Case Notes

Dutch State Ordered to Cut Carbon Emissions

*Elbert R. de Jong**

District Court of The Hague, 24 June 2015, The Urgenda Foundation v. The Netherlands, ECLI:NL:RBDHA:2015:7145

The Dutch State has to ensure that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990.

The parties agree that the severity and scope of the climate problem make it necessary to take measures to reduce greenhouse gas emissions. Based on the State's current policy, the Netherlands will achieve a reduction of 17% at most in 2020, which is below the norm of 25% to 40% for developed countries deemed necessary in climate science and international climate policy.

With this order, the court has not entered the domain of politics. The court must provide legal protection, also in cases against the government, while respecting the government's scope for policymaking. For these reasons, the court should exercise restraint and has limited therefore the reduction order to 25%, the lower limit of the 25%-40% norm.

I. Introduction

On 24 June 2015 the District Court of The Hague (The Netherlands) (hereafter: the Court) ordered a historical judgment in the context of climate change. In *The Urgenda Foundation* v. *The Netherlands* (hereafter: *Urgenda*-judgment) the Court ordered that the Dutch State must take more action to reduce greenhouse gas emissions in the Netherlands and held that the State has a legal obligation to ensure that the Dutch emissions in the year 2020 will be reduced by 25% compared to the emission level in 1990.[1]

For several reasons the *Urgenda*-judgment is a landmark ruling. First, the judgment is an illustration of the fact that liability law is increasingly being explored as an instrument to counterattack governmental inaction in the context of health and environmental risks. Similar legal proceedings have been initiated against the State in relation to other health and safety risks, such as tobacco risks.[2] Second, the legal obligations of the State are derived from *national* tort law, and not from public law and/or international (climate) treaties. And lastly, the judgment is remarkable in light of the separation of powers doctrine. It is the first – from the plaintiff's perspective – successful climate change litigation in which a State is legally obliged to reduce greenhouse gas emissions.

These three aspects will most likely also be the core issues on appeal. On 1 September 2015 the Dutch government announced to appeal against the judgment. The government expressed its wish that, also in the light of possible future legal proceedings in the context of other health and environmental risks, a

* Utrecht Centre for Accountability and Liability Law, Utrecht University, e.r.dejong@uu.nl.

1 District Court of The Hague, 24 June 2015 ECLI:NL:RBDHA:2015:7145 (*The Urgenda Foundation* v. *The Netherlands*).

2 For example, in 2013 two Dutch lung specialists and the 'Prevention Tobacco Youth foundation' (*Stichting rookpreventie jeugd*) initiated legal action against the Dutch State. In their opinion, the tobacco industry and tobacco lobby have too much influence on the formation of Dutch national health policies related to tobacco. They requested the Court to prohibit the Dutch government to allow tobacco lobby groups to attend meetings related to national health policy. The case is still pending. And in 2014, the Dutch Supreme Court held that the Dutch government is not allowed to exclude small pubs from a smoking ban. Hoge Raad 10 oktober 2014, ECLI:NL:HR:2014:2928.

https://doi.org/10.1017/S1867299X00004943 Published online by Cambridge University Press

higher court gives a ruling on *inter alia* the role of the civil judge in regulating risks and the way the Court construed the State's duty of care.[3]

In this case note the abovementioned aspects of the *Urgenda*-judgment will be discussed. First, the topic of judge made risk regulation in the context of climate change risks will be introduced. Second, I discuss the State's duty of care on the base of national tort law and the defenses put forward by the State in this regard. Lastly, I examine the Court's ruling on the separation of power doctrine.

The verdict is extensive (it is sixty pages) and includes a wide variety of legal issues, such as the interpretation and assessment of climate science, admissibility requirements for interest groups, the applicability of international and European Union law and its implications for the feasibility of climate change policies in the Netherlands. For these issues I refer to the English version of the verdict.[4]

II. Judge-made Risk Regulation to Counterattack Governmental Inaction

In climate science it is broadly accepted that without far reaching mitigation measures, it is very probable that within several decades dangerous climate change will occur with irreversible consequences for man and the environment.[5]

On the base of several international and national laws, the Dutch State is responsible for safeguarding both the natural environment and the physical safety of its citizens against climate change threats.[6] However, governments face serious challenges in meeting this responsibility. Governmental action is paralysed by *inter alia* scientific uncertainties about the nature, gravity and magnitude of risks, economic interests that may be negatively impacted by regulation, changing political views, influences of corporate lobbying, a lack of public support, externalization of the effects of climate risks and the global nature of climate risks, which makes it necessary to take action on an international level. Ultimately these circumstances may lead to a failure of the State to provide the level of protection that is socially and legally demanded.

