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A Climate of change? Taking stock of the Urgenda case with a Supreme Court ruling on the horizon

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Where one looks across the *piste* of emergent significant climate litigation – that is, important cases in courts around the world that deal significantly with issues related to climate change – the case of *State of Netherlands v. Urgenda* (hereafter '*Urgenda*') looms as large as most, if not any, court ruling to date.

This case, brought by the eponymous Dutch NGO Urgenda, has been rightly held up by many lawyers, commentators and environmental activists concerned to protect our planet from the harmful impacts of anthropogenic climate change as an important testament to the capacity for human rights law to assist in grappling meaningfully with hard problems posed by climate change in the courts.

Here, The Hague Court of Appeal ruled in October 2018 that the State was required to adjust the Netherlands' national greenhouse gas emissions reduction target for 2020 upward from 20% to 25% (measured on 1990 emissions levels). This example of national courts ordering a state to adopt a more stringent climate mitigation target is unprecedented at the present time.

In addition to being of particular interest to human rights lawyers and legal analysts, including in these pages where key elements of the ruling have been summarised and discussed by David Hart QC, the broader ripple-effects of the case have become a motivating force in the wider context of climate activism, including in relation to some of the climate protests that have been springing up lately around the world.

However, and while these developments create legitimate cause for enthusiasm among many of those concerned for the state of our environment, the optimism that the *Urgenda* breakthrough has engendered in many quarters should be tempered by a sharp awareness of the broader legal reality of the situation. Otherwise, a meaningful sense of the case's genuine import cannot be constructed.

With this note of caution in mind, it is helpful to take a hard look at certain key facts.When the case was at first instance in the Netherlands in 2015, the District Court expanded the Dutch tort doctrine of hazardous state negligence, employing *inter alia* Article 162 of Book 6 of the Dutch Civil Code. In doing so, it ruled that the Dutch government's then target of a 17% reduction in greenhouse gas emissions for 2020 (benchmarked from 1990 levels) was to be increased to 25%. This revised figure, the court held, met the minimum standards required by current scientific knowledge and associated international policy approaches to permit the State to make a minimum necessary contribution to global climate change mitigation.

While this ruling amounts to an important achievement, it is notable that the District Court *did* find for Urgenda on tort grounds, but *did not* accept additional key arguments put forward on human rights grounds. Most particularly, the court held that Article 2 (right to life) and Article 8 (right to private and family life) of the ECHR could not apply because they were prevented from doing so by Article 34 ECHR (admissibility of individual applications); see the judgment at para 4.45.

On appeal, it was determined by the Court of Appeal in 2018 that Article 34 ECHR should not be construed as screening out Urgenda's ability to rely directly on Articles 2 and 8 ECHR, and they were applied by the court to affirm the 25% reduction figure established at first instance. Thus, while an understandable tendency exists to extol the *Urgenda* case as a substantial testament to the effectiveness of human rights-driven public interest law in the complex area of climate change, it is also notable that the District Court initially gave application of the ECHR short shrift.

Moreover, for all the justified enthusiasm attaching to the Court of Appeal decision, the ruling is presently under appeal at the Supreme Court of the Netherlands. Treating the matter as a closed-book human rights success story thus permits one to ignore a very real question that the Dutch courts are presently considering, as expressed here by Minnerop:

Did the Court of Appeal go too far and interpret the rights of the ECHR in a more generous way than the ECtHR, thereby delivering a ruling that is unconvincing and perhaps even susceptible to being overturned by the Supreme Court of the Netherlands?

To this picture, one might also add the observation that various courts in other states have lately been unpersuaded by similarly substantial attempts to apply Article 2 and 8 ECHR arguments to climate change matters, see: in the UK, *Plan B v Secretary of State*; in Ireland, *Friends of the Irish Environment*.

The Supreme Court hearings took place on 24 May 2019, and the judgement is expected on 20 December 2019. Parties concerned that the Court of Appeal's trail-blazing decision might be overturned can find a degree of reassurance in the advisory opinion issued recently to the Supreme Court on 13 September by Deputy Procurator General Langemeijer and Advocate General Wissink to the Supreme Court, advising that the Court of Appeal ruling be upheld.

Further, and albeit that the present writer has emphasised here that the frequently celebrated *Urgenda* decision is neither final nor set in stone, an additional point of

importance was emphasised recently by Justice Preston, Chief Judge of the Land and Environment Court of New South Wales, in response to a question from an audience in the UK after delivering a recent detailed lecture on climate litigation. He stated that the "genie is very much out of the bottle", emphasising that the substantial enthusiasm that the Court of Appeal decision has served to generate around the world cannot by this time be stifled even in the event of the Supreme Court ruling the other way.

This is an important point. It also serves in turn to emphasise a related matter, that is, a further procedural aspect pertinent to the *Urgenda* litigation that is rarely addressed meaningfully – the issue of *timing*. While it is not unusual for substantial litigation to range across a number of years, the facts of the *Urgenda* case are unusually time-sensitive, involving a target year of 2020.

Some of the litigation's most important milestone dates include as follows: 24 June 2015, District Court judgement; 9 October 2018, Court of Appeal judgement; 24 May 2019, Supreme Court hearings; 20 December 2019, indicative date of the final Supreme Court judgement.

Given that the facts of the case hinge on the crucial date of 2020, one is compelled to reflect on what the gaping timespan underpinning the first and last of the dates just mentioned has to say about the present condition of climate law.

On this particular point, in the writer's view, this important case looks much less of a success story.

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