

THE *URGENDA* CASE IN THE NETHERLANDS ON CLIMATE CHANGE AND THE PROBLEMS OF MULTILEVEL CONSTITUTIONALISM

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Abstract

This contribution analyses the *Urgenda* judgments in the Netherlands which ordered the state to reduce the national emissions of greenhouse gases by 25% by the end of 2020. In arriving at this conclusion, the courts relied heavily on international law, which was applied indirectly and directly to the case. The analysis shows various incongruencies and gaps in the judgments' legal grounds and reasoning, and suggests that a focus on the Constitution is needed as well in addressing such important issues. This will require long overdue reform of the bar on constitutional review in order to stimulate a strong national legal culture based on the Constitution.

Keywords: Climate Change, Constitutional Law, European Convention on Human Rights, International Law, The Netherlands.

I. INTRODUCTION

Usually, the constitutional law of the Netherlands, including its protection of fundamental rights, does not attract sustained comparative and international attention. This has changed with the now widely debated *Urgenda* case on

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climate change. The matter has led to three judgments, the first in 2015 by the District Court of The Hague, the second in 2018 by the city's Court of Appeal and the third in 2019 by the Supreme Court.¹ The reason the case attracts so much attention, is that all three courts directed state policy on the pressing issue of climate change in very clear and precise terms. The judgments enjoined the state to reduce, by the end of 2020, annual Dutch greenhouse gas emissions by 25%, when measured against the emission levels of 1990.

The aim of this contribution is to critically discuss and assess these judgments from a legal perspective, and in particular whether they conform to the Netherlands' multilevel constitutional framework. To this end, it must be noted that the overall framework is composed of international, EU and national constitutional law components and that it operates on the basis of monism. This means that international and EU legal norms form part of the domestic order and are hierarchically superior to the Constitution. Such norms are directly applicable by the courts under qualifying circumstances.

In conducting the analysis, the United Nations legal framework on climate law is addressed first as the general background to the dispute between *Urgenda* and the state (section 2). This is followed by an outline of the dispute, as well as the Courts' findings (section 3). The attention is then turned to outlining the legal bases and arguments relied on by the Courts with a focus on the indirect and direct application of international law (sections 4 and 5). Upon analysis it will become apparent that there are noteworthy incongruences between the legal grounds on the one hand, and the legal arguments on the other (section 6). Apart from these incongruences, it will also become apparent that there is a clear *gap* in the legal grounds when it comes to applying the Constitution (section 7). While these incongruences put the judgments in doubt, filling the identified gap might provide a justification for the decisions, or at least a sounder point of departure. The reasons for the gap and the difficulty in filling it are considered too. A call will be made to rebalance the components of the country's

¹ District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA, 2015:7196; Court of Appeal The Hague, 9 October 2018 (ECLI:NL:GHDHA:2018:2610); Supreme Court, 20 December 2019 (ECLI:NL:HR:2019:2006). For the judgments, including English translations: <https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda>.

multilevel constitutional framework. This is necessary in order to contextualise and ground difficult questions, such as those raised by the *Urgenda* judgments, in the future (section 8).

II. UN FRAMEWORK AND GREENHOUSE GAS EMISSION TARGETS

An important anchor point in discussing the *Urgenda* case is the United Nations Framework Convention on Climate Change (UNFCCC) from 1992, to which the Netherlands is a signatory. Article 2 of the Convention explains that it seeks to achieve within a sufficient timeframe the stabilisation of greenhouse gas emissions in the atmosphere at levels that would prevent dangerous interference with the climate system. In achieving these aims, article 3 establishes a number of principles. For instance, parties to the Convention undertake to protect the climate system for the “benefit of present and future generations of humankind” on the basis of equity. They further ascribe to the precautionary principle in order to prevent and minimise the causes of climate change and limit its adverse effects, and are required to promote the right to sustainable development. Article 3 also explains that developed countries should bear a disproportionate or abnormal burden under the Convention, while the specific needs and special circumstances of developing countries should be given full consideration. This is reflected in article 4 of the Convention. According to this provision Annex I parties, which include the Netherlands and the EU, should take the lead in combatting climate change.²

These parties also agreed to reduce their greenhouse gas emissions individually or jointly to 1990 levels.³ This was later expanded on by the Kyoto Protocol of 1997 to the Convention. The Protocol, which bound the Netherlands, set legally binding reduction targets leading up to 2012.⁴ In 2012, the Doha Amendment to the Kyoto Protocol was agreed, according to which new binding targets were set. Under the Amendment, the EU

² United Nations Framework Convention on Climate Change (UNFCCC), Article 4(2)(a).

³ United Nations Framework Convention on Climate Change (UNFCCC), Article 4(2)(b).

⁴ Kyoto Protocol, Decision 1/CP.3, UN Doc FCCC/CP/1997/7/Add.1, 25 March 2008.

and its Member States agreed to jointly fulfil their commitment of a reduction of 20% by 2020.⁵ The EU offered to adopt a 30% reduction, provided that other developed countries agreed to similar reductions, and developing countries contributed relative to their responsibilities and own capabilities. The offer was not taken up. The Amendment has not yet entered into force at the time of writing.

The Conference of the Parties is established in article 7 of the UNFCCC as the supreme decision-making body of the Convention, entrusted with monitoring its implementation and that of any related legal instruments adopted by the Parties. Several Conferences have been held to date, usually referred to as Climate Conferences. It was for instance during the Climate Conference in Qatar that the Doha Amendment was agreed in 2012. Especially noteworthy also is the Bali Conference of 2007, which adopted the Bali Action Plan.⁶ This Plan was drafted in part as a response to and in recognition of the Fourth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC). The IPCC is a scientific body and intergovernmental organisation established under the auspices of the United Nations which assesses the science related to climate change.⁷ In its Fourth Assessment Report published in 2007, the IPCC explained that “a 1 to 2°C increase in global mean temperature above 1990 levels (about 1.5 to 2.5°C above preindustrial) poses significant risks to many unique and threatened systems including many biodiversity hotspots”.⁸ The Report is reflective of a general consensus in climate science and beyond that the increase in mean global temperature should not exceed 2°C.⁹ According to science, there would be a reasonable chance of keeping the mean global temperature in check if the concentration of greenhouse

⁵ Doha Amendment, Decision 1/CMP.8, UN Doc FCCC/KP/CMP/2012/13/Add.1, 28 February 2013.

⁶ Bali Action Plan, Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.

⁷ See Judgment 2015 of District Court of The Hague, paras. 2.8-2.10 (District Court of The Hague 2015); Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 4 (Court of Appeal The Hague 2018).

⁸ Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.), “*Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*” (An Assessment Report of Intergovernmental Panel on Climate Change (IPCC) 2007), 19.

⁹ See Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 3.5. (Court of Appeal The Hague 2018).

gasses in the atmosphere does not exceed 450 parts per million in the year 2100.¹⁰ This has been referred to as the “450 scenario”. According to the Report, this scenario would require a reduction in greenhouse gas emissions by Annex I parties of between 25% to 40% by 2020 relative to their 1990 emission levels.¹¹ By 2050 a reduction of between 80% to 95% would have to be achieved.

