must have a sufficiently close connection with the Dutch legal sphere and the event to which the legal claim relates must have taken place in the Netherlands (see the new article 3:305a(2-3) DCC).

that claim cannot be instituted to obtain monetary damages[58]. However an order, injunction and a declaratory judgment can be requested on basis of article 3:305a DCC[59].

In this case Urgenda met the criteria for admissibility as mentioned in article 3:305a DCC. The District Court found that Urgenda's claims against the State indeed belonged to the group of claims the Dutch legislature finds allowable and has wanted to make possible with article 3:305a DCC[60]. The District Court considered that Urgenda had a sufficient interest in view of the description of its objectives in its bylaw, which mention that Urgenda strives for a sustainable society, starting in the Netherlands and that it stands up for the interests of both present and future generations[61]. Furthermore Urgenda had made sufficient efforts to attain its claim by entering into consultations with the Dutch State. The District Court therefore concluded that Urgenda's claims, in so far as it acts on its own behalf, were allowable to the fullest extent[62]. However, as mentioned in the introduction of this paragraph, the District Court dismissed the claim as far as it was grounded on the article 2 and 8 ECHR because Urgenda could not be considered a victim within the meaning of article 34 ECHR, against which decision Urgenda successfully appealed[63]. The Court of appeal found that because individuals who fall under the Dutch State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda could also do so on their behalf on the basis of Article 3:305a DCC[64]. The Supreme Court upheld that decision.

The question arises how article 3:305a DCC relates to the ECHR. The cornerstone of Dutch civil procedural law is party autonomy which entails the that parties take the initiative to initiate civil proceedings, determine who is to be litigated against as well as the scope of the proceedings and may also terminate the proceedings[65].

Article 3:305a DCC does not alter this party autonomy. The class action of article 3:305a DCC is deemed to be in line with article 6 ECHR, the right to a fair trial[66]. This can be deduced from the ratio of article 3:305a DCC, as the power of a collective action should promote a greater access to the courts as the organisation which defends the collective interest does this on behalf of the

[58] As of 1 January 2020, this condition has lapsed.
[59] I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, 203.
[60] The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.6.
[61] The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7196, paras. 4.7-4.8 (see for a summary of Urgenda's bylaws paras. 2.2-2.3 of this judgment).
[62] The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.9
[63] The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.45; On appeal, the Dutch State contested the admissibility of Urgenda because it cannot act for future generations. This complaint was dismissed by the Court of Appeal on the grounds of lack of interest, because Urgenda's claims are also admissible in so far as it acts for the current generation of Dutch citizens. See The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 37.
[64] The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 36.
[65] A.W. JONGBLOED, *GS Vermogensrecht*, Deventer, 2019, article 3:305a DCC, note 6.
[66] P. SMITS, *Artikel 6 EVRM en de civiele procedure*, Kluwer, Deventer, 2008, p. 79; A.W. JONGBLOED, *GS Vermogensrecht*, Deventer, 2019, article 3:305a DCC, note 6.

individuals who, for all kinds of reasons, are not able to go to court themselves.[67] Moreover, a collective action does not deprive the person concerned of the possibility to initiate proceedings of its own.

The Dutch legislator expressly wanted to keep this option open[68]. In principle, only the interest group itself and the defendant are bound by the judgment. With respect to this, article 3:305a(5) DCC determines that a judgment shall have no legal effect against a person whose interests are the subject of the proceedings and who opposes the effectiveness of the judgment in relation to that person[69]. This unless the nature of the judgment means that its effectiveness cannot be excluded in relation only to that person[70]. In view of the foregoing the collective action therefore is of a subsidiary character[71].

Contrary to Dutch law, the ECHR does not recognize the right to collective action. The Convention and ECtHR are aimed at the protection of private individuals against a violation of human rights by the government[72]. This follows from article 34 ECHR which stipulates that the ECtHR may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. Therefore a collective action or '*actio popularis*' of an interest group based on the breaching of human rights that follow from the ECHR is not possible before the ECtHR[73]. The ECHR does not allow a collective action[74] to avoid that cases are being brought before the ECtHR by individuals complaining of the sole existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not part too[75]. Only if the rights of the individual members are pursued alongside the collective interest, it

[67] See in this way: E.J. DOMMERING, *Het grondrecht op behoorlijke rechtspraak in het Nederlandse civiele recht, preadvies*, NJV 1983, Zwolle 1983, p. 189; P. SMITS, *Artikel 6 EVRM en de civiele procedure*, Kluwer, Deventer, 2008, p. 79; and Kamerstukken II 1991/92, 22 486, nr. 3, p. 26.
[68] Kamerstukken II 1991/92, 22 486, nr. 3, p. 26; and: P. SMITS, *Artikel 6 EVRM en de civiele procedure*, Deventer, 2008, 81.
[69] This provision has been replaced as of 1 January 2020 by an op-out arrangement whereby individuals may, by means of an individual statement, within a period set by the court, evade the effect of a court ruling (article 1018f Civil Procedure Code).
[70] Unofficial English translation of article 3:305a(5) DCC by the author. Article 3:305a(5) stipulates (in Dutch): «Een rechterlijke uitspraak heeft geen rechtsgevolg ten aanzien van een persoon tot bescherming van wiens belangen de rechtsvordering strekt en die zich verzet tegen werking van de uitspraak ten opzichte van hem, tenzij de aard van de uitspraak meebrengt dat de werking niet slechts ten opzichte van deze persoon kan worden uitgesloten».
[71] C.J.J.M. STOLKER, *T&C Burgerlijk Wetboek*, Deventer, 2019, article 3:305a DCC, note 1.
[72] D.J.HARRIS, M.O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Law of The European Convention on Human Rights*, Oxford, 2018 (fourth edition), 84; I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, nr.195, 204.
[73] D.J.HARRIS, M.O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Law of The European Convention on Human Rights*, Oxford, 2018 (fourth edition), 89; I. GIESEN, *Mr.s C. Assers Handleiding tot de beoefening van het Nederlands Recht. Procesrecht. 1. Beginselen van het burgerlijk procesrecht*, Deventer, 2015, nr. 195, 204.
[74] see for example the case ECtHR 12 February 2004, Perez v. France, no. 47287/99 para. 70
[75] ECtHR 24 February 2009, no. 49230/07, L'Erablière a.s.b.l. v. Belgium. See the Information Note on the Court's Case-law No. 116 (February 2009).

is possible to be declared admissible with the ECtHR, but then it can no longer be said that there is a real actio popularis.

