

Lambrecht, J., and Ituarte-Lima, C. 2016. Legal innovation in national courts for planetary challenges: Urgenda v State of the Netherlands, *Environmental Law Review* 2016 18: 57-64.

Note: the version of the paper including copy-editing can be accessed at <http://elj.sagepub.com/content/18/1>

LEGAL INNOVATION IN NATIONAL COURTS FOR PLANETARY CHALLENGES:

URGENDA V STATE OF THE NETHERLANDS

Urgenda v State of the Netherlands

District Court of the Hague, 24 June 2015, C/09/456689/ HA ZA 13-1396

Keywords: climate change, legal innovation, legal principles, duty of care, equity, planetary boundaries

1. Introduction: Planetary Boundaries, Climate Change and Equity

This article analyses the Urgenda climate case in which the State of the Netherlands was ordered to reduce its greenhouse gas emissions with 25% by 2020, which has generated much interest in the Netherlands¹ and internationally². We argue that this case, which links local initiatives and planetary challenges, is innovative in operationalizing legal concepts and principles in a climate change context.

Climate change and biosphere integrity are the ‘core boundaries’ of the updated Planetary Boundaries framework which distinguished nine and quantified seven planetary subsystems or processes with associated bio-physical boundaries beyond which abrupt and undesirable environmental change could

¹ See, e.g., C.W. Backes, ‘Noot onder AB 2015/336’ (2015) 36 AB Rechtspraak Bestuursrecht 2112; S. Fikkers, ‘Urgenda, de zorgplicht en toekomstige generaties’ (2015) 33 Nederlands Juristenblad 2289.

² See, e.g., J. van Zeven, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?’ (2015) 4 Transnational Environmental Law, 339; C.Y. Nyinevi, ‘Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation’ (2015) 8 J. Pol. & L. 135

occur.³ These planetary boundaries (hereafter PB) are closely interlinked and together form a so-called ‘safe operating space’ in which humanity can thrive and develop.

While this conceptual framework is very useful for addressing the bio-physical limits of the planet it is not designed to deal with issues of justice or equity within this ‘safe operating space’, since legal and policy dimensions lie essentially beyond its scope. As the scientists developing the revised PB framework acknowledge: “...*the planetary boundaries approach says nothing about the distribution of affluence and technologies among human societies. Thus, remaining within planetary boundaries is a necessary, but not sufficient, condition for sustainable development.*”⁴

Certain authors have already tried to complement the PB framework with justice considerations⁵ while others have focused on its relation to the development of Sustainable Development Goals.⁶ However, more research from a *legal perspective* is needed to understand the equity dimensions of the PB framework. Some legal scholars have already observed that law and governance will also have to consider “*conflicts and the distributive effects within these boundaries*”.⁷

This PB research can be further complemented with literature that focuses on justice and equity issues of environmental challenges, in particular climate change.⁸

³ J. Rockström et al., ‘A Safe Operating Space for Humanity’ (2009) 461 Nature 472; W. Steffen et al., ‘Planetary boundaries: Guiding human development on a changing planet’ (2015) 347 Science 1259855.

⁴ W. Steffen et al., ‘How Defining Planetary Boundaries Can Transform Our Approach to Growth’ (2011) 2 (3) Solutions 65.

⁵ K. Raworth, ‘A Safe and Just Space for Humanity’ (2012) Oxfam Discussion Paper <www.oxfam.org/sites/www.oxfam.org/files/dp-a-safe-and-just-space-for-humanity-130212-en.pdf> accessed 6 August 2015.

⁶ T. Elmqvist et al., *Global Sustainability & Human Prosperity – Contribution to the Post-2015 agenda and the development of Sustainable Development Goals* (TemaNord 2014:527, Nordic Council of Ministers, 2014).

⁷ J. Ebbesson, ‘Planetary Boundaries and the Matching of International Treaty Regimes’ (2014) 59 Scandinavian Studies in Law 259, 281.