In the opinion of several (Dutch) legal scholars, legal practitioners, members of the judicial branch and NGO's a failure as mentioned above is currently occurring in the context of climate change. In their search for possible responses to this alleged government failure of the Dutch State, they have paid attention to private law's potential to counterattack governmental inaction.[7] Especially, injunctions have received attention. An injunction is a court's decision that orders the defendant (*i.e.* states or corporations) to act or to refrain from a specific act. In the context of climate change, injunctions are used as an instrument to fill the regulation gaps that originate from governmental inaction by judge-made risk regulation. Hence US scholars speak of "*regulation through litigation*".[8]

III. Facts

In 2013, the Dutch NGO Urgenda (a contraction of "urgent agenda") initiated an action for an injunction against the Dutch State for its alleged failure to adequately address climate change.[9] Among other things, Urgenda claimed that the State has a legal obligation to reduce the joint volume of annual greenhouse gas emissions in the Netherlands by 40% by the end of 2020, in any case by at least 25%, compared to 1990.[10]

Based on its current climate change policy the Netherlands will achieve a reduction of at most 17%

3 *Kamerstukken II* 2014/15, 32813, nr. 103.

4 Available at http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&keyword=urgenda. (last assessed on 7 September 2015).

5 IPPC, "Climate Change 2014 Synthesis Report Summary for Policymakers", 2014, available at http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf (last assessed on 7 September 2015). See also at. para. 4.32 of the judgment.

6 E.g. Artt. 21 and 22 of the Dutch Constitution, Artt. 2 and 8 of the European Convention on Human Rights, European Union Law and the international climate changes treaties.

7 Chris van Dijk, "Private-law liability for global warming", *NJB* 2007/45-46; Coen Drion, "Van een duty to care naar een duty of care", *NJB* 2007/45, p. 2857; Roger Cox, "The Liability of European States for Climate Change", 30 *Utrecht Law Review* 2014; Jaap Spier, "Injunctive Relief: Opportunities and Challenges: Thoughts About a Potentially Promising Legal Vehicle to Stem the Tide", in: Jaap Spier en Ulrich Magnus (ed.), *Climate Change Remedies* (The Hague: Eleven 2014), pp. 2-155.

8 Patrick Luff, "Risk Regulation and Regulatory Litigation", *Rutgers Law Review* 2011/61, pp. 173-215; Andrew Morriss (et. al.,) Regulation by litigation, (*Yale University Press* 2008).

9 Urgenda is a citizens' platform with members from various domains in society, such as the business community, media communication, knowledge institutes, governmental and non-governmental organisations. Urgenda aims for a fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy. The platform is involved in the development of plans and measures to prevent climate change.

10 This is the standard accepted in climate science and the international climate policy.

https://doi.org/10.1017/S1867299X00004943 Published online by Cambridge University Press

in 2020. The State acknowledges that climate change is a serious problem and that it is necessary to avert this threat by mitigating greenhouse gas emissions. The State also shares Urgenda's view that CO_2 emission needs to be reduced by 80-95% in 2050 compared to 1990. As a consequence, the dispute concerns the pace, or the level of the reduction of Dutch greenhouse gas emissions, not its necessity.[11] The State argues that it cannot be forced by Urgenda to adhere to the 25-40% target. In its view, the State bears no legal obligation towards Urgenda to achieve the reduction ordered and upholding Urgenda's claim would constitute an unjustified interference with the system of the separation of powers.

IV. Judgment

1. The Negligence Rule

The Court first assessed the legal bases for the duty of care as claimed by Urgenda. After it concluded that several international climate laws do not have a direct legal effect in the relationship between Urgenda and the State[12], it examined whether legal obligations for the State could be derived from the negligence rule as laid down in Article 162 of Book 6 of the Dutch Civil Code.[13] The negligence rule provides a standard of behavior established by unwritten law for the protection of others against unreasonable risk of harm. An operator has acted negligent if he departed from this standard. In order to determine this standard a judge has to balance several factors[14], internationally known as the Learned Hand formula.