In this case the District Court ruled that Urgenda could not rely on the article 2 and 8 ECHR because Urgenda itself did not qualify as a victim within the meaning of article 34 ECHR because unlike with a natural person, a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with. However, as the Court of Appeal considered, the District Court failed to acknowledge that article 34 ECHR (only) concerns access to the ECtHR. Furthermore the Court of Appeal noted that the ECHR does not give an answer about access to the Dutch courts as this is not possible because this falls within the scope of the Dutch judges. This meant, according to the Court of Appeal that article 34 ECHR could not serve as a basis for denying Urgenda to rely on articles 2 and 8 ECHR in the proceedings before the Dutch courts. Furthermore the Court of Appeal ruled that Dutch law is decisive in determining access to the Dutch courts, in the case of Urgenda in these proceedings article 3:305a DCC in particular, which provides for class actions of interest groups. As individuals who fall under the State's jurisdiction may invoke articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf based on article 3:305a DCC. The Supreme Court upheld this judgment of the Court of Appeal[76].

In view of the foregoing the judgment of the Supreme Court appears to be consistent with both Dutch and European law. However, in granting Urgenda with its collective action to rely on the Articles 2 and 8 of the ECHR, the situation arises that the Dutch Supreme Court decides on a violation of articles 2 and 8 ECHR, but this decision cannot be submitted for review to the ECtHR in Strasbourg, because Urgenda, as an interest group, is inadmissible on the grounds of article 34 ECHR, and also the Dutch State cannot be qualified as a victim within the meaning of the aforementioned article. For this case it means that the Dutch State and Urgenda are both bound to a decision on the articles 2 and 8 ECHR, which cannot be appealed to with the ECtHR, which makes the Dutch Supreme Court in effect the highest authority to rule over a claim instituted on infringement of the ECHR. The question can be asked whether this is a desirable outcome. However, it could be argued that this is only a minor issue because, as the Supreme Court itself recognized in its judgment, the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR[77]. The courts of the Netherlands are therefore not allowed to deviate from the interpretation of the ECHR by the ECtHR.

[76] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007, paras. 5.9.1-5.9.3. The Supreme Court assesses the admissibility of the parties to the proceedings ex officio. If the parties are admissible, no further attention is paid to this in the judgment. This is different if one party has argued that the other party is inadmissible. In that case, an assessment is made which is reflected in the judgment. The same applies if a party is declared inadmissible ex officio.

[77] Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007, paras. 5.6.1.

5. The legal nature of the reduction target for 2020: the role of scientific data, international and european law

After ruling that the positive obligations under articles 2 and 8 ECHR apply to the area of State responsibilities for climate change, the Supreme Court addressed the question of the specific and concrete content of those obligations. In essence, the Court wondered whether the rules in question resulted in an obligation for the Netherlands to reduce its greenhouse gas emissions by 25% compared to 1990 level by 2020, as requested by Urgenda. To that end, the Court's investigation started from the consideration of certain factual data which were certain because they were not contested by the parties:

a) for a long time the scientific community has reached a broad consensus that the emission of greenhouse gases is leading to an ever higher concentration of those gases in the atmosphere. This is warming the planet, which is resulting in a variety of hazardous consequences. Some of this consequences are already happening right now. Moreover, climate science reached a high degree of consensus that the warming of the earth must be limited to no more than 2 C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 450 ppm. In addition to this climate science has since arrived at the insight that a safe warming of the earth must not exceed 1,5 C. Exceeding these concentrations would involve a serious degree of danger for the planet;

b) this dangerous scenario has been recognized by international community trough the Intergovernmental Panel on Climate Change (hereinafter IPCC)[78] Fourth Assessment Report, AR4, 2007[79]. According to the Report, for there to achieve more than a 50% chance of not exceeding the 2 C limit, the concentration of greenhouse gases in the atmosphere must stabilise at the level of 450 ppm by 2100. In order to achieve this scenario, the countries included in Annex I of the United Nation Framework Convention on Climate Change (hereinafter UNFCCC) must necessarily reduce greenhouse gas emissions by 25-40% compared to 1990 by 2020.;

c) the IPCC published its Fifth Assessment Report in 2013-2014 (AR5)[80]. This Report established that the planet is warming as a result of the increase in the concentration of CO2 in the atmosphere and that this is being caused by human activities. In the AR5, the IPCC concluded that if the concentration of greenhouse gases in the atmosphere stabilises at around 450 ppm in the year 2100, the chance

[78] The Intergovernmental Panel on Climate Change was created in 1988 under the auspicies of the United Nations by the Meteorological Organization, WMO, and the United Nations Environment Programme, UNEP. The IPCC's goal is to obtain insight into all aspects of climate change through scientific research. The IPCC does not conduct research itself but studies and assesses the most recent scientific and technological information that become available around the world. The IPCC is not just a scientific organisation but an intergovernmental organisation as well and has 195 members, including the Netherlands.

[79] www.ipcc.ch/assessment-report/ar4/

[80] www.ipcc.ch/assessment-report/ar5/

that the global temperature increase would remain under 2 C was higher than 66%.

d) the scientific data reported in AR4 and AR5 correspond to the commitments made by the States through the UNFCCC[81] 1992. Since the 1992 annual climate conferences have been held by the Conference of the Parties of UNFCCC, COP[82], the higest body under that Convention, which comprises representatives of the contracting States. At each of those conferences it was emphasised that reducing greenhouse gas emission is urgent and that contracting States are called on to make that reduction are reality. At several conferences specific agreements have (also) been made about that reduction[83]. More in particular, the insight that a safe warming is limited to a maximum of 1.5 C and that this means that the concentration of greenhouse gases in the atmosphere must be limited to a maximum of 430 ppm, was included in the Paris Agreement of 2015 signed by more than 190 countries, including the Netherlands and the European Union[84];

[81] The United Nations Framework Convention on Climate Change was ratified in 1992 with the purpose to promote the stabilisation of the concentration of greenhouse gases in the atmosphere at a level which would prevent dangerous anthropogenic interference with the climate system. The parties to the UNFCCC are referred to as Annex I countries , that are the developed countries, including the Netherlands, and non-Annex I countries. According to art. 4 (2) of the convention, the Annex I countries must take the lead in counteracting climate change and its negative consequences. They must periodically report on the measures they have taken. The treaty, as originally stipulated, did not set mandatory limits on greenhouse gas emissions for individual nations; it was therefore legally non-binding in this respect. It did, however, include the possibility for the signatory parties to adopt, in special conferences, additional acts (called "protocols") that would set mandatory emission limits. The main one, adopted in 1997, is the Kyoto Protocol followed by the Paris Agreement in 2015.

[82] Art.7 UNFCCC, 1992. COPs shall be the forum for negotiation between the Parties and may result in decisions that are not legally binding or in agreements or protocols with legal force. At the moment the only two document with juridical value are the Kyoto Protocol and the Paris Agreement, both ratified by the Netherlands and the European Union, although no specific implementing instrument is foreseen.

