

## ARTICLE

# *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*

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### Abstract

Liability for causing or failing to mitigate climate change has long been proposed as an alternative, or backstop, to lagging international cooperation. Thus far, there has been very limited success in holding governments or individuals responsible for the emission of greenhouse gases (GHGs) that are considered the primary cause of anthropogenic climate change. The recent landmark decision in *Urgenda Foundation v. Government of the Netherlands (Ministry of Infrastructure and the Environment)* breaks with this tradition. In June 2015, the Dutch District Court (The Hague) held that the current climate policies of the government are not sufficiently ambitious for it to fulfil its duty of care towards Dutch society. The judgment, and the accompanying order for the government to adopt stricter GHG reduction policies, raises important questions about the future of climate change liability litigation, the separation of powers between the judiciary and the legislature, and the effect of litigation on international climate change negotiation and cooperation.

**Keywords:** Mitigation, Liability, International climate policy, Injunctive relief, Separation of powers, Climate change litigation

## 1. INTRODUCTION

Small as it is, the continued existence of the Kingdom of the Netherlands represents a sizeable victory of willpower and engineering over the natural environment. The Dutch have had to accommodate an ever-growing population and its material demands within the territorial limits of their Kingdom, starting with – although not limited to – an ongoing battle with the water that frequently tries to reclaim large parts of the Netherlands. Their success has depended on a high degree of interference with the natural environment, reflected in heavily industrialized agriculture and man-made ‘polders’.

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The Netherlands' downstream and downwind position with respect to other heavily industrialized European countries increases the pollution burden on the already stretched Dutch ecosystems. Not surprisingly, the Dutch have long advocated environmental leadership and international cooperation on environmental problems that are particularly difficult to resolve unilaterally, including climate change.

In the 1960s and 1970s, the environmental costs of economic development became a salient issue for the Dutch public.<sup>1</sup> By the 1980s, the Netherlands had manoeuvred itself into a position of environmental leadership, particularly with respect to participatory environmental policy, which explicitly reserves space for non-governmental organizations (NGOs) and interest groups.<sup>2</sup> Given its historic experience with transboundary environmental problems, this leadership logically extended to climate change mitigation and adaptation, and the Dutch government was able to strengthen its international influence through the European Union (EU).<sup>3</sup> However, over the last ten years, other European countries have started to outperform the Netherlands in several areas of environmental policy, including renewable energy and other climate-related policies.<sup>4</sup> This change can be attributed to a shift in ambition, also reflected in the Dutch government's official policy against the 'gold plating' of EU environmental directives: unlike before, no effort will be made to go beyond the minimum European standards unless it serves 'significant Dutch interests' to do so.<sup>5</sup>

The recent judgment in *Urgenda Foundation v. Government of the Netherlands (Ministry of Infrastructure and the Environment)* (*Urgenda*) may force the Dutch government back into a position of environmental leadership, at least on the issue of climate change mitigation. On 24 June 2015, the Dutch District Court (The Hague) held that the Dutch government has a duty of care towards the plaintiffs (a foundation representing Dutch society) to mitigate the likelihood of dangerous

<sup>1</sup> Together with the publication of the report 'Concern for Tomorrow' (Netherlands Institute of Public Health and Environmental Protection), the Queen's 1988 Christmas speech represents a watershed moment for sustainable environmental policy in the Netherlands. Queen Beatrix observed that 'the earth is slowly dying and the inconceivable – the end of life itself – is becoming conceivable'. Her speech, devoted almost entirely to problems of environmental deterioration, was in open disagreement with her earlier address to Parliament in Sept. 1988. The latter speech, written by the Dutch Council of Ministers, stated that recently 'the country has become cleaner. This applies in particular to water and air': E. Tellegen, 'The Dutch National Environmental Policy Plan' (1989) 4(4) *The Netherlands Journal of Housing and Environmental Research*, pp. 337–45, at 337. For a full overview (and partial history) of Dutch environmental law and policy, see J. van den Broek, *Bundeling van Omgevingsrecht* (Wolters Kluwer, 2012). On the first Dutch National Environmental Policy Plan, see Tellegen, *ibid.*

<sup>2</sup> C. Hey, 'EU Environmental Policies: A Short History of the Policy Strategies', in S. Scheuer (ed.), *EU Environmental Policy Handbook: A Critical Analysis of EU Environmental Legislation* (European Environmental Bureau, 2006), pp. 17–30, at 20.

<sup>3</sup> M.E. Pettenger (ed.), *The Social Construction of Climate Change: Power, Knowledge, Norms, Discourses* (Ashgate, 2007), p. 55.

<sup>4</sup> L.H. Gulbrandsen & J.B. Skjærseth, *Implementing the EU 2020 Climate and Energy Package in the Netherlands: Mixed Instruments, Mixed Results* (Fridtjof Nansen Institute, 2014), pp. 15, 31.

<sup>5</sup> J.H. Jans et al., "'Gold Plating" of European Environmental Measures?' (2009) 6(4) *Journal for European Environmental and Planning Law*, pp. 417–35, at 419. The Dutch ban on 'gold plating' does not only prevent ambitious environmental action by the Dutch government but can even result in the downgrading of pre-existing Dutch environmental laws that go beyond European requirements: Jans et al., *ibid.*, at p. 427.

anthropogenic climate change.<sup>6</sup> The current Dutch reduction policies for greenhouse gas (GHG) emissions, which fulfil country-specific goals set by the EU,<sup>7</sup> are insufficiently ambitious to discharge this duty of care.<sup>8</sup> The Court therefore ordered the Dutch government to adopt emissions reduction policies that would result in, at least, a 25% reduction compared with 1990 levels by 2020 – as opposed to the current foreseen reduction of 17 to 20%.<sup>9</sup>

The *Urgenda* judgment has put the Netherlands on the climate change litigation ‘map’, which had thus far been dominated by the United States (US), Australia and, within the EU, the United Kingdom (UK).<sup>10</sup> Even as the legal implications of the judgment remain unclear – there are several possible stages of appeal available to the Dutch government – its symbolic significance has already been described as ‘courageous’,<sup>11</sup> ‘unprecedented in Europe, and unexpected’.<sup>12</sup> *Urgenda* represents an important new chapter in climate change liability litigation, particularly in the EU, and therefore requires close inspection.<sup>13</sup> In determining *Urgenda*’s place in the body of climate change jurisprudence, three key questions must be answered:

1. As a matter of law, does the legal basis for liability in *Urgenda* – the Dutch *onrechtmatige daad* (tortious act) – have suitable equivalents to provide a legal basis for similar actions in other jurisdictions?
2. As a matter of constitutional doctrine, can an order to enact mitigation policies with a minimum reduction goal survive the test of democratic governance, specifically in light of the separation of powers doctrine?
3. As a matter of climate change mitigation policy, will this case force the ambitious governmental action that environmental interest groups have been fighting for?

<sup>6</sup> *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (*Urgenda*), para. 4.83. An official English translation of the judgment is not yet available. The discussion of the judgment is based on the original judgment as read in Dutch by the author of this piece. Any translations (unless specified otherwise) are unofficial and undertaken by the author.

<sup>7</sup> See Decision 406/2009/EC on the Effort of Member States to Reduce Their Greenhouse Gas Emissions to Meet the Community’s Greenhouse Gas Emission Reduction Commitments up to 2020 [2009] OJ L 140/136 (EU Effort Sharing Decision).

<sup>8</sup> *Urgenda*, n. 6 above, at para. 4.84.

<sup>9</sup> *Ibid.*, at para. 5.1.

<sup>10</sup> The term ‘climate change litigation’ (CCL) covers many different types of action, both civil and criminal. The focus of this article will be exclusively on action brought against the government, and to some extent individuals, for failure to reduce GHG emissions and any liability for climate change resulting from these emissions. Peel and Osofsky provide one of the most recent and comprehensive overviews of this body of cases and how it may be mapped: J. Peel & H. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) generally, and specifically at p. 8. For an exhaustive overview of climate change litigation, see resources provided by the Sabin Center for Climate Change Law, Columbia University, New York, NY (US), available at: <http://web.law.columbia.edu/climate-change/resources>.

