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The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives

Hoge Raad (Netherlands Supreme Court) 20 December 2019,
Urgenda v The State of the Netherlands

Leonard F.M. Besselink*

Some time ago, on 20 December 2019, the Dutch court of cassation, the Hoge Raad (Supreme Court), ruled that the target to reduce greenhouse gas emissions¹ by at least 20% compared to those of 1990 by the end of the year 2020, set by the Netherlands government in accordance with EU minimum targets, infringes the right to life and the right to private and family life under Articles 2 and 8 of the European Convention on Human Rights.² Even more significantly, it upheld the order of the District Court of The Hague, and sustained at the Appeals Court, that the State of the Netherlands – appearing in court as a legal person under Dutch civil law – must reduce the joint volume of annual greenhouse gas emissions, or have them reduced, by at least 25% at the end of 2020 compared to the emission level of the year 1990. This *Urgenda* case has by now generated a huge amount of commentary, in all its three instances, mostly positive; precisely on the

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¹For the various greenhouse gases expressed in carbon dioxide equivalents.

²HR 20 December 2019, ECLI:NL:HR:2019:2007, (<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>) (unofficial translation provided by the Supreme Court), visited 11 April 2022; *see* the caveat in n. 21.

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legal (constitutional and EU law) considerations, however, some commentary is critical.³ It is time to take stock and present a long overdue summary of the judgment, as well as discussing two of the most significant issues it raises in terms of European constitutional law.⁴ The first is that ordering, by judicial means, the pursuit of a policy target and setting a time limit for its realisation, is something

³A small sample: C.W. Backes, 'Urgenda en de Klimaatwet: vuurtorens voor een succesvol klimaatbeleid?', *Nederlands Tijdschrift voor Bestuursrecht* (2020) p. 99; L. Bergkamp and J.C. Hanekamp, 'Climate Change Litigation against States: The Perils of Court-made Climate Policies', 24(5) *European Energy and Environmental Law Review* (2015) p. 102; L. Burgers and T. Staal, 'Climate action as positive human rights obligation: The appeals judgment in Urgenda v the Netherlands', in R.A. Wessel et al. (eds.), *Netherlands Yearbook of International Law 2018*, p. 223-244; C. Eckes, 'The Urgenda Case is Separation of Powers at Work', in N. De Boer et al. (eds.), *Liber Amicorum Besselink* (University of Amsterdam 2021) p. 207; M. Eliantonio, 'The Urgenda case in the EU multi-level governance system', 35(3) *Milieu & Recht* (2016) p. 207; J.H. Jans and K. de Graaf, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', 27(3) *Journal of Environmental Law* (2015) p. 517; I. Leijten, 'Human rights v. Insufficient climate action: The Urgenda case', 37(2) *Netherlands Quarterly of Human Rights* (2019) p. 112 (very hesitant on the use of Art. 2 and Art. 8 ECHR in *Urgenda*); J. Lin, 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)', 5(1) *Climate Law* (2015) p. 65; M. Morvillo, 'Climate change litigation e separazione dei poteri: riflessioni a partire dal caso Urgenda', [*Quaderni Costituzionali*] *Forum di Quaderni Costituzionali Rassegna*, (<https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2019/06/morvillo.pdf>), visited 11 April 2022; M. Peeters, 'Europees klimaatrecht en nationale beleidsruimte', *Nederlands Juristenblad* (2014) p. 2918 (discussing the *Urgenda* claim already prior to the judgment at first instance); M. Peeters, 'Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States', 25(1) *RECIEL Review of European Community & International Environmental Law* (2016) p. 123-129; T.J. Thurlings, 'The Dutch Climate Case: Some Legal Considerations', SSRN (<https://ssrn.com/abstract=2696343>), visited 11 April 2022; J. van Zeven, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?', 4(2) *Transnational Environmental Law* (2015) p. 339; C. Zoethout, 'Klimaatverandering in Nederland en het Verenigd Koninkrijk: een zaak voor de rechter of de politiek?', *Liber Amicorum Besselink* (2021) p. 193.

⁴I discussed the meaning of this judgment in the line of Dutch case law on the relation between courts and legislature, and the power of the Hoge Raad as ultimate arbiter of that relation in 'Rechter en politiek: Machtenscheiding in de Urgenda-zaak', 11(2) *Tijdschrift voor Constitutioneel Recht* (2020) p. 128, available at (<https://dare.uva.nl/search?identifier=d375d4c8-4879-45f1-bb4e-4c38f9e3bb0>) visited 11 April 2022; for a discussion of the role of the technique of using not-directly effective treaty provisions in the judgment at first instance, and the use of positive obligations under the ECHR in connection with the role of courts in the Court of Appeal's judgment in *Urgenda*, see my 'De constitutioneel meer legitieme manier van toetsing', *Nederlands Juristenblad* (2018) p. 3078; some of the views expressed in the present case note were sketched in a series of presentations in conferences on the *Urgenda* case at the Vereniging voor Milieurecht, the Centrum voor Internationaal Recht of the Netherlands Ministry of Foreign Affairs, and at the University of Leuven (the latter available at (<https://youtu.be/D8BXOXUDzic?t=3690>)), in the course of January and February 2020, which provided me with most valuable feedback.

that few courts in the European Union and beyond have either the power or the inclination to do. In the comments below, we argue that no other judicial proceedings relating to climate (in Europe and beyond) went quite that far; we also argue that on constitutional grounds going so far is open to criticism. The second issue is the following: one can read this judgment as in effect striking down the legally binding EU minimum targets that were set by the Council and European Parliament in the EU's 'Climate Package'.⁵ The comments on the Dutch judgment presented in this case note focus on the power of courts to set policy targets and to set aside legally binding EU decision-making regarding those policy targets, both on the basis of the ECHR.

THE JUDGMENT

The judgment is more elaborately argued than can be reproduced in this summary. Those interested are strongly recommended to read both the summary and the full text of the judgment as published in an English version by the Hoge Raad itself.⁶

The judgment was handed down by the civil law chamber of the Hoge Raad. Under the general tort provision of the Dutch Civil Code⁷ (*Burgerlijk Wetboek*), it is possible to sue the State as a legal person under private law, for unlawful acts causing damage. Courts can order the tortfeasor to prevent damage ensuing from such unlawful acts. The Civil Code allows collective action by interest groups (Article 305a of Book 3).⁸ Public interest litigation in the Netherlands is thus a matter of civil law, determined at highest instance by the civil chamber of the Hoge Raad. The standard for lawfulness under civil law includes directly effective provisions from human rights treaties, which have priority over any conflicting national law.⁹

The case was brought by the *Urgenda Stichting*, a non-profit foundation whose statutory objective is to stimulate and accelerate transition processes towards a more sustainable society. It asserted the incompatibility of the national targets for reducing greenhouse gas emissions with a full spectrum of international climate and human rights treaties, including the ECHR. The District Court of

⁵See n. 69 below.

⁶See *supra* n. 2.

⁷A translation of Civil Code Book 6, Art. 162 is available at (<http://www.dutchcivillaw.com/civilcodebook066.htm>), visited 11 April 2022.

⁸Art. 3:305a Collective actions ('Class actions'), Dutch Civil Code, at (<http://www.dutchcivillaw.com/civilcodebook033.htm>), visited 11 April 2022.

⁹Art. 94 Constitution [*Grondwet*]: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law that are binding on everyone'.

The Hague (*Rechtbank Den Haag*) held that *Urgenda*, as a foundation, could not be considered a victim in the sense of Article 34 ECHR as it had neither a right to life nor to private or family life under the ECHR.¹⁰ Instead, international commitments undertaken in the UN Climate Change Convention, the Kyoto Protocol and the associated Doha amendment, though not directly effective, were used to construe the meaning of relevant open standards of civil law, in particular the civil law duty of care and due diligence related to the duty to prevent damage that is likely to result from dangerous situations one has caused.¹¹ Under international law, the state is assumed not to act contrary to any international commitments, including not-directly effective international law, which thus acquires a ‘reflex effect’ in national law.¹²

The Court of Appeal (*Gerechtshof Den Haag*) upheld the dictum of the judgment at first instance, but ruled differently on the relevance of Article 34 ECHR, because *Urgenda* was acting to protect the interests and rights of citizens affected by the climate crisis. This allowed the Court of Appeal to take Articles 2 and 8 ECHR as the foundation for its reasoning. It relied on the positive obligations under these provisions to take protective measures when these rights are actually threatened; and it derived the concrete measures to be taken from climate science and relevant policy objectives formulated in various international climate commitments undertaken by the Netherlands, which are in themselves – as the Court of Appeal states – not directly effective international law. Thus, non-directly effective international commitments concerning policy targets were nevertheless turned into legal yardsticks.