[83] At the climate conference in Kyoto in 1997 (COP-3), the Kyoto Protocol was agreed upon between a number of Annex I countries, including the Netherlands. This Protocol records the reduction targets for the period 2008-2012. The Bali Action Plan, adopted at the climate conference in Bali in 2007 (COP-13), citing the AR4, acknowledged the need for drastic emission reductions and in particular of 25-40% compared to 1990 by 2020. This goal was confirmed at the climate conference in Cancún in 2010 (COP-16), with the Cancún Agreements. In the Cancun Pledges the EU countries as a group declared themselves prepared to achieve a 20 % reduction by 2020 compared to 1990, and offered to achieve a 30% reduction on the condition that other countries were to undertake the achievement of similar reduction targets. At the climate conference in Doha in 2012 (COP-18), all Annex I countries were called on to raise their reduction targets to at least 25-40% in 2020. An amendment to the Kyoto Protocol was adopted, in which the EU committed to a reduction of 20% in 2020 compared to 1990, and offered and offered to achieve a 30% reduction on the condition that other countries were to undertake the achievement of similar reduction targets. This condition was not met and the Doha Amendment did not enter into force.

[84] The Paris Agreement was concluded at the climate conference in Paris in 2015 (COP-21). This Convention calls on each contracting state to account for its own responsibilities. The convention stipulates that global warming must be kept well below 2 C as compared to parties must prepare ambitious national climate plans and of which the level of ambition must increase with each new plan. It is made up of two documents: the Decision and the Paris Agreement, which formally constitutes a annex to the first one. These are separate acts with different legal effects: only the Agreement is binding on the Parties and as such is subject to ratification by

e) in its 2017 report, the United Nations Environment Programme, UNEP, States that, in light of the Paris Agreement, the reduction of greenhouse gas emission is more urgent than ever. The UNEP also remarks that if the emission gap is not bridged by 2030, achieving the target of a maximum warming of 2 C is extremely unlikely.

Based on this undisputed facts the Court of Appeal concluded that there is «a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life»[85] and that it is «clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individual in this group, will have to deal with the adverse effects of climate change in their lifetime if global emission of greenhouse gases are not adequately reduced»[86].

Considering that factual and scientific data were not contested by the parties, the Court found that the Dutch State correctly stated that the 25% target requested by Urgenda, and confirmed by the District Court and the Court of Appeal, was not legally binding. It is also clear that the State did not contest the need and urgency of reducing greenhouse gas emissions, but rather the need and urgency to achieve a certain objective in the short term, as supported by the scientific community and recognized by the international community.

At the same time, the Court notes that the urgent need to rapidly reduce greenhouse gas emissions by at least 25% compared to 1990 by 2020, in order to achieve the long-term targets, is subject to a high degree of consensus among the scientific and international community[87]. This makes this target legally binding according to the common ground method developed by ECtHR.

According to the common ground method developed by the ECtHR in the 2008 Demir and Baykara v Turkey case, the provisions of the ECHR must be interpreted and applied so as to make it a safeguard, practical and effective[88]. Taking into account also article 31 of the Vienna Convention on the Law of

the Contracting States. The Decision, which although a legal instrument adopted in implementation of the Convention is not binding, provides for the initiatives that States will have to put in place before 2020, in order to prepare for the entry into force of the Agreement and to improve and implement their own initiatives. programmatic

[85] The Hague Court of Appeal 9.10.2018, ECLI:NL:GHDHA:2018:2591

[86] The Hague Court of Appeal 9.10.2018, ECLI:NL:GHDHA:2018:2591

[87] As the judges report in their decision, even the European Union has taken as the starting point of its climate policy the needs set out in AR4, expressing on several occasions the scientifically supported need to reduce greenhouse gas emissions by 30% compared to 1990 by 2020. In deeds, at the 2010 Cancun Climate Conference, the EU bound itself to reduce greenhouse gas emissions by 30% by 2020 provided that other developed countries also committed to do the same. This condition was not fulfilled. This lead the European Union, for essentially political reasons, to set a target of 20% by 2020, and setting a more ambitious plan of a 40% reduction by 2030 to comply with the Paris agreement. For an in-depth examination of the relationship between European policies and the Paris Agreement see F. SACALIA, *L'Accordo di Parigi e i paradossi delle politiche dell'Europa su clima ed energia*, in Rivista di Diritto e Giurisprudenza Agraria, Alimentare e dell'Ambiente, 6, 2016, 1; L. KRAMER, *EU Environmental Law*, London, 2016.

[88] ECHR, art.13.

Treaties[89] and the fact that the ECHR is a living instrument that must be interpreted in the light of the circumstances in which it is applied[90], courts, in defining the meaning of terms and notions in the text of Convention can and must take into account:

a) elements of international law other than Convention;

b) the interpretations of such elements by competent organs;

c) the practice of european States reflecting their common value[91].

The consensus emerging from international instruments and from the practice of contracting States is a decisive element in the interpretation of the Convention, which must take into account the instruments that denote a continuous evolution of law, common and shared by the majority of States in a specific field[92]. According to the ECtHR case law, an interpretation and application of the ECHR must also take into account scientific insights and generally accepted standards[93]. The common ground method aims, therefore, to interpret the ECHR taking into account the points of view shared by the contracting States, considering their jurisprudence but also agreements which, may have an indirect legal effect in certain circumstances.

Using these hermeneutical coordinates, the Dutch Supreme Court stated that the 25% target, widely shared by the scientific community and repeatedly considered in various forms by the COPs of the UNFCCC, should be considered as a common ground to be used in identifying the specific content of the obligations under articles 2 and 8 ECHR.

Having established by the common ground method that the 25% target represents a bond for the UNFCCC Annex I countries as a whole, the Supreme Court has analysed the question of the application of this constraint to the Netherlands individually in the light of the commitments made within the European Union. The State has argued that the EU as whole is commited to a 20% reduction in greenhouse gas emission by 2020 and that the Netherlands would contribute to this by reducing its greenhouse gas emission in 2020 by 21% for ETS sector and by 16% for the non ETS sector[94]. Therefore it complies with all its obligations.

In order to understand the decision of the Dutch Supreme Court on this issue, it should be made clear that the climate change is an area where the EU and the Member States enjoy shared competence[95], but the compatibility of enhanced targets and additional climate measures adopted by Member State is a contestable

[89] Vienna Convention on the Law of Treaties, 1969, art.31: «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose(…)»

[90] ECtHR, 7.14.1989, Soering v United Kingdom, 14038; 12.09.2012, Nada v Switzerland, 10593; 27.01.2009, Tatar v Romania, 67021.

[91] ECtHR, 12.11.2008, Demir and Baykara v Turkey, 34503.

[92] ECtHR, 12.11.2008, Demir and Baykara v Turkey, 34503.