<sup>11</sup> ‘Urgenda vraagt rechter “moedig vonnis” te wijzen in klimaatzaak’, 14 Apr. 2015, available at: <http://www.trouw.nl/tr/nl/13110/Klimaatverandering/article/detail/3954211/2015/04/14/Urgenda-vraagt-rechter-moedig-vonnis-te-wijzen-in-klimaatzaak.dhtml>.

<sup>12</sup> ‘Netherlands Ordered to Cut Greenhouse Gas Emissions’, *BBC News*, 24 June 2015, available at: <http://www.bbc.co.uk/news/world-europe-33253772>.

<sup>13</sup> Some have suggested that the current judgment has ‘raised the bar’ for other governments: see, e.g., K. Purnhagen, ‘Climate Law: Dutch Decision Raises Bar’ (2015) (523)7561 *Nature*, p. 410.

The answers to these questions require an appreciation of the specific legal context in which the *Urgenda* judgment was handed down. While climate change is a global challenge which benefits from transboundary regulatory approaches, climate change litigation – particularly before national courts – remains jurisdiction-specific.<sup>14</sup> Equally, even as the basis for liability stems from a specific Dutch understanding of tortious acts, Dutch climate change policy cannot be understood without reference to its membership of the EU. Dutch governmental discretion in this area is heavily curtailed by the EU's competence in this policy field and early concerns have been voiced regarding the ability of the Dutch government to take unilateral action on this issue.<sup>15</sup> This means that the parameters of the impact of the *Urgenda* ruling for climate change policy – the third question – are determined not only by the Dutch legal and political system but also by that of the EU.

The remainder of this article is structured as follows: Section 2 sets out the developments leading up to the *Urgenda* ruling and provides an overview of the judgment, including the Court's treatment of the threshold question of standing. Section 3 focuses on the judgment's implications for climate change liability litigation, particularly the extent to which *Urgenda* is 'transposable' to other jurisdictions. Section 4 discusses possible concerns regarding the separation of powers between the judiciary and the executive in light of the Court's order to act. Section 5 concludes by addressing the broader question of the potential impact of governmental liability for failure to undertake (ambitious) climate change mitigation policies on national and international climate change policy.

## 2. *URGENDA V. GOVERNMENT OF THE NETHERLANDS*

Since its foundation in 2008, *Urgenda* has advocated governmental and non-governmental action with a view to creating a 'sustainable and circular economy powered by renewable energy and green resources'.<sup>16</sup> Drawing on the Dutch tradition of NGO-led reform,<sup>17</sup> *Urgenda* requested the Dutch government to take more aggressive, or 'urgent' action on climate change mitigation.<sup>18</sup> The State Secretary for Infrastructure and the Environment responded to *Urgenda*'s specific request for more ambitious GHG emissions reduction targets by pointing to the potential risks of overly ambitious unilateral action in the absence of international commitments to do the same

<sup>14</sup> Peel & Osofsky, n. 10 above (on the US and the UK); C.J. Hilson, 'Climate Change Litigation: An Explanatory Approach (Or Bringing Grievance Back In)', in F. Fracchia & M. Occhiena (eds), *Climate Change: la riposta del diritto* (Editoriale Scientifica, 2010), pp. 421–36 (on the UK); E. Kosolapova, *Interstate Liability for Climate Change-related Damage* (Eleven International, 2013) (on domestic litigation on interstate/international liability).

<sup>15</sup> See also M. Peeters, 'Europees Klimaatrecht en Nationale Beleidsruimte' (2014) (89)41 *Nederlands Juristenblad*, pp. 2918–25, at 2924.

<sup>16</sup> *Urgenda* Mission Statement, available at: <http://www.urgenda.nl/over-urgenda/missie>.

<sup>17</sup> It is worth noting that whereas NGOs have traditionally played an important part in the public debate, public interest litigation such as that pursued by *Urgenda* is a relatively novel development in the Netherlands: L. Enneking & E. de Jong, 'Regulering van Onzekere Risico's via Public Interest Litigation' (2014) 23 *Nederlands Juristenblad*, pp. 1542–51, at 1551.

<sup>18</sup> Letter to Dutch Government, available at: <http://www.wijwillenactie.nl/wp-content/uploads/2012/11/121112-ondertekend-aan-Staat-der-NL.pdf>.

(for example, carbon leakage and the limited impact of Dutch emissions on a global problem).<sup>19</sup> In response, Urgenda, together with 886 individual plaintiffs, brought a class action against the Dutch government, specifically the Ministry of Infrastructure and the Environment, on 20 November 2013.<sup>20</sup> Urgenda's summons centred on its request for a mandatory order 'directing the Dutch State to take action to limit the amount of [carbon dioxide] CO<sub>2</sub> emissions to 40% below the 1990 level by 2020'.<sup>21</sup> This claim was later expanded with several supportive claims. The Court restated and grouped Urgenda's claims into (i) several points for declaratory relief;<sup>22</sup> and (ii) the request for an order to act (mandatory order)<sup>23</sup> with respect to more ambitious emissions reduction policies.<sup>24</sup>

With respect to the declaratory relief, Urgenda sought the recognition of a number of facts regarding climate change as *legal facts*.<sup>25</sup> Urgenda's claim regarding the mandatory order was specified to include *either* a reduction of emissions by 40% compared with 1990, but a minimum of 25%, by 2020;<sup>26</sup> *or* a reduction of at least 40% compared with 1990, by 2030.<sup>27</sup>

In brief, the Court rejected Urgenda's claims for declaratory relief on the basis that any declaration of fact had become irrelevant in light of its order to act.<sup>28</sup>

<sup>19</sup> Letter No. IenM/BSK-20 12/244002, 11 Dec. 2012, available at: <http://www.urgenda.nl/documents/BriefReactievandeStaatlp-i-m-0000002872.pdf>.

<sup>20</sup> The complete Summons (in Dutch) is available at: <http://www.urgenda.nl/documents/DagvaardingUrgendaKlimaatzaak19-11-13.pdf>. Both Urgenda and the Dutch government provided lengthy written and oral pleadings to the District Court (The Hague): Response to Summons by the Dutch Government (2 Apr. 2014) available at: [http://gallery.mailchimp.com/91ffff7bfd16e26db7bee63af/files/Conclusie\\_van\\_antwoord.pdf](http://gallery.mailchimp.com/91ffff7bfd16e26db7bee63af/files/Conclusie_van_antwoord.pdf); and (19 Feb. 2015), available at: <http://www.urgenda.nl/documents/20150119-ConclvanDupliek-UrgendaKlimaatzaak.pdf>; Written Reply by Urgenda (10 Sept. 2014), available at: <http://www.urgenda.nl/documents/Conclusie-van-Repliek-10-09-2014.pdf>; Oral Pleadings by Dutch Government (14 Apr. 2015), available at: <http://www.urgenda.nl/documents/Staat20150414pleitnotaaindiversie.pdf>; and Oral Pleadings by Urgenda (14 Apr. 2015), available at: <http://www.urgenda.nl/documents/PleitnotaVanDenBergUrgendaKlimaatzaak.pdf>.

<sup>21</sup> Para. 45 of Urgenda's unofficial English translation of its Summons, available at: <http://www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf>.

<sup>22</sup> *Urgenda*, n. 6 above, at para. 3.1.

<sup>23</sup> There are several legal translations available for the order to act issued by the Dutch court (including the mandatory order, injunctive relief, and specific performance). The possibility to request such an order is set out in s. 296 of Book 3 of the Dutch Civil Code.

<sup>24</sup> *Urgenda*, n. 6 above, at para. 3.1(7). In addition to requesting an order that would force the Dutch government to reduce emissions, Urgenda requested an order that would force the government to provide information about emissions reduction policies to the Dutch public via newspapers and the governmental website: *ibid.*, at para. 3.1(8) and (9).

