Jean Monnet Working Paper Series
-
Environment and Internal Market

Vol. 2020/1

Link between Climate Change and Positive Obligations of a Preventive Nature

Reflections on the Judgment of the Hoge Raad in *Urgenda*

by

Nicolas de Sadeleer, Professor of EU law, Jean Monnet Chair
University of Saint Louis

Published on https://tradevenvironment.eu/

desadeleer.nicolas@gmail.com

Abstract The judgment of the Hoge Raad (hereafter HR) given on 20 December 2019 in the *Urgenda* case upheld the Court of Appeal judgment of 9 October 2018 ruling on a collective interest action brought by the Urgenda Foundation on behalf of 886 Dutch citizens objecting to the inadequacy of measures to reduce greenhouse gas (GHG) emissions in the Netherlands. The HR largely endorsed the particularly detailed advisory opinions delivered on 13 September 2019 by Procurator General F.F. Langemeijer and Advocate General M.H. Wissink. The HR judgment is of particular interest in view of the personal, temporal and substantive scope of Articles 2 and 8 of the European Convention on Human Rights (hereafter ECHR). A complete discussion of the judgment is beyond the scope of this paper.

1. Introduction

For around twenty years, environmental concerns have progressively been incorporated into the interpretation of first-generation human rights, including in particular the right to life (Article 2) and the right to respect for private and family life (Article 8) guaranteed under the ECHR.[1] Thanks to a constructive and dynamic interpretation of the Convention, the ECtHR has been able, by extension, to guarantee a minimum level of environmental protection. Until the The Hague Court of Appeal held in 2018 that Articles 2 and 8 ECHR had been violated due to an overly cautious domestic policy to combat global warming, the application of fundamental rights to review domestic climate change mitigation policies was still a disputed matter.[2] Lately the link between climate change and positive obligations of a preventive nature that are incumbent upon States under human rights law has been increasingly debated. Since the 2018 The Hague Court of Appeal' judgment, the debate has been in full swing as climate risks may be distinguished from industrial and technological risks both due to their temporal unpredictability as well as the collective nature of the harm they are liable to cause.

Indeed, given that climate change is permeated by uncertainty, scientists are unable to determine with precision the regularity, frequency and magnitude of impacts, regardless of the quality of their models. The impacts climate change may provoke are likely to vary in terms of

- time of latency between the increase of temperatures and the actual impact of damage (gradual or abrupt),
- speed (acceleration or deceleration),
- frequency of natural events (storms, floods, droughts, wildfires, erosion),
- duration (persistent, reversible, slowly reversible, irreversible, multigenerational),
- magnitude (cumulative or synergistic, serious or insignificant),
- localization (e.g., change in the regional distribution of precipitation, acidification of oceans, Arctic region warming more rapidly than the normal mean, warming over land larger than over the ocean, increase concentration of ozone),
- effects (human health, vulnerable countries, biodiversity loss, agricultural yields, tourism),
- and scale (global, continental, or regional).

Against this background, the potential victims are by definition less easy to identify than residents living in the vicinity of a classified installation. However, with only a few

[1] N de Sadeleer, *EU Environmental law and the Internal Market* (OUP, 2014) 112-122.
[2] The Hague Court of Appeal, 9 October 2018, *Netherlands v Urgenda,* ECLI:NL:GHDHA:2018:2591.

exceptions,[3] the disputes ruled on to date by the ECtHR have generally concerned risks for which the victims had been able to establish a causal link between the activity in question and the violation of their rights.

Uncertainty permeates all of these factors. In particular, it affects the calculation of the speed of the phenomenon as well as the nature and scope of the impacts it may entail. Whereas the risk of irreversible climate change impacts (also called tipping elements) were considered to be low in the early 2000, they are nowadays considered with ever decreasing uncertainty to be moderate for the same increases in temperatures. By way of illustration, as it was exemplified lately by the bush fires that ravaged South West Australia, the forest died-off provoked by climate change will increase wildfires and would lead to more warming. As a result, the shrinkage of carbon sinks will form a positive feedback compounding the impacts of climate change. Small shifts in the climate system can trigger large-scale and often irreversible damage. In *Urgenda*, the Court of Appeal of The Hague stressed that the uncertainties of climate change could imply that, due to the occurrence of a tipping point, the situation could become much worse than currently envisioned.[4] Against a backdrop of uncertainty, experts propose scenarios rather than assertions.