[93] ECtHR, 30.11. 2004, Oneryildiz v Turkey, 48939; 20.5.2010, Oluic v Croatia, 61260.

[94] Effort Sharing Decision (ESD) No 406/2009/EC.

[95] By virtue of art. 4 (2) TFEU, the EU and Member States enjoy shared competence with respect to areas related to climate change policy including environment, transport and energy.

issue[96]. On the one hand the Effort Sharing Decision contains binding commitments, but on the other hand, there are no explicit restrictions for Member States from adopting higer targets. It should also be noted that Member States may by virtue of article 193 TFEU introduce or maintain more stringent protective measure in relation to the environment as long as they are compatible with the Treaties[97].

In the Supreme Court's view, it is correct to say that the target of 25% concerns Annex I countries as a group. However, the UNFCCC and the Paris Agreement are both based on the individual responsibility of States. Furthermore, the Netherlands, as well as any other EU country, is subject to the obligations imposed by the European Union but without prejudice to the individual responsibility of States, as set out in Consideration 17 of the Effort Sharing Decision and article 193 TFEU.

In addition to the regulatory elements described above, the Supreme Court refers to the fact that on several occasions the Dutch government has agreed with the need and possibility of achieving a 25-40% reduction in greenhouse gas emissions by 2020[98]. After 2011, the State adjusted its targets for 2020 downwards to a 20% reduction arguing that achieving a 25-40% reduction by 2020 is not necessary because the same results can be achieved by accelerating the reduction of greenhouse gas emission in the Netherlands after 2020. In the Court's view, the Dutch State has failed to demonstrate the scientific validity of that strategy and to specify what measures it intends to take to achieve that purpose[99].

By failing to demonstrate the effectiveness of its strategy and the impossibility of reaching the 25% target by 2020, the Dutch State has violated the precautionary principle according to which far-reaching measures must be taken to achieve the necessary reduction in greenhouse gas emissions.

The way the precautionary principle is used in Urgenda case is that more action should be adopted despite uncertainty of the effects of additional

[96] S. ROY, *Urgenda v The Netherlands: A new climate change constitutionalism?*, in Netherlands Tijdschrift voor Energierecht, 5, 2015, 197.

[97] A Higher national target, however, may have effect on stakeholders in the EU by virtue of possible leakage, distortions of competition and restriction on the movemente of goods and service. for a more in-depth examination of the subject, see C. HILSON, *It is all about climate change stupid! Exploring the relationship between enviromental law and climate law*, in Journal of Environmental Law, 25, 2013, 359.

[98] According to the letter from the Minister of Housing, Spatial Planning and Enviroment dated 12 october 2009, the State was at the time of the opinion that a rediction of 25-40% by 2020 was necessary to stay on a credible track to keep the 2 C target within reach. In the same letter the Minister informed the Dutch House of Representatives about Netherland's negotiation objective in the context of the climate conference in Copenhagen in 2009 (COP-15): «the total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2 degree target within reach». Moreover, based on a 2007 program entitled *Schoon en zuinig*, that can be translate as Clean and Economical, the Netherlands was working from the premise of 30% reduction target in 2020 compared to 1990's emissions.

[99] In addition, in the Dutch Climate Act 2019 the Dutch State set a reduction target of 49% by 2030 and 95% by 2050. In order to achieve those targets, according to the Court, it would still be necessary to achieve a reduction of 28% by 2020.

measures[100]. Thereby the Court preferred procedural version of the precautionary principle[101] instead of the substantive. Using the precautionary principle by a procedural point of view, the Court, in a correct way, is not discussing the policy of the State nor the legal measure adopted, but considers that, unlike Urgenda, the State has not produced any scientific evidence of the sufficiency or adequacy of the strategy adopted to counter climate change. Therefore, on the basis of the common ground method and precautionary principle, as well as the principle of effective legal protection enshrined in article 13 ECHR, under articles 2 and 8 ECHR, the Netherlands is required to take appropriate measures to prevent risks arising from climate change in accordance with the 25-40% target set by IPCC AR4, which must be regarded as an absolute minimum.

In basing the legal nature of the 25% reduction target for 2020 on the common ground method developed by the ECtHR, the Dutch Supreme Court used scientific data and non-binding agreements to outline the specific content of the obligations under articles 2 and 8 ECHR. In this way, the Court opens the debate on what the substantive value of progressive resolutions adopted by States should be and demonstrates that the distinction between legally binding obligations and not binding obligations or acts which do not have direct legal effect can prove to be relative in the light of ECtHR case law.

In the Urgenda case, the European governance of climate change is clearly not in dispute, however, one can perceive a critical judgement not only against the Dutch government's attitude to reducing greenhouse gas emissions but, implicitly, also against the policy adopted by the European Union.

There is no doubt that it is not within the competence of the Dutch Supreme Court to assess European climate change policy and the position taken in international negotiations, nor to order the State to abandon a no gold-plating attitude, however, by reminding the Netherlands of its individual responsibility for guaranteeing human rights in the field of climate change, the judges seem to suggest that this matter, at a time of grave emergency, should be removed from political negotiation and entrusted to the scientific community and its conclusions on the climate change issue, and to the responsability that each State has towards its citizens and humanity as a whole.

6. The constitutional lawfulness of the Court order: a juridical decision with a political effect

One of the most sensitive aspects of the Urgenda case concerns the constitutional legitimacy of the court order of reduction addressed to the State with respect to the principle of separation of powers, which is the foundation of any democratic system, and the political question doctrine.

[100] S. ROY, *Urgenda v The Netherlands: A new climate change constitutionalism?*, in Netherlands Tijdschrift voor Energierecht, 5, 2015, 203.
[101] A. ARCURI, *The Case for a Procedural Version of the Precautionary principle erring on the Side of Environmental Preservation*, in M.BOYER (ed), *Frontiers in the Economics of Environmental Regulation and Liability*, Farnham, 2006, 19.

In its appeal to the Supreme Court, the State argues that the reduction order is essentially political in nature and must be considered inadmissible for two reasons:

a) the decision taken by the District Court and upheld by the Court of Appeal constitutes an order to enact legislation, and for this reason is contrary to both constitutional principles and the case law of the Supreme Court;

b) by virtue of these constitutional principles, and more specifically the principle of the separation of powers, it is not for the judiciary to develop political considerations regarding the reduction of greenhouse gas emissions. This type of decision, in fact, is strictly a matter for the legislator.

Before analysing the decision taken by the Supreme Court on this matter, the constitutional and jurisprudential framework relating to the separation of powers in Dutch law must first be briefly introduced.