<sup>25</sup> *Ibid.*, at para. 3.1. Specifically, Urgenda requested the Court to declare that: (1) as a result of the emission of GHGs, the earth's atmosphere is warming. According to the best scientific knowledge, this will result in dangerous climate change, unless we urgently and significantly reduce these emissions; (2) 'dangerous anthropogenic climate change' means an increase in average temperature of 2°C or more, compared with pre-industrial times. This will be a significant threat to large groups of people and human rights globally; (3) the Netherlands has one of the highest per capita emissions rates in the world; (4) the collective emissions of the Netherlands are '*onrechtmatig*' (illegitimate); (5) the Dutch government is liable for Dutch collective emissions; (6) the Dutch government will be acting illegally if it has not reduced total Dutch GHG emissions by 40%, or at least 25%, compared with 1990, by 2020 [primary claim]; the Dutch government will be acting illegally if it has not reduced total Dutch GHG emissions by at least 40% compared with 1990 by 2030 [subsidiary/alternate claim].

<sup>26</sup> *Ibid.*, at para. 3.1(7) primary claim.

<sup>27</sup> *Ibid.*, at para. 3.1(7) secondary/alternate claim.

<sup>28</sup> *Ibid.*, at para. 4.105.

However, in reaching its judgment, the Court discussed at length the current state of climate science and any international political and legal consensus on climate change<sup>29</sup> as the ‘legal and policy context’ on which its decision would be based. In doing so, the Court accepted ‘as fact’ findings of the Intergovernmental Panel on Climate Change regarding dangerous anthropogenic climate change,<sup>30</sup> and the link between climate change and GHG emissions.<sup>31</sup> These findings form the basis of the Court’s holding that there is sufficient scientific consensus regarding the causes and effects of climate change, and that the Dutch government shares in this consensus by signing and ratifying international agreements (including the Cancun agreements,<sup>32</sup> which confirmed that any temperature rise above two degrees Celsius from 1990 levels constitutes ‘dangerous anthropogenic climate change’), as well as accepting reduction targets mandated by the EU.<sup>33</sup>

The key disagreement between the two parties revolved around the urgency with which these reductions should take place. In issuing its mandatory order to the Dutch government, the Court supported Urgenda’s position that the current Dutch policy for 2020 is insufficient in light of climate science and international climate policy.<sup>34</sup> The order instructs the Dutch government to (create policies that will) reduce Dutch GHG emissions by at least 25% compared with 1990 by 2020 – a more ambitious goal than the existing 17 to 20% reduction commitment.<sup>35</sup> Failure to put in place such reduction policies triggers the government’s duty of care towards the Dutch population and consequent liability for endangerment.<sup>36</sup> The legal basis for this duty of care is Section 162 of Book 6 of the Dutch Civil Code (Section 6:162), which details liability for ‘tortious acts’.<sup>37</sup>

Before discussing the Court’s treatment of this article in more detail, the preliminary challenge with respect to Urgenda’s standing must briefly be considered. Standing has long been a stumbling block for parties to climate change liability litigation.<sup>38</sup> In the US, questions of standing are linked closely with those on

<sup>29</sup> Ibid., at paras 2.34–2.70.

<sup>30</sup> Ibid., at para. 4.12.

<sup>31</sup> Ibid., at para. 4.15.

<sup>32</sup> Decision 1/CP.16 of the Conference of the Parties, as agreed on 11 Dec. 2010. Full text available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>.

<sup>33</sup> *Urgenda*, n. 6 above, at para. 4.31.

<sup>34</sup> Ibid., at para. 5.1.

<sup>35</sup> Ibid., at para 5.1. The Court also ordered the Dutch government to pay Urgenda’s costs, but rejected as invalid Urgenda’s claim for an order to inform. It held that the order had no basis in law and, given that it is not yet clear what action the order to act will take, that it would not be reasonable to force the Dutch government to provide any information to the public (para. 4.107). The existing Dutch reduction commitments are based on its EU obligations, which in turn are based on its international commitments under the systems established by the United Nations Framework Convention on Climate Change (UNFCCC) (New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>) and its Kyoto Protocol (Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php)).

<sup>36</sup> Ibid., at paras 4.85–4.86.

<sup>37</sup> See in detail Section 3 below.

<sup>38</sup> Peel & Osofsky (n. 10 above, at p. 308) observe that whereas standing is a real issue in the US, it has been much less problematic in Australia, where practical concerns, such as the costs of litigation, provide a different type of barrier to litigation.

the separation of powers, as the type of question brought by the plaintiffs can be decisive for the court's ability to hear the case.<sup>39</sup> Similarly, the Dutch government questioned Urgenda's standing, as well as the separation of powers implications of the action. The Court treated these questions as distinct, considering the separation of powers question relevant to its ability to grant an order to act, but not with respect to the requested declaratory relief.<sup>40</sup> As to the question of standing, the Court supported the position of environmental interest groups and (charitable) foundations, such as Urgenda, with little reservation.<sup>41</sup>

As Urgenda was acting both on its own behalf and on behalf of the 886 individuals who had joined the suit, the Court divided the question of standing into two parts. Under the Dutch Civil Code, any legal person wishing to bring a civil claim must demonstrate direct and individual concern.<sup>42</sup> As a charitable foundation, Urgenda's direct and individual concern is demonstrable through its statutes: it is empowered to bring a claim on behalf of the public or the collective interest that it was founded to protect.<sup>43</sup>

The Dutch government did not challenge Urgenda's standing insofar as Urgenda claimed to be acting on behalf of the Dutch people with regard to GHG emissions taking place on Dutch soil. It did, however, question whether it was possible for Urgenda to act on behalf of future generations of Dutch citizens, and rejected the possibility that it could act on behalf of current or future generations of citizens of countries other than the Netherlands.<sup>44</sup>

As a preliminary issue, the Court underlined that the Dutch Civil Code aims to support claims such as that brought by Urgenda.<sup>45</sup> Accordingly, an environmental organization is empowered to bring a claim to further the protection of the environment without having to identify, or act on behalf of, a specific group of people in need of protection.<sup>46</sup> More specifically, the Court considered Urgenda's statutory

<sup>39</sup> For more detailed discussion of the relationship between the political question doctrine, displacement (the judiciary infringing the competence of the legislature or executive) and standing, see Peel & Osofsky, n. 10 above, at p. 269–78. Generally on the political question doctrine and environmental litigation, see Kosolapova, n. 14 above, at pp. 89–90, 105–9, 117–20. For US cases on standing, see primarily *Massachusetts v. Environmental Protection Agency (EPA)* 549 U.S. 497 (2007) (state petitioners) and *American Electric Power Co. (AEP) v. Connecticut*, 564 U.S. \_\_\_ (2011) (on non-state petitioners). See also *Gersh Korsinsky v. US EPA*, 2005 U.S. Dist. Lexis 21778; *Korsinsky v. EPA*, 05 Civ. 859 (nrb), and *Connecticut v. AEP*, 406 F. Supp. 2d 265; *Connecticut v. AEP*, 2005 U.S. Dist. Lexis 19964, 04 Civ. 5669 (lap), 04 Civ. 5670 (lap) (the latter found the plaintiffs' question to be political and non-justiciable).

<sup>40</sup> *Urgenda*, n. 6 above, at para. 4.94. See Section 4 below for more detail.

<sup>41</sup> See also Peel & Osofsky, n. 10 above, at p. 271 on standing requirements under Art III. See *Massachusetts v. EPA* and *AEP v. Connecticut*, n. 39 above, on the distinction between state and non-state applicants.

<sup>42</sup> S. 303 of Book 3 of the Dutch Civil Code.

<sup>43</sup> S. 305a of Book 3 of the Dutch Civil Code. Additionally, Urgenda needed to show that reasonable care had been taken to resolve the issues through cooperative engagement with the defendant: s. 305a(2) of Book 3 of the Dutch Civil Code. Urgenda had fulfilled this requirement through its correspondence with the Dutch government: Letter to Dutch Government, n. 18 above.