A number of Climate Conferences since have reiterated the case for urgent action and have referenced the need for states to follow the recommendations in the Fourth Assessment Report.¹² Parties have been encouraged to raise their ambition, and Annex I parties in particular to take the lead in drastically reducing their greenhouse gas emissions. Increasingly, mention is also made of aiming at an upper rise of the global mean temperature of only 1.5°C, as opposed to 2°.¹³ In this regard, article 2(1)(a) of the 2015 Paris Conference’s Agreement seeks to enhance the implementation of the UNFCCC by keeping the increase in the global temperature to “well below” 2°C and “pursuing efforts to limit temperature increase to 1.5°C above pre-industrial levels”.¹⁴

III. LEGAL DISPUTE AND DECISIONS

Urgenda, which is a contraction of “urgent” and “agenda”, is a foundation established in the Netherlands by notarial deed in 2008 functioning as a citizens’ platform.¹⁵ The foundation arose from the Dutch Research Institute for Transitions (Drift) which concerns itself with sustainability transitions at Erasmus

¹⁰ Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 3.5. (Court of Appeal The Hague 2018).

¹¹ B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds.), “*Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*” (An Assessment Report of Intergovernmental Panel on Climate Change (IPCC) 2007, Cambridge University Press), 776.

¹² For an overview, see Judgment 2018 of Court of Appeal The Hague, 9 October 2018, paras. 11, 51 (Court of Appeal The Hague 2018).

¹³ Decision of Cancun Climate Conference, 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011 (Cancun Climate Conference, 2011).

¹⁴ Decision of Paris Agreement 1/CP.21, UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016 (Paris Agreement 2016).

¹⁵ Judgment 2015 of District Court of The Hague paras. 2.1-2.2 (District Court of The Hague 2015); Judgment 2018 of Court of Appeal The Hague, para. 3.1 (Court of Appeal The Hague 2015).

University Rotterdam.¹⁶ According to article 2(1) of its by-laws, the “purpose of the Foundation is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands”.¹⁷ In bringing the case, *Urgenda* acted on its own behalf and that of 886 individuals who authorised it to represent their interests.¹⁸

The dispute between *Urgenda* and the state did not concern the fact that the state had to “mitigate” the problem of climate change. “Mitigation” in this context refers to reducing greenhouse emissions, as opposed to only “adaptation” or dealing with its consequences.¹⁹ The crux of the dispute concerned the pace at which mitigation had to take place.²⁰ In this regard, both parties accepted that the country’s greenhouse gas emissions would have to be reduced by 80-95% by 2050, when compared to 1990 levels. This mirrored the Fourth Assessment Report of the IPCC.

In reaching the end target, the Netherlands initially pursued a policy of reducing the country’s greenhouse gas emissions in 2020 by 30%, relative to 1990.²¹ In other words, a target higher than the Fourth Assessment Report’s minimum 25% reduction, but below its upper recommendation of 40%. After 2011 the Netherlands adjusted its policy to a target of 20% by 2020, which was in line with the goal of the EU.²² In meeting the common EU target, this meant that the Netherlands had to reduce greenhouse gas emissions by 2020 for the ETS sector by 21%, and for the non-ETS sector by 16%, relative to 2005.²³ For 2030,

¹⁶ Judgment 2015 of District Court of The Hague, para. 2.1 (District Court of The Hague 2015); “About Drift,” Drift for Transition, <https://drift.eur.nl/about/>.

¹⁷ Judgment 2015 of District Court of The Hague, para. 2.2 (District Court of The Hague 2015).

¹⁸ Judgment 2015 of District Court of The Hague, para. 2.4 (District Court of The Hague 2015).

¹⁹ Judgment 2015 of District Court of The Hague, para. 2.8 (District Court of The Hague 2015).

²⁰ Judgment 2015 of District Court of The Hague, para. 4.32 (District Court of The Hague 2015).

²¹ Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 19 (Court of Appeal 2018); Judgment 2015 of District Court of The Hague, paras. 2.71-2.72 (District Court of The Hague, 2015). This was in accordance with the Government’s “New Energy for the Climate Work Programme of the Clean and Sustainable Project” from 2007.

²² Judgment 2018 of Court of Appeal The Hague, para. 20 (Court of Appeal 2018).

²³ Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 17, 20 (Court of Appeal 2018). The European Emissions Trading System (ETS) refers to energy-intensive companies in the EU only being allowed to emit greenhouse gasses in exchange for emission allowances. Emission allowances can be bought, sold and stored. The amount of gasses such companies are allowed to emit is reduced annually, achieving a reduction of 21% in 2020, relative to 2005. See Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814.

the European Council committed the EU and its Member States to a binding reduction of at least 40%, building up to an 80% reduction in 2050 that would conform to the “450 scenario” in preventing irreversible climate change.²⁴

Urgenda disagreed with the Netherlands’ revised target of reducing greenhouse gas emissions by at least 20% in the EU context by the end of 2020, relative to the 1990 levels. As a consequence, the Foundation brought ten claims before the District Court in The Hague. Requesting inter alia, that the Court rule with immediate effect that:

“(6) *principally*: the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020 (...).”²⁵

Essentially, *Urgenda*’s main claim was designed to keep the Netherlands to the greenhouse gas reduction range recommended in the Fourth Assessment Report. On 24 June 2015, the Court passed judgment, ordering:

“(...) the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990 (...).”²⁶

The state appealed the judgment to the Court of Appeal in The Hague.²⁷ *Urgenda* for its part did not appeal any of its rejected claims, which meant that a reduction of greenhouse gas emissions of *more* than 25% by 2020 relative to 1990 levels was not at issue.²⁸ On 9 October 2018, the Court of Appeal upheld the judgment of the District Court, and also declared the judgment provisionally enforceable as the District Court had done.²⁹ As a consequence, the state was acting unlawfully by not pursuing a more ambitious path in reducing greenhouse gas

²⁴ Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 18 (Court of Appeal 2018); Judgment 2015 of District Court of The Hague, paras. 2.66-2.68 (District Court of The Hague 2015). See European Council (23 and 24 October 2014)-Conclusions, EUCO 169/14, conclusion 2.1; Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, referring to the 40% target in recitals 2 and 5.

²⁵ Judgment 2015 of District Court of The Hague, para. 3.1 (District Court of The Hague 2015).

²⁶ Judgment 2015 of District Court of The Hague, para. 5.1 (District Court of The Hague 2015).

²⁷ Judgment 2018 of Court of Appeal The Hague, paras. 30-33 (Court of Appeal 2018).

²⁸ Judgment 2018 of Court of Appeal The Hague, paras. 3.9, 27 (Court of Appeal 2018).

²⁹ Judgment 2018 of Court of Appeal The Hague, paras. 76 (Court of Appeal 2018).

emissions.³⁰ The state appealed the Court of Appeal's judgment to the Supreme Court, which rejected the appeal on 20 December 2019.³¹

IV. LEGAL GROUNDS: INTERNATIONAL LAW INDIRECTLY AND DIRECTLY APPLIED

Although their judgments achieve the same outcome, the District Court followed a different route than the Court of Appeal and the Supreme Court in establishing that the state had a duty of care in respect of the environment. The main ingredients used in this regard were *private law* (the Dutch Civil Code) and elements from the country's multilevel constitutional framework. Elements from this framework comprised *international law* (especially the UNFCCC and the European Convention on Human Rights (ECHR)), *EU law* and the *Constitution*. A mixture of these legal grounds can be found in the judgments with an emphasis on international law in constructing the state's duty of care.