The Constitution of the Netherlands does not provide for an article dedicated to the separation of powers, which is implicitly guaranteed by a series of limits designed to prevent the same person holding different offices in different branches of the State [102]. The separation of powers is an intrinsic trait of the Dutch constitutional order but, at the same time, it is not very strict[103]. Many dutch authors, therefore, prefer to talk about the balance between the three State powers and about a consitutional system of checks and balances[104]. This is confirmed by the fact that the legislative power is not strictly separated from the executive power with which it shares certain legislative competence[105]. In turn, the executive power is subject to the control of the States-General and the Council of State chaired by the King, that issues opinions which can strongly influence the legislative process[106].

It should also be considered that art. 120 of the Constitution states that courts shall not review the constitutionality of acts of Parliament and treaties. As a result the Dutch constitutional system does not provide for a constitutional review body. The task of controlling the compatibility of laws and other normative acts with the constitution is not assigned to any other organ. «The Dutch Constitution establishes the supremacy of the legislative power with respect to the judiciary as regards the interpretation of the constitution»[107], not allowing the

[102] Dutch Constitution, art. 57.

[103] M.T. OOSTERHAGEN, *Machtenscheiding. Een onderzoek naar de rol van machtenscheidingstheorieën in oudere Nederlandse constituties (1798 – 1848)*, Rotterdam, 2000, 359.

[104] M.T. OOSTERHAGEN, *Machtenscheiding. Een onderzoek naar de rol van machtenscheidingstheorieën in oudere Nederlandse constituties (1798 – 1848)*, Rotterdam, 2000, 362; M.C. BURKENS, H.R.B.M. KUMMELING, B.P. VERMEULEN, R.J.G.M. WIDDERSHOVEN, *Beginselen van de democratische rechtsstaat*, Deventer, 2017; Somewhat differently: P.P.T. BOVEND'EERT, *Het rechtsbeginsel van de machtenscheiding*, in R.J.N. SCHLÖSSELS (ed), *In beginsel. Over aard, inhoud en samenhang van rechtsbeginselen in het bestuursrecht*, Deventer, 2004, 243.

[105] Dutch Constitution, art. 81.

[106] Dutch Constitution, art. 73.

[107] A. RINELLA, *Constitutional Interpretation: The Dutch Case in Comparative Perspective*, in G.F. FERRARI, R. PASSCHIER, W. VOERMANS (eds), *The Dutch Constitution beyond 200 Years. Tradition and Innovation in a Multilevel Legal Order*The Hague, 2018,177.

courts to carry out its own constitutional interpretation in that forum[108]. However, established case law considers that it is permissible to interpret legislative acts in a manner consistent with constitutional principles and provisions, as well as to verify their compliance with international human rights treaties, which are considered to be of substantially constitutional value[109].

The described ban on constitutional review is more or less ecletic and partial one[110]. In fact, article 94 of the Constitution establishes an exception to the system, stating that legal provisions (including acts of Parliament) in force in the Kingdom are not applicable if they are contrary to the provisions of the treaties or decisions of public law which bind any person. So, even though Dutch courts are not allowed to review acts of Parliament and treaties on their constitutionality, they are free to review all products of domestic legislation as to their compatibility with international Treaties and EU Law[111]. More in particular, the human rights catalogue of the European Convention on Human Rights and its protocols, which have direct effect and is directly applicable in the Dutch legal order, is invoked and applied frequently[112]: «If we look through this lens, there is actually more judicial review, even constitutional review in the Netherlands then meets the eye without this lens»[113].

That said, it should be pointed out that in the Urgenda case, the Supreme Court was not called upon to judge the conformity of a legislative act with the ECHR or constitutional principles, but to determine whether or not the insufficient (in Urgenda's opinion) action by the State to reduce greenhouse gas emissions by 2020 complies with the ECHR.

Article 120 of the Constitution does not explicitly answer the question whether the omission or insufficiency of legislative action can be the subject of legal proceedings in the courts. However, there is no doubt that, according to the case law of the Supreme Court, the jurisdiction of the courts cannot extend to the power to issue an order to legislate, even if Parliament or the Government has failed to adapt the legal system to a European directive[114]. The opposite would infringe the principle of the separation of powers. The case law interpretation of the principle of the separation of powers is based on the dividing line between

[108] J. UZMAN, *The Dutch Supreme Court: A Reclutant Positive Legislator*, Electronic Journal of Comparative Law, 3, 2010; G. VAN DER SCHYFF, *Constitutional Review by the Judiciary in the Netherlands: A bridge too far?*, German Law Journal, 2, 2010, 257.

[109] www.denederlandsegrondwet.nl/id/vkndm7nuwdwh/de_trias_politica_in_de_nederlandse

[110] W. VOERMANS, *Constitutional Law*, in J. CHORUS, E. HONDIUS, W. VOERMANS (eds), *Introduction to Dutch Law*, Alphen aan den Rijn, 2016, 359.

[111] European Court of Justice, Italian Finance Administration v Simmenthal Spa, 09.03.1978, ECLI: ECLI:EU:C:1978:49

[112] Dutch Constitution, art. 93

[113] W. VOERMANS, *Constitutional Law*, quoted, 359. See also M. ADAMS, *Constitutional Review by the judiciary in the Netherlands: A matter of politics, democracy or compensating strategy*, ZaoRV, 66, 2006, 399 ss.; S. ROY, E. WOERDMAN, *Situating Urgenda versus Ntherlands within Comparative Climate Change Litigation*, Journal of Energy and Natural Resources Law, 34, 2016, 1.

[114] HR 19.11. 1999 C 98/096HR, ECLI:NL:HR:1999:AA3374; HR 21.03.2003 C 01/327HR, ECLI: NL:HR: 2003:AE8462; HR 01.10.2003 C 03/118HR, ECLI:NL:HR:2004:AO8913.

discretionary decisions of a political nature, which must be left to the legislator, and legal matters, which are subject to the jurisdiction of the courts. This results in a necessary tendency in jurisprudence to avoid strictly political issues[115], according to what can be called the Dutch political question doctrine.

Taking as a point of reference the relevant case law of the American Supreme Court[116], Van der Hulle summarises the political question criterias as follows:

a) the dispute concerns a subject that was assigned to one of the other two state powers by or by virtue of the Constitution;

b) there are insufficient clear and objective criteria on the basis of which the dispute could be resolved;

c) a substantive assessment could interfere with the functioning and previous political decision of the other State powers[117].