2. The Hague Court of Appeal 2018 judgment

In *Urgenda*, the Hague court of appeal ruled that a reduction of 25% of the GES by 2020 should be considered a minimum. In forming its opinion, the Court has taken into consideration that based on the current proposed policy the Netherlands will have reduced its emissions by 23% by 2020. Though this target is not far from 25%, a margin of uncertainty of 19-27% applies. The Court held that 'this margin of uncertainty means that there is real chance that the reduction will be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable'. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility suffices.[5] As a result, if the Dutch government knew that there was a real and imminent threat, it must have taken precautionary measures to comply with its international and EU obligations.[6]

The Court held that given that there are clear indications that the current measures will be insufficient to prevent serious adverse effects, even leaving aside the question whether the current policy will actually be implemented, the State was called on to adopt measures based on the precautionary principle that enhance the level of safety. Accordingly, 'the very serious dangers associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty'.[7]

---

[3] ECtHR 10 January 2012, no. 30765/08, *EHRC* 2012/79 (*Di Sarno and others/Italy*).
[4] The Hague Court of Appeal, § 63.
[5] Ibid.
[6] The Hague Court of Appeal, §43. See the comments of L.F.M. Besselink, *'De constitutioneel meer legitieme manier van toetsing*. Urgenda *voor het Hof Den Haag, NJB* 2018/2154 (41), p. 3081; T. Barkhuysen and M.L. van Emmerik, *'Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van* Lindenbaum/Cohen *via* Kelderluik *en* Öneryildiz *naar* Urgenda?', *RMTh* 2019 (1), pp. 53-54; J.W.A. Fleuren, 'Urgenda *en niet(?)-rechtstreeks werkend internationaal (klimaat)recht'*, *NJB* 2019/475 (issue 9), p. 604; E.R. de Jong, '*Urgenda: rechterlijke risicoregulering als alternatief voor risicoregulering door de overheid?*', *NTBR* 2015/46 (no. 10); A Zahar, The Urgenda Appeal Decision and the Argument from Physical Necessity (November 15, 2018).
[7] The Hague Court of Appeal, §73.

3. The Hoge Raad 2019 Judgment

In its landmark 2019 judgment, the Hoge Raad (HR) dismissed the appeal of the Dutch authorities. It held that, given the severity of the impact of climate change, the Dutch State is subject to a duty of care in accordance with Articles 2 (right to life) and 8 (right to privacy and family life) ECHR, which have direct effect, and is required to adopt mitigating measures.

3.1. *Scope of Articles 2 and 8 ECHR*

The HR recalled first of all that the State is subject to positive obligations under Articles 2 and 8.[8] The Court then went on to reject the narrow interpretation of these provisions proposed by the Dutch government.

Ratione personae. In determining the scope of Articles 2 and 8, consideration must thus be given to the nature of the damage involved. With respect to untargeted risks, the concept of 'victim' and the 'demonstrable' nature of the damage or risk of damage must be interpreted more broadly than is required for industrial or technological risks. The protection guaranteed under these two provisions is granted to the 'society or population as a whole' that is threatened by an 'environmental risk', and not exclusively to individual natural persons.[9] As regards the tangible nature of the risk, the HR stressed the vulnerability of certain 'communities' residing in the Netherlands to sea level rises.[10] Indeed, large swathes of the population of the Netherlands may be exposed to a risk related to rising sea-levels.[11] Moreover, the State could not require that The Hague Court of Appeal should identify with precision the communities the fundamental rights of which were liable to be violated, as this would be tantamount to requiring this court to furnish a *probatio diabolica*.[12] Last, the HR also stressed that the Court of Appeal had noted an 'accumulation of specific risks' and not a global risk threatening the entire human race.

Ratione temporis, where the risk is 'real and immediate', which is the case for the Netherlands, the State is under a positive duty to take preventive action. Whilst the 'danger' that must be averted must be 'tangible and direct', its 'immediacy' does not however imply the damage suspected must arise immediately,[13] which would be impossible to demonstrate in relation to climate change risks. The preventive nature of the positive obligations does not require any acute or immediate danger.

Ratione materiae, in accordance with the precautionary principle which the HR inferred from Articles 2 and 8 ECHR, 'preventive measures' that must be adopted in order to combat the climate emergency are required, even if there are doubts as to its specific manifestation.[14]

---

[8] HR, *Urgenda*, 19/00135 [2019] ECLI: NL: HR: 2019: 2006, §5.2.2 and 5.2.3.
[9] HR, §5.3.1 and 5.6.2.
[10] HR, §3.12.
[11] HR, §5.6.2.
[12] HR, §5.6.2.
[13] HR, §5.2.3.
[14] HR, §5.3.2.