<sup>44</sup> *Urgenda*, n. 6 above, at para. 4.5.

<sup>45</sup> Specifically, ss. 303–305a of Book 3 of the Dutch Civil Code.

<sup>46</sup> *Urgenda*, n. 6 above, at para. 4.6.

aim of creating a ‘more sustainable society, starting in the Netherlands’<sup>47</sup> to be inherently intergenerational and transboundary, thus providing Urgenda with standing in respect of all elements of its claim.<sup>48</sup> The Court leaves unanswered the question of Urgenda’s standing as the representative of the 886 individual claimants on the basis that consideration of these individual interests would not have altered the Court’s judgment. Any individual or direct concern on their part could not be shown to be sufficiently distinct from Urgenda’s interest to warrant standing for these individuals separate from Urgenda.<sup>49</sup>

The Court denied the existence of any directly enforceable (individual) right based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>50</sup> or the international ‘no harm’ principle, but rather referred to these provisions as meaningful in the interpretation of its duty of care under Section 6:162.<sup>51</sup> This brings us back to one of the core questions raised by the District Court’s ruling: does the legal basis for liability in *Urgenda* – the Dutch *onrechtmatige daad* (tortious act) – have suitable equivalents to provide a basis for similar actions in other jurisdictions?

### 3. A DUTY OF CARE FOR THE CLIMATE

Climate change jurisprudence can be organized along several vectors: by the relative centrality of climate change as motivation for the litigation;<sup>52</sup> the public or private nature of the plaintiff/defendant;<sup>53</sup> as pro- or anti-regulatory;<sup>54</sup> or as proactive or reactive.<sup>55</sup> In addition, different legal bases may be used to force, or prevent, a certain type of behaviour from a specific actor. Examples include statutory duties, common law claims, customary or treaty-based international law, and constitutional

<sup>47</sup> Art. 2 of Statutes of Urgenda, as quoted by the Court: *ibid.*, at para. 4.7. Although Urgenda’s statutes are not publicly available, very similar information is available in its mission statement on its website, available at: <http://www.urgenda.nl/en>.

<sup>48</sup> *Urgenda*, n. 6 above, at paras 4.7–4.10.

<sup>49</sup> Particularly with respect to Arts 2 and 8 ECHR, as will be discussed in detail in Section 3 below.

<sup>50</sup> Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://conventions.coe.int>. In the UK, the ECHR may provide additional grounds for standing under nuisance. This question was first raised in *ECtHR*, 1 Jul. 1998, *Khatun and 180 Others v. United Kingdom*, appl. no. 38387/97 (unreported), and has since been discussed in *Nora McKenna & Others v. British Aluminium Ltd* [2002] Env LR 30.

<sup>51</sup> *Urgenda*, n. 6 above, at paras 4.42 and 4.45. Cf. K. Purnhagen, ‘Towards a Regime of Emissions Litigation Based on Science’, 10 Wageningen Working Papers in Law and Governance 10/2015, Law and Governance Group, 18 July 2015, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2632858](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632858) (describing the decision of the Dutch District Court as acknowledging ‘an individual right to emission reduction enforceable in courts’: *ibid.*, at p. 2. The current article does not subscribe to this reading of the judgment since Urgenda’s standing was upheld as being representative of a collective interest rather than an individual interest).

<sup>52</sup> Peel & Osofsky, n. 10 above, at p. 8.

<sup>53</sup> See the state/non-state distinction made by the US Supreme Court with respect to standing, n. 39 above.

<sup>54</sup> See also D. Markell & J.B. Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2012) 64 *Florida Law Review*, pp. 15–86, at 15 (on the tug of war between environmental groups and industry).

<sup>55</sup> The latter two categorizations are introduced by Hilson, n. 14 above.



or human rights. Within this rich body of jurisprudence, the *Urgenda* judgment occupies a unique position as the first decision to order a government to ensure the reduction of GHG emissions for reasons other than statutory mandate.<sup>56</sup>

The Court's mandatory order is based on Dutch tort law, specifically negligence, as set out in Section 6:162. In order to establish negligence on the part of the Dutch government, a duty of care must be found to exist which imposes a responsibility on the Dutch government to shield *Urgenda* (and those whom it represents) from harm caused by negligent behaviour.<sup>57</sup> To ascertain the existence and extent of the Dutch government's duty of care, the Court set out to determine 'whether the existing mitigation policies are acceptable in light of the need to prevent dangerous anthropogenic climate change, given the government's discretion in adopting said policies'.<sup>58</sup> If not, *Urgenda's* claim that the Dutch government's policies were negligently endangering the Dutch people in breach of its duty of care would have to be upheld.

Paragraph 2 of Section 6:162 defines the standard of care applicable in the Dutch tort of negligence (*onrechtmatige daad*) as a 'social standard of due care'. The case law of the Dutch Supreme Court has developed four questions to determine the scope of this standard of care.<sup>59</sup> The District Court distilled five considerations specific to (the scope of) the government's duty of care with respect to *Urgenda* from these four questions, namely:

- the nature and scope of the damage caused by climate change;
- the foreseeability of the damage;
- the likelihood of dangerous anthropogenic climate change;
- the nature of the government's act (and omissions); and
- the discretion that the government may exercise based on public law.

In answering these questions, the Court specifically took into account present-day scientific consensus, the (technical) availability of mitigation measures, and the cost-effectiveness of these mitigation measures.<sup>60</sup> In parallel, *Urgenda* submitted several additional legal bases for the existence of a duty of care on the part of the

<sup>56</sup> See also resources provided by the Sabin Center for Climate Change Law, n. 10 above.

<sup>57</sup> The definition of duty of care as a concept is not uncontroversial. Several criteria (reasonable foresight of harm, sufficient proximity and whether it is fair, just and reasonable to impose a duty) are shared between jurisdictions, but the application of these criteria can differ. See, e.g., Principles of European Tort Law, Art. 4:102 (the text can be found on the website of the European Group on Tort Law, available at: <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf>). More generally, on the definition of duty of care and accompanying difficulties see D. Nolan, 'Deconstructing the Duty of Care' (2013) 129 *The Law Quarterly Review*, pp. 559–88, at 561–3.

<sup>58</sup> *Urgenda*, n. 6 above, at para. 4.63.

<sup>59</sup> How apparent is the danger? How likely is the danger to manifest itself? How serious is the danger (i.e. property damage or personal harm)? How onerous would it be to take necessary preventative measures? Hoge Raad (Dutch Supreme Court), 6 Nov. 1965, NJ 1966/136. See also R. Cox, 'The Liability of European States for Climate Change' (2014) 30(78) *Utrecht Journal of International and European Law*, pp. 125–35, at 129.

<sup>60</sup> *Urgenda*, n. 6 above, at para. 4.63.

Dutch government under Dutch constitutional and international law.<sup>61</sup> The Court rejected the existence of any directly enforceable rights based on these provisions, with respect to both *Urgenda* and the individual claimants. Instead, the Court underlined their importance for the interpretation of the standard of care under Section 6:162,<sup>62</sup> and the five considerations set out above.

With regard to the nature, foreseeability and likelihood of damage, the Court found that the government has a far-reaching duty of care, as the risk of dangerous climate change is high and the related damage severe.<sup>63</sup> The government's ability to control (private) emissions within its territory means that it must provide the legal and institutional framework for mitigation.<sup>64</sup> The measures necessary to achieve 'sufficient' mitigation were found to be neither disproportionately costly nor technologically impossible.<sup>65</sup> Considering these scientific and legal realities, the Court held mitigation to be essential in preventing dangerous climate change and considered that the government's policy discretion in addressing this issue was therefore restricted.<sup>66</sup> In light of the existence and scope of the government's duty of care (mitigation to a level that prevents dangerous anthropogenic climate change),<sup>67</sup> the Court held that current Dutch policies are insufficient and cannot be justified on the basis of excessive cost or technical impossibility.<sup>68</sup>

Having established a duty of care, the Court went on to consider issues of causation and harm. The Court deemed the (increased) risk of future harm to be sufficiently concrete to trigger the government's duty of care.<sup>69</sup> As such, the harm need not yet have materialized for *Urgenda*'s claim for a mandatory order to be successful.