In the event that such conditions are met, the court should therefore refrain from taking any judgment in order not to infringe the principle of separation of powers[118]. At the same time it should be considered that the civil courts determine their jurisdiction on the basis of law on which the claimant bases its claim rather then on the nature of the dispute and whether it pertains to public or private law[119] . Courts may never refuse to administer justice on the pretext that there is a lack, insufficiency or vagueness of law[120]. In such cases courts are forced to further develop and supplement the law with a chance of friction within the trias politica. At the same time it may be unsatisfactory for effective legal protection when courts are forced to limit their judgment on the finding that a national statutory provision is incompatible with a treaty provision[121]. In the event of an impending violation

[115] HR 21.12.2001 C99/355HR, ECLI:NL:HR:2001:AB2566; HR 29.11.2002 C01/027HR, ECLI:NL:HR:2002:AE5164; HR 06.02.2004 C 02/217 HR, ECLI:NL:HR:2004:AN8071.

[116] U.S. Supreme Court in Marbury v. Madison, 5 U.S. 137 (1803); U.S. Supreme Court in Baker v. Carr, 369 U.S. 186 (1962); R.E. BARKOW, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, Columbia Law Review, vol. 102, 2, 2002 pp. 237 ss.; J. HARRISSON, *The Political Question Doctrines*, American University Law Review vol. 67, 2, 2018, 457.

[117] R. VAN DER HULLE, *Het vonnis van de Haagse Rechtbank over het Oekraïne-referendum. In het licht van de Amerikaanse political question-doctrine*, NJB 2017/1755, 2316; R. VAN DER HULLE, *Klimaatverandering en de verhouding tussen rechter en wetgever: een vergelijking met de Verenigde Staten*, Milieu en Recht 2018/34.

[118] A similar description was used in a judgment rendered by the Preliminary Relief Judge of District Court of Amsterdam on the Brexit problem: «the first defence pertains to the political question doctrine and concerns the allocation of tasks between the judiciary and the executive and/or legislature. According to this doctrine, the key to answering the question on whether the judiciary is allowed to assess a dispute is whether it concerns a subject that constitutionally falls within the competence of another State power, or whether there are sufficient clear and objective criteria to be able to assess the dispute *de jure*, and/or whether a court judgment would interfere with the possibility of another competent State power to form a political opinion on the matter» (District Court of Amsterdam 7 February 2018, ECLI:NL:RBAMS:2018:605, para. 5.3 (Brexit), JB 2018/45 annotated by R. van der Hulle. The judgment was set aside on appeal for a different reason in Court of Appeal of Amsterdam 19 June 2018, ECLI:NL:GHAMS:2018:2009).

[119] HR 31.12.1915, ECLI:NL:HR:1915:AG1773, NJ1916.

[120] Kingdom Legislation Act, art. 13.

[121] This issue is also known in other countries. For example, the English Courts may, under art. 4 of Human Rights Act, issue a declaration of incompatibility which addresses the incompatibility of existing statutory rule with a provision of the ECHR (ECHR 23 November

of the fundamental rights of individuals, courts are forced to provide effective legal protection sooner. As the risks of a violation become more serious, the expectations of judicial intervention also increase. On the other hand, there is a risk that the judiciary will lose authority and public trust if it goes too far in an area that the constitution reserves for the legislature.

It is on the basis of this complex background that the Supreme Court of Netherlands has addressed the State's complaint that an order to reduce greenhouse gas emissions by 25% below 1990 levels by 2020 corresponds to a constitutionally unlawful order to legislate.

The Court held that given the obligations arising from articles 2 and 8 ECHR, which are directly applicable in Dutch legal system, the courts may order the State, as well as any other subject, to comply with those obligations under article 3:296 DCC[122]. The State's submission to those obligations corresponds not only to a fundamental principle anchored in the Netherlands' constitutional system, but also to the principle of effective legal protection enshrined in article 13 ECHR.[123].

Article 3:296 DCC prevents the courts from order the State, as well as any other subject, to fulfil an obligation only in two cases:

a) when such prohibition is expressly laid down by law;

b) when such a prohibition can be clearly inferred from the nature of the obligation or legal act.

It is clear that the prohibition to enact an order to legislate is one of the exceptions to the rule laid down in article 3:296 DCC[124]. However, in the Court's view, that principle does not entail an absolute prohibition on the judicial power to intervene in the political decision making process. In accordance with article 94 of the Constitution and consolidated case law on the subject[125], the courts are allowed to issue a declaratory judgment on the fact that a public authority or body is acting unlawfully by not adopting a certain conduct[126]. The only prohibition to which the courts are subject to, is to issue decisions requiring the State to adopt legislation with a specific content. As a result, the courts are permitted to adopt declaratory decisions requiring public bodies to take measures to achieve certain objectives until such time as this results in an order to create a legal discipline with a specific content[127].

In the Supreme Court's view, the order to reduce greenhouse gas emissions by 25% compared to 1990 levels by 2020 is a case of declaratory decision and not an illegal order to issue legislation with a specific content. The order, in fact, leaves

2010, Greens et al. v. the United Kingdom, no. 60041/08, EHRC 2011/20).

[122] Under Dutch law, injunctions are based on article 3:296 DCC, which indicates that if someone is obligated to give, to do, or to refrain from doing something towards another, he is ordered so by court. On the basis of this article, who commit a tort can be obligated to do or refrain from doing something.

[123] HR 28.09.2018, ECLI:NL:HR:2018:1806.

[124] HR 21.03.2003, ECLI:NL:HR:2003:AE8462.

[125] HR 21.03.2003, ECLI:NL:HR:2003:AE8462; HR 01.10.2004, ECLI:NL:HR:2004:AO8913.

[126] HR 09.04.2010, ECLI:NL:HR:2010:BK4549; HR 07.03.2014, ECLI:NL:HR:2014:523.

[127] HR 09.04.2010, ECLI:NL:HR:2010:BK4549

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to the State the freedom and discretion to determine which measures, not necessarily legislative, should be adopted in order to achieve an objective which, it is recalled, is imposed by the obligations under articles 2 and 8 ECHR. There is no doubt that in the Dutch constitutional system the decision making process regarding the reduction of greenhouse gases is the responsibility of the Government and Parliament, which have a wide margin of appreciation in formulating the necessary political considerations in this regard. However, it is for the judiciary to determine whether, in exercising that discretion, the Government and Parliament have complied with the legal obligations to which they are bound by the ECHR.

In addition, the extraordinary emergency nature of the circumstances of the Urgenda case must be taken into account. In that context, the policy pursued by the Dutch State to postpone greenhouse gas reductions for a prolonged period is not sufficient to deal with that emergency and ensure the protection of the human rights of its citizens, with a corresponding breach of its obligations under articles 2 and 8 ECHR.

The allegation of the court's interference with the State is not restricted to technocratic competence to assess adequate and effective measures; the primary allegation has been that the Court is taking over the normative role that is attributed to the State by deciding on a political question. However, the presence of international science, of the human right's obligation and of the ECtHR jurisprudence via art. 94 of Constitution transformed a possible political question in to a legal question. The focus of this case is what we can call the human face of the climate change: the substantive rights ensured by ECHR, that have a substantive constitutional value, confer a positive obligation on the State to take reasonable and appropriate measures to protect such rights. It is also the State that needs to demonstrate that its limited action on climate change satisfies its positive obligation.