3.2. *Due diligence approach*

The HR went on to add that the State 'policy' must not only be 'coherent' and 'timely', but must also take all action required in relation to the matter according to a 'due diligence' approach.[15] According to Article 13 ECHR, States are required to put in place appropriate 'means' in order 'to prevent effectively the most severe harm'.[16] The decision as to whether these measures are 'reasonable and adequate' must be subject to judicial review.[17] Thus, effective judicial relief must be guaranteed.[18] It follows that the State must bear the burden of proving that it has complied with these requirements.[19] Finally, the obligation at issue pertains to the means and not to the result.[20]

3.3. *Objective of cutting GHG emissions from 25% to 40%*

Whilst the objective of cutting GHG emissions by 80-95% by 2030 (compared to 1990 levels) did not appear controversial, the parties disagreed concerning the efforts that had to be made in order to achieve the intermediate objective for the end of 2020. Whereas the Urgenda Foundation called for a 25% reduction of global GHG emissions, the Dutch State on the other hand considered that both international and EU law allowed it to abide by its 2011 objective of a 20% cut. It will be recalled that the Court of Appeal had found against the Dutch State owing to its failure to achieve the scenario recommended by the IPCC in its 2007 report (AR4), according to which the industrialized states mentioned in Annex I to the UNFCCC are required to reduce their GHG emissions by 2020 by between 25% and 40% compared to emissions recorded in 1990. The aim of such a scenario is to avoid reaching a threshold of 450 ppm CO2, which would make it possible to limit overall global temperature increases to 2° C above pre-industrial levels.

In its appeal to the HR, the Dutch Government argued that the distinction between industrialized States included in Annex I and other States had become blurred due to the breakneck industrialization of a number of developing countries such as China.[21] The Government also objected to the reasoning of the Court of Appeal that the Netherlands should adopt more stringent measures to reduce GHG emissions because it is a global phenomenon.[22]

The question arose thus as to whether the 25% - 40% benchmark could be taken into consideration by the Dutch courts to verify whether the Dutch authorities complied with their due diligence obligations.

According to the case law of the ECtHR, and specifically the principle of effectiveness, Articles 2 and 8 ECHR cannot be interpreted in isolation. Pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[23] these provisions must be interpreted in the light of an understanding of the scientific facts ('*wetenschappelijke inzichten*') and general

[15] HR, § 5.3.3
[16] HR, §5.4.3.
[17] Effective judicial relief must be guaranteed. See §§ 5.5.1, 5.5.2 and 5.5.3.
[18] HR, §5.5.1, §5.5.2 and §5.5.3.
[19] Advisory opinion, § 4.181. See also ECtHR 13 July 2017, no. 38342/05, *EHRC* 2017/190 (*Jugheli and others/Georgia*).
[20] HR, § 5.3.4; Opinion of the Procurator General and the Advocate General, § 2.53.
[21] HR, §7.2.5.
[22] HR, §5.6.3.
[23] The HR referred to the judgment in *Nada v. Switzerland*, §5.4.2.

standards ('*algemeen aanvaard standaarden*').[24] Against this backdrop, the HR invoked a variety of instruments (decisions, recommendations, reports, etc.) adopted both by the United Nations and by the EU. In particular, it drew on a number of sources of international law in support of its conclusion that the global nature of the phenomenon does not preclude individual responsibility on the part of the State.[25] It thus referred to treaty law (United Nations Framework Convention on Climate Change), customary law (the no harm principle that codifies customary international law[26]) and soft-law (draft articles of the International Law Commission on state responsibility).[27] In particular, the openness towards science of the ECHR explains why the HR followed the reasoning of the District Court of The Hague of 24 June 2015 and The Hague Court of Appeal, insisting repeatedly on the 'scientific consensus' regarding the severity of the phenomenon, a consensus which has progressively consolidated over the last two decades within various international circles. For instance, the IPCC AR4 report from 2007 subsequently played a decisive role in establishing the substance of the requirement of due diligence. In one of its numerous heads of cassation, the Government had argued that the Hague Court of Appeal had erred in law in interpreting the obligation of due diligence in the light of the 2007 AR4 report of the IPCC on the assumption that it was a binding obligation, notwithstanding the fact that the IPCC is only a consultative scientific body.[28] This interpretation was also argued to be mistaken.[29] This head of cassation was rejected by the HR on the grounds that the interpretation of the obligation of due diligence was based on both factual and legal considerations regarding the responsibility of the Dutch State.[30]

In light of these various hard law and soft-law obligations, the HR reached the conclusion that 'an international consensus' has been established as regards 'the urgent need for a GHG cut of 25-40% by 2020 in order to prevent heating in excess of 2° C'.[31] Moreover, the intermediate objective of -20% instead of -25% adopted by the State authorities is more in line with the Paris Agreement, which seeks to achieve a scenario under which global temperatures increase by 1.5 °C rather than 2 °C.[32]

The fact that such an obligation is incumbent upon all industrialized countries and not specifically on the Netherlands did not alter the individual responsibility of the Dutch State.[33] The HR also stressed the fact that the Netherlands have to date pursued a particularly lax policy compared to other industrialized countries and that CO2 emissions in this country are particularly high.