The Hoge Raad, which as a court of cassation determines whether the Court of Appeal properly applied the law and whether, in light of the facts established at lower instance, the Court of Appeal’s opinion is comprehensible and adequately substantiated, in turn upheld the judgment of the Court of Appeal and its line of reasoning, taking special account of the state of climate science.

From the case law of the European Court of Human Rights on Articles 2 and 8 ECHR, the latter in accordance with the case law of the Strasbourg court understood as the right to protect individuals’ well-being, the Hoge Raad derived the obligation to take suitable measures if a real and immediate risk to people’s lives or welfare exists of which the State is (or should be) aware. The Hoge Raad judged this obligation to apply also when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise

¹⁰*Cf* Supreme Court of Ireland, *Friends of the Irish Environment CLG v Government of Ireland*, 31 July 2020, [2020] IESC 49, paras. 7.5-7.24, denying standing for corporate bodies to litigate constitutional and ECHR rights.

¹¹At para. 4.42.

¹²At paras. 4.43-4.44.

over the long term. While Articles 2 and 8 ECHR should not result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the State to take measures that are suitable to avert the imminent hazard as much as is reasonably possible.¹³

Although neither Urgenda nor the State had relied on or discussed the scope of the right to an effective remedy under Article 13 ECHR, the Hoge Raad added this on its own authority, saying that national law must offer an effective legal remedy against an actual or imminent violation of the rights safeguarded by the ECHR. This means, according to the Hoge Raad, that the national courts must be able to provide effective legal protection, an argument that is used later on in the judgment to justify the far-reaching power to set detailed policy objectives, a power that the Hoge Raad derives from its understanding of the ECHR rights involved.¹⁴

As to the issue of the global nature of the climate problem in relation to the obligations of individual states, the Hoge Raad took its cue from the premise on which the UN Framework Convention on Climate Change is based, viz that all parties to the Convention must take measures to prevent climate change, in accordance with their specific responsibilities and options. That entails, according to the Hoge Raad, that a country cannot escape its own share of the responsibility to take measures by arguing that, compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. Hence, the State of the Netherlands has the obligation to reduce greenhouse gas emissions within its territory in proportion to its share of responsibility. The Hoge Raad adduced Article 47 of the Draft Articles on State Responsibility and, in this light, interpreted Articles 2 and 8 ECHR to entail an obligation for the Netherlands to do 'its part', given the grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.¹⁵

What 'its part' means concretely, is firstly a matter for politics to decide, the Hoge Raad states; but it adds

the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change. [...] Under certain circumstances, there may also be such clear views, agreements and/or consensus in an international context about the distribution of measures among countries that the courts can establish what – in accordance with the widely supported view of states and international

¹³Paras. 5.2.1-5.3.6 of the judgment.

¹⁴Paras. 5.5.1-5.5.3.

¹⁵Paras. 5.7-5.8.

organisations, which view is also based on the insights of climate science – can in any case be regarded as the State's minimum fair share. (para. 6.3)

This methodologically important turn in its reasoning made it possible to substantiate the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, in terms of 'broadly supported scientific insights and internationally accepted standards' that courts must take into account on the basis of Article 13 ECHR. The Hoge Raad adds: 'In determining the State's minimum obligations, the courts must observe restraint, especially if rules or agreements are involved that are not binding in themselves. It is therefore only in clear-cut cases that the courts can rule, on the grounds referred to [...], that the State has a legal obligation to take measures' (para. 6.6).

The Hoge Raad presents a fairly elaborate résumé of the state of climate science, and then focuses on the commitments made to reduce greenhouse gases. With regard to its preferred minimum policy target of a reduction of 25%, the Hoge Raad follows the Court of Appeal's concentration on a somewhat hidden table in the Fourth International Panel on Climate Change Assessment Report.¹⁶ Reference to this table was sometimes made in subsequent climate conference documents (though only in terms of political desirability, never as a legal commitment).¹⁷ The Hoge Raad points out that in later conferences there were calls to increase the reduction targets by the end of 2020 for Annex I countries (which include the EU member states) to a minimum of 25% in order not to exceed a temperature increase of 2°C (paras. 7.2.1-7.2.4). The Hoge Raad finds it, moreover, significant that the EU at the Cancún conference was willing to increase the target from 20 to 30% provided that other parties also increased their targets; a condition that, however, was not fulfilled in practice. That the EU was at all willing to increase the minimum to 30% – though in fact it did not – the Hoge Raad takes as an indication of the international consensus on the minimum target of 25%, and as a confirmation that the 20% target is insufficient (para. 7.2.6).

The Hoge Raad next discusses the policy actually pursued by the Netherlands (paras. 7.4.1-7.5.3). It notes that until 2011 the target set for 2020 was a

¹⁶Box 13.7 at p. 776 of the Report by Working Group 3; the judgment of the Hoge Raad contains no specific reference to the source.

¹⁷A footnote to the fourth recital 'Bali Action Plan', see 'Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007', *United Nations Framework Convention on Climate Change*, (<http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf>), visited 11 April 2022; and a reference in the preamble to the Cancún meeting, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancun from 29 November to 10 December 2010', *United Nations Framework Convention on Climate Change*, at (<http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf>), visited 11 April 2022.

reduction of 30%. After 2011, this was lowered to 20% for 2020; the policy objective was to subsequently accelerate the reduction to 49% in 2030 and 95% in 2050 (the latter has – post-*Urgenda* – been enshrined in the Climate Act, *Klimaatwet*). The Hoge Raad notes that the State has not explained, however, why a reduction of just 20% in 2020 is considered responsible *in an EU context*(!),¹⁸ in contrast to a reduction of 25 to 40%, which is internationally broadly supported and even considered necessary. Postponement will only necessitate more comprehensive and more expensive measures, the Hoge Raad states.¹⁹ Moreover, postponement increases the risk of an irreversible tipping point in climate change. In light of these generally endorsed insights, the Hoge Raad finds that the State should have explained that the proposed acceleration of the reduction after 2020 was feasible and sufficiently effective to meet the targets for 2030 and 2050, and thus to keep the 2°C target and the 1.5°C target within reach, but it did not do so. Hence, the order to attain the minimum target of a reduction of 25% must remain in force.

In a final set of considerations, the Hoge Raad addresses the lawfulness of a court order providing a remedy directed at the legislature and executive, in terms of the relation between courts and what it calls ‘the political domain’.

In this context (paras. 8.2.2-8.2.7), it addresses the question what courts can do *vis-à-vis* the legislature. In earlier case law, the Hoge Raad held that courts are prohibited from ordering the State to pass an act of parliament to implement a specific international obligation or EU directive, but it allowed courts to issue a declaratory decision to the effect that the public body in question is acting unlawfully by failing to enact legislation with a particular content.²⁰ In *Urgenda*, the Hoge Raad holds that courts are only prevented from issuing an order to pass *legislation* with a specific content, but they are allowed to order the public body in question to take general measures so as to achieve a certain goal (para 8.2.6).

The Hoge Raad furthermore considered the broader argument that it is not for courts to undertake the political assessments necessary for a decision on the reduction of greenhouse gas emissions, in terms which merit full quotation:

¹⁸The wording is from the HR’s own summary, but the emphasis on the EU context is substantiated by the more elaborate text in para 7.4.1 ff. This conclusion is rather awkward as it implies that the EU targets for 2020 and after are incoherent.

¹⁹This is argued in terms of cost efficiency, not in terms of fundamental rights of present or future generations; unlike BVerfG 24 March 2021, *Klima-Urteil* (1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20); see also n. 41 below.

²⁰HR 21 March 2003, ECLI:NL:HR:2003:AE8462, *Waterpakt* (on an order to pass an act of parliament) and HR 1 October 2010, ECLI:NL:HR:2004:AO8913, *Stichting Faunabescherming* (prohibiting a court order to pass provincial legislation).

8.3.2. [I]n the Dutch constitutional system the power of decision-making on the reduction of greenhouse gas emissions pertains to the government and parliament. They have a wide discretion to make the required political assessments. It is up to the courts to judge whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.²¹

8.3.3 The limits referred to in 8.3.2 include those arising from the ECHR. As considered in 5.6.1 above, the Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the interpretation of the European Court of Human Rights. The protection of human rights thus provided is an essential component of a democratic state under the rule of law.

8.3.4 This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well (see 4.2-4.8 above). The State is obliged to do 'its part' in this context (see 5.7.1-5.7.9 above). Towards the residents of the Netherlands, whose interests *Urgenda* is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents (see 5.1-5.6.4 and 5.8-5.9.2 above). The fact that Annex I countries, including the Netherlands, will need to reduce their emissions by at least 25% by 2020 follows from the view generally held in climate science and in the international community, which view has been established by the District Court and the Court of Appeal (see 7.2.1-7.3.6 above). The policy that the State pursues since 2011 and intends to pursue in the future (see 7.4.2 above), whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established. At least the State has failed to make it clear that its policy is in fact in accordance with the above (see 7.4.6 and 7.5.1 above).