The decision of the Urgenda case seems to allow a distinction between a political decision and a legal decision with political consequences. In that sense the Court reasons find a corrispondence in the view of the relationship between the trias politica as a balance of powers. This balance is legally achieved by a constructive application of ECHR, precautionary principle and proportionality principle, where the assessment of the risks to human rights arising from climate change are beholden to the scientific findings of international bodies. This realises a shift from a political question to a climate constitutionalism[128] which could influence the constitutional interpretation of other equally sensitive jurisdictions.

[128] S. ROY, *Urgenda v The Netherlands: A new climate change constitutionalism?*, in Netherlands Tijdschrift voor Energierecht, 5, 2015, 203.

7. Climate change litigation in the European Union: the People's climate case

Like the Urgenda case, the People's climate case, which is currently pending before the European Court of Justice, is set against the backdrop of rising global temperatures, the resulting climate change and the devastating effects on mankind and natural resources.

The People's climate case concerns the appeal lodged by ten families, for a total of 36 individuals[129], and the Sami Youth Association Saminuorra organisation before the EU General Court in order to compel the EU to take more stringent greenhouse gas (ghg) emissions reductions. Plaintiffs allege that the EU's existing target to reduce domestic ghg emissions by 40% by 2030, as compared to 1990 levels, is insufficient to avoid dangerous climate change and threatens plaintiffs' fundamental rights of life, health, occupation, and property.

The lawsuit has two major components. First, plaintiffs bring a nullification action, asking the court to declare three EU legal acts as void for failing to set adequate ghg emissions targets and in particular:

a) directive 2003/87/EC governing emissions from large power generation installations (ETS);

b) regulation 2018/EU on emissions from industry, transport, buildings, agriculture, and etc. (ESR); c) regulation 2018/EU on emissions from and removals by land use, land use change, and forestry (LULUCF).

Plaintiffs argue that inadequate emissions reductions violate higher order laws that protect fundamental rights to health, education, occupation, and equal treatment as well as provide obligations to protect the environment.

These higher ranking laws include the:

a) EU Charter of Fundamental Rights (ChFR), the Treaty on the Functioning of the European Union (TFEU);

b) United Nations Framework Convention on Climate Change (UNFCCC);

c) Paris Agreement.

With the second action the applicants claim the non-contractual liability of the EU on the basis of art. 340 TFEU. This norm provides a mechanism for injunctive relief when three conditions are met:

a) there is an unlawful act by the EU institution(s);

b) the unlawful act is a serious breach of a law that protects individual rights;

c) there is a sufficient causal link between the breach and the damages.

Demanded relief is an injunction to compel the EU to set more stringent ghg emissions reductions targets through the existing framework of the ETS, ESR and LULUCF regimes in order to bring the EU into compliance with its legal obligations. Plaintiffs assert this would require a 50%-60% reduction in ghg emissions below 1990 levels by 2030.

[129] The 36 applicants come from different EU countries, Germany, France, Portugal, Italy and Romania, and from outside Europe, Kenya and Fiji. All ten families base their livelihoods on agriculture and tourism.

The European General Court did not rule on the merits, but dismissed the case on procedural grounds, finding that the plaintiffs could not bring the case since they are not sufficiently and directly affected by these policies (direct and individual concern criterion)[130].

The court concluded that the plaintiffs did not have standing to bring the case because climate change affects every individual in one manner or another and case law requires that plaintiffs are affected by the contested act in a manner that is «peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually»[131].

The court rejected plaintiffs' argument that the interpretation of the concept of individual concern referred to in the fourth paragraph of article 263 TFEU is not compatible with a fundamental right to effective judicial protection under article 47 of the Charter of Fundamental Rights. Nor did the court find that plaintiffs could bring the case under the other possible criteria under the fourth paragraph of article 263 of the TFEU which would require that they were direct addressees of the legislative package in question or they contested a regulatory act that was of direct concern to them.

The plaintiffs appealed to the European Court of Justice on July 11, 2019, arguing that the EU General Court erred in concluding that plaintiffs lacked standing under article 263, and by holding that plaintiffs needed to establish standing under article 263 in order to bring a claim for non-contractual liability.

Comparing the People's climate case with the Urgenda case, the similarities in the structure of the case are evident:

a) According to the complainants in both cases the State and the EU are bound by higher-ranking rules which oblige them to prevent the risks arising from climate change from materialising and to take direct measures to that end;

b) in both cases the focus of the applicants' motives is an actual and future human rights violation;

c) In both cases, according to the applicants, the institutions have not adopted sufficient measures and policies to meet their obligations under higher-ranking standards such as the ECHR and the EU Charter of fundamental rights.

This shows how the path of climate change litigation in Europe leads to the question of the protection of human rights, a superior good to be taken away from any political whim or economic logic.

However, unlike the Dutch courts, the EU General Court would not accept the standing of the applicants. The EU General Court found that the applicants did not have a sufficient individual interest, as required by article 263 TFEU, because they could not qualify as the adressee of the legislation which was called upon. Furthermore, unlike in the People's climate case, in the Urgenda case was not requested for the nullity of existing legislation, but focused mainly on the violation of fundamental rights under the ECHR.

[130] EU General Court, 08.05.2019, 888764/19.
[131] EU General Court, 08.05.2019, 888764/19.

The interpretation of the European general court keeps a tight hand on the condition of a sufficient individual interest. Thus, the Court now prevents proceedings being brought at European level for the benefit of the general public, for example to prevent the effects of climate change. This position is questionable, particularly as the danger of climate change will only become apparent in the long term and the EU judiciary should also be able to provide adequate legal protection against the infringement of fundamental rights.

We will have to wait for the Court of Justice decision to know whether the decision of the Dutch Supreme Court of the Urgenda case has had any influence on the development of a link between human rights and climate change in European case law.

8. Concluding remarks: The Urgenda global repercussion the climate constitutionalism and the climate litigation

The Dutch Supreme Court decision in the Urgenda case, by changing the paradigm of climate change litigation, brings with it a particularly innovative impact that can be the keystone of a new climate constitutionalism aimed at accentuating the legal and scientific aspects, instead of the political ones, of the approach to the fight against climate change, reminding States of their responsibility towards their citizens and future generations.

As early as 2015, the year of the appeal to the District Court, the Urgenda case began to produce the first effects on national policymaking and public debate, leading the State to approve a new climate bill: the Dutch Climate Act of 2019.

The case has also prompted several changes and inspired more litigation in other parts of the world.