The District Court held that in not reducing greenhouse gas emissions more, the state was acting unlawfully according to article 6:162 on torts in the Civil Code.³² The Court of Appeal also noted this ground in its judgement, but focussed on the application of the ECHR, as did the Supreme Court.³³ The District Court by comparison did not allow *Urgenda* to rely on the Constitution, international law or EU law, at least not *directly*.³⁴ Instead, as is explained below, the District Court used these sources *indirectly* for inspiration in deciding that a duty of care rested on the state in respect of the environment, and that it had not been fulfilled to the standard required by private law.

³⁰ Judgment 2018 of Court of Appeal The Hague, paras. 76 (Court of Appeal 2018).

³¹ Judgement 2019 of Supreme Court, para. 9 (Supreme Court 2019). In doing so, the Court followed the advice given it by the Deputy Procurator General and the Advocate General (ECLI:NL:PHR:2019:1026).

³² For the provision in English see <http://www.dutchcivillaw.com/legislation/dcctitle6633.htm>. On the question of comparable equivalents to this route in other jurisdictions, see Josephine van Zeben, "Establishing a Government Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" *Transnational Environmental Law* 4, no. 2 (2015): 339, 349-352. On aspects of tort law doctrine, see Marc Loth, "Climate Change Liability After All: A Dutch Landmark Case," *Tilburg Law Review* 21, no. 1 (2016): 5, 9-10, 25-29.

³³ Judgement 2019 of Supreme Court, para. 5 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 39, 46-53 (Court of Appeal 2018).

³⁴ Judgment 2015 of District Court of The Hague, paras. 4.44, 4.52 (District Court of The Hague 2015).

In deducing such a duty the District Court referred to the clear wording of article 21 of the *Constitution*, which provides that the state must “keep the country habitable and [...] protect and improve the environment”.³⁵ This approach is in line with Dutch courts’ practice of applying constitutional rights indirectly to private law by distilling the principle underlying a right, instead of applying any structural elements such as limitation provisions directly to a case.³⁶ Although the Court’s analysis started with the Constitution, very little attention was subsequently paid to this ground, as the Court turned to EU law and international law next.

In gauging its value, the District Court noted the increased role of *EU law* in protecting and caring for the environment.³⁷ Article 191 of the Treaty on the Functioning of the EU (TFEU) was highlighted, which outlines that the EU shall contribute to preserving, protecting and improving the quality of the environment. EU law can sometimes operate directly in the Netherlands’s legal order, which means that the courts (and executive) would be bound to apply it. This monism is not governed by national constitutional rules, as opposed to international law such as the ECHR, but falls under the autonomous rules of the EU itself. As the EU environmental rules were not directly applicable according to EU law, the District Court did not apply them as such.³⁸ The Court of Appeal also took note of article 191 TFEU, but did not apply this provision directly either.³⁹ The Supreme Court also refrained from applying EU law directly.

The question concerning the indirect application of *international law* was more complicated and a source of division between the District Court on the one hand, and the Court of Appeal and the Supreme Court on the other. In understanding the judgments’ reasoning, it must be understood that international law norms (i.e. non-EU norms) can be relied upon before courts (and the

³⁵ Judgment 2015 of District Court of The Hague, paras. 2.69, 4.36 (District Court of The Hague 2015).

³⁶ A.J. Nieuwenhuis, M. den Heijer and A.W. Hins, *Hoofdstukken grondrechten* [Fundamental Rights Chapters] (Nijmegen: Ars Aequi Libri, 2017), 162-165.

³⁷ For a critical appraisal of the judgment’s use of EU law, see Roy Suryapratim and Edwin Woerdman, “Situating *Urgenda v the Netherlands* within Comparative Climate Change Litigation,” *Journal of Energy & Natural Resources Law* 34, no. 2 (2016): 165, 174-177.

³⁸ Judgment 2015 of District Court of The Hague, para. 4.44 (District Court of The Hague 2015).

³⁹ Judgment 2018 of Court of Appeal The Hague, para. 16 (Court of Appeal 2018).

executive) in the Netherlands if such norms were intended to bind natural or legal persons in addition to the state, and are sufficiently clear to warrant application.⁴⁰ The direct application of international law is regulated in articles 93 and 94 of the Constitution.⁴¹ In applying these provisions, the rule of thumb holds that first generation or classical rights can be applied directly by courts, while second generation or social rights cannot.⁴² The thinking behind this rule being that classical rights are intended to be applied in individual cases and are clear enough to do so, while social rights are often too vague or not directed at persons. Also, international norms must be written in order to be directly applicable, which means that the unwritten nature of international customary law excludes it from such application.⁴³

In deciding the application of international law, *all* three Courts did not apply the *UNFCCC* directly. The District Court found that such norms could not be relied on by *Urgenda* as they were not binding on persons.⁴⁴ This is in accordance with the rule of thumb, as such norms essentially guarantee interests akin to social rights. In trying to persuade the bench that the Netherlands had to act to prevent climate change beyond its borders, the claimant also relied on the international “no harm principle”, which holds that a state cannot engage in activities on its territory damaging to other states.⁴⁵ This rule too was found to be binding between states alone.⁴⁶ This consideration was unnecessary though,

⁴⁰ See M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen and R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat* [Democratic rechtsstaat principles] (Deventer: Kluwer, 2017), 359-360.

⁴¹ They provide: Article 93: “Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.” Article 94: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.” Source of translation: <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>. See also Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

⁴² Burkens et al., *Democratische rechtsstaat*, 144. On classical and social rights, see Nieuwenhuis et al., *Hoofdstukken grondrechten*, 25-27.

⁴³ Supreme Court, 6 March 1959 (ECLI:NL:HR:1959:131); Supreme Court, 18 September 2001 (ECLI:NL:HR:2001:AB1471). Viewed from the perspective of art. 38(1) of the Statute of the ICJ, written sources such as international conventions are covered by art. 94 of the Constitution, but not unwritten sources such as international custom or general principles of law.

⁴⁴ Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

⁴⁵ Judgment 2015 of District Court of The Hague, para. 4.39 (District Court of The Hague 2015).

⁴⁶ Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

because as an example of customary international law, the rule would have been incapable of direct application.

A marked *difference* though arose between the Courts, as the District Court denied the direct applicability of articles 2 and 8 of the *ECHR*, the rights to life and respect for private and family life respectively. In arriving at its decision, the District Court held that *Urgenda* did not qualify as a “victim” in the sense of article 34 *ECHR* as the provision did not allow public interest litigation.⁴⁷ Only “victims” are capable of bringing cases before the European Court of Human Rights (ECtHR) according to the provision. According to the District Court the two *ECHR* rights could therefore only have an indirect bearing on the case in applying private law. However, as the Court of Appeal pointed out, the victim requirement is a rule of international procedure which governs access to the ECtHR and does not replace national procedure which governs access to Dutch courts.⁴⁸ This meant that the directly applicability of articles 2 and 8 *ECHR* had to be determined in accordance with articles 93 and 94 of the Constitution.

As articles 2 and 8 *ECHR* concerned classical rights and there was no reason to disregard the rule of thumb, the Court of Appeal and the Supreme Court applied them *directly*, as opposed to the District Court. These rights consequently formed the backbone of the higher courts’ judgments in defining the state’s duty of care in respect of the environment. The Courts’ reliance on these rights will be explored more in the sections to follow. It may be noted already that according to the Court of Appeal and the Supreme Court article 2 *ECHR* was applicable to environmental situations that could “affect or threaten” or pose a “real and immediate risk” to the right to life, and that article 8 *ECHR* applied in the event environmental situations impacted individuals’ private and family life.⁴⁹ In addition, the Supreme Court observed that states had a duty under article 1 *ECHR* to secure the Convention’s rights to everyone within their

⁴⁷ Judgment 2015 of District Court of The Hague, para. 4.45 (District Court of The Hague 2015).