A central issue in this proceeding is whether the State is in breach of its duty of care under the general negligence rule for taking insufficient measures to prevent dangerous climate change. As the Court rightly points out, this question has never before been answered in Dutch legal proceedings and consequently the existing case law does not instantly provide a tailored framework. Nevertheless, inspired by Dutch academic literature on this issue[15], the Court holds that the negligence doctrine bears such a resemblance to the theme of dangerous climate change that it can be applied analogously. Subsequently, the Court finds that in determining the existence and scope of the duty of care of the State, it has to balance:

> "*(i) the nature and extent of the damage ensuing from climate change;*
> *(ii) the knowledge and foreseeability of this damage;*
> *(iii) the chance that hazardous climate change will occur;*
> *(iv) the nature of the acts (or omissions) of the State;*
> *(v) the onerousness of taking precautionary measures; (vi) the discretion of the State to execute its public duties – with due regard for the public-law principles*".

In balancing these factors, the Court also takes into account: "*- the latest scientific knowledge;- the available (technical) option to take security measures, and - the cost-benefit ratio of the security measures to be taken*".

In addition, in the Court's opinion international climate laws provide an informational background for the application of the abovementioned factors. Consequently, the principles and obligations enshrined in these laws have a "*reflex effect*" in national law.[16]

4. The Duty of Care

a. Application of the Factors

In order to determine the existence and the scope of the State's duty of care, the Court applies the abovementioned factors to Urgenda's claim. In the Court's opinion this application results in far-reaching obligations to mitigate greenhouse gas emission for the State. Moreover, as will be discussed below the Court

11 At para. 4.32 of the judgment.

12 At para. 4.52 of the judgment.

13 Art. 21 of the Dutch Constitution, the "no harm" principle under international law, the UN Climate Change Convention, with associated protocols, and Art. 191 TFEU with the ETS Directive and Effort Sharing Decision based on TFEU.

14 HR 5 November 1965, ECLI:NL:HR:1965:AB7079, *NJ* 1966,136 *(Kelderluik)*.

15 Eddy Bauw, Green Series, Unlawful Act (*Onrechtmatige daad*), scheme from Book 6 of the Dutch Civil Code; Willem Braams, Arjen van Rijn and Martijn Scheltema (ed.), "Climate and Law", (Deventer: Kluwer 2010), at p. 5; Chris van Dijk, "Private-law liability for global warming", *supra* note 7, at p. 2866; Jaap Spier, *Shaping the Law for Global Crisis*, (The Hague: Eleven International Publishing 2012), at pp. 88-89.

16 At para. 4.63 of the judgment

https://doi.org/10.1017/S186729X00004943 Published online by Cambridge University Press

essentially rejected all the defenses put forward by the State in this respect.

b. A "Serious Duty of Care"

The first three factors (i. the nature and extent of the damage ensuing from climate change, ii. the knowledge and foreseeability of this damage, and iii. the chance that hazardous climate change will occur) provide the fundament for the Court's finding that the State has a "*serious duty of care to prevent*" climate change.[17] According to the Court "*it is an established fact that the current global emissions and reduction targets [...] are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high and this with serious consequences for man and the environment, both in the Netherlands and abroad.*" In addition, the Court underlines that there is not much time left to cope with climate change and that *"without far-reaching reduction measures, [...] around 2030 [...] realising the 2° target will have become impossible"*. Therefore, the State has to take immediate mitigation measures on its own territory to prevent dangerous climate change.

c. Precautionary Measures

Next, in order to determine the State's duty of care the Court takes into account the (future) technical availability of measures and the costs of these measures. In this regard a central issue is related to the cost-effectiveness of the measures. In Urgenda's view it is more cost-effective to maintain the reduction target of 25-40% in 2020, while the State argues that it is also cost-effective to realize 40% reduction in 2030 and 80% in 2050.[18]