Some scholars have debated whether the Courts in Urgenda case exceeded their judicial authority. Some argued that the decision is a threat to the rule of law and constitutional democracy, and open the possibilities of an activist civil court which would adjudicate science-based policymaking that would not necessarily represent the majority of the population[132].

However, the Supreme Court's ruling seems to refute those views by realising the restoration of a constitutional balance. Because the government was negligent toward citizens and failed to do enough to protect them, the courts will simply be taking up the slack when the other branches of the State have failed and have not fully protected the fundamental rights that are guaranteed to its citizens.

A similar issue was also raised in Pakistan in Leghari v Federation of Pakistan[133] of 2015. This case was brought by a farmer based on the government's failure to implement the 2012 National Climate Policy and Framework, which was developed to fulfill the commitments under the UNFCCC[134]. This farmer realised

[132] L. BERGKAMP, J.C. HANEKAMP, *Climate Change Litigation against States: The Perils of Court-Made Climate Policies*, in European Energy and Environmental Law Review, October 2015, 102.

[133] Lahore High Court, 04.09.2015, W.P. No. 25501.

[134] According to the Bali Action Plan 2011 and the Cancun Agreements, the government of

that climate change had led to water scarcity and temperature shift, causing a severe impact on food security. The insufficient State intervention actually worsened these impacts. Instead of seeking compensation, Leghari requested the government to promote irrigation practice and green energy practice.

The Lahore High Court first noted that climate change significantly impacts communities in Pakistan, and ruled that the delay in implementing the system to counteract the climate change offended the constitutional rights to life as well as the right to a healthy and clean environment and the right to human dignity. As in the Urgenda case, the Pakistan court based its decision on a blend of international climate change norms and domestic constitutional principles, directly linking climate change to human rights. As a result the court requested the government to take specific actions to implement the framework. But, this court was more specific than the Dutch court and set up specific ways in which the executive branch would have to comply with the ruling.

Both of these cases are significant developments. Urgenda was the first case in Europe in which human rights, international law and scientific data had been used to determine a government's duty of care towards its citizens with respect to climate change regulation. The Leghari case, built on the same foundation, came from a developing country, which is equally significant for climate justice[135].

These cases give a human dimension to environmental law, bringing the litigation on a constitutional level and linking human rights with environmental law and climate change specifically.

The Urgenda case has, in particular, significant implications for other climate justice cases around the world.

The first case that was influenced by the Urgenda case is a case in Belgium that was filed in 2015 and still pending because of procedural reasons. The public interest group Klimaatzaak instituted a claim against the federal and regional governments of Belgium in April 2015, similarly alleging that by failing to take sufficient action to prevent climate change, the governments had breached their obligations towards Belgian citizens under the Belgian civil code, the Belgian Constitution, as well as the ECHR. As in Urgenda case, the plaintiff is seeking an order that the Belgian governments reduce their greenhouse gas emissions, in this case by 40 % relative to 1990 levels, by 2020. A three year procedural dispute concerning whether to conduct the litigation in French or Dutch was recently resolved in June 2018, and it is anticipated that the oral pleadings will be heard in the second half of 2020.

Only to refer to another successful example of climate litigation, on January 29, 2018, 25 youths from across Colombia (Future Generations) filed a *tutela*, a Colombian legal action to enforce the protection of human rights, against the Colombian government, represented by the Ministries of Environment and

Pakistan had to establish some specific domestic climate change policy and then implemented it. The government established the policies in the 2012 policy framework, but did not fully implemented them.

[135] Two other cases have been presented in Pakistan: Maria Khan et.al. v Federation of Pakistan et. al., 8960/2019 and Ali v Federation of Pakistan 2016, still pending.

Agriculture, alleging that by failing to prevent deforestation in the Colombian Amazon and the increase in average temperature across the country, the Colombian government had violated their constitutional rights to life, health, food, water and a healthy environment. On April 13, 2018, the Supreme Court of Justice of Colombia issued a judgement accepting the claim by Future Generations, recognizing that the deterioration of the environment violates fundamental rights of current and future generations. It ordered the Colombian government to create an intergenerational pact for the life of the Colombian Amazon, in order to reduce deforestation and greenhouse gas emissions[136].

There are also cases in France[137], Germany[138] Ireland[139] and United Kingdom[140] that show that we are in a new era of climate action. While these and other rights-based climate litigation cases have been met with varying degrees of success, in the absence of serious action to curtail greenhouse gas emissions, governments can and should expect groups to continue use the court system to prompt what they and the scientific community deem is necessary to prevent the most serious harms of climate change.

Climate litigation provide ways in which the government and its citizens can engage in a dialogue to increase regulatory ambitions. In response to that trend, courts are starting to be more open to those initiatives. The Urgenda case may represent the beginning of a more fruitful path in the fight against climate change which, taken away from the political arena and entrusted to climate science, leads the courts to go beyond their traditional role playing to a more active and decisive function. With its decision in the Urgenda case, the Dutch Supreme Court has made the Climate litigation a mechanism to promote a new climate constitutionalism and climate justice. It is only in the future that it will be possible

[136] Colombian Supreme Court, Future Generations v Ministry of the Environment and Others, 11001-22, 13.04.2018.

[137] Commune the Grande-Synthe v France, 23.01.2019, still pending before the Council of State; Notre Affaire a Tous and Others v France, 2018, still pending before the Administrative Court of Paris.

[138] Friends of the Earth Germany, Association of Solar Supporters and Other v Germany; Berlin Administrative Court, Family Farmers and Greenpeace Germany v Germany, 00271/17/R/SP/2018: On October 31, 2019 the Administrative Court of Berlin dismissed the case, concluding that the 2020 target was not legally binding. However, the court did hold that the government's climate policy is subject to judicial review and must be consistent with the government's duties to protect fundamental rights under the German Constitution. The court also determined that the government must undertake measures to provide adequate and effective protection of the fundamental rights potentially affected by climate change, including the rights to life and property. In the court's view, the government's current protection policy, which will lower emissions by 32% rather than 40% by the end of 2020, is within its discretion.

[139] Friends of the Irish Environment v. Ireland, 2017, No.793 JR: On September 19, 2019, the Court ruled for the government. The Court rejected FEI's claim that the Plan was invalid for failing to achieve substantial short-term emissions reductions. The Court recognized that there is now limited room, or carbon budget, for greenhouse gas emissions given the safe temperature rise target of 1.5 degrees Celsius. The Court concluded that FEI had standing to bring rights-based claims, but rejected the argument that the government had violated Ireland's Constitution and commitments under the European Convention on Human Rights. On November 22, 2019, FEI appealed the ruling to the Court of Appeal.

[140] Plan B Earth and Others v Secretary of State for Transport, 2019, still pendig before the Appeal Court.

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to verify whether these same legal arguments will also find a place in other European jurisdictions.

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