⁴⁸ Judgment 2018 of Court of Appeal The Hague, para. 35 (Court of Appeal 2018).

⁴⁹ Judgement 2019 of Supreme Court, paras. 5.2.2.-5.2.3, 5.6.2-5.6.4 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 40 (Court of Appeal 2018).

jurisdictions, and that article 13 ECHR required states to provide “an effective remedy” in the event such rights were violated.⁵⁰

In making sense of the legal grounds employed by the Courts, their refusal to apply international law directly to the domestic context accords with the Dutch order’s rules in this regard, but as the Court of Appeal and the Supreme Court showed this refusal should not extend to the ECHR.

V. LEGAL ARGUMENTATION: REVIEWING THE DUTY OF CARE

The way in which the three Courts applied the legal grounds they identified in reviewing the state’s duty of care can be described as ground-breaking and activist. The question addressed in the *Urgenda* matter was far from mundane. At issue was not a typical vertical relationship concerned with vindicating an individual’s classical rights by preventing the state from acting in order to protect clearly defined interests, such as prohibiting censorship of expression. Instead, the case concerned public interest litigation aimed at enforcing social rights through positive state action in ensuring a healthy environment. While some jurisdictions still doubt or resist this type of judicial review, these judgments not only embraced it, but did so wholeheartedly.⁵¹

In truly appreciating the *scope* of the decisions, the epithet “social rights” would need to be understood broadly. This is because the *Urgenda* case essentially embellished the typical objective of second generation rights, understood as advancing equality by improving people’s living conditions in an *intra-generational* context, by adding an *inter-generational* dimension. The willingness of the District Court to factor in the interests of future generations illustrates this point.⁵² And although the Court of Appeal limited its enquiry to the consequences of climate change on the current generation, a position echoed by the Supreme Court, the ultimate implication of its order was to prevent irreversible climate change

⁵⁰ Judgement 2019 of Supreme Court, paras. 5.2.1, 5.5.1-5.5.3 (Supreme Court 2019).

⁵¹ See generally Malcolm Langford, “The Justiciability of Social Rights: From Practice to Theory,” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge: Cambridge University Press, 2008), 3-45.

⁵² Judgment 2015 of District Court of The Hague, para. 4.56 (District Court of The Hague 2015).

affecting future generations too.⁵³ The real effect was to cast the protection of the environment as a third-generation or “solidarity” right to sustainable development. In other words, people could not be allowed to meet their current needs in a way that would compromise the ability of future generations to meet their own, as the Brundtland Report defined sustainable development in 1987.⁵⁴

Adding to the ground-breaking nature of the judgments is the fact that a right to sustainable environmental development was not only recognised at law, but also duly enforced. The “polycentric” aspect of the case, the fact that a judgement deals with a matter that has an effect well beyond the immediate parties, did not deter the courts. Lon Fuller explained polycentric cases as being “many centred” in that pulling on one part of the spider’s web creates new centres of tension somewhere else along its pattern of lines.⁵⁵ This is clearly at issue in the *Urgenda* case, given the range of interests and parties affected by the decision to reduce greenhouse gas emissions in the country by 25% by 2020. Polycentric cases, Fuller argued, are better suited for solution by *managerial direction* or *contract*, than *adjudication*.⁵⁶ As an element of contract he pointed to the striking of “political deals” in achieving an “accommodation of interests” in settling polycentric problems. However, the judgments rejected as satisfactory the accommodation of interests that the Netherlands achieved when it agreed to a common EU-wide reduction of 20%, which was itself the product of international negotiation in the context of the Kyoto Protocol. Instead of deferring to political bargaining and inter-state accommodation, the Courts favoured adjudication as the most appropriate solution.

In addition to not preventing judicial review from taking place, polycentric concerns did not temper the *intensity* of the Courts’ review either. All three Courts exercised what can only be described as strict scrutiny in finding that the state was in breach of its duty of care to protect the environment. The fact

⁵³ Judgement 2019 of Supreme Court, para. 4.7 (Supreme Court 2019), Judgment 2018 of Court of Appeal The Hague, para. 37 (Court of Appeal 2018).

⁵⁴ Judgment 2015 of District Court of The Hague, para. 2,3 (District Court of The Hague 2015).

⁵⁵ Lon L. Fuller, “The Forms and Limits of Adjudication,” *Harvard Law Review* 92, no. 2 (1978): 395. See Langford, “Justiciability,” 36.

⁵⁶ Fuller, “Forms and Limits,” 399-400.

that the case was without precedent, and that a ready-made legal framework was lacking in solving it, did not temper the Courts in holding the state to account.⁵⁷

In conditioning the state's duty of care, the Courts emphasised the importance of the *precautionary principle*. The principle as it pertains to the environment is expressed in article 3(3) UNFCCC and article 191(2) TFEU, and has been recognised by the ECtHR.⁵⁸ The Court of Appeal and the Supreme Court gave particular attention to the precautionary principle in the context of the ECHR. The Court of Appeal explained that negative and positive obligations issue from articles 2 and 8 ECHR. The Court noted that the ECHR required concrete measures by the state to prevent future violations of these rights. Future violations, it explained, meant that a protected interest was not yet infringed, but that an infringement was imminent because of an act, activity or natural event meeting a "minimum level of severity".⁵⁹ The Supreme Court noted similarly that where a "real and immediate risk" arose, something which could also develop over time, the state had to take precautionary measures to protect these rights even if it was not entirely sure that the threat would materialise.⁶⁰ In fulfilling its duty to prevent such infringements the state had to observe "due diligence", but not in a manner that implied an "impossible or disproportionate burden" for the state.⁶¹ This meant the state had to take reasonable and concrete actions within its powers to prevent imminent threats. The Court of Appeal emphasised that this applied to public and non-public threats, which included industrial activities which it noted were dangerous by their very nature.⁶²

In assessing whether the state had indeed fulfilled its duty of care, the three Courts described the nature and seriousness of climate change. The District Court summarised its enquiry as one into "the nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of this damage and the chance that hazardous climate change will occur".⁶³ In

⁵⁷ In this regard, see Judgment 2015 of District Court of The Hague, para. 4.53 (District Court of The Hague 2015).

⁵⁸ ECtHR, *Tătar v. Romania*, Application no. 67021/01, 27 January 2009, para. 120.

⁵⁹ Judgment 2018 of Court of Appeal The Hague, para. 41 (Court of Appeal 2018).

⁶⁰ Judgement 2019 of Supreme Court, paras. 5.2.2, 5.3.2 (Supreme Court 2019).

⁶¹ Judgement 2019 of Supreme Court, paras. 5.3.3-5.3.4 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 42 (Court of Appeal 2018).

⁶² Judgment 2018 of Court of Appeal The Hague, para. 43 (Court of Appeal 2018).