The Court rules in favor of Urgenda and holds that the State has a duty to reduce greenhouse gas emission "*quickly and as much as possible*".[19] An apparent important circumstance for this finding is the fact that up to 2010 "*the Netherlands had a national reduction target of 30% for 2020 (compared to 1990) [...] and that apparently, this reduction target was then deemed to be cost-effective*". According to the Court the State did not justify the abandonment of this reduction by improved scientific insights or by stating that maintaining a 30% target would economically be irresponsible.[20] In its finding, the Court takes also into account that in international climate science and policy there is consensus that the most serious consequences of climate change have to be prevented,[21] that technologies are available to cut greenhouse gas emissions and "*that later intervention increases the need for new technologies, while the risks and options of these technologies are still uncertain*".[22]

d. The State's Minimal Contribution Defense

Another defense is related to the State's minimal contribution to climate change and the effectiveness of a 'one-man operation' of the Netherlands to deal with climate change. Climate change is a global problem that only can be tackled by concerted international action. The Netherlands is responsible for 0.5% of the worldwide emissions and if Urgenda's claim would be allowed (25-45% reduction) it would lead to an 0.04-0.09% decrease of global emissions. The State asserts that Urgenda has no interest in the allowance of the claim, since it would hardly affect global emissions.[23]

The Court rejects this argument. Climate change is a global problem that requires "*global accountability*" for which the signatories of UN Climate Change Convention have a joint and individual responsibility.[24] In addition, in accordance with Dutch case law under the general negligence rules which holds that an actor cannot escape liability by stating that its contribution is minor[25], the Court finds that *any* anthropogenic greenhouse gas emission does contribute to climate change and "*the fact that the amount of the Dutch emissions is small compared to other countries does not affect the State's obligations* [...]". Lastly, since the Netherlands is a developed country whose per capita emission is amongst one of the highest in the world, it has to take a leading position in reducing greenhouse gas emissions.[26]

17 At para. 4.65 of the judgment.

18 At para. 4.69 of the judgment.

19 At para. 4.73 of the judgment.

20 At para. 4.70 of the judgment.

21 At para. 4.71 of the judgment.

22 At para. 4.72 of the judgment.

23 At para. 4.78 of the judgment.

24 The Netherlands is one of these signatories.

25 HR 23 September 1988, *NJ* 1989,743 (*Kalimijnenarrest*).

26 The Court speaks about an annex I country to the Framework Convention on Climate Change.

https://doi.org/10.1017/S1867299X00004943 Published online by Cambridge University Press

e. Carbon Leakage Defense

Another defense of the State is based on the so-called 'carbon leakage effect' or 'waterbed effect'.[27] This defense comes down to the argument that Urgenda's claim would require the State to reduce more than most other similar countries (have to) do. Upholding the claim would provide an incentive to other (European) countries to put less effort in place to reduce their national greenhouse gas emission. On the base of an accompanying document to an announcement of the European Commission which concludes that "*so far there have been no signs of carbon leakage*"[28], the Court holds that the State could not maintain this argument.[29]

f. Level Playing Field Defense

Lastly, the State argues that a court's reduction order would have a negative (economic) impact on the Dutch industry and would create an 'unlevel playing field'. Clearly, the Court deems this argument poorly substantiated and finds that the State does not specify to what extent and for which specific industry upholding Urgenda's claim would create an unlevel playing field.[30] By contrast, the Court even considers that stringent reduction targets might have positive economic effects for some business sectors.[31]

5. Separation of Powers

A crucial and controversial issue in the judgment is whether upholding Urgenda's claim "*would constitute an interference with the distribution of powers in a democratic system*".[32] The Court's point of departure is that under Dutch law each state power (i.e. executive, legislative and judicial) has its own tasks and responsibilities, but that the distribution of powers between the different branches is about balancing powers, rather than about separating them. In this system of check and balances the judicial branch has to offer legal protection and solve legal disputes between parties to the proceedings. The Court notices that "*great restraint or even abstinence is required when it concerns policy-related considerations of ranging interests which impact the structure or organisation of society*".[33] Allowing Urgenda's claim would clearly have direct or indirect consequences for third parties. Yet, in the Court's view Urgenda's claim does not fall outside the judicial domain since it "*essentially concerns legal protection and requires judicial review*".[34] In fact, "*the actions of (independent, democratic, legitimised and controlled) political bodies*" are covered by the rule of law and therefore subject to judicial review of an independent court.[35] By (democratically established) legislation, the legislative branch assigned courts with this task.[36] Also, the fact that the present issue is subject to a political sensitive debate and that a reduction order by a court might lack "*political support*" does not alter this conclusion.[37]