In addition, the HR pointed out that the public authorities had committed before 2011 to achieving a cut of 25% by 2020.[34] Upholding the Court of Appeal judgment, the HR held that the State had not been able to demonstrate how this more relaxed approach (a 20% cut in GHG emissions instead of the 25% reduction initially recommended) was indispensable.

---

[24] HR, §5.6.2.
[25] HR, §5.7.7.
[26] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 2 [1996], AO.
[27] HR, §5.7.2 to 5.7.7.
[28] D. French and B. Pontin, 'The science of climate change: a legal perspective on the IPCC ', in D. Faber and M. Peeters (eds.), *Climate Change Law - Enclyclopedia of Environmental Law* (Edgard Elgar, 2016) 9- 20.
[29] Advisory opinion, §4.97.
[30] Ibid, §4.205.
[31] HR, §7.2.11.
[32] HR, §7.3.2.
[33] HR, §7.3.6.
[34] HR, §7.4.2.

Because the 25% reduction of GHG emissions in 2020 ordered by the Dutch courts is deemed to be the minimum target in order to avoid significant damage from rising sea-levels, the Dutch State has no margin of appreciation to postpone compliance with that target. Indeed, were the reduction to be put off any longer, additional efforts would be insufficient to exclude the risk of exceeding the 2°C temperature increase threshold.[35] Moreover, the scope for discretion left to the authorities as to the nature of the measures to be taken in order to achieve a reduction of 25% target does not prevent Articles 2 and 8 from having direct effect, and does not preclude judicial review of the exercise of that margin of appreciation.[36]

Furthermore, the possibility of judicial review is by no means called into question by the principle of the separation of powers.[37]

Where the authorities are aware of a real and imminent threat of sea-level rise, they must be required to take preventive action in accordance with their obligations under international environmental and human rights law and EU law.[38] As stressed in the IPCC 5th ACR, when the overwhelming evidence is so compelling and the costs are mounting, 'substantial and sustained reductions of GHGs emissions' are required to limit further climate change.[39] Accordingly, the preventive measures the Netherlands are called on to adopt must involve a 25% reduction of GHG emissions by the end of 2020, instead of the government's projected reduction of 20%. Such a target is deemed to be necessary in order to limit the concentration of GHG in the atmosphere to 450 ppm in order to prevent the dangerous climate change that would be associated with any temperature rise in excess of 2°C. It follows that the faint-hearted nature of the Dutch measures to combat climate change could be objected to with reference to Articles 2 and 8 ECHR on the grounds that the State 'had failed to exercise due diligence by pursuing a policy that was suitable and coherent'.[40] In particular, human rights law requires the State to mitigate (prevention) rather than to promote adaptation (harm reduction).[41]

The Dutch Government also argued that the goal of a 25% cut was disproportionate having regard to the costs associated with a more drastic reduction target. Specifically, the imposition of a 20% cut would only enable global temperature increases to be reduced by 0.000045° C by the end of the century.[42] However, the HR did not find that the proportionality principle had been violated as it considered that the Dutch State is required to shoulder is international responsibility.

Finally, the discretion over whether to adopt adjustment measures rather than preventive measures did not convince the HR.[43]

[35] HR, § 3.24.
[36] HR, § 2.69
[37] HR, §6.3.
[38] The Hague Court of Appeal, 9 October 2018, *Netherlands v Urgenda*, §43.
[39] IPCC, 2014: Summary for Policymakers. In: *Climate Change 2014*, 19.
[40] HR, §6.5.
[41] HR, § 7.5.2; Advisory opinion, § 3.14.
[42] Ibid, §4.200.
[43] HR, §7.5.2.

3.4. *Precautionary principle*

The Dutch government stressed that the impact of sea level rise is heavily encumbered with uncertainty.