8.3.5 In this case, therefore, the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020.

COMMENTS

The essence of the climate change problem is the failure to take adequate action to prevent the disaster the consequences of which can already be glimpsed in so many places in the world. The cause of this pending disaster is human behaviour. Curbing human behaviour through legislative and executive action is a main purpose of political government. Clearly, political government across the world has so far failed to act adequately to prevent climate disaster, and the Netherlands has failed abysmally, being among the worst in per capita emissions

²¹Own translation; the version published by the Hoge Raad is garbled.

of greenhouse gases of the European Union's member states.²² What to do when government in a democracy fails to act?

Self-evidently, citizens can try all means available outside the institutions of democratic government themselves to wield influence on government policy in order to awaken it from its climate slumber. This is the road followed by Greta Thunberg with great zeal and with some success. Another path, within the institutions of democracies under the rule of law, is to have courts assess the lawfulness of government and parliament's relative inertia. That is what has happened around the world, often with limited success, and in the Netherlands with what at first glance might seem great success.

In this case comment, we first locate the *Urgenda* judgment within the landscape of some of the most important recent climate case law in various countries, so as to show how uniquely far the Dutch court went by providing the remedy of a court order setting a minimum emission reduction target that as such may be considered politically desirable, but was not a binding obligation under public international law, and which replaced the one set by government and parliament; that target was moreover to be achieved within a specified time limit. Secondly, we discuss how this apparent success comes with a price in terms of constitutional democracy. In this context, we describe the political background to the lowering of emission targets, and subsequently the Court's arguments about politics having to remain within the bounds of the law, about climate science, and the argument of exceptionality.

The third group of comments addresses the EU law aspect: under this heading, we first highlight the constitutional status of the ECHR in the Netherlands, under which it can in principle outweigh other treaty obligations, including EU law. Although the Hoge Raad is an unlikely candidate to – in effect – strike down EU law, this is what its *Urgenda* judgment amounts to. Finally, we make some concluding remarks based on these observations as to what the Hoge Raad, in our view, should have restricted itself to doing.

THE POWER OF COURTS: *URGENDA* WITHIN THE PANORAMA OF CLIMATE JUDGMENTS

Although there has been a spate of court judgments on climate change in various countries,²³ some more successful and others less so, none have gone quite so far

²²The Netherlands ranked 23 among the EU's 27 member states in CO₂ equivalents per capita in 2018: see 'Country profiles – greenhouse gases and energy 2020', *European Environment Agency*, <<https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/climate-and-energy-country-profiles/country-profiles-greenhouse-gases-and-1>>, visited 11 April 2022.

²³For an overview of climate litigation worldwide see 'Climate Change Litigation Databases', <<http://climatecasechart.com/climate-change-litigation/>>, visited 11 April 2022.

as the *Urgenda* case, mostly on the basis of arguments about the proper role of courts in terms of separation of powers.

In the US, the political question doctrine²⁴ has been used in some cases to reject claims to undertake specific climate action through court injunctions.²⁵ In *Juliana v United States*, the US District Court of Oregon had dismissed reliance on this doctrine,²⁶ but the decision was reversed by the US Court of Appeals for the Ninth Circuit.²⁷ Plaintiffs asserted a violation of their constitutional substantive due process *cum* equal protection rights to life, liberty and property, and a violation of the constitutional public trust to hold natural resources for the people and future generations, seeking declaratory relief and an injunction ordering the government to implement a plan to ‘phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]’. The Court of Appeals found that it was beyond the power of ordinary courts ‘to order, design, supervise, or implement the plaintiffs’ requested remedial plan . . . [A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches’.²⁸ It quoted Justice Kennedy: ‘Failure of political will does not justify unconstitutional remedies’;²⁹ and it ‘reluctantly conclude[d] that the plaintiffs’ case must be made to the political branches or to the electorate at large’.³⁰

²⁴US Supreme Court, *Baker v Carr*, 369 U.S. 186, 217 (1962).

²⁵On the use of the doctrine in the early US ecology case law see J. Jaffe, ‘The Political Question Doctrine: An Update in Response to Recent Case Law’, 38 *Ecology Law Quarterly* (2011) p. 1033-1065.

²⁶US District Court for the District of Oregon Eugene Division, *Kelsey Cascadia Rose Juliana, et al. v. United States of America*, Case No. 6:15-cv-01517-tc, Opinion and Order, 10 November 2016, (<https://www.ourchildrenstrust.org/s/Order-MTDAiken.pdf>), visited 11 April 2022; this was criticised by amongst others Matthew Schneider, ‘Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level’, 41(1) *Environs: Environmental Law & Policy Journal* (2017) p. 47 at p. 60 fn.114.

²⁷US Court of Appeals for the Ninth Circuit, *Juliana v US*, No. 18-36082, D.C. No. 6:15-cv - 01517-AA, Decision on interlocutory appeal, 17 January 2020, (<https://www.ourchildrenstrust.org/s/20200117-JULIANA-OPINION.pdf>), visited 11 April 2022. This was decided by a three-judge panel, with a powerful and extensive dissent by Judge Staton. For a discussion of the implications for the remedial powers of courts, central to our case note, see *Juliana v United States*, 134 *Harvard Law Review* (2021) p. 1929. For the follow-up and present state of this case see (<https://www.youthgov.org/our-case>), visited 11 April 2022.

²⁸At p. 25.

²⁹*Clinton v City of New York*, 524 U.S. 417 (1998) at 449, Kennedy concurring.

³⁰At p. 32: ‘We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. [. . .] We reluctantly conclude, however, that the plaintiffs’ case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have

In France, in the *Grande Synthe* interim judgment of 19 November 2020, the Conseil d'État rejected the request to annul the implicit refusal by the President of the Republic, the Prime Minister and the Minister for the Ecological Transition, to take legislative measures 'that make the climate a legally binding priority' and to prohibit all measures increasing the emission of greenhouse gases.³¹ It held that the failure of the executive to submit a bill to parliament touches on the relations between the constitutional powers and therefore escapes the jurisdiction of administrative courts. It did indeed hold that if international legal provisions require complementary acts before they can have effect, those provisions need to be taken into account in the interpretation of national law that effectuates them.³² This argument is structurally similar to the 'reflex effect' doctrine by the Dutch courts in the *Urgenda* case. A big difference is that the Conseil d'État refers to legally binding provisions, while the Dutch courts used international sources that were not legally binding, but merely intended to express political desirabilities in determining the specific minimum target at 25%;³³ and, moreover, the Conseil did not set new reduction targets.

The Conseil did order the government to justify the compatibility of its decisions to postpone part of the realisation of its commitments to reduce greenhouse gas emission until after 2020 and 2023 with the reduction targets that had actually been laid down in legislation (Article L. 100-4 of the Energy Code, -40% in 2030 compared to 1990 emission levels) and in EU Regulation 2018/842 (-37% compared to 2005). In its final judgment of 1 July 2021, the Conseil d'État concluded that the government had failed to show that the measures taken could achieve these targets. So this judgment merely reviews government inaction against pre-existing targets set in binding national and EU law and orders the Government to comply with them by 31 March 2022.³⁴ It did not, as the Hoge Raad did in *Urgenda*, order the political branches to set different targets.

Similarly, in the 'trial of the century' in France, the Paris administrative court limited itself to establishing an 'ecological tort' under Article 1246 of the French Civil Code, by reviewing government behaviour against existing legal obligations (and found them to be infringed).³⁵ Also the Irish Supreme Court in *Friends of the*

abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes'. See also p. 11.

³¹Conseil d'État, *Grande Synthe*, N° 427301, 19 November 2020, ECLI:FR:CECHR:2020:427301.20201119, para. 2.

³²Ibid., para. 12.

³³See the provisions mentioned in *supra* n. 17.

³⁴Conseil d'État, N° 427301, 1 July 2021, ECLI:FR:CECHR:2021:427301.20210701.

³⁵'Trial of the century'. Tribunal Administratif de Paris, interim judgment of 3 February 2021, *Oxfam France and others*. (http://paris.tribunal-administratif.fr/Media/TACAA/Paris/00communi ques_de_presse/laffaireodusiecle), visited 11 April 2022.