⁶³ Judgment 2015 of District Court of The Hague, paras. 4.64-4.65 (District Court of The Hague 2015).

this regard, it was made clear that the state could be held responsible for the collective emission of greenhouse gasses in the country, even though it did not cause them directly, as it had the power and duty to regulate these emissions.⁶⁴ The Court concluded that the risks of serious climate change were very high, that the state had known of the problem since 1992 and therefore had a serious duty of care to mitigate the problem expeditiously.⁶⁵ “Prevention is better than the cure” the Court held as it rejected the state’s counter-arguments.⁶⁶ “Carbon leakage” was no defence, the idea that a Dutch reduction in emissions would be neutralised by other EU states, thereby not reducing the block’s emissions as a whole.⁶⁷ The state’s argument that it was bound to respect the EU’s collective effort to reduce emissions by 20% by 2020 was interpreted as being a minimum requirement, meaning the state could be ordered to do more.⁶⁸ The argument that reductions in the Netherlands were negligible on a global level failed to convince too, as did the argument that a reduction would mean an unequal playing field for Dutch businesses in having to compete with foreign businesses not subjected to similar constraints.⁶⁹ Apart from evaluating arguments dealing with the merits of reducing greenhouse gas emissions, the Court defended its own function against the background of the separation of powers. The state had namely argued that this doctrine prevented the Court from issuing an order that it had to do more in combatting climate change than it had already planned. The Court explained that it would not enter the political domain or seek such support for its decisions, but that did not rule out that its decisions might have political implications.⁷⁰

In holding it responsible and capable to act, the Court of Appeal and the Supreme Court joined the District Court in rejecting the state’s arguments.⁷¹

⁶⁴ Judgment 2015 of District Court of The Hague, para. 4.66 (District Court of The Hague 2015).

⁶⁵ Judgment 2015 of District Court of The Hague, para. 4.65 and 4.73. (District Court of The Hague 2015).

⁶⁶ Judgment 2015 of District Court of The Hague, para. 4.66 (District Court of The Hague 2015), Judgment 2015 of District Court of The Hague, para. 4.76 (District Court of The Hague 2015).

⁶⁷ Judgment 2015 of District Court of The Hague, para. 4.81 (District Court of The Hague 2015).

⁶⁸ Judgment 2015 of District Court of The Hague, para. 4.80 (District Court of The Hague 2015).

⁶⁹ Judgment 2015 of District Court of The Hague, paras. 4.78, 4.82 (District Court of The Hague 2015).

⁷⁰ Judgment 2015 of District Court of The Hague, paras. 4.94-4.102 (District Court of The Hague 2015).

⁷¹ Judgement 2019 of Supreme Court, paras. 2.3.2, 7.5.3 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 54-58, 60-62 (Court of Appeal 2018).

The Supreme Court was clear about the fact that the reduction target of 25% could be relayed to the Netherlands as such and did not refer to a collective benchmark for Annex I states as a group. It was also unconvinced, as was the Court of Appeal, that an increased reduction would place a disproportionate burden on the state.⁷² As to the separation of powers, the Court of Appeal and the Supreme Court amplified the District Court's findings, explaining that the state was not ordered to enact legislation of any kind, thereby leaving the manner of the reduction to the state's discretion.⁷³ The Supreme Court acknowledged that the country's constitutional dispensation entrusted decision-making about the reduction of greenhouse gas emissions to the legislature and executive.⁷⁴ This, though, had to be understood against the background of the courts' duty to apply ECHR rights in cases before them, the protection of which formed an essential part of the democratic *rechtsstaat*.⁷⁵

By the time the case reached the Court of Appeal and the Supreme Court, the serious nature of climate change had only become more pronounced. The Supreme Court feared that a "tipping point" could be reached, leading to abrupt and far-reaching climate change.⁷⁶ Analysis showed that the problem was more concerning than revealed by the figures at first glance.

Forecasts at the time of the Court of Appeal's judgment predicted a reduction of emissions in the EU of between 26% and 27% in 2020, in relation to 1990.⁷⁷ Pertaining to the Netherlands, the forecast was that the country would reduce its greenhouse gas emissions by 23% by 2020.⁷⁸ Accounting for the margin of uncertainty, this figure could range from 19% to 27%.⁷⁹ This was certainly more optimistic than at the handing down of the District Court's judgment in 2015, when the prediction was that the country would only achieve a reduction of 14%

⁷² Judgement 2019 of Supreme Court, paras. 2.3.2, 7.5.3 (Supreme Court 2019).

⁷³ Judgement 2019 of Supreme Court, paras. 8.2.4, 8.2.6 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 42, 73-74 (Court of Appeal 2018).

⁷⁴ Judgement 2019 of Supreme Court, para. 8.3.3 (Supreme Court 2019).

⁷⁵ Judgement 2019 of Supreme Court, para. 8.3.3 (Supreme Court 2019).

⁷⁶ Judgement 2019 of Supreme Court, paras. 4.2, 7.2.10 (Supreme Court 2019).

⁷⁷ Judgment 2018 of Court of Appeal The Hague, para. 18 (Court of Appeal 2018).

⁷⁸ Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).

⁷⁹ Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).

to 17% by 2020 in relation to the base year.⁸⁰ Based on the later predictions, the state stood a reasonable chance of achieving a reduction in the range requested by *Urgenda*.

In analysing these figures though, the Court of Appeal noted that more recent scientific calculations revealed that there was actually a *higher* concentration of greenhouse gasses in the atmosphere than previously thought.⁸¹ The real threat to the climate was therefore more serious than had been assumed in the past. If older estimates about the level of greenhouse gasses present in the atmosphere had been correct, which apparently they were not, a reduction by the Netherlands of only 17% in relation to 1990 would have achieved more in real terms, than the later forecast reduction of 23% in the context of a greater concentration of gasses.⁸²

The scale of the threat posed by climate change, taken together with the measures necessary to mitigate the risk, led all three Courts to conclude that the state had to do more within the scope of its powers to combat the problem. This close and intense scrutiny of the state's policy on climate change resulted in it having to pursue a reduction of 25% by 2020, as advised in the IPCC's Fourth Assessment Report from 2007.

VI. EVALUATION: INCONGRUENCIES BETWEEN LEGAL GROUNDS AND LEGAL ARGUMENTATION

The proportionality exercises conducted by the District Court, Court of Appeal and Supreme Court were sincere and well-argued attempts at defining the duty of the Netherlands in addressing the pressing problem of climate change. In this regard, the judgments covered the four criteria found across jurisdictions in cases with budgetary implications by delineating the state's duty of care, establishing its contribution to the violation, weighing the violation's seriousness and determining the manageability of the state carrying out the

⁸⁰ Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).

⁸¹ Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018); Judgement 2019 of Supreme Court, para. 2 (Supreme Court 2019).

⁸² Judgement 2019 of Supreme Court, para. 2 (Supreme Court 2019).

court's order.⁸³ However, *noteworthy incongruences* become apparent between the Courts' arguments and the legal grounds on which they are based. These incongruences pertain not only to the legal sources used by the Courts in arriving at their judgments, but also pertain to the intensity of the judicial review based on such sources.

Attention is turned first to the use of the Civil Code by the *District Court* in deciding the lawfulness of the state's policy. What is remarkable is that the Court put so much emphasis on international climate norms in judging whether the state was acting as required under its duty of care to protect the environment.⁸⁴ The relevant norms were not directly applicable as the Court rightly explained, as they could only serve to indirectly infuse the private law test for unlawfulness.⁸⁵ Yet, the Court's extensive reliance on such norms could easily have been mistaken for their direct application. International climate norms were used not only to construct the state's duty of care, but also to substantially narrow down the state's discretion in fulfilling that duty. The practical effect was essentially to downplay or even erase the distinction between international law norms that are directly applicable by domestic judges in accordance with articles 93 and 94 of the Constitution, and norms which are not.⁸⁶ In this way the very function of these two provisions in making a distinction between international law which binds the state only, as opposed to international law which also applies to individuals, was made redundant.