In the end, the Court arrives at two (seemingly) conflicting findings: on the one hand it has to exercise restraint in examining Urgenda's claim, on the other hand the *trias politica* does not constitute an obstacle to allow Urgenda's claim.[38] The Court renders account for these findings in its judgment in two ways. First, it orders a 25% reduction by 2020, while Urgenda claimed a 40% reduction and at least a 25% reduction.[39] It is up to the State whether or not to reduce more than the 25% ordered. Second, the court does not order specific legislative or policy measures (which it is not allowed to do under Dutch law). So the State "*will retain full freedom to determine how to comply with the order concerned*".[40]

27 See also Marjan Peeters, "Europees klimaatbeleid en nationale beleidsruimte", *NJB* 2014/2109.

28 Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A policy framework for climate and energy in the period from 2020 up to 2030 COM (2014) 15 final, SWD(2014)16, at p. 2.

29 At para. 4.81 of the judgment.

30 At para. 4.82 of the judgment.

31 At para. 4.82 of the judgment.

32 At para. 4.92 of the judgment.

33 At para. 4.95 of the judgment.

34 At para. 4.98 of the judgment.

35 At para. 4.95 of the judgment.

36 At para. 4.97 of the judgment.

37 At para. 4.98 of the judgment.

38 At para. 4.102 of the judgment.

39 Which is generally accepted to be the bear minimum to avoid dangerous climate change.

40 At para. 4.101 of the judgment.

https://doi.org/10.1017/S1867299X00004943 Published online by Cambridge University Press

V. Comment: The Suitability of Judge-made Risk regulation

The Urgenda case is illustrative for the use of private law as an instrument to counterattack governmental inaction. This use of civil courts as risk regulators raises new issues.

A first topic is related to the suitability of judge-made risk regulation. Do injunctions, and under what conditions, provide an adequate alternative instrument to risk regulation by governments? In order to answer this question one has to examine to what extent judge-made risk regulation can be paralysed by factors that can paralyse governmental risk regulation, such as scientific uncertainties, economic interests, externalization of environmental risks, information deficits, global nature of technology and environmental risks, lack of public support and corporate lobbying.[41] The *Urgenda*-judgment and the way the Court assesses the defenses of the State (carbon leakage, level playing field, lack of international action) shows that many factors that paralyse regulation, are legally no valid reason for inaction. The crucial question, however, remains whether a court's order would in practice lead to more action by national governments and the international community.

Further, the capability of a civil judge to deal with scientific complex risk issues should be examined. Are civil judges capable to deliver judgments on topics that are not (directly) within their field of expertise? For instance, can they assess the validity of complex climate models? In the *Urgenda*-judgment this was not really an issue, since Urgenda and the State agreed on the interpretation of the scientific insights on climate change. Nevertheless, in future proceedings it is conceivable that parties will dispute each other's interpretations of scientific insights. Then the question arises whether a judge has to call to a large extent on experts, who also might (and most likely: will) contradict each other.

Next, it is unpredictable whether a judge will receive all the information he needs to make sound risk regulation. For instance, to what extent do litigants put the information forward that a judge needs in order to get a comprehensive overview of the risk problem? It is likely that parties to the proceedings will not submit (meta) information to the court that is not directly relevant for solving their dispute, but that is indispensable for examining the broader (social and risk regulatory) effects of a certain verdict. In the *Urgenda*-judgment the Court notices this drawback of judge-made risk regulation and holds that it should "*exercise restraint [...] if the court does not have a clear picture of the magnitude and meaning of these consequences*".[42]

And last but not least, legitimacy issues arise. Critics argue that the judgment is contrary to the separation of power doctrine. However, in the light of the rule of law one could argue that the State is not legally allowed to neglect climate change risks that pose catastrophic threats to its civilians and their rights and that in such a situation judicial review is justified. In deciding claims for damages in the context of other health and environmental risks (such as asbestos), courts stretched the boundaries of several legal concepts (such as duties of care, causation issues, and limitation periods). Future legal proceedings should help us to gain insight into whether judges are prepared to search for or even stretch the boundaries of the separation of power doctrine and their role in the polity when they are asked to regulate risks *ex ante*. The appeal proceedings in the *Urgenda*-case will be the first occasion. To be continued...

41 See section II of this case note. See for an analysis in Dutch Liesbeth Enneking & Elbert de Jong, "Regulering van onzekere risico's via public interest litigation?", *NJB* 2014/23, pp. 1542-1551;

42 At para. 4.96 of the judgment.

https://doi.org/10.1017/S1867299X00004943 Published online by Cambridge University Press