Irish Environment reviewed only whether the National Mitigation Plan was *ultra vires* the relevant legislation it intended to implement (and found the Plan had to be quashed as falling far short of the relevant Act's requirement to specify measures to be taken).³⁶

The civil chamber of the francophone court of first instance of Brussels, in its *ASBL Klimaatzaak*,³⁷ took a similar approach and rejected the reasoning of the Dutch Hoge Raad on essential points. It agreed with the Hoge Raad that the ECHR imposes positive obligations to take climate measures, and it ultimately found that Belgium had not taken the necessary measures under Articles 2 and 8 ECHR. However, it held that this regards only the measures to be taken, and not the result to be achieved.³⁸ It limited its review as to results to clearly spelt out legal obligations, finding – contrary to the Hoge Raad – that under the international climate treaties Belgium had only bound itself to a reduction in 2020 with a minimum 20% (not the 25–40% the plaintiffs had argued for). Legal obligations could only be derived from the EU Climate Package and legally defined domestic targets. The Belgian court found these to be infringed by the Federal State and Regions to such an extent that this amounted to an infringement of Articles 2 and 8 ECHR. It refused to issue a judicial order imposing specific emission targets over time: if a court were to step in and exercise the discretionary power attributed to the legislature and administration this would infringe the separation of powers.³⁹ It held that scientific expertise is not a source of law. The Belgian Court found that, with the exception of the obligations undertaken under the EU Climate Package, the international legal obligations are such that the manner in which Belgium is to attain the climate objectives is currently within the discretion of its legislative and executive bodies: ‘The amount and rate of the reduction in greenhouse gas emissions that Belgium is to follow, and the internal distribution of the efforts in this direction are and will be the result of political arbitration with which the judicial power cannot interfere. It is not for courts to

³⁶*Friends of the Irish Environment*, *supra* n. 10. On the issue of the Plan's compatibility with fundamental rights under the Irish Constitution and Arts. 2 and 8 ECHR, it found that plaintiffs had no standing under Irish law.

³⁷Tribunal de première instance francophone de Bruxelles, Section Civile, Jugement No. 167, 17 June 2021, *ASBL Klimaatzaak*, published at (https://prismic-io.s3.amazonaws.com/affaireclimat/18f9910f-cd55-4c3b-bc9b-9e0e393681a8_167-4-2021.pdf), visited 11 April 2022.

³⁸*Ibid.*, p. 62: ‘Enfin, les obligations découlant des articles 2 et 8 de la CEDH portent sur les mesures à prendre par les pouvoirs publics et non sur le résultat à atteindre. Pareilles obligations dites de comportement sont donc soumises au contrôle marginal du juge de la responsabilité. D'ailleurs, la Cour européenne des droits de l'homme insiste, dans différents arrêts relatifs à la problématique de l'environnement lié à l'article 8 de la CEDH, sur la marge d'appréciation dont disposent les Etats’.

³⁹*Ibid.*, p. 80: in 2025, a target of 48% or at least 42%, in relation to 1990; in 2030 65%, or at least 55% in relation to 1990; for 2050 a net zero emission target.

determine the quantified greenhouse gas emission reduction targets for all sectors that Belgium should meet in order to “do its part” in preventing dangerous global warming’.⁴⁰

The approach was different, but still fundamentally unlike *Urgenda*, in the *Klima-Urteil* (Climate Judgment) of 24 March 2021 of the Bundesverfassungsgericht.⁴¹ The German Constitutional Court derives from Article 20a of the Grundgesetz a duty to protect the climate interest also for future generations, which the legislature made concrete in the targets formulated in the Federal Climate Protection Act of 2019.⁴² These consist of the Paris Agreement objectives of limiting the global temperature increase to significantly less than 2°C and preferably less than 1.5°C, and its translation into a reduction target of at least 55% in 2030, with a view to climate neutrality in 2050, unless international or EU legislation requires a higher target. The Act imposed the duty on the government to issue a government decree subject to parliamentary approval in the year 2025, establishing the decreasing quantities of emissions for the periods after 2030. The Constitutional Court found that the temperature objectives and the greenhouse gas emissions targets for 2030, though not free of risks, were sufficiently compliant with constitutional requirements. The legislative provisions concerning the period after 2030, however, were found to be unconstitutional, essentially due to their imprecision, in disregard of the constitutional duty to protect against a disproportionate future infringement of the rights to life and bodily integrity (Article 2(2), first sentence Grundgesetz). The protection of the climate requires far-reaching measures, and this requires earlier legislation prior to 2025 providing more precise guidance as to the emission limits over time, and as to how these will be set (para. 258). Instead of the court dictating targets and limits, as was done in *Urgenda*, the German Court decided that the relevant legislative provisions remained applicable on condition that they are replaced by legislation that lives up to the constitutional requirements prior to 2023.⁴³

⁴⁰Ibid., p. 82: ‘La mesure et le rythme de la réduction des émissions de GES par la Belgique ainsi que la répartition interne des efforts à faire en ce sens sont et seront le résultat d’un arbitrage politique dans lequel le pouvoir judiciaire ne peut s’immiscer. Ainsi, il n’appartient pas au juge de déterminer les objectifs chiffrés de réduction des émissions de GES tous secteurs confondus que devrait rencontrer la Belgique afin de «faire sa part» dans la prévention du réchauffement climatique dangereux’ (author’s translation).

⁴¹*Klima-Urteil*, *supra* n. 19.

⁴²Bundesgesetzblatt 2019, I, nr. 48, p. 2513 ff.

⁴³That legislation was passed in June 2021; see *Erstes Gesetz zur Änderung des Bundes-Klimaschutzgesetzes* of 18 August 2021, Bundesgesetzblatt 2021, I, nr. 59, p. 3905 ff. Apart from setting targets beyond 2030 and providing for procedures to adapt the various rules, instruments and targets, though not strictly required by the BVerfG judgment, it also increased the minimum reduction target for 2030 to 65%, for 2040 to 88%, and net zero to be achieved in 2045, with negative emissions after 2050 (revised Art. 3(1) Klimaschutzgesetz).

THE PRICE OF *URGENDA* IN TERMS OF CONSTITUTIONAL DEMOCRACY*Political background*

In assessing the question whether it should be in the power of courts, ordinary or constitutional, to do what was done in *Urgenda*, it is useful to be aware of the specific political background to the Dutch government's decision of 2011 to lower the target for emissions reductions for 2020 from 30% to 20%. Policy targets in the context of global issues are seldom set without taking into account political, social, fiscal, and economic constraints. In 2011, Europe was in the midst of the Eurozone debt crisis. This was combined with a situation of considerable political instability at the national level. The collapse of the centre-left majority coalition of the Christian-Democrats with the Social-Democrats had led to interim elections in 2010, which in turn led to a centre-right minority coalition of the Christian-Democrats and conservative Liberals, with the external support of the islamophobic Freedom Party of Geert Wilders. Austerity as the way out of a recession was a main political economic goal of the government – a view widely shared beyond the perimeters of the governing coalition. Those were the times that the Netherlands, 'Germany's faithful squire in preaching the orthodoxy of fiscal rigour', made no concessions for those who strayed from austerity policies. It was the dawn of the crisis and The Hague felt it was 'a full member of the Euroland elite'. This policy was not only for export to Greece and the other 'Club Med' member states; austerity was preached also domestically as a medicine to cure all ailments and conditions.⁴⁴ Against this background, the previously more ambitious climate targets were lowered to the 20% that had been agreed as the minimum in the EU context. This had broad support in parliament. It was a matter of not giving the climate crisis a greater fiscal priority over other public interests, among which prominently the cost of education, health care, social security, and similar costly public sectors, or a few years later, the international commitments to increase defence spending caused by the threat to the (Eastern and other) EU member states emanating from the occupation of the Crimea and the war in the Donbas.⁴⁵

⁴⁴The quoted metaphorical language was used in *Ore24* (the Italian equivalent of the *Financial Times*) a few years later, when the Dutch themselves got in trouble with the fiscal limits imposed by the EU Treaties. On 16 August 2013, the headlines addressed the Dutch with a cordial 'Benvenuti al Club Med!': 'C'era una volta l'Olanda, fedele scudiero della Germania nel predicare l'ortodossia del rigore, senza sconti a chi sgarava dalle politiche di austerità. Erano gli albori della crisi e L'Aja si sentiva membro a pieno titolo dell'élite di Eurolandia'. See 'Benvenuti nel «Club Med», *Il Sole 24 Ore*, <<https://st.ilsole24ore.com/art/notizie/2013-08-16/benvenuti-club-182247.shtml>>, visited 11 April 2022.

⁴⁵See the NATO Wales Declaration, 'The Wales Declaration on the Transatlantic Bond', *North Atlantic Treaty Organization*, <https://www.nato.int/cps/en/natohq/official_texts_112985.htm>, visited 11 April 2022.

I dare to say that the political decision of 2011 to lower the emission reduction targets was as regrettable from the perspective of preventing a climate disaster, as it was democratically legitimate. Is the court intervention in *Urgenda* equally – or indeed more – legitimate?