This conclusion is compounded by the fact that the District Court also made no distinction between *written* and *unwritten* international norms. In infusing its private law enquiry, the Court relied on international norms derived from treaties in the same breath as the unwritten "no harm" principle found

⁸³ Langford, "Justiciability", 37.

⁸⁴ Compare K.J. de Graaf and J.H. Jans, "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change," *Journal of Environmental Law* 27, no. 3 (2015): 517, 525.

⁸⁵ See section 4 of this contribution.

⁸⁶ Compare Leonard Besselink, "*De constitutioneel meer legitieme manier van toetsing: Urgenda voor het Hof Den Haag* [Constitutionally More Legitimate Review. Urgenda in The Hague District Court]," *Nederlands Juristenblad*, no. 41 (2018): 3079, 3081-3081, who notes and questions the reliance placed on non-binding international norms by the District Court, extending this criticism to the role such norms played in the Court of Appeal's judgment. He explains that the difference between the two judgments is a formal rather than a material one.

in customary international law.⁸⁷ As explained in discussing the legal grounds, it is standard judicial practice in the Netherlands that such unwritten norms do not qualify for direct applicability in the domestic order.⁸⁸ While the direct applicability of written international law could still be allowed under articles 93 and 94 of the Constitution, the “no harm” principle would have been excluded from such application. Yet, the District Court placed both written and unwritten sources on a par with each other without giving further thought to each’s ideal weight in the equation.

The sum of these points leads to the curious situation that the *indirect* route of applying international law allowed the Court to achieve *more* than it would have been able to, had the route of *direct* application been followed. Instead of enabling judges to apply international law, the requirements for the direct applicability of such law in the Constitution actually turned into an impediment when compared to the District Court’s generous approach to indirect applicability. In this regard it is important to note that the purpose of this observation is not to question the indirect applicability of international law to private law in principle. The practice is to be encouraged as a way of recognising the presence of international law in the country’s monist legal order, as well as the high regard in which such law is held. Rather the indirect application of such law, also given its inability to have been applied directly, should arguably have restrained the intensity of the District Court’s review. The Court could for instance have given more weight to the state’s arguments and existing legal commitments in the context of its EU membership.

As explained, the *Court of Appeal* and the *Supreme Court’s* decisions rested on the direct applicability of the ECHR, in particular article 2 on the right to life and article 8 on the respect for private and family life.⁸⁹ This was undoubtedly correct, as opposed to the District Court’s refusal to accept the direct applicability of these rights. Again though the legal arguments advanced might be said to be incongruent when compared with the legal basis relied on by the Courts.

⁸⁷ Judgment 2015 of District Court of The Hague, paras. 4.42-4.43 (District Court of The Hague 2015).

⁸⁸ See section 4 of this contribution.

⁸⁹ See section 4 of this contribution.

When applying international law directly, the general position of courts in the Netherlands is that the limits set by international courts in interpreting such law are not to be exceeded.⁹⁰ The Supreme Court in *Urgenda* confirmed this position, when it explained that judges must follow ECtHR judgments or interpretative methods in determining the meaning of ECHR provisions.⁹¹ This was also noted in discussing the nature of the effective national remedy to be provided according to article 13 ECHR.⁹² The effect is that the ECHR as duly interpreted and applied by the ECtHR becomes a *maximum* norm and not a *minimum* norm when guiding courts in the Netherlands.

Although the ECHR does not protect the right to a healthy environment as such, as the Supreme Court also observed, the rights it does protect can be invoked because of “environmental degradation”.⁹³ It is open to discussion though whether the ECtHR would have conducted a review of articles 2 and 8 ECHR as strict as the Court of Appeal and the Supreme Court had done.⁹⁴ For instance, the ECtHR’s contribution to regional integration and sustainable development has as recently as 2015 been described as “not major” and its case law as not having resulted in progressive environmental policies, the harmonisation of environmental standards, or the explicit recognition of the complete integration of economic, social and environmental considerations in contributing to sustainable development.⁹⁵ States are usually also held to account by the ECtHR to the extent that they failed to adhere to domestic environmental standards.⁹⁶ In addition,

⁹⁰ Supreme Court, 10 August 2001 (ECLI:NL:HR:2001:ZC3598); Nieuwenhuis et al., *Hoofdstukken grondrechten*, 229-231.

⁹¹ Judgement 2019 of Supreme Court, para. 5.6.1 (Supreme Court 2019), referring to Supreme Court, 16 December 2016 (ECLI:NL:HR:2016:2888), para. 3.3.3.

⁹² Judgement 2019 of Supreme Court, para. 5.5.3 (Supreme Court 2019).

⁹³ See the discussion by Jonathan Verschuuren and Werner Scholtz, “Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe,” in *Regional Environmental Law*, eds. Jonathan Verschuuren and Werner Scholtz (Cheltenham: Edward Elgar, 2015), 382-383; Judgement 2019 of Supreme Court, para. 5.2.3 (Supreme Court 2019).

⁹⁴ See Ingrid Leijten, “The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease,” *VerfassungsBlog*, 19 October 2018, <https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/>. Ingrid Leijten, “Human Rights v. Insufficient Climate Action: The Urgenda Case”, *Netherlands Human Rights Quarterly* 37, no. 2 (2019): 112, 118 explains that efforts are needed “to ensure that human rights ‘fit’ climate change.”

⁹⁵ Verschuuren and Scholtz, “Contribution of the Case Law,” 384-385.

⁹⁶ Verschuuren and Scholtz, “Contribution of the Case Law,” 383. This captures the idea of social rights as standstill norms which guarantee a level of protection relative to what a state has achieved or committed itself to. On this idea, see Burkens et al., *Democratische rechtsstaat*, 145.

the scope of the ECtHR cases relied on by the Supreme Court was not on the same national or global scale as in the *Urgenda* case, but was often localised to mudslides in a particular area, health and environmental threats issuing from a gold mine or pollution caused by a specific steelworks.⁹⁷ This raises questions as to whether the ECtHR precedents relied on matched the facts sufficiently in order to support the outcome of the case. And while in some of the ECtHR cases there was hardly any state action to speak of, the Dutch state could not be accused of a complete dereliction of duty, which would have required the Courts to act as surrogates.⁹⁸ The state acted by working successfully towards the goal of an EU-wide 20% reduction of greenhouse gas emissions by 2020. In this sense there was arguably “a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” in article 2 ECHR, as required in *Öneriyildiz v. Turkey*.⁹⁹ The conclusion that the Netherlands did not fail in its positive obligations could in all likelihood also be applied to article 8 ECHR. This is because the ECtHR takes articles 2 and 8 ECHR largely together in the context of activities that can endanger the environment, as the Supreme Court also noted.¹⁰⁰

Amplifying the state’s commitment is its recognition, with *Urgenda*, of the need for an overall reduction of 80% to 95% of emissions by 2050 in order to prevent serious and irreversible climate damage. The state also did not pursue a policy of only mitigation, in other words of addressing the consequences of climate change, but it also recognised and acted upon the need to address the problem by actively reducing greenhouse gas emissions. Moreover, by the time the Court of Appeal handed down its judgment in 2018 a new national government had been formed which committed itself to a reduction of 49% of

⁹⁷ ECtHR, *Budayeva v. Russia*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008; ECtHR, *Tătar v. Romania*, Application no. 67021/01, 27 January 2009; ECtHR, *Cordella v. Italy*, Application nos. 54414/13 and 54264/15, 24 January 2019.