Causation has proved to be problematic in climate change litigation in that the traditional 'but for' test typically cannot be satisfied: dangerous anthropogenic climate change is triggered by the accumulation of GHG emissions over time and space, not by the actions of one specific actor. The Dutch District Court held that the lack of individual responsibility in the Dutch government for the (future) harm of climate change does not negate its duty of care or break the chain of causation.<sup>70</sup>

<sup>61</sup> *Ibid.*, at paras 4.35–4.52. These included the following: Art. 21 of the Dutch Constitution; the international 'no harm' principle; Arts 2 and 8 ECHR (n. 50 above); the UNFCCC (n. 35 above) and its protocols, mainly the Kyoto Protocol (n. 35 above); Art. 191 of the Treaty on the Functioning of the EU (TFEU) (Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, available at: [http://europa.eu/libson\\_treaty/full\\_text](http://europa.eu/libson_treaty/full_text)); the EU ETS Directive (Directive 2003/87/EC establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and amending Directive 96/61/EC [2009] OJ L275/32); and the EU Effort Sharing Decision (n. 7 above).

<sup>62</sup> *Urgenda*, n. 6 above, at para. 4.52.

<sup>63</sup> *Ibid.*, at para. 4.65.

<sup>64</sup> *Ibid.*, at para. 4.66.

<sup>65</sup> Rather, delayed action would be less cost-effective in the long term: *ibid.*, at para. 4.73.

<sup>66</sup> *Ibid.*, at paras 4.74–4.77. The Dutch government did not contest its responsibility to take mitigation or adaptation measures, but rather questioned the required scope of the measures before 2020: *ibid.*, para. 4.64.

<sup>67</sup> *Ibid.*, at para. 4.83.

<sup>68</sup> *Ibid.*, at paras 4.84–4.85.

<sup>69</sup> *Ibid.*, at para. 4.89.

<sup>70</sup> *Ibid.*, at paras 4.79 and 4.90. See also *Massachusetts v. EPA*, n. 39 above ('While it might be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows

Urgenda had proposed an alternative interpretation of the government's liability, based on a pro-rata calculation of the share of Dutch emissions within global emissions. The Court followed Urgenda's reasoning only insofar as the government's argument regarding the negligible effect of Dutch emissions on climate change was rejected.<sup>71</sup> Rather than adopting Urgenda's pro-rata approach, the Court primarily referred to the *Kalimijnen* case, in which the combined chloride dumps by various parties in France, Germany, Luxembourg and the Netherlands caused costly pollution to the Rhine, but no one party could be identified as being solely responsible for the entire harm.<sup>72</sup> Although there are distinct differences between the *Kalimijnen* case and *Urgenda*, the Court saw sufficient overlap to hold that it was unnecessary for Urgenda to fulfil the requirements of the 'but for' test. The Court also used the Dutch mitigation goals under the Kyoto Protocol to the UNFCCC<sup>73</sup> as evidence of the government's commitment to reductions that may have been considered disproportionately high relative to its own emissions.<sup>74</sup>

In sum, the Court established an extensive duty of care on the part of the Dutch government, which calls for the implementation of ambitious GHG mitigation policies in order to avoid negligence through endangerment under Section 6:162.

The non-statutory basis for the Court's order to act distinguishes *Urgenda* from previous climate change litigation in which mandatory orders have been based on statutory obligations.<sup>75</sup> This raises the question as to whether suitable equivalents to the Dutch *onrechtmatige daad* can be found for similar actions in other jurisdictions. Several elements of the judgment could prove particularly pertinent to the further development of climate change litigation, provided that their application can be extended beyond the Netherlands. A comprehensive comparative survey of the tort of negligence across jurisdictions is outside the scope of this contribution,<sup>76</sup> but some preliminary observations may be offered concerning the US and the UK.<sup>77</sup>

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that we lack jurisdiction to decide whether the EPA has a duty to take steps to slow or reduce it [...] A reduction in domestic emissions would slow the pace of global emissions increase, no matter what happens elsewhere').

<sup>71</sup> The government showed that the ordered reduction amounts to 0.04 to 0.09% of global emissions: *Urgenda*, n. 6 above, at para. 4.78.

<sup>72</sup> Hoge Raad (Dutch Supreme Court), 23 Sept. 1988, NJ 1989/743.

<sup>73</sup> N. 35 above.

<sup>74</sup> *Urgenda*, n. 6 above, at para. 4.79.

<sup>75</sup> E.g., *Massachusetts v. EPA* (n. 39 above) is about interpreting the statutory duty of the US EPA to regulate air pollutants.

<sup>76</sup> See, generally, (2009) 20(2) *King's Law Journal*, Special Issue on European Tort Law, specifically K. Oliphant, 'Introduction: European Tort Law', *ibid.*, pp. 189–202; H.-B. Schäfer & F. Mueller-Langer, 'Strict Liability versus Negligence', in M. Faure (ed.), *Tort Law and Economics* (Edward Elgar, 2009), pp. 3–45. See also U. Magnus, 'Why is US Tort Law So Different?' (2010) 1(1) *Journal of European Tort Law*, pp. 102–24.

<sup>77</sup> Together with Australia, these two jurisdictions have generated the majority of climate change jurisprudence thus far. More importantly, these jurisdictions hold comparable, but not identical international and, for the UK, EU mitigation commitments. See the US and the UK commitments anchored in the Cancún Agreements at the UN Climate Change Conference in Cancún in 2010, available at: [http://unfccc.int/meetings/cancun\\_nov\\_2010/items/6005.php](http://unfccc.int/meetings/cancun_nov_2010/items/6005.php). The US did not sign or ratify the Kyoto Protocol (see 'Status of Ratification of the Kyoto Protocol', available at: [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php)). The UK, however, is bound by the second commitment period under the Kyoto Protocol (n. 35 above).

The first point of investigation is whether an action in tort could be mounted against the government in other jurisdictions. Under the US legal system, we encounter obstacles that are absent from the Netherlands: unless the US federal government has explicitly waived its immunity, federal sovereign immunity makes it impossible for it to be sued in tort or on the basis of contract.<sup>78</sup> This is different for individual US states, especially if they have incorporated public trust obligations in their constitutions. Pennsylvania, for example, has included an Environmental Rights Amendment into its constitution, which the Pennsylvania Supreme Court has interpreted as creating trustee obligations on the state government.<sup>79</sup> Such trustee obligations could be viewed as imposing a duty of care similar to that under Section 6:162 of the Dutch Civil Code, particularly since the latter was also interpreted in light of a constitutionally enshrined trustee obligation.<sup>80</sup>

The parallel between American state law and Dutch law, however, should not be overstated. Some US commentators have suggested that in states with public trust obligations, the *Urgenda* ruling would be very persuasive and could lead to more ambitious state implementation of, for instance, the Clean Air Act (CAA).<sup>81</sup> However, several clouds obscure this bright prediction. Procedurally, challenges relating to the interpretation and application of the CAA are regulated under statute, which reduces the value of a tort-based claim.<sup>82</sup> Politically and legally, states have (very) limited ability to go beyond, or against, federal policy regarding international commitments.<sup>83</sup> While the federal government has thus far shown tolerance towards state action on climate change-related issues,<sup>84</sup> it by no means endorses such action and it is unclear at best what the federal response would be to mandatory orders from state courts.<sup>85</sup> The most promising course of action for more ambitious GHG mitigation policies therefore continues to be to pressure the US Environmental Protection Agency (EPA) towards a more ambitious interpretation of its mandate to regulate GHGs, for which statutory

<sup>78</sup> See *Price v. United States*, 174 U.S. 373 (19 S. Ct. 765, 43 L. Ed. 1011). Federal sovereign immunity has been waived in only very few cases, e.g., under the Federal Tort Claims Act (Federal Employees).

<sup>79</sup> Art. I, § 27 of the Constitution of the Commonwealth of Pennsylvania; *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, (Pa. 2013).