The justification of courts determining policy objectives

In justifying its determination of the emission reduction targets, and their timing, the Hoge Raad relies as both starting point and endpoint on the simple reason that the law provides the legal boundaries within which democracies must operate in a state under the rule of law (paras. 8.3.2 ff, cited above). This attempt at depoliticisation⁴⁶ is begging the question.

It is self-evident that the law is not politically neutral. Determining the meaning of the law is therefore an inherently political activity, as Montesquieu correctly assumed.⁴⁷ In a case like *Urgenda*, the political nature of judicial activity is evident also in the sense that it concerns a highly controversial issue in political society. The Hoge Raad correctly states that the ‘protection of human rights provided [by courts] is an essential component of a democratic state under the rule of law’, but this statement needs to be complemented by another statement: as long as the rule of law claims to be democratic, respect of democracy by courts is crucial for any country under the rule of law. Just as legislatures and executives must act within the bounds of the law, the judicial power of courts must remain within the bounds of democracy.

Merely saying that the other political branches must remain within the bounds of the law obscures the issue in terms of decision-making that is core to the legitimacy of judicial pronouncements: saying that a body must act lawfully does not in itself decide who is to determine what is lawful, nor who is to turn what is politically desirable into law. The question of who should ultimately take political decisions, within the limits of their respective powers, is, moreover, not exhausted by merely invoking a general division of powers, specifically when it comes to a competence which may interfere with other institutions’ powers. It is not enough to say that a power exists; it is also a matter of its *modus quo*, the manner in which it is exercised with regard to the other powers in concrete cases. The exercise of an existing power in concrete cases remains subject to limits inspired by the principles of both democracy and law. That is why in most constitutional orders various principles and doctrines exist regarding the limits of judicial powers: if such

⁴⁶Morvillo, *supra* n. 3, p. 11.

⁴⁷C.-L. de Secondat, Baron de Montesquieu, *De l'esprit des loix* (1758) Book XI, Des lois qui forment la liberté politique dans son rapport avec la constitution, Ch. 6, De la constitution de l'Angleterre.

judicial powers are exercised without due respect for the proper role and function of the other powers, this would be considered to infringe the balance of powers itself. Democracy is an element in any modern consideration of the relations between the respective public powers. The fact that democracies operate under the rule of law does not make them any less democracies. The judiciary is democratically legitimated by the democratic nature of constitutional norms that invest it with judicial power, as well as by the democratic nature of the legal norms courts apply, especially norms enacted by parliament, but this remains a less direct legitimation compared to that of legislatures and executives.

So, the argument of the law as a limit to democracy needs to be refined if it is to be used to argue for the legitimacy of this particular judgment, particularly so as to justify why, in the course of saying what the law is, the judiciary arrogates to itself both the power to define policy targets and the timeframe within which these have to be realised. And refining the argument in such a way is no easy task.

The Hoge Raad relies crucially on three points to legitimate the restriction of democratic decision-making on its substance: the state of climate science; the meaning of Articles 2 and 8 ECHR in combination with Article 13 ECHR; and the Court's view that this case involves 'an exceptional situation'.

Climate science

The dominant role of scientific knowledge in this judgment is neither unique in environmental case law nor unproblematic.

In this context it is useful to note that the 25% target mentioned on one of the nearly 3,000 pages of the Fourth Assessment Report⁴⁸ was not formulated with the intention to create a firmly grounded scientific standard – on the contrary, according to one of the authors of the relevant IPCC report, the table ended up more or less as a kind of footnote to the text, because it was considered to be an estimate only, and was too weakly substantiated from a scientific point of view to be mentioned in the findings of the main text.⁴⁹ Also, the particular table's asserted range of a 25-40% range of reduction for the so-called Annex I countries (of which the Netherlands is one) in connection with a reduction to a stable quantity of 450 ppm (particles per million) CO₂ equivalents, in order to attain the legally binding aim of reducing emissions to reach a temperature increase of no more than 2°C (with an effort to significantly less, and ideally 1.5°C) is at the very least uncertain. Instead of the 25-40% range, scientifically a reduction range of 10-80% was considered to be better climate science at the

⁴⁸See text to *supra* nn. 16 and 17.

⁴⁹L. Meyer, 'Urgenda-vonnis ontbeert goede wetenschappelijke onderbouwing', 36 *Milieu en Recht* (2016).

time, according to the same co-author.⁵⁰ That a co-author of the report that has been so decisive in all instances, makes short shrift of the scientific solidity of the judgments,⁵¹ should make one wary about the use that judges have made of the report: not only was the 25–40% range for reduction of emissions by developed states a guess that was considered too unsubstantiated, the very 2°C criterion set as a legally binding target in the Paris Agreement was not established by climate science but stems from political decision-making. Moreover, according to the same climate science, a temperature increase of 1.5°C would occur even if emissions could be reduced to nil in 2016, this being a consequence of the lingering effect of greenhouse gases in the atmosphere.⁵² This is not to say that these criteria were necessarily wrong, but merely that they are *not* founded on climate science, but on a political assessment and on a political choice.

This political choice might easily be different from that of either the EU institutions, or the Dutch government and parliament, or that of the Hoge Raad. The climate reports available at the time do not suggest at all that a target of 25% reduction by the end of 2020 is sufficient to prevent climate consequences that would in many places in the world be catastrophic. Much is to be said for the view that 25% by the end of 2020 is incredibly low, and most probably too little too late. Viewed over time dynamically, the various reports from the International Panel on Climate Change sketch other and better scenarios, some of which are more elaborately substantiated than that one table which never ever recurs in the texts or conclusions of any of the scientific reports (nor in the relevant report itself). No clear evidence exists that 25–40% is the one and only minimum limit at one particular moment in time to be achieved or pursued by the Netherlands in order to reach the 2°C target (or the 1.5°C target), let alone that it could deal sufficiently with the broader long-term problem. Seeking a ‘minimum’ is necessarily choosing between various scenarios. Thus, in 2008, the UK chose 26% as its legally binding minimum target for 2020, which it subsequently amended in 2009 to 34% – a target it achieved and even exceeded in practice.⁵³ Why the Hoge Raad found a scenario of a minimum of 25% to be the only relevant one remains uncertain and to that extent arbitrary – a different

⁵⁰See Meyer, *ibid.*

⁵¹Meyer wrote in response to the District Court judgment.

⁵²Meyer, *supra* n. 49.

⁵³Climate Change Act 2008, s. 5, as amended by the Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009, SI 2009/1258, Art. 2(2). The independent supervisory Climate Change Committee determined that UK emissions were 48% below 1990 levels in 2020; discounting the impact of Covid-19 on emissions in 2020, the fall in emissions between 2019 and 1990 was estimated at 40%; ‘Advice on reducing the UK’s emissions’, *Climate Change Committee*, (<https://www.theccc.org.uk/about/our-expertise/advice-on-reducing-the-uks-emissions/>), visited 11 April 2022.

choice could easily be made, and the rationales for different choices inevitably depend on non-legal policy preferences.

The ECHR as policy framework

It may be doubted whether the established legal meaning of Articles 2 and 8 ECHR can be used to justify the rulings of the Dutch courts. The Hoge Raad (following the Court of Appeal) refers to the European Court of Human Rights judgments on the meaning of the relevant provisions with regard to environmental matters in the Strasbourg case law.⁵⁴ Although the Hoge Raad acknowledged that the European Court of Human Rights has so far not handed down any judgment on climate change, it boldly asserted that the answer to the question of the protection afforded by Articles 2 and 8 ECHR is in this case ‘sufficiently clear’ (para. 5.6.3), and did not submit questions to the European Court of Human Rights for an advisory opinion under Protocol No. 16 to the ECHR⁵⁵ (para. 5.6.4).

But is it so clear? We saw that, contrary to the Hoge Raad, the Brussels civil court judged differently, and found that 20% did *not* infringe Articles 2 and 8 ECHR. And is the Strasbourg case law ‘sufficiently clear’ to enable a court to say that a 23% reduction target by the end of 2020 – which was still within reach at the time of the judgments – is an infringement of the right to life and individuals’ well-being, but a target of 25% is not? The precise borderline seems rather arbitrary; in any case, this exceptional judicial clear-sightedness, insight and wisdom would have merited being backed up by a referral for an advisory opinion under Protocol No. 16 to the European Court of Human Rights.

Exceptionality

It is within the province and duty of the legislative branches of government to balance competing political goals of similar magnitude and importance in light of distributive justice, in particular the overall scarcity of public resources and fiscal limitations. Courts are generally not in a position to do that kind of macro public interest balancing, if only because the other public interests involved are not usually represented in the particular case before the court. If anything, the very existence of competing general interests of similar importance and magnitude

⁵⁴Amongst others ECtHR 28 March 2000, No. 22492/93, *Kiliç v Turkey*; ECtHR 30 November 2004, No. 48939/99, *Öneryıldız 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 17 July 2014, No. 47848/08, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*.