⁹⁸ ECtHR, *Budayeva v. Russia*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, paras. 147-158.

⁹⁹ ECtHR, *Öneriyildiz v. Turkey*, Application no. 489393/99, 30 November 2004, para. 89. Consider also, Roel Schutgens, “*Urgenda en de trias: Enkele staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter* [Urgenda and the Trias: Some Constitutional Notes on a Much-discussed Climate Case],” *Nederlands Juristenblad*, no. 33 (2015): 2270, 2272.

¹⁰⁰ Judgement 2019 of Supreme Court, para. 5.2.4 (Supreme Court 2019); ECtHR, *Brincat v. Malta*, Application no. 60908/11, 24 July 2014, para. 102.

emissions by 2030.¹⁰¹ Given this context it is not unthinkable that the ECtHR would have recognised the efforts taken by the state as sufficient in discharging its responsibilities under the ECHR. A more stringent level of review would then have been left to the discretion of the national authorities.

Were the ECtHR though to adopt a level of scrutiny as intense as that of the Court of Appeal and the Supreme Court, it would imply a similar level of strict scrutiny for other states in addition to the Netherlands. This would have far-reaching polycentric implications, as a “hard” and uniform third generation right to sustainable development would emerge across the Council of Europe, leaving states limited room for independent manoeuvre. Such a level of scrutiny is contentious though, as the right to a healthy environment is only deduced from the ECHR and might not be included in its text anytime soon given the lack of political agreement on this point. Yet, strictly enforcing such a right could require all Annex I countries which are party to the ECHR, of which there are more than 35, to enforce the greenhouse gas emission recommendations in the Fourth Assessment Report of the IPCC. Although the Supreme Court pointed to *international* consensus on reducing emissions by 25% by the end of 2020 as part of its “common ground” analysis in holding the Netherlands to this reduction, the perceived common ground across the *Council of Europe* might be open to doubt.¹⁰² This is because the EU, which comprises 27 Council of Europe members, chose to pursue a minimum reduction of only 20% after its earlier offer of 30% was not taken up by other states in the context of the Doha Amendment. The effect is to question the reliance placed on such a common ground by the Supreme Court, and consequently the strict level of scrutiny derived from it.

The purpose here is not to argue that a reduction of 25% should not have been ordered under any circumstances, but rather to question whether the ECtHR would have arrived at the same conclusion as the Supreme Court. Given that an expectation of such congruence underscored the Supreme Court’s judgment, it was regretful that the Court chose not seek an advisory opinion from the ECtHR

¹⁰¹ Judgment 2018 of Court of Appeal The Hague, para. 3.7 (Court of Appeal 2018).

¹⁰² Judgement 2019 of Supreme Court, paras. 5.4.1-5.4.3, 7.2.11 (Supreme Court 2019).

in accordance with Protocol No. 16 of the ECHR.¹⁰³ This would have given the ECtHR an opportunity to clarify the principles and framework to be applied to such an important and novel case.

VII. EVALUATION: GAPS IN THE LEGAL FRAMEWORK

In addition to the discussed incongruences, a noteworthy *gap* can be identified in the legal grounds relied on by the District Court, Court of Appeal and Supreme Court. In analysing the judgments, it becomes apparent that there is no real *Constitution-based voice* in grounding the balancing exercises conducted by these Courts. This is illustrated by the District Court's indirect reliance on international law, and the Court of Appeal and the Supreme Court's direct application of such law. The voices in evidence are either derived from international law, or national private law.

Any references to the Constitution, as the prime example of national public law, are only made in passing and not essential to the Courts' arguments. For instance, while the District Court opened its construction of the state's duty of care in respect of the environment by reference to the corresponding social right in article 21 of the Constitution, it quickly moved on to discuss the impact of international law in this regard. The role of the constitutional right was otherwise quite limited. The Constitution fared no better in the judgment of the Court of Appeal where it was not even mentioned, while the Supreme Court's reference to the Constitution was primarily limited to explaining its role in the direct application of the ECHR.¹⁰⁴ From a comparative perspective such a near constitutional silence is certainly striking. For instance, the case law from other jurisdictions evidences an important role for their respective Constitutions in questions related to social issues.¹⁰⁵

¹⁰³ Judgement 2019 of Supreme Court, para. 5.6.4 (Supreme Court 2019).

¹⁰⁴ Judgement 2019 of Supreme Court, paras. 5.6.1, 8.2.1, 8.2.4, 8.3.3 and 8.2.1. (Supreme Court 2019).

¹⁰⁵ On South Africa, see Pierre de Vos and Warren Freedman, eds., *South African Constitutional Law in Context* (Oxford: Oxford University Press, 2014), 667. On Colombia and Brazil, see David Landau, "Judicial Role and the Limits of Constitutional Convergence in Latin America," in *Comparative Constitutional Law in Latin America*, eds. Rosalind Dixon and Tom Ginsburg (Cheltenham: Edward Elgar, 2017), 235-238, 247.

The near absence of the Constitution from the judgments in the *Urgenda* case can at best be explained as the consequence of article 120 of the Constitution. This provision provides that: “The constitutionality of Acts of Parliament (...) shall not be reviewed by the courts.” The effect is to establish a *strict* separation of powers between the legislature on the one hand, and the courts on the other. Courts are to apply the Constitution, but are barred from establishing the constitutionality of acts of parliament, as this function is reserved solely for the legislature.

Admittedly, the *Urgenda* case did not involve the review of an act of parliament, or an order enjoining the state to adopt such an act. Yet the bar on review has a pervasive effect well beyond its textual confines by minimising the role and importance of the Constitution in general. The bar dates from 1848 and has survived all attempts at reform. Recently an amendment bill which would have allowed the judicial review of classical rights guaranteed in the Constitution came to lapse during its second reading, meaning that the bar will again stay intact.¹⁰⁶ The lack of success in changing the bar on judicial review is paradoxically matched by the calls for it to be reconsidered. For instance, at roughly the same time the attempt at reforming the bar failed in 2018, the State Commission on the Parliamentary System advised the government to relax the bar in order to ensure sufficient legal protection in the country.¹⁰⁷ This call too is unlikely to result in reform as the government rejected the recommendation.¹⁰⁸

The primary reasons for the provision’s resistance to reform are the difficult constitutional amendment procedure on the one hand, and the role of treaty review in the country’s multilevel order on the other.¹⁰⁹ As the *Urgenda* case illustrates, courts can rely on international law either indirectly or directly in checking the public exercise of power, which has led to treaty review attempting

¹⁰⁶ *Parliamentary Papers II*, 2018/2019, no. 10, item 8.

¹⁰⁷ Staatscommissie Parlementair Stelsel, *Lage drempels, hoge dijken. Democratie en rechtsstaat in balans* [Democracy and the Rule of Law in Equilibrium] (Amsterdam: Boom, 2018), 195-216.

¹⁰⁸ *Parliamentary Papers I*, 2019/2020, 34430, T, p. 9. Compare Burkens et al., 202-204; Gerhard van der Schyff, “Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far,” *German Law Journal* 11, no. 2 (2010): 275; Gerhard van de Schyff, “The Prohibition on Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform,” *German Law Journal* 21, no. 5 (2020): 884.