<sup>80</sup> Art. 21 of the Dutch Constitution: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment' (English translation available at: <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>).

<sup>81</sup> 42 U.S.C., Ch. 85. See R. McKinstry, Jr., 'Potential Implications for the United States of the *Urgenda* Foundation v Netherlands Decision Holding that the UNFCCC and International Decisions Required Developed Nations to Reduce Emissions by 25% from 1990 Levels by 2020', 17 July 2015, available at: <http://ssrn.com/abstract=2632726>.

<sup>82</sup> CAA, *ibid.*, §§ 7604, 7607.

<sup>83</sup> The executive branch has constitutional authority to make treaties with the consent of the Senate: US Constitution, Art. 2 § 2 cl. 2, § 3.

<sup>84</sup> See, e.g., L. Wexler, 'Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law' (2006) 28(1) *Michigan Journal of International Law*, pp. 1–48, at 16–20.

<sup>85</sup> The authority of foreign decisions in American courts has traditionally been limited and federal law would trump state law, as well as state constitutions: see L.H. Goulder & R.N. Stavins, 'Interactions between State and Federal Climate Change Policies', in D. Fullerton & C. Wolfram (eds), *The Design and Implementation of U.S. Climate Policy* (University of Chicago Press, 2012), pp. 109–21.

avenues are available.<sup>86</sup> The added value of an action in tort against individual states within the US remains limited given the current restrictions.<sup>87</sup>

In terms of governmental tort liability, the UK position more closely resembles that of the Netherlands, as proceedings in tort and contract may be brought against the Crown acting as the government, and against individual ministers.<sup>88</sup> Moreover, as an EU Member State, the international obligations of the UK are comparable with those of the Netherlands. What still remains to be investigated is whether the District Court's treatment of causation in *Urgenda* could also be inspirational for climate change litigation elsewhere<sup>89</sup> and, in particular, the UK.

The Dutch Court's treatment of causation in *Urgenda* differs significantly from that of the British courts in comparable cases.<sup>90</sup> The establishment of negligence under English law requires breach of a duty of care by the defendant and foreseeable damage resulting from that breach.<sup>91</sup> For environmental harm, particularly climate change, it is difficult to prove that the harm was foreseeable and/or caused by the claimant because of the plurality of causes and scientific uncertainty regarding causation.<sup>92</sup> Thus far, the UK Supreme Court has dealt mainly with harm caused by multiple defendants in the context of work-related health injuries, such as lung cancer caused by asbestos.<sup>93</sup> In these cases, courts have held that claimants did not have to prove a causative link between the behaviour and the harm; rather, they have to show that the defendant's actions 'materially increased the risk of harm'.<sup>94</sup> Moreover, if it creates an inequitably onerous burden for the claimant, the burden of proof may be reversed.

<sup>86</sup> McKinstry (n. 81 above) submits that *Urgenda* provides authority for the interpretation of national laws in light of international obligations. This argument is problematic for several reasons. Firstly, the US did not ratify the Kyoto Protocol, which restricts its obligations. Secondly, this is not in fact the core holding in *Urgenda*; while international and national mitigation obligations were taken into account by the Court, this interpretation would be far less powerful without the tort foundation of s. 6:162 Dutch Civil Code. The importance of *Urgenda* as providing an interpretative obligation must be considered carefully and in light of these two factors.

<sup>87</sup> The displacement doctrine, discussed in Section 4 below, also has considerable bearing on this issue.

<sup>88</sup> See Crown Proceedings Act 1947. See, generally, C. Booth & D. Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 2006); D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press, 2003).

<sup>89</sup> For other jurisdictions, see also the comparable judgment in *Environmental Defense Society v. Auckland Regional Council and Contact Energy Ltd* [2002] 11 NZRMA 492 (New Zealand Environmental Court) (in which the scientific evidence on the link between emissions and climate change damage was also accepted but the efficacy of imposing measures was questioned, on which basis the appeal was rejected).

<sup>90</sup> See, e.g., *RWE Npower Renewables v. East Lindsey DC* (Planning Inspectorate Decision, 2011); *Veolia v. Shropshire CC* (Planning Inspectorate Decision, 2012); *Pugh v. Secretary of State for Communities and Local Government and Others* [2015] EWHC 3 (Admin) (UK); *North Cote Farms Ltd v. Secretary of State for Communities and Local Government and Another* [2015] EWHC 292 (Admin) (UK). The US courts are more sympathetic to the Dutch approach and are also quoted in *Urgenda's* pleadings, n. 20 above.

<sup>91</sup> S. Bell, D. McGillivray & O. Pedersen, *Environmental Law*, 8<sup>th</sup> edn (Oxford University Press, 2013), p. 371.

<sup>92</sup> *Cambridge Water Co. v. Eastern Counties Leather plc* [1994] 2 AC 264, on foreseeability and the state of scientific knowledge.

<sup>93</sup> *Fairchild v. Glenhaven Funeral Services Ltd* [2002] 3 WLR 89.

<sup>94</sup> *Ibid.*; see also *McGhee v. National Coal Board* [1973] 1 WLR 1 (*McGhee*), at p. 9. Nevertheless, the issue of the foreseeability of the harm remains: J. Steele & N. Wikely, 'Dust on the Streets and Liability for Environmental Cancers' (1997) 60(2) *The Modern Law Review*, pp. 265–75, at 265.

In such cases, the defendant must show that, on the balance of probabilities, (s)he did not cause the harm.<sup>95</sup> The Dutch District Court did not address any of these questions in its rather succinct assessment of causation.<sup>96</sup> Provided the decision is not overturned on appeal, the extremely limited grounds for causation given by the Court could reduce its relevance for jurisdictions such as the UK, as it does not address many of the questions typically posed by courts in this jurisdiction.

In conclusion, by basing its order to act on the tort of negligence, the Dutch District Court took a pioneering decision within climate change litigation. Yet the ‘exportability’ of this holding to other jurisdictions is not self-evident or unproblematic. At present, the judgment may be a valuable example of how liability through negligence could be used to stimulate government action – not as a blueprint for mandatory orders in other jurisdictions. With respect to the latter, too many legal differences remain.

#### 4. SEPARATION OR BALANCE OF POWERS?

From the 16<sup>th</sup> century onwards, separation of powers has been considered an essential feature of democracy and good governance.<sup>97</sup> Most modern constitutions stipulate the separation of function and personnel between the three branches of government to prevent a concentration of power in any one branch or person. As such, separation of powers provisions typically go hand in hand with a system of checks and balances, which allows branches to ‘check’ the potential abuse of power by others. The judiciary plays an essential role as its independence allows it to review acts by both the legislature and the executive without itself being susceptible to review by these bodies. The flip side of judicial independence is its limited democratic mandate. Also, to ensure that the judiciary does not overstep the boundaries of its mandate, there are limits to the types of act that may be reviewed, on what basis, and with which consequences.<sup>98</sup> As is the case for tort law, the presence of a concept of the separation of powers across jurisdictions should not be confused with a common understanding of its attributes or implications. The entitlements and obligations of the various branches of government are interpreted differently across jurisdictions even if they incorporate a concept of separation of powers.

The Dutch constitutional system is organized through three branches of government – the *trias politica* – but their relationship is not one of strict separation.<sup>99</sup> Rather, it is a system of balance within which the judiciary is charged

<sup>95</sup> *McGhee*, *ibid.*, at p. 6 (‘where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him *unless he shows that it had some other cause*’) as quoted in S. Deakin, A. Johnston & B. Markesinis, *Markesinis and Deakin’s Tort Law* (Oxford University Press, 2012), p. 225. The holding in *McGhee* on this point has not been without controversy – see Deakin, Johnston & Markesinis, *ibid.*, at pp. 225–8.

<sup>96</sup> *Urgenda*, n. 6 above, at para. 4.90.