⁵⁵Entry into force for the Netherlands on 1 June 2019.

that need to be balanced, should be a reason for courts to exert restraint or even to abstain from allowing or upholding a claim in public interest litigation.⁵⁶ In several places in the *Urgenda* judgment the Hoge Raad seems to acknowledge this, saying that in principle the setting of public policy targets is the competence of the political branches of government (by which it means the legislature and executive). A special argument that the Hoge Raad uses to diverge from that principle in this particular case nevertheless is the appeal to the ‘exceptionality’ of the present situation. What is the importance of this appeal to ‘exceptionality’, and what could it possibly mean?

These are important questions to pose. In democracies one should as a matter of principle be sceptical about invoking ‘exceptionality’ as a justification for interventions in the ordinary democratic process and trenchant interference with fundamental rights. During the major recent crises, from the troubles in Northern Ireland, the Basque armed attacks, the post-9/11 terrorist threat, the Bataclan and other terrorist attacks in France, the banking and euro crises, right up to the Covid 19-pandemic crisis, states of exception – formal and informal – have been declared.⁵⁷ Declaring the ongoing climate crisis, which is indeed one of the greatest challenges facing mankind, not just a crisis but an emergency situation, to be precise a ‘climate emergency’, as did the European Parliament,⁵⁸ can be viewed with suspicion. The essence of emergency situations and states of exception has in constitutional history – and also in positive constitutional law – been that they justify diverging from the ordinary relations between public powers in a democratic state under the rule of law.⁵⁹

For one thing, in the whole of the judgment there is not one argument regarding the power of courts to order policy targets to be replaced by targets set by the courts themselves that is formulated as being contingent on the exceptionality of the case. In fact, none of the arguments used by the Hoge Raad on constitutional relations between courts and ‘the political domain’ are restricted to climate cases only.⁶⁰ On the face of it, there is no reason to think that this remedy can only exist in

⁵⁶This applies to setting public policy targets, not to taking general interests into account when balancing individual rights.

⁵⁷On both the inappropriateness and inadequacy of the ‘climate emergency’ language, see A. Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press 2021) p. 255 ff.; on the constitutional dangers of states of exception, among many others, S. Henneke Vauchez, *La Démocratie en État d’Urgence: Quand l’exception devient permanente* (Seuil 2022).

⁵⁸European Parliament Resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)), (https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html), visited 11 April 2022.

⁵⁹See A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018).

⁶⁰See HR, *Urgenda*, paras. 8.2.2-8.2.7 summarised above; see for a detailed analysis on the shift in the relations between courts and legislatures brought about by *Urgenda*, Besselink 2020, *supra* n. 4.

climate cases. The power that the Hoge Raad asserts to order executive and parliament to pursue and attain policy objectives that it has itself set, is justified on the basis of powers it supposedly has anyway. This explains why some of the more enthusiastic commentary on *Urgenda* finds that the new separation of powers delineated in *Urgenda* should not be anything exceptional and should be embraced generally.⁶¹ Others believe that judicially changing the constitutional arrangements is the only right way to ‘green the constitution’ if the other political branches fail to achieve what is politically desirable.⁶² Traditionally, states of exception have been conservative in nature, in the sense that they aimed at restoring a *status quo ante*.⁶³ In this new line of argument, the exception is meant to lead to constitutional change that is here to stay – as has indeed happened so often in the crises of recent decades.

But perhaps this reading is overstating the more general drift of what an exception means semantically: something that is not ordinary and should not be ordinary. Exceptionality may, after all, have been invoked in order to do what courts should otherwise not be allowed to do, i.e. balance competing political goals to be achieved in the general interest in light of distributive justice under circumstances of scarcity.

The justification of the exception may lie in the absoluteness of the issue of life and death that overrides any other consideration; it makes such balancing unnecessary or even undesirable. On the assumption that courts do not decide on the size of the cake, this means, however, apportioning a value to one piece of the cake and necessarily reducing what is left in terms of other pieces of the cake, even if these other ‘pieces of the cake’ may involve similar interests of life, death and serious disadvantages to human well-being.

Yet doing so, as in *Urgenda*, only in one particular instance of life and death and large-scale negative effects on human well-being and not in others, soon produces curious inconsistencies. To illustrate the problems courts end up with, consider the case of air pollution and the accompanying health damage, which currently causes many thousands of early deaths,⁶⁴ particularly in larger cities

⁶¹ See e.g. R. van Gestel, and M. Loth, ‘Voorbij de trias politica: Over de constitutionele betekenis van “public interest litigation”’, *Ars Aequi* (2019) p. 647-65.

⁶² M. Van der Sluis, ‘Groen Staatsrecht: klimaatverandering als constitutioneel probleem’ [Green constitutional law: climate change as constitutional problem, *Blog Montesquieu Instituut*, 8 March 2021, (montesquieu-instituut.nl) visited 11 April 2022.

⁶³ See J. Ferejohn and P. Pasquino, ‘The law of the exception: A typology of emergency powers’, 2(2) *I.CON* (2004) p. 210; see also Greene, *supra* nn. 57 and 59.

⁶⁴ The European Environmental Agency estimated the premature deaths caused by polluted air for the Netherlands at over 12,000 persons, and the years of life lost at 131,000 in the year 2014 (which means an average of one year of life lost for the general population of the Netherlands): European Environment Agency, *Air quality in Europe — 2017 report No 13/2017*, (https://www.eea.europa.eu/publications/air-quality-in-europe-2017), visited 11 April 2022, p. 57 and 59. The Netherlands Health Council (Gezondheidsraad) recommended, on the basis of the best available science, not simply the application of the standards prescribed by Directive 2008/50/

in the Netherlands. It is ironic that the very same Court of Appeal at The Hague, whose judgment in *Urgenda* was upheld by the Hoge Raad, in a later air pollution case rejected a claim against the State to order measures to be applied on the basis of the positive obligations deriving from Articles 2 and 8 ECHR (or at least the WHO air pollution standards – informed by the best available medical science) in the implementation of an EU Air Pollution Directive. It refused to declare the failure to comply with WHO standards unlawful for three reasons: the margin of appreciation under the ECHR; the State's compliance with the EU Directive's minimum standards; and the fact that actually the State is moving towards stricter standards in practice than previously.⁶⁵ With regard to the climate cause in *Urgenda*, however, it found these three arguments unjustified. By implication, it found the right to life and an individual's well-being less worthy of judicial protection in the case of air pollution causing death than in the climate crisis. Is the invocation of 'exceptionality' then the right legal standard for courts to privilege the well-being and life of another, probably larger, group of future 'others' over the present right to life and well-being of a group of certainly thousands of persons? Is exceptionality a legal standard at all?

STRIKING DOWN LEGALLY BINDING EU POLICY TARGETS ON THE BASIS OF THE ECHR

Given their acceptance of the supra-constitutional rank of EU law in principle,⁶⁶ and of the constitutionally guaranteed primacy of directly effective provisions of treaties and decisions of international organisations,⁶⁷ Dutch courts may seem unlikely candidates to strike down EU decisions for infringing constitutional standards. In fact, in *Urgenda* the Hoge Raad, like the courts at lower instance, avoided doing so directly and expressly by focusing exclusively on the Dutch policy objectives. The decisions of the Dutch political institutions were the target, and not the EU decisions. And yet, there can be little doubt that declaring the national minimum target of 20% reductions to be an infringement of the right to life and private life under the ECHR, linked as they are to the EU minimum target, implies that those EU targets, on which the national ones were explicitly based,⁶⁸

EC, which are less stringent than the WHO standards, but to go even beyond the WHO standards; Gezondheidsraad, *The Health Effects of Air Pollution*, January 2018, (<https://www.gezondheidsraad.nl/documenten/adviezen/2018/01/23/gezondheidswinst-door-schonere-lucht>), visited 11 April 2022.

⁶⁵Gerechtshof Den Haag 7 May 2019, ECLI:NL:GHDHA:2019:915 at paras. 3.20-3.21.

⁶⁶HR 2 November 2004, ECLI:NL:HR:2004:AR1797.

⁶⁷Art. 94 Constitution, *supra* n. 7.

⁶⁸The coalition agreement 2010, *Vrijheid en Verantwoordelijkheid*, 20 September 2010, p. 12: 'The European targets for sustainable energy supply are leading. This means a carbon dioxide

are in the view of the Hoge Raad equally in conflict with the relevant provisions of the ECHR.