⁸ E. Posner and D. Weisbach, *Climate Change Justice* (Princeton University Press 2010); S. Humphreys (ed), *Human Rights and Climate Change* (CUP 2010); S. Nicholson and D. Chong, ‘Jumping on the Human Rights Bandwagon: How

Our contribution builds on the above-mentioned body of work and can be situated at the crossroads of the PB framework, equity and law, with a specific focus on climate change. We chose to analyse a concrete and recent case where a national court has dealt with equity in relation to global and intergenerational aspects of climate change. ‘Equity’ is socially constructed and may be understood differently under distinct legal systems. ‘Equity’ is also essentially relativistic relating to concepts of justice or fairness dependent on perceptions of relative equality among members of society.⁹ Hence, although equity and justice are inter-related, we use the notion ‘equity’ because it is conceptually more suitable to understand the issues raised by the case and it is explicitly part of the considerations of the Court. Our main research question is: *‘what are the possibilities and limitations of national courts in contributing to safe and equitable operating spaces where humanity can thrive?’*

2. Methodology

Legal scholarship necessitates critical self-reflection - without being dependent on one particular method.¹⁰ We opted for a case study-approach through which we reviewed scientific and grey literature and analyzed the Dutch climate case “Urgenda v State of the Netherlands” because it brings together both important procedural and substantive elements related to our research question, such as issues of standing and equity as shown in sections 1 and 5. Furthermore, the interpretation of key legal environmental law concepts and principles in this case is innovative and has the potential to set a precedent in legal practice.

Rights-based Linkages Can Refocus Climate Politics’ (2011) 11 (3) Global Environmental Politics, 121; N. Hällström (ed), *What next Volume III – Climate, Development and Equity* (Dag Hammarskjöld Foundation and the What Next Forum 2012); M. Grasso, *Justice in Funding Adaptation under the International Climate Change Regime* (Springer 2010). See also: Oslo Principles on Global Climate Change Obligations <<http://globaljustice.macmillan.yale.edu/news/oslo-principles-global-climate-change-obligations>> accessed August 13 2015.

⁹ C. McDermott et al., ‘Examining equity: a multidimensional framework for assessing equity in payments for ecosystem services’ (2013) 33 Environmental Science & Policy 416; C. Ituarte-Lima et al., ‘Assessing equity in national legal frameworks for REDD+: The case of Indonesia’ (2014) 44 Environmental Science & Policy 291

¹⁰ E. Fisher et al., ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 JEL 213.

We studied the documents of the proceedings¹¹ and focused on the judgment of the Court.¹² In order to ensure accuracy, we use the Dutch version of the documents.

3. Factual background

The Urgenda Foundation (hereafter: Urgenda; a contraction of ‘*urgent agenda*’) is a Dutch foundation established in 2008 with the aim to “*stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands*”.¹³ In November 2013 Urgenda filed the first-ever climate suit against a European state in the District Court of The Hague (civil law).¹⁴ Urgenda thereby acted both on its own behalf as well as on behalf of 886 individual Dutch citizens.

In the 144-page summons Urgenda used the Fourth Assessment Report (AR4 - 2007) of the Intergovernmental Panel on Climate Change (IPCC) as an exhibit to demonstrate that a level of 450 ppm CO₂-eq in the atmosphere leaves us with a 50% chance¹⁵ of not exceeding the 2-degree threshold necessary to avoid dangerous climate change. In order not to go beyond this CO₂-eq level¹⁶ Annex I countries must achieve emission cuts by the year 2020 of at least 25% to 40% compared to 1990 levels.

Urgenda argued that although the State of the Netherlands (represented in the proceedings by the Ministry of Infrastructure and the Environment, hereafter: the State) has already acknowledged the latter in the context of international negotiations, its current emission reduction target for 2020, derived from

¹¹ Available at < www.urgenda.nl/en/climate-case/ > accessed 7 August 2015.

¹² Only the Dutch version of the judgment is authoritative, but an English translation is available at the official website <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>> accessed 7 August 2015.

¹³ As stated in its by-laws of 17 January 2008.