<sup>97</sup> J. Calvin, *Institutes of the Christian Religion* (translated by H. Beveridge) (Calvin Translation Society, 1845). Later also Montesquieu, *Spirit of the Laws* (translated by A.M. Cohler, B.C. Miller & H.S. Stone) (Cambridge University Press, 1989).

<sup>98</sup> These conditions vary from jurisdiction to jurisdiction: on the UK, see M. Fordham, *Judicial Review Handbook* (Hart, 2012); on the US, see K.L. Hall, *Judicial Review and Judicial Power in the Supreme Court: The Supreme Court in American Society* (Routledge, 2014).

<sup>99</sup> *Urgenda*, n. 6 above, at para. 4.95.

with reviewing the legality of government action in individual cases. In *Urgenda*, the Court emphasized that the effect of judicial decisions is typically restricted to the parties involved in a specific case. The mandatory order in *Urgenda* challenges this presumption, as any subsequent governmental (in)action will clearly have direct and indirect effects on third parties. The District Court took the view that the potential impact of its judgment did not affect its ability to rule on, or award, the mandatory order, provided that the government's ability to (better) balance societal interests was treated with sufficient deference.<sup>100</sup> The government challenged the Court's authority to award the mandatory order based on the Court's lack of democratic legitimacy, and the impact of the judgment on the position of the Netherlands in international negotiation.<sup>101</sup> The Court did not find these arguments persuasive and held that the mandatory order was firmly within its competence.<sup>102</sup> As the government retained discretion on how to implement the mandatory order, the Court did not encroach on the government's executive or legislative powers.

Within Dutch academia, much was written about *Urgenda* in the lead-up to the judgment. The main issues centred on the ability of the judiciary to take decisions in areas of scientific uncertainty and political sensitivity. Proponents of public interest litigation in the Netherlands have emphasized the ability of the courts to act without concern for re-election or other forms of political accountability, which may allow for forceful decision making on sensitive issues.<sup>103</sup> The added value of judicial progressivism under conditions of scientific uncertainty is more contentious. Enneking and de Jong provide a very balanced discussion about the strengths and weaknesses of the court in these circumstances, with particular regard to the type of risk that climate change forces us to consider.<sup>104</sup> The judicial process in the Netherlands does not allow for the judge to gather information in addition to that provided by the parties.<sup>105</sup> Enneking and de Jong suggest that the abstract estimation of risk,<sup>106</sup> without the need to take into consideration the economic feasibility, societal impact of its

<sup>100</sup> *Ibid.*, at para. 4.96.

<sup>101</sup> *Ibid.*, at para. 4.100.

<sup>102</sup> On the specific issue of the democratic mandate of the judiciary, the Court underlined the legislative foundations of its position, which themselves were the result of a democratic process: *ibid.*, at para. 4.97.

<sup>103</sup> On the *Urgenda* case, see T. Hartlief, 'Een Rechtszaak Uit Liefde' (2013) 88(42) *Nederlands Juristenblad*, p. 2911; J. Spier, 'Injunctive Relief: Opportunities and Challenges: Thoughts about a Potentially Promising Legal Vehicle to Stem the Tide', in J. Spier & U. Magnus (eds), *Climate Change Remedies: Injunctive Relief and Criminal Law Responses* (Eleven International, 2014), pp. 1–120; C. Drion, 'Van een Duty to Care naar een Duty of Care' (2007) 82(45–46) *Nederlands Juristenblad*, p. 2857.

<sup>104</sup> Their rich treatment of the issue also discusses the question whether judicial activism must be approached differently when it is prospective (as is the case in *Urgenda*) rather than retrospective: Enneking & de Jong, n. 17 above, particularly pp. 1550–1.

<sup>105</sup> Cf. with the US where the adversarial system allows for more fact-finding by judges: R.A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2009).

<sup>106</sup> In the EU, this abstract estimation of risk by the courts is likely to result in a high(er) level of care as a result of the influence of the precautionary principle: see Art. 191(2) TFEU, n. 61 above: 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.

decision or policy design features, may allow the Court to push through political stalemate on certain issues.<sup>107</sup>

This pragmatic approach has both legal and democratic limits. Firstly, the jurisdiction of national courts is restricted, which is particularly relevant for global problems such as climate change.<sup>108</sup> Secondly, while the pragmatic approach may be particularly useful for politically divisive issues, complaints of judicial overreach will also be more likely in these cases. Thus far, the Dutch Supreme Court has balanced the two issues by leaving ample discretion to the legislature.<sup>109</sup> In *Urgenda*, the District Court claims to leave similar discretion to the Dutch government, as the method of mitigation is not detailed in the order.<sup>110</sup> However, this argument is unconvincing as the order contains a comparatively high level of specificity,<sup>111</sup> which severely reduces the government's discretion with respect to mitigation options.

Notwithstanding the District Court's own view of its position within the *trias politica* and the appropriateness of its judgment, many view the imposition of a minimum emissions reduction goal on a government as unacceptable judicial activism. Jurisdictions that follow a more rigid interpretation of the separation of powers doctrine will provide very limited possibilities for a court to impose similar obligations. In the US, the protection of the separation of powers between the judiciary and the legislature and executive takes place through two key doctrines: the political questions doctrine, and the displacement doctrine. While lower courts have entertained the political questions exception in climate change-related cases – a recognition that the matter raised is of a primarily political rather than legal nature and therefore should be left to the legislature and/or executive – the Supreme Court has explicitly set aside this issue in the context of public nuisance.<sup>112</sup> Through this Supreme Court ruling, the political questions doctrine has lost much of its force in blocking climate change litigation from the courts.<sup>113</sup> The displacement doctrine, however, continues to be applied to climate change litigation. Under this doctrine, statutory powers given to agencies 'displace' the power of the judiciary to address the issue at hand via different routes, such as common law public nuisance.<sup>114</sup> Given the non-statutory basis of the *Urgenda* judgment, this doctrine may prove particularly powerful in restricting its application outside the Netherlands.<sup>115</sup>

<sup>107</sup> Enneking & de Jong, n. 17 above, at pp. 1548–9.

<sup>108</sup> Although not considered a barrier to rule on the Dutch component of the global issue by the District Court, see *Urgenda*, n. 6 above, at paras 4.91–4.92.

<sup>109</sup> Hoge Raad (Dutch Supreme Court), 17 Dec. 2010, NJ 2012/155 (*Wilnis*), and Hoge Raad (Dutch Supreme Court), 30 Nov. 2012, TBR 2013/72 (*Dordtse Paalrot*).

<sup>110</sup> *Urgenda*, n. 6 above, at para. 4.101.

<sup>111</sup> A minimum of a 25% reduction compared with 1990 by 2020: *ibid.*, at para. 4.103.

<sup>112</sup> *AEP v. Connecticut*, n. 39 above.

<sup>113</sup> Peel & Osofsky, n. 10 above, at p. 273.

<sup>114</sup> *Ibid.* See specifically *AEP v. Connecticut*, n. 39 above. See also *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

<sup>115</sup> The US Supreme Court has also used the separation of powers doctrine to restrict the power of the executive in interpreting statutory powers: see *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2446.



Comparatively, a challenge against the Canadian government's decision to withdraw from the Kyoto Protocol<sup>116</sup> was dismissed in light of the executive branch's exclusive prerogative to sign and withdraw from treaties.<sup>117</sup> Similarly, the Canadian Federal Court has held that there was no justiciable duty for the government to comply with the Kyoto Protocol more generally.<sup>118</sup> In Australia, challenges have not been barred on the basis of separation of powers arguments but this might be because most cases, and requested orders, are more firmly within the realm of traditional judicial review, in which the courts are not asked to overstep their mandate.<sup>119</sup> Other jurisdictions have seen the award of mandatory orders, but only on the basis of pre-existing statutory obligations.<sup>120</sup> In light of our earlier comparison, brief mention of the UK position is also warranted. While the UK incorporates some functional and personal separation of powers, the principle of parliamentary sovereignty prevents the British Parliament from being bound by anything or anyone, including its own legislation.<sup>121</sup> The award of a mandatory order such as that in *Urgenda* would therefore be highly unlikely and ultimately ineffective as Parliament cannot be restrained.<sup>122</sup> As such, any Parliamentary Act that stipulates a maximum level of emissions reduction would not be reviewable.<sup>123</sup>

Some have argued that the courts provide an alternative forum for parties that have been unable to effectively voice their views in the political arena, particularly on the issue of climate change.<sup>124</sup> However, the fact that the judgment in *Urgenda* aims to have a pro-regulation effect in the area of climate change mitigation does not mean that it is inherently legitimate; other jurisdictions have seen equally or more effective anti-regulation campaigns pushed through the courts.<sup>125</sup> In the US, many of these challenges have been brought as a response to the pro-regulation 'victory' in *Massachusetts v. EPA*.<sup>126</sup> A similar backlash could follow in the Netherlands even if the *Urgenda* judgment survives appeal. In terms of constitutional doctrine, the *Urgenda* ruling ties in with long-standing questions on the position of the courts

<sup>116</sup> N. 35 above.