The 20% minimum target was adopted by the EU institutions in the so-called EU Climate Package of December 2008.⁶⁹ The formula adopted was referred to as ‘three times 20’: 20% reduction of greenhouse gas emissions; 20% increase in renewable energy; 20% savings through increased energy efficiency, all by the end of the year 2020.⁷⁰ This agreement on the policy objectives, the result of tough negotiations, was at the basis of a set of instruments⁷¹ which turned policy targets into legally binding commitments, mentioned in the preambles of the various instruments that elaborate on how to reach those targets.⁷² Although the methodology of how to translate the overall target into specific targets in the range of instruments is complicated – this point is not touched on in the *Urgenda* judgments – there can be little doubt that declaring the overall target in conflict with the ECHR would also invalidate the legal instruments implementing it. Moreover, the provisions of the instruments themselves express their substantive dependence on the overall target. Thus, Articles 1(2) and 8 of Decision 406/2009/EC, on the effort sharing of member states to reduce their greenhouse gas emissions up to 2020, make a distinction between the percentages for the respective member states under this instrument, depending on whether the minimum overall target would change from 20% to 30%, as had been conditionally promised in the context of the political negotiations in the various climate conferences,⁷³ although the condition was never fulfilled. These specific provisions are incomprehensible if the overall minimum targets are not binding as a matter of EU law. If the percentage is legally binding, it can be assumed that adhering to it is also lawful.

reduction of 20%’; *ibid.*, p. 30: ‘The cabinet aims at a level playing field concerning the standards for emissions, . . .’; Policy letter to Lower House, setting out the climate policy until 2020, 8 June 2011, p. 1: ‘This government’s ambition for the reduction of greenhouse gases is in line with the European objective: 20% in 2020 in relation to 1990’; *ibid.*, p. 2: ‘In the collation agreement, it was agreed that the government would comply with the 20% reduction target in 2020 as agreed in the European Climate Package’.

⁶⁹See European Council, *Presidency Conclusions 11-12 December 2008*, 17271/08, Brussels 12 December 2008, (<https://data.consilium.europa.eu/doc/document/ST-17271-2008-INIT/en/pdf>), visited 11 April 2022, points 22 and 23; and formally adopted in a set of instruments by the European Parliament on 17 December 2008, (<https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=20081217&secondRef=TOC&language=en>), visited 11 April 2022.

⁷⁰See EP Press Release 16 December 2008 no. 44857 and EP Background Paper *EU Legislation on Climate Change: Climate and energy package*, of the same date.

⁷¹Regulation, Directives and Decision of 23 April 2009, OJ L 140, 5 June 2009.

⁷²*Cf Friends of the Irish Environment*, *supra* n. 10, at para 8.15, holding that once enshrined in law, the objectives changed from an unjusticiable policy matter into a justiciable matter of law.

⁷³See above p. 6.

Yet, as a matter of EU law, this 20% will still have to comply with fundamental rights like the right to life and personal and family life in the sense of Articles 2 and 7 of the EU Charter of Fundamental Rights and Articles 2 and 8 ECHR – as the Charter must be interpreted in light of the latter (Article 52(3) Charter), and the latter forms part of the general principles of Union law in the sense of Article 6(3) TEU.

Against this view it has been asserted, although in a somewhat ambiguous manner, that the EU targets and instruments elaborating them are only minimum values. And as with minimum harmonisation, member states are free to apply targets over and above this minimum. The Hoge Raad refers in passing also to Article 193 TFEU in this regard,⁷⁴ evidently to dismiss any appeal to EU law, as the Procurator General at the Hoge Raad did in a set of remarks to reach the conclusion that the validity of EU law was neither directly nor indirectly at stake.⁷⁵ Indeed, as the Court of Justice has in the meantime made clear in *TSN*, any authentic ‘gold plating’ by setting higher norms than minimally required under EU law, falls outside the scope of EU law.⁷⁶ However, what is at issue is not the legality of ‘gold plating’ by setting a higher target, but whether complying with the minimum target agreed in EU law and on which the EU climate measures all hinge, was as a matter of EU law incompatible with the ECHR. Clearly, if this minimum were unlawful, the EU instruments based on that would be affected, and partially or totally invalid, in particular the Effort Sharing Decision. In other words, although what member states do over and above the EU minimum may be outside the reach of EU law, the minimum which is set in EU law must itself be compliant with EU law – that is the whole point of minimum harmonisation. The reasoning that member states may choose more stringent protective measures (Article 193 TFEU) would assume that the higher minimum standards of the ECHR are set by the member states, but that is not the case. They are binding on the member states, and are part of the general principles of EU law. That a very particular interpretation of the ECHR is given by a national court does not change this. This commentator agrees, therefore, with the EU environmental lawyers who intimated that the Hoge Raad should have referred the matter to the European Court of Justice on this ground;⁷⁷ by not doing so, it infringed EU law under the *Foto-Frost* doctrine.

⁷⁴*Urgenda*, para. 7.3.3.

⁷⁵*Urgenda*, Conclusion of the Procurator General, ECLI:NL:PHR:2019:887, paras. 4.105-4.116.

⁷⁶ECJ 19 November 2019, Case C-609/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry*, para. 46 ff.

⁷⁷T.J. Thurlings, ‘The Dutch Climate Case: Some Legal Considerations’, SSRN (<https://ssrn.com/abstract=2696343>), visited 11 April 2022; Jans and De Graaf, *supra* n. 3, at p. 518; Peeters (2016), *supra* n. 3; Eliantonio, *supra* n. 3, at pp. 2, 4 and 7; Backes, *supra* n. 3; C. Backes and G.A. van der Veen, *AB Rechtspraak Bestuursrecht*, AB 2020/24, p. 173; van Zeben, *supra* n. 3.

The Dutch constitutional perspective

In the Netherlands, the ECHR is a constitutional standard against which all acts of parliament or government and all other acts and omissions of public authorities can be reviewed by any domestic court.⁷⁸ The Hoge Raad has taken the view that, although courts cannot review the compatibility of *acts of parliament* with the provisions of the Constitution (Grondwet), there

is no rule, either in the Constitution or any other rule of the (national) law of the Netherlands, which stands in the way for a Netherlands court to review whether *a treaty* is in conflict with other treaties or other norms of public international law.⁷⁹

This argument was the basis for Dutch courts subsequently to review international obligations deriving from treaties to which the Netherlands is a party against the ECHR. Thus, the Hoge Raad reviewed the obligation under the NATO Status of Forces Agreement with the US to deliver an American soldier within the Netherlands' jurisdiction who had confessed he had murdered his wife, to the American military authorities against the obligations deriving from Article 3 ECHR, which according to the European Court of Human Rights prevents extradition of persons to the USA, whenever there is the risk that they will end up on 'death row' if condemned to capital punishment, which amounts to inhuman treatment.⁸⁰ Under this case law, although the ECHR has no pre-established priority over other treaties under public international law, the interests involved in complying with the respective treaty obligations must be balanced in light of the circumstances of the case. So far, each time the Hoge Raad has been faced with a treaty obligation that was incompatible with the ECHR, the ECHR has prevailed.⁸¹ On each of these occasion, it concerned infringements of Article 3 ECHR (the right not to be subjected to torture or to inhuman or degrading treatment or punishment). But it is hard to see why a threat to the right to life and

⁷⁸On the role of the ECHR and other treaties in constitutional adjudication in the Netherlands, see L.F.M. Besselink, 'Constitutional Adjudication in the Netherlands', in A. von Bogdandy et al. (eds.), *The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions* (Oxford University Press 2020) p. 565.

⁷⁹HR 10 November 1989, NJ 1990, 450, *Cruise missiles*, para. 3.4.

⁸⁰HR 30 March 1990, NJ 1991, 249, *Short*; see ECtHR 7 July 1989, *Soering*.

⁸¹HR 15 September 2006, ECLI:NL:HR:2006:AV7387; various cases on rendering of asylum seekers to Greece concern the incompatibility of the Dublin Regulation 343/2003 and Art. 3 ECHR, i.e. colliding obligations arising from the EU Treaty and the ECHR respectively, e.g. Rb's-Gravenhage 14 July 2010, ECLI:NL:RBSGR:2010:BN1664; in Rb. Limburg 2 February 2017, ECLI:NL:RBLIM:2017:1002 Art. 6 ECHR was judged to prevail over functional immunity of an international organisation on grounds of customary international law, but this was quashed on appeal, while further appeal in cassation is pending at the Hoge Raad.

well-being under Articles 2 and 8 ECHR due to a failure to prevent a climate disaster could not be a reason to review an obligation deriving from the EU Treaties against these rights.⁸²

The national constitutional situation in the Netherlands is, in sum, that the ECHR as a treaty that forms an integral part of national law enjoys supra-constitutional rank and prevails in case of conflict with law that is binding under other treaties. In principle this also applies to obligations under the EU Treaties: EU law that infringes the ECHR must be disapplied in the Netherlands.⁸³ In the *Urgenda* case this means that from the national constitutional perspective Articles 2 and 8 ECHR prevail over a legally binding EU commitment that sets the minimum reduction target for greenhouse gas emissions as low as 20% *vis-à-vis* the emission rate of 1990. By implication and implicitly, this is what the Hoge Raad has done in *Urgenda*.