¹⁴ R. H.J. Cox, ‘The Liability of European States for Climate Change’ (2014) 30 (78) Utrecht Journal of International and European Law 125.

¹⁵ Increased to more than 66% in AR5 (2013).

¹⁶ Box 13.7 of chapter 13 WG III of AR4 (p. 776) refers to 450 ppm CO₂-eq. However, because the actual boundary lies at a temporary overshoot of 50 ppm CO₂-eq, this boundary can also be expressed as 450 ppm CO₂.

the EU-target of 20%¹⁷, falls short of this goal. Hence, Urgenda argued the State is acting *unlawfully* (i.e. through an unlawful act or tort) because its neglect is putting the Dutch society and territory in danger.

Urgenda claimed that the legal basis for this can be found in *international* law (with the ‘no harm rule’ as a principle of international law, the United Nations Framework Convention on Climate Change (UNFCCC) and consecutive decisions by the signatory parties), in *European* law (with the right to life (art. 2 European Convention on Human Rights (ECHR) and the right to health and respect for private and family life (art. 8 ECHR)) as well as in *national* (i.e. Dutch) law (with the (unwritten) legal duty of care based on Section 162, paragraph 2 of Book 6 of the Dutch Civil Code and further elaborated by the Dutch Supreme Court).

The plaintiffs maintained that their rights were violated by the State and therefore requested an order¹⁸ imposing the latter to take action to reduce emissions to 40%, or in any case at least 25%, below the 1990 level by 2020, based on the IPCC 450 ppm scenario.

The State did not deny that climate change poses a significant threat but argued that Urgenda did not have sufficient legal interest to make its claims, that the State is already meeting its international legally binding reduction commitments, that the Dutch emissions are not illegal and that the court cannot decide on the reduction of Dutch emissions since this is a political matter.

4. Key elements of the judgment

Through a synthesis of the Court Decision, this section highlights key issues for assessing the possibilities and limitations of national courts in addressing safe and equitable operating spaces.

4.1. Urgenda’s standing

The Dutch Civil Code¹⁹ allows a foundation with full legal capacity to start legal proceedings in court to protect *general interests* or the *collective interests of other persons* as long as this protection is based on the

¹⁷ European Parliament and Council Decision 406/2009/EC of 23 April 2009 (OJ L 140/136 5.6.2009) 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.

¹⁸ Book 3, Section 296 of the Dutch Civil Code.

objectives formulated in its by-laws and that it has adequately tried to instigate a *dialogue* with the defendant in order to have its demands met.²⁰

The State argued that the plaintiffs had no case in so far as they defended the rights or interests of current or future generations *in other countries*.

The Court found that Urgenda's action (acting on its own behalf) was admissible because its by-laws demonstrated "*prioritization and not a limitation to Dutch territory*". The court acknowledged that the term "*sustainable society*" has "*an inherent international (and global) dimension*" and "*by its nature crosses national borders*". Urgenda can thus "*partially base its claims on the fact that the Dutch emissions also have consequences for persons outside the Dutch national borders, since these claims are directed at such emissions.*"²¹

4.2. Climate change: facts and figures

In its assessment the Court referred directly to the UNFCCC and the IPCC and considered the findings of the latter as *facts*²², which are moreover not contested by the State. The Court found that from a scientific point of view there is a strong preference for the 450 ppm scenario and associated emission cuts for Annex I countries included in AR4 (see above, 3), "*taking into account an equitable sharing*" (i.e. of the reduction efforts).²³ Furthermore, the Court notes that the Netherlands, as a Party to the UNFCCC, adopted the COP 16 decision²⁴ which acknowledged that "*achieving the lowest levels assessed by the IPCC to date and its corresponding potential damage would require Annex I Parties as a group to reduce emissions in a range of 25–40 per cent below 1990 levels by 2020 (...)*" and "*urged*" Annex I Parties to raise the level of ambition accordingly.²⁵

¹⁹ Book 3, Section 303a.

²⁰ Paragraph 2. In 2012 there was correspondence between Urgenda and the Dutch government with regard to its claims.