¹⁰⁹ For the amendment procedure, see art. 137 of the Constitution.

the role which constitutional review might fulfil in other jurisdictions. As a consequence the ECHR can be described as the Netherlands' *de facto* bill of rights given its frequent application by the country's courts.¹¹⁰ In understanding this situation it must be noted that it is not the product of design or clear intent, but probably that of coincidence. While courts laboured under the bar on reviewing the Constitution, the large body of international law generated after the Second World War came to be increasingly applied by the same courts because of the country's monist legal system which opens up the national legal order to international law. Far from substituting the function of constitutional review in a satisfactory way though, a concerning contradiction has arisen. This is because the country's legal system is based on *political constitutionalism*, regarding the role of the Constitution, while also embracing *legal constitutionalism*, regarding the role of international law. This simultaneous reliance on opposing strands of constitutionalist thinking does not make for an easy or happy co-existence.

These contradictory positions have led to the Constitution, as an important national source of law, being overshadowed by a near automatic and far-reaching reliance on the judicial enforcement of international law.¹¹¹ A constitutional drought of sorts has occurred in that the country's public law culture has increasingly been equated with international law. This is not a mere formal or superficial issue either. The *Urgenda* judgments show that in rendering effective legal protection courts have had to stretch the realms of possibility in applying international law both indirectly and directly, while neglecting the Constitution.¹¹² Ideally, courts in the Netherlands should have been able to develop and rely on a strong Constitution-based culture in reviewing state action or inaction in important fields such as climate policy. This approach would arguably have resulted in a sounder and more credible legal basis in the *Urgenda* case, as opposed to the current over-reliance on international law. The aim though should not be to exclude international law from the equation, but to allow article 21 of the Constitution

¹¹⁰ See also Burkens et al., *Democratische rechtsstaat*, 358-359.

¹¹¹ Compare Ernst M.H. Hirsch Ballin, *De Grondwet in politiek en samenleving. Rechtsstaatlezing 2013* [The Constitution in Politics and Society: Rechtsstaat Lecture 2013] (The Hague: Boom Lemma, 2013), 9-13.

¹¹² See also De Graaf and Jans, "The *Urgenda* Decision," 525 who ask whether specific constitutional provisions have "lost their meaning".

to fulfil a prominent role. However, the effect of the bar on judicially reviewing acts of parliament has been to limit case law on the Constitution, which in turn has negatively impacted on the country's constitutional culture in general.

VIII. ON JUDICIAL DESTABILISATION AND CONSTITUTIONAL REFORM

The idea of creating a “destabilisation branch” of government has been mooted in rethinking the traditional separation of powers. The purpose of such a branch would be to intervene in the event structures become ossified by not adapting quickly enough to a changing environment.¹¹³ When the idea is applied to the *Urgenda* case, the three Courts involved, although not forming a new or special branch of government, did arguably act as “destabilisation” agents by interrupting state bureaucracy on the issue of climate change. Settled patterns of state thinking and decision-making were questioned and overturned by these Courts, much as a special destabilisation branch might do. The effect of their intense scrutiny of the state's policy in reducing greenhouse gas emissions was to fundamentally question the conventional setting of the separation of powers in the Netherlands. The Courts were not deterred by the notion that the *separation* of powers requires standard deference on the part of unelected courts when faced by clearly formulated government policy and action. The radical nature of these judgments is confirmed by some commentaries which speak of the need to maintain a clear separation of powers which would preclude courts from moving too far into the political domain.¹¹⁴

The modern reality though is more complex and demanding than relying on traditional maxims about the separation of powers and the settled role of the courts. Democratic theory has come to show that classic arguments about the courts being undemocratic, thereby casting doubt on the function of judicial

¹¹³ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2018), 123–124 discussing the constitutional use of Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987).

¹¹⁴ Consider especially Schutgens, “Urgenda en de trias,” 2270; Lucas Bergkamp, “Het Haagse klimaatvonnis: Rechterlijke onbevoegdheid en de negatie van het causaliteitsvereiste [The Hague Climate Judgment: Judicial Incompetence and the Negation of Causality],” *Nederlands Juristenblad*, no. 33 (2015): 2278, 2287. Consider also Besselink, “Meer legitiem,” 3081, and Leonard Besselink, “Naschrift [Postscript],” *Nederlands Juristenblad*, no. 9 (2018): 606; L.F.M. Besselink, “Machtenscheiding in de Urgenda-zaak [Separation of Powers in Urgenda],” *Tijdschrift voor Constitutioneel Recht* 11, no. 2 (2020): 128, 130, 150.

review, need to be revisited. Pierre Rosanvallon explains that today “electoral democracy” is reinforced or buttressed by “indirect powers”, to which the power of judgment belongs.¹¹⁵ This power has a place in the “general grammar of democratic action” and is “yet another way of regulating the political system in a democracy”.¹¹⁶ In this scheme a recourse to the courts can itself be viewed as a way of allowing people to make themselves heard, in addition to “episodic democracy” through the ballot box. It is also in this context that pressing situations may and do arise which require the destabilisation of everyday decision-making and political bargaining. In the process mainstays such as the separation of powers and the role of the courts might have to be reinterpreted and reconfigured in meeting real needs. There is definitely a case to be made for courts acting as agents of destabilisation in this way.

In principle, therefore, an argument can be made in support of the three Courts’ intervention in the *Urgenda* case. However, as the analysis has shown, the judgments are open to criticism in the way they approached the matter. Even challenging state action in the cause of exceptional situations, such as climate change, cannot result in near free-floating balancing exercises by courts. The function of destabilisation, too, is in need of *predictability* if it is to be repeated in future and justified for the present. Otherwise, the act of destabilisation would miss the mark and mean little more than instability. The very fact that the District Court departed from national private law in judging the state’s policy, whereas the Court of Appeal and the Supreme Court emphasised public international law, illustrates the lack of and need for predictability in this regard. In addition, the *overstretching* of judicial power in the application of international law also became apparent. This is because of the District Court’s blurring of the constitutional distinction between the direct and indirect application of such law. To this can be added the doubts about whether the strict scrutiny of the

¹¹⁵ Pierre Rosanvallon, *Counter-democracy. Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008), 8. See too Rob van Gestel and Marc Loth, “Voorbij de trias politica: Over de constitutionele betekenis van ‘public interest litigation [Past the Trias Politica: Constitutional Meaning and Public Interest Litigation],” *Ars Aequi* 68, (2019): 6.

¹¹⁶ Rosanvallon, *Counter-democracy*, 247.

state's policy by the Court of Appeal and the Supreme Court would have been repeated by the ECtHR.

As explained in the previous section, the lack of a *national constitutional voice* in the Netherlands lies at the root of such difficulties with the *Urgenda* judgments. For too long the *irreconcilable dichotomy* between legal constitutionalism, expressed by treaty review, and political constitutionalism, expressed by the bar on constitutional review, has been allowed to simmer. The consequence of which has been considerable outsourcing to international law and an overreliance on private law. The polycentric questions raised in these judgments about the enforcement of essentially third generation rights should have benefitted from the moorings of a strong national-based constitutional culture in tandem with the country's international obligations. Instead, the bar on the constitutional review of acts of parliament has resulted in the strange case of the missing Constitution where one is needed for exercises in deliberation and justification, and even destabilisation.

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