<sup>117</sup> *Turp v. Canada (Attorney General)* [2012] FC 893, T-110-12 (Federal Court of Canada).

<sup>118</sup> *Friends of the Earth Canada v. The Governor in Council and Others* [2008] FC 1183 (Federal Court of Canada).

<sup>119</sup> In addition, the bulk of Australian litigation has taken the shape of procedural claims: see, e.g., *Re Australian Conservation Foundation v. Latrobe City Council* [2004] 140 LGERA 100 (Victoria Civil and Administrative Tribunal, Australia). See also Kosolapova, n. 14 above, at pp. 89–105.

<sup>120</sup> See, e.g., *Environment-People-Law v. Ministry of Environmental Protection* [2008] (Commercial Court of Lviv, Ukraine).

<sup>121</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915).

<sup>122</sup> While parliamentary sovereignty has survived the UK's accession to the EU, certain inroads have been made: see, e.g., Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-02433, ECLI:EU:C:1990:257 (*Factortame*). This sovereignty does not extend to the executive, whose actions may be, and frequently are, reviewed.

<sup>123</sup> E.g., Climate Change Act 2008, c. 27, available at: <http://www.legislation.gov.uk/ukpga/2008/27/contents>.

<sup>124</sup> See Hilson, n. 14 above.

<sup>125</sup> Peel & Osofsky, n. 10 above, at p. 106. This is particularly true for Australia and the US.

<sup>126</sup> N. 39 above. For current CAA cases see, e.g., A. de Vogue, 'Supreme Court: EPA Unreasonably Interpreted the Clean Air Act', *CNN Politics*, 29 June 2015, available at: <http://edition.cnn.com/2015/06/29/politics/supreme-court-epa-emissions>.

and the legitimacy of the judicial process. In the enthusiasm regarding the pro-environmental outcome of *Urgenda*, the perceived desirability of the outcome must not be seen as a cure for the democratic legitimacy concerns that this mandatory order raises.

### 5. *URGENDA*: TURNING THE TIDE OR A DROP IN THE OCEAN?

This article set out to answer three questions regarding the meaning of *Urgenda* for climate change litigation and policy, the first and second of which concerned the ‘exportability’ of the judgment in terms of the legal basis of the decision and its impact on the constitutional division of power between the branches of government. It is too early to judge definitively the importance of *Urgenda* as much will depend on possible appeals by the Dutch government and their outcome. However, the preliminary discussion in this article shows that the specific legal context of the case restricts its exportability based on the current state of the law in some of the most important climate change litigation jurisdictions. Even so, the academic, political and judicial discussions following *Urgenda* may prove valuable in their own right, especially in light of the forthcoming Conference of the Parties (COP-21) to the UNFCCC to be held in Paris in December 2015, during which Parties are expected to adopt a new global climate agreement.<sup>127</sup> This brings us to the third and final question: will *Urgenda* lead to more ambitious governmental action on climate change mitigation?

The answer depends on the timeline and on whether the focus is on national, European, or global consequences. There have already been tangible consequences of the judgment within the Netherlands, including the call for a parliamentary debate on the government’s climate policies, and the political debate is likely to continue as the case goes through the various stages of appeal.<sup>128</sup> In Belgium, a very similar case – *Klimaatzaak* – is currently pending before the court and the Dutch judgment has raised hopes for a climate-friendly outcome.<sup>129</sup> In the short term, therefore, *Urgenda* may have a signalling effect, which is particularly relevant in light of the forthcoming Paris Conference.

In *Urgenda*, the Dutch government emphasized its limited discretion with respect to climate policy given the EU’s competence in this policy area. Whereas the government’s arguments regarding its inability to reduce more than the EU norm under, for example, the EU Emissions Trading Scheme were judged unconvincing, some complications do arise from EU membership.<sup>130</sup> For example, it is unclear what will happen with any ‘over-compliance’ achieved by the Netherlands; the EU may redistribute these ‘extra’ allowances to help other Member States to achieve their

<sup>127</sup> On the 2015 Paris Climate Conference, see the UN website at: <http://newsroom.unfccc.int/paris>.

<sup>128</sup> At the time of writing (6 Aug. 2015), an appeal has not been confirmed.

<sup>129</sup> More information is available at: <http://www.klimaatzaak.eu/en>.

<sup>130</sup> *Urgenda*, n. 6 above, at para. 4.80. The Dutch government argued specifically that it would not be allowed to increase reductions in EU ETS sectors because of EU regulation. The Court disagreed, as the EU goals are minimum levels rather than reduction ceilings. In its oral pleadings, the government admitted that it would be legally and factually possible to go beyond EU reduction goals.

goals, thereby levelling out reductions within the EU despite an increase in Dutch reductions, and negating the aim of the Court's mandatory order.<sup>131</sup> Similarly, the EU negotiation position for the Paris Summit has been finalized and its intended national contributions will be communicated to the Secretariat of the UNFCCC by November 2015.<sup>132</sup> European leaders agreed upon the EU's negotiation strategy during the European Summit of October 2014, establishing a minimum reduction of 40% compared with 1990 by 2030.<sup>133</sup>

The potential signalling effect of *Urgenda* is thus diluted and complicated through the overlapping Dutch and EU legal contexts. The District Court is a Dutch *and* a European court, bound to apply and uphold European law as well as Dutch law, yet very little attention was paid to this obligation by the District Court. Equally, the scholarly debate on the legal and constitutional implications of *Urgenda* has left the European dimensions relatively unexplored. This is partly because of the limited relevance of EU law for national tort law and the internal institutional organization of the Member States.<sup>134</sup> Nevertheless, in order to understand the role that climate change litigation can play within Europe, the EU dimension cannot be ignored. The two-level game between national and European 'government' means that political costs of action (and inaction) can be externalized and accountability is reduced. The Dutch government's attempt to 'hide' behind EU-imposed reduction targets is a case in point. In this political climate, achieving change through the democratic process can be more costly than achieving a victory through the courts. However powerful these judgments may be, they cannot replace the democratic process, domestically or at the EU level. In time, this might prove to be the most powerful 'signal' of *Urgenda*.

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<sup>131</sup> *Ibid.*, at para. 4.81.

<sup>132</sup> See also the European Commission's website at: [http://ec.europa.eu/clima/news/articles/news\\_2015022501\\_en.htm](http://ec.europa.eu/clima/news/articles/news_2015022501_en.htm).

<sup>133</sup> For a detailed breakdown of this plan, see Communication from the Commission to the European Parliament and the Council, 'The Paris Protocol – A Blueprint for Tackling Global Climate Change Beyond 2020' [2009] COM(2015) 81 final/2, available at: [http://ec.europa.eu/clima/policies/international/paris\\_protocol/docs/com\\_2015\\_81\\_en.pdf](http://ec.europa.eu/clima/policies/international/paris_protocol/docs/com_2015_81_en.pdf).

<sup>134</sup> Art. 4(2) of the Treaty on European Union (TEU), Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, available at: [http://europa.eu/lisbon\\_treaty/full\\_text](http://europa.eu/lisbon_treaty/full_text).