²¹ Consideration 4.7.

²² 4.12.

²³ 4.22 and 4.23.

²⁴ Decision of the Ad Hoc Working Group of Annex I countries (Decision 1/CMP.6).

²⁵ Considerations 4.23 and 4.24.

The Court noted that the Netherlands originally had a reduction target of 30% while the later adopted EU-based target (see above, 3) is expected to lead to a total reduction of 14-17% in 2020. This is below the standard “*deemed necessary by climate science and in international climate policy*”.

The Court concluded that the dispute revolved around the question of whether or not the State is falling short in its *duty of care* by fixing a target for 2020 that is lower than the standard of 25-40%, all compared to 1990.

4.3. Duty of care for the State

The Court rejected any direct claims based on the “no harm” rule, the UNFCCC and associated protocols or on articles 2 and 8 ECHR, but considered that these still hold meaning and can serve as a source of inspiration²⁶ when applying and interpreting open standards of law, such as the standard of care of Book 6, Section 162 of the Dutch Civil Code. First, they determined what *degree of discretionary power* is granted to the State with regard to this specific topic. Second, the goals and principles contained in these regulations (for example, *the protection of the climate system for the benefit of present and future generations of humankind, on the basis of equity*) are relevant in determining *the minimum degree of care* the State is supposed to observe.

The Court came to the conclusion that given the high risk, the current insufficient emission reduction targets, and the fact that an early and speedy reduction of the emissions increases the chance to avoid dangerous climate change, the State has a “*serious duty of care to take measures to prevent it*”. The level of policy discretion is limited by principles such as an equitable sharing of emission reductions and by the fact that, with current emissions, the cost of adaption measures will eventually become disproportionately high. The Court considered: “*If it turns out to be cheaper to act now (...) the State has a serious obligation (...) towards future generations to act accordingly.*”

²⁶ For example, the Court refers to the 2005 “Manual on human rights and the environment” (Council of Europe) which explains the rulings of the ECtHR. In particular, reference is made to the existence of a positive obligation for public authorities to adopt measures to prevent infringements of rights, for example depending on the harmfulness of the situation and the foreseeability of risks.

Finally, the Court rejected the State's argument that its contribution to *global* greenhouse gas emissions was minor, ruling that “*any anthropogenic greenhouse gas emission (...), contributes to an increase of CO₂ levels in the atmosphere and therefore to hazardous climate change.*” The Court referred *mutatis mutandis* to the Potash mines ruling of the Dutch Supreme Court (HR 23 September 1988), leaving the State's obligation to exercise care towards third parties intact. The Court also noted that “*the Dutch per capita emissions are one of the highest in the world.*”²⁷

For all these reasons, the Court ruled that in pursuing an emission reduction below the level of 25-40% the State *failed* to fulfil its duty of care and had therefore acted unlawfully.²⁸ However, the Court saw no reason to oblige the State to take on an emission reduction target above the low-end of that spectrum (25%), since this would interfere with the policy discretion of the State.

4.4. Separation of powers

The Court considered that it had democratic legitimacy to provide legal protection, also against government authorities, and that it did not enter the field of policy in doing so. The Court acknowledged that allowing a claim can have political consequences, but this is inherent in the role of the judge “*with respect to government authorities in a state under the rule of law*”.

5. Commentary

Based on the synthesis of key elements of the judgment in section 4, we now discuss the constraints and prospects of national courts in fostering safe and equitable operating spaces for a sustainable society.

5.1. Limitations with regard to Safe and Equitable Operating Spaces

One could interpret these proceedings as a *failure of both national and international politics*, which despite increasing scientific evidence, until now (September 2015) has failed to agree on necessary climate

²⁷ Consideration 4.79, based on the Emissions Database for Global Atmospheric Research (EDGAR) referred to in consideration 2.25.

²⁸ The court assumes a sufficient causal link between the Dutch greenhouse gas emissions, global climate change and the (current and future) effects on the Dutch environment (consideration 4.90).

measures of a binding nature.²⁹ In that perspective the role of civil society trying to change the status-quo has become more important.³⁰ However, making effective climate policies dependent on court decisions can be problematic for numerous reasons.