The perspective of European Union law

Striking down the EU minimum target of 20% would be compatible with EU law under certain conditions only. It would require that, first, the Hoge Raad refers the preliminary question to the European Court of Justice, as most of the more rebellious national constitutional courts now tend to do. Next, the European Court of Justice would need to consider the compatibility with the ECHR and, moreover, it would need to find the incompatibility that the Hoge Raad stipulates, before the latter could use that in its own judgment in the case before it.

It would not be relevant for the admissibility of the case in Luxembourg, nor for its outcome, that by the end of 2019 the EU was projected to reach the overall emission reduction target of 26% by 2020,⁸⁴ and would therefore reach the *Urgenda* standard of 25% to comply with the right to life and well-being under

⁸²Similar problems of treaty collisions and their judicial review were considered to arise in case of incompatibility of obligations under GATT and EC law at the time: see L. Besselink, 'An Open Constitution and European Integration: the Kingdom of the Netherlands', in *Nationales Verfassungsrecht mit Blick auf die europäische Integration* (FIDE XVII. Kongreß) (1996) section 3a.

⁸³For a discussion of the role of Art. 251 TFEU (at the time Art. 234 EC) see L. Besselink, 'Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union', 35(3) *Common Market Law Review* (1998) p. 629 at p. 659 ff. The newer formulation of the third paragraph of Art. 251 TFEU and case law might or might not have changed things in terms of what a Dutch court would do.

⁸⁴European Environment Agency, *Trends and projections in Europe: Tracking progress towards Europe's climate and energy targets Report 15/2019*, Figure ES2, (<https://www.eea.europa.eu/publications/trends-and-projections-in-europe-1>), visited 11 September 2021, p. 9.

Articles 2 and 8 ECHR; the issue is whether it is lawful for the Netherlands to comply with a target of merely 20%.⁸⁵

We must be aware, however, that it is now standard case law that the European Court of Justice no longer adjudicates the validity of secondary EU law against the standards of the ECHR, notwithstanding the letter of Article 6(3) ECHR. Since the entry into force of the Charter, the ECHR has disappeared into the background, to a position that is at best secondary to the Charter, even if a referring court relies exclusively on the ECHR.⁸⁶ Rather, the Court would rule on the compatibility of the 20% minimum with Articles 2 and 7 of the EU Charter, the EU parallels to Articles 2 and 8 ECHR.

Whether the European Court of Justice would come to the same conclusion as the Hoge Raad did in *Urgenda* is questionable. On the core issue of whether a 20% reduction is an infringement of the right to life and well-being, and 25% is not, there is no European Court of Human Rights case law, so Article 52(3) Charter would not enter the picture. The Court might in principle extend autonomous protection that goes beyond the available ECHR standards. So far, no court – except in *Urgenda* – has found an infringement in such terms, and it is therefore not very likely the European Court of Justice would do so.

What if?

If the European Court of Justice were to find an infringement of the Charter, the Hoge Raad would probably judge as it did now; the specific question whether the infringement can be remedied by a domestic court order addressed to government and parliament is probably within the procedural autonomy of member states.

If the European Court of Justice were, on the contrary, to find that there is no such infringement of the Charter, speculation could go in various directions.

⁸⁵Compare the questions which the Flemish Region formulated for reference to the ECJ on the compatibility of targets in the EU climate package with the Charter, in the *ASBL Klimaatzaak*, *supra* n. 37, p. 44-45.

⁸⁶E.g. ECJ 15 February 2016, Case C-601/15 PPU, *JN v Staatssecretaris van Veiligheid en Justitie*, paras. 45-46: ‘... whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law [...]. Thus, an examination of the validity of [the Directive] must be undertaken solely in the light of the fundamental rights guaranteed by the Charter’; earlier cases are ECJ 9 November 2010, Case C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, paras. 44-46; ECJ 6 November 2012, Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, paras. 46-47; ECJ 3 September 2015, C-398/13 P *Inuit Tapiriit Kanatam*, paras 45-47.

Either the Hoge Raad would comply, and Urgenda's claim would be off the cards, or the matter would be judged autonomously on the basis of the ECHR, as in fact was done. The position of the ECHR under Dutch constitutional law is clearly a tendency in that direction. One might speculate that this would induce the Hoge Raad to explicitly and autonomously disapply the EU 20% minimum standard, on the ground that it infringes the ECHR. Let us not forget that Dutch resistance in the run-up to the Charter was inspired by the view that the ECHR should retain precedence,⁸⁷ which reflects the national constitutional position. Although it is unlikely that the Dutch courts will become as rebellious as, say, the Bundesverfassungsgericht, the phasing out of the ECHR as judicial standard for the validity of EU law, might actually tempt courts to claim space for an autonomous power to adjudicate.⁸⁸ This could take different forms. One of these is the classic approach of circumventing the EU law basis of the act or omission to be reviewed, and focusing on the national act only, so as to pretend that no EU law at stake. It looks as if this is what the Hoge Raad did in *Urgenda*.

FINAL CONSIDERATIONS: WHAT SHOULD THE HOGE RAAD HAVE DECIDED?

It is not appropriate for an academic commentator to tell the Hoge Raad what it should have decided. The findings above, however, indicate that it went beyond the common ground in the European case law by replacing politically determined policy targets with policy targets of its own design, and ordering legislature and executive to realise those targets, after it found that the State of the Netherlands' failure to combat the impending climate disaster was an infringement of the ECHR and therefore unlawful. It could, I submit, have established the unlawfulness of failing to act without going into the tricky issue of which exact percentage would need to be attained. Thus the Hoge Raad would have remained within the overall boundaries of the European case law sketched above, and would not have exposed itself to the criticism of determining policy targets (so aptly captured in

⁸⁷E.g. Advisory Opinion of the Raad van State [Council of State] on the Charter, *Kamerstukken* [Parliamentary Documents], Tweede Kamer, 2000–2001, 21 501-20, A, para. 7.

⁸⁸A curious further legitimization of this might be found in the ambiguous meaning of the Grand Chamber judgment in ECJ 24 April 2012, Case C-571/10, *Kamberaj* at para. 62, where the Court, in a case that was presented as falling within the scope of EU law, answered the question of the direct applicability of the ECHR as part of the general principles of EU law, saying: 'Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that Convention and a provision of national law'.

the Italian expression *indirizzo politico*), which in the European constitutional tradition is left to parliament and government. Clearly, *Urgenda* is an extreme case of courts ‘acting as shepherd of Parliaments rather than as guardians of the Constitution’.⁸⁹

It is by no means certain that the way the ECHR provisions were interpreted in *Urgenda* would actually be what the European Court of Human Rights would have done, especially as regards the core issue of whether a minimum reduction target of 20% would infringe the right to life and well-being, but a minimum reduction of 25% would not. In order to find that out, a reference under Protocol 16 ECHR would be required; this would, however, not be allowed under EU law⁹⁰ in as much as the matter seems to come within the scope of EU law.

Setting the minimum reduction target at 20% was based on EU law. Striking that minimum down means, in effect, striking down EU law. For a court to do that, the case should first have been referred to the Court of Justice, which has the monopoly on assessing the validity of EU law. According to the European Court of Justice’s post-Lisbon standard case law, the ECHR can no longer be used as a standard, and it would instead review the case under Articles 2, 3 and 7 of the Charter; and it would have to apply this autonomously in the absence of clear case law from the European Court of Human Rights as to what reduction targets would and would not infringe those rights.

Instead of all this, the Hoge Raad bypassed EU law and gave its own autonomous national interpretation of the fundamental rights standard under the ECHR, providing a remedy that is both unique within European constitutional law, and controversial from the perspective of the democratic rule of law.



⁸⁹P. Faraguna, ‘Constitutional Paternalism and the Inability to Legislate’, *VerfBlog*, 26 September 2019, <<https://verfassungsblog.de/constitutional-paternalism-and-the-inability-to-legislate/>>, visited 11 April 2022, who concludes somewhat pessimistically: ‘this paternalistic approach seems very unlikely to provide for any efficient treatment of the various diseases affecting Parliaments in contemporary constitutional systems and – on the contrary – ends up helping their suicidal plans. The point is that it is far from certain that there is any life for liberal-democratic constitutionalism after the death of Parliaments’.

⁹⁰ECJ 18 December 2014, Opinion 2/13, paras. 99-100.