The HR inferred the precautionary principle from Article 3(3) UNFCCC and Articles 2 and 8 ECHR. Nevertheless, the principle does not constitute an independent basis for assuming a preventive obligation for the Netherlands to avert significant risks; it is only relevant when substantively interpreting the scope of State's obligations.[44]

The HR held that even though there is scientific uncertainty concerning the exact nature of the risks that any sea level rise may have on the human population in the Netherlands over an extended period of time, the Dutch authorities are not relieved of their positive obligations to prevent such a risk from being realized. According to the precautionary principle, 'the existence of a tangible possibility that such a risk may manifest itself' results in a requirement to take appropriate action.[45] Accordingly, the precautionary principle does not apply solely in relation to clearly identifiable risks to specific environmental resources, but also encompasses the risks associated with climate change, the exact nature, time of realization and scope of which are still uncertain.[46] Given continuing temperature rises, the more flexible reduction target for the Dutch authorities (20% reduction of GHG emissions by the year 2020 against the 1990 benchmark, instead of a 25% reduction as proposed in the IPCC AR 4 report) runs counter to the environmental principle.[47]

It is clear that, since the case involved an application for an order of specific performance rather than a liability action, a more flexible approach was followed as regards the causal link between the inaction on the part of the State and the violation of the rights concerned.

3.5. *Order to legislate ('bevel to wetgeving') and declaratory ruling of unlawfulness*

The HR recalled that the courts must not become involved in the political decision making process in terms of whether it is appropriate to enact legislation with specifically defined content when issuing an order to legislate. Whilst it is a matter 'solely for the legislator concerned to decide, taking account of constitutional rules, whether legislation with a certain content must be adopted', the courts may nevertheless issue a declaratory ruling of unlawfulness.[48]

The HR recalled that the contested judgment of the Court of Appeal did not specify the precise content of the measures to be adopted in order to achieve the intermediate target of a 25% reduction. It is in fact for the State to decide which action must be taken and to assess whether it is essential to enact legislation in order to achieve the reduction targets.[49]

---

[44] Advisory Opinion, § 4.241.
[45] HR, §5.6.2. See N. de Sadeleer, 'The Precautionary Principles and Climate Change', in D. Faber and M. Peeters (eds.), *Climate Change Law - Enclycopedia of Environmental Law* (Edgard Elgar, 2016) 20-32.
[46] HR, *Urgenda*, para 5.7.5.
[47] Ibid, para 7.2.5.
[48] HR, §8.2.4.
[49] HR, § 8.2.7.

3.6. *Respect for the principle of the separation of powers*

The Dutch Government had alleged a violation of the principle of the separation of powers (' *het stelsel van machtenscheiding*') on the grounds that the order issued by the Court of Appeal impinged upon the exercise of legislative and executive powers. The HR held that it falls 'to the courts to review whether the Government and Parliament have properly exercised their powers in accordance with the legal framework established for them'.[50] The HR recalled in this regard that 'the protection of fundamental rights is an essential element of a democratic State governed by the rule of law'.[51] The HR insisted on the exceptional nature of this case as it involved a 'threat of dangerous climate change and it is clear, as was held by the first instance court and the Court of Appeal, and as is recognized by the State itself, that urgent action needs to be taken'.[52]

It will be noted that the Court of Appeal did not order a reduction in excess of the minimum target of 25% recommended by the IPCC in 2007 in order to avoid serious climate disruption.[53]

4. Conclusions

Climate risks are distinguished from industrial and technological risks both by their unpredictability over time and by the collective nature of the damage they are likely to cause. Indeed, their potential victims are less easy to identify than residents living near to a hazardous facility.

The historic judgment handed down on December 20th 2019 by the HR opens up new perspectives on the scope of Articles 2 and 8 ECHR, in particular with reference to the precautionary principle. In addition, irrespective of the State's contribution to this global phenomenon, it is required to shoulder its responsibilities. These responsibilities are not diluted by the fact that international instruments impose obligations on a group of industrialized States, without however specifying individual contributions. The Netherland's small share in global emissions and the insignificance of additional emissions reduction imposed by Dutch courts does not mean that a reduction pathway of 25% of GHG emissions in 2020 is disproportionate. The due diligence required under Articles 2 and 8 must be assessed not only having regard to Human Rights Convention obligations, but also in relation to the scientific consensus. In accordance with the precautionary principle, 'the very existence of a real possibility of harm therefore requires appropriate measures to be taken'.[54] Both ECHR provisions offer general protection to society against the risks associated with climate change.[55]Since Article 53 ECHR requires a minimum level of protection, there is nothing to prevent the national courts from granting additional protection to victims.[56]

[50] HR, §8.3.2.
[51] HR, §8.3.3.
[52] HR, §8.3.4.
[53] Advisory opinion, §4.79.
[54] HR, § 5.6.2.
[55] Opinion of the Procurator General and the Advocate General, § 3.11 (hereinafter 'Advisory opinion').
[56] HR, §2.40.