Firstly, going to court requires substantial investments both with regard to time and money.³¹ Most non-governmental organisations have very limited economic resources and investing these in legal proceedings often means not investing in other activities. To a certain extent, the financial argument also applies to the State, whose resources are not unlimited either, and which will have to deploy extra personnel for responding to time consuming court cases, which maybe even more problematic in poorer countries. However, the possibility of a court case might be an incentive for governments to enter into effective dialogue with civil society for addressing environmental challenges.

Secondly and with regard to the protection of a safe operating space, even a 25% emission reduction by 2020 might not be sufficient. The updated PB quantification research suggested that the zone of uncertainty for the CO₂ control variable should be narrowed from 350-550 ppm to 350-450 ppm CO₂.³² Thus, a 25% reduction seems the absolute minimum needed to attain a situation that presumably still contains a high level of uncertainty. The IPCC has established that a 450 ppm scenario only gives us a 66% chance of *not* overshooting the 2°C target. Is society willing to take this risk?

Thirdly and with regard to the creation of an equitable operating space, even though a human rights based approach in a climate change context is currently being advocated, the question whether or not the human rights of the +800 *individual Dutch citizens* in this case have been violated currently remains

²⁹ J. Ebbesson, 'Planetary Boundaries and the Matching of International Treaty Regimes' (2014) 59 *Scandinavian Studies in Law* 259, 266.

³⁰ V. Galaz et al., 'Connected Risks, Connected Solutions' (Stockholm Resilience Centre and the Global Challenges Foundation 2014), 46.

³¹ A similar case has been initiated in Belgium. Through crowdfunding, organisers are currently trying to raise 180.000 EUR See: <www.klimaatzaak.eu>; The cost issue is relevant to other branches of environmental law too. For the UK see: R. Stech et al., 'Costs Barriers to Environmental Justice' (Environmental Law Foundation 2009).

³² W. Steffen et al., 'Planetary boundaries: Guiding human development on a changing planet' (2015) 347 *Science* 1259855-3.

unanswered, since the Court considered that this would not lead to a different outcome - compared to the claims that were already granted to Urgenda acting on behalf of itself.

Finally, the State is appealing the judgment. There is no guarantee that the appellate court or courts in other countries that are faced with the same questions, will rule in the same vein. This might depend on both procedural issues (legal standing) and more substantive issues. For example, some authors note that the court dealt with the question of causality in this case (i.e. plurality of causes) rather lightly³³ or that complaints of judicial overreach in cases like these are more plausible.³⁴

5.2. Possibilities with regard to Safe and Equitable Operating Spaces

We find that the Court is innovative in operationalising the national legal concept of ‘duty of care’ in a *climate case*. In doing so, the Court is furthermore ‘giving teeth’ to (or increasing the enforceability of) principles embedded in the UNFCCC as it explicitly takes into account the equity principle, precautionary principle and sustainable development principle to determine the duty of care and discretionary power of the State.

As for the principle of common but differentiated responsibilities, although it is not explicitly cited in the ‘assessment section’ of the judgment (it is cited in ‘facts’ section), its ‘spirit’ is certainly present in the considerations regarding the equitable sharing of emission reductions, the leading role of developed countries in this regard and the ascertainment that Dutch emissions are among the highest in the world. Some authors suggest that the principle of common but differentiated responsibilities has evolved as an alternative to the no harm rule in the context of climate change³⁵, which might help to overcome some of the limitations of the no harm rule.³⁶

³³ C.W. Backes, ‘Noot onder AB 2015/336’ (2015) 36 AB Rechtspraak Bestuursrecht 2112, 2115.

³⁴ J. van Zeben, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?’ (2015) 4 Transnational Environmental Law, 339, 354.

³⁵ See: J. Ebbesson, ‘Social-Ecological Security and International Law in the Anthropocene’ in J. Ebbesson et al. (eds), *International Law and Changing Perceptions of Security*, Liber Amicorum Said Mahmoudi (Brill, 2014) 71, 90.

³⁶ J. Ebbesson and C. Folke, ‘Matching scales of law with social-ecological contexts to promote resilience’ in A. Garmestani and C. Allen (eds), *Social-Ecological Resilience and Law* (Columbia University Press 2014) 265, 281.

Employing other general principles of international law, such as the no harm rule³⁷, as well as human rights such as the right to life (art. 2 ECHR) and the right to health and respect for private and family life (art. 8 ECHR) as a *source of inspiration* to define the duty of care in a climate context, is also innovative. These principles and rights are relevant for fostering both safe and equitable operating spaces.

Moreover, using Decision 1/CMP.6 to conclude that the State's current emission reduction targets are below the standard "*deemed necessary*" in international climate policy (see above 4.2.), enhances the legal status³⁸ (i.e. the obligatory character) of this decision, which can also be considered as legally innovative.

The weight of *science* in this judgment seems to indicate that the threshold for the Court to restrict the discretionary power of the State is still relatively high. Presumably not every advocacy group fighting for a general interest in accordance with its statutory goal will be able to build a case that is as scientifically substantiated as the present one. This can counter potential criticism that this ruling will open the door to many more activist groups challenging different kinds of government policies *in court*.

This case provides evidence of how a *legal bottom-up approach* by civil society can affect decisions normally adopted with a *top-down approach* by State representatives in international and national negotiations. Exploring the dynamics between these two forms of governance, and the interactions between international and national law to address planetary challenges such as climate change can open possibilities to better understand the possibilities and barriers for *legal transformations*.³⁹ We also find that this case links local initiatives with global concerns: the citizens involved intend to defend primarily Dutch but also global interests. In that sense, Urgenda's clear by-laws seem to have been crucial in the decision of the Court with regard to legal standing (see above 4.1.). The Court recognizes the crucial role of the

³⁷ A direct application of the no harm rule was dismissed because the latter is only binding towards States.

³⁸ The perspectives on the legal status of COP decisions differ. Although the Court explicitly acknowledges that almost all the decisions of the COP are not legally binding (consideration 4.38) and while some consider this particular COP decision as not legally binding (see: J. Ebbesson, 'Planetary Boundaries and the Matching of International Treaty Regimes' (2014) 59 Scandinavian Studies in Law 259, 266), others (e.g. Natural Justice) argue that the legal status of COP decisions is not clear.

³⁹ V. Galaz et al., 'Connected Risks, Connected Solutions' (Stockholm Resilience Centre and the Global Challenges Foundation 2014), 47.

government in a transition to a sustainable society. Steering public policies away from fossil fuels might be considered as a positive outcome of this judgment.

In conclusion, this judgment indicates that the existing body of law is sufficient to compel (at least certain) national states to adopt stricter emission reduction targets. We also find that citizens' mobilizations for addressing planetary challenges in courts require courageous judges. The future will tell if this case has created a precedent in legal practice. As Jaap Spier, Advocate-General of the Netherlands Supreme Court, said in a recent interview: *"It is just a matter of applying existing law, although undoubtedly not all judges will be open to this. Judges with the courage to give a ruling on this will one day be applauded, whereas those who don't eventually will be tarred and feathered."*⁴⁰

Jesse Lambrechtⁱ

Centre for Environmental and Energy Law

Ghent University

Belgium

Claudia Ituarte-Limaⁱⁱ

Stockholm Resilience Centre

Stockholm University,

Sweden

ⁱ This case note was written while this author was a visiting researcher at Stockholm Resilience Centre

ⁱⁱ Dr Iruarte-Lima was financially supported by the Swedish Research Council for the Environment, Agricultural Sciences and Spatial Planning (Formas) through the project "Effective and Equitable Institutional Arrangements for Financing and Safeguarding Biodiversity".

⁴⁰ J. Bouma and A.G. Franssen, 'Klimaat onder de rechter' *Trouw* (Amsterdam, 8 april 2015).