

EUFJE Conference 22 and 23 September 2017 Oxford (UK)

REPORT ON THE NETHERLANDS

1. Climate Change in legislation

Climate change as a special topic is not mentioned in the Dutch Constitution. The Dutch Constitution states that the government's concern is to protect and improve the environment. In Dutch environmental legislation there is also no specific attention for climate change. In the Dutch parliament an initiative of two members for a special Climate Act is pending. Since the Treaty of Paris the common opinion is that there is a need for additional national legislation concerning Climate Change. The judgement of the District Court of The Hague in the Urgenda case is also considered as an incentive for further legislation.

2. Structures of government

In The Dutch legal system several institutions play a role in taking measures against climate change. Municipalities f.i. enforce the isolation of new buildings. Provinces do the planning of wind parks within their territory. The Ministry of Economic Affairs takes care of the planning and realisation of wind parks offshore. The usual separation of powers (legislative, executive and judicial) is present also when climate change measures are at stake.

3. Climate Change Litigation

Climate change itself cannot serve as a basis for judicial action in The Netherlands, while Dutch law doesn't know a right to an unchanged climate. However, since the environment in general is protected under Dutch law, damage to the environment in combination with some tortuous acting of negligence (in civil law cases) or in combination with violation of public law rules or regulations (in administrative law cases) is often used as a basis for civil or administrative litigation. EU law sometimes plays an important role, especially when directives or regulations with strict standards are at stake.

4. Court cases

Climate Change has given rise to court cases in The Netherlands. An environmental group - Urgenda Foundation - started some years ago, together with almost 900 individuals, a civil procedure against the Dutch State, based on the proposition that the State acted unlawful (tortuous) by neglecting to take measures to reduce the Dutch CO2 emission in 2020 with 25 % compared with 1990. In the ruling of the District Court of The Hague of 24 June 2015 ((ECLI:NL:RBDHA:2015:7145) this claim was allowed. The Court gave an order to the State to reduce the Dutch CO2 emission in 2020 with 25%. This judgement was based on the fact that the State had supported in several policy statements

that the Dutch CO2 emission had to be reduced with at least 25% in 2020, but had failed to implement legislation or other measures to ensure that reduction. Given the duty of care of the State to protect and improve the living environment the State must do more to avert the imminent danger caused by climate change. The State lodged an appeal against this ruling of the District Court. The appeal procedure is still pending..

Most environmental cases in The Netherlands are decided by administrative courts, with the Judicial Division of the Council of State as appellate court. These cases focus on the (un)lawfulness of formal governmental decisions, like granting a permit for an industrial site or the confirmation of an urban plan for a new industrial area. An appeal at an administrative court can lead to the annulment of the challenged decision. In administrative procedures climate change is seldom the central issue. The central question is, whether the authorities (municipality, province or Ministry) has given the contested decision according to the applicable rules and regulations and according to the principles of good government.

Only when a formal public law decision is not at stake, the civil courts are competent to decide environmental cases, based on a tort-action.

5. Climate Change Adjudication

The Dutch (civil and administrative) courts are using conventional legal concepts in climate change cases. Especially the tort action is under Dutch law flexible enough to be able to solve climate change cases. The main question there is not the lack of legal concepts, but whether there was an tortuous acting or neglecting of any governmental body or a violation of any applicable rule or regulation.

The concept of causation is only relevant if a plaintiff is looking for financial compensation. Environmental groups and other NGO's seldom claim financial compensation in environmental cases.

The Judicial Division of the Council of State regularly issue preliminary rulings to the EU court concerning environmental issues that are related to climate change issues.

6. Factual issues

The influence of factual issues can be different in civil proceedings and in administrative proceedings. When an environmental group or an individual pursue the annulment of an formal decision (like a permit or a zoning plan) not only climate change arguments will be used, but all kind of arguments that can lead to the annulment of the decision. About all these arguments parties can disagree. The administrative courts have the opportunity to ask for an expert-report. That report will be given by an independent institute, the Environmental Judicial Advisory Foundation. That Foundation will give an opinion about the (technical) issues of the case. That opinion is free of costs for the parties in the procedure. The Foundation is financed by the Ministry for the Environment.

In civil cases the plaintiff will focus on the supposed tort. In civil cases, the court can appoint an expert to give his opinion about a certain (technical) question. Parties have to pay the expert.

Administrative and civil courts are in general free to divide the burden of proof to the parties. In cases against governmental bodies the general approach is, that the plaintiff/appellant must make plausible that the government's decision or policy was based on incorrect facts.

7. Access to Justice

Most actions relating to climate change are brought by NGO's (environmental groups or local groups) and/or by individuals. A NGO has standing if the objective of the group is involved by the alleged decision or action. An individual has standing if he is an interested party, i.e. if he suffers some effect of the decision or action.

Industry plays a role when f.i. a permit of a competitor is disputed. Normally industry will use the same set of laws as a NGO or an individual. Sometimes aspects of competition law can play a role in cases brought by the industry.

8. Standing and costs

Rules on standing normally do not affect climate change litigation. Access to civil or administrative courts is rather easy for NGO's and individuals .In administrative proceedings parties are free to use legal aid. If no external legal advisor or attorney is brought in, the costs of the procedure for an administrative court will be very low. In civil proceedings there is an obligation to use an attorney. That means that the costs of a civil procedure are much higher than of an administrative procedure.

9. Remedies

Civil courts have a broad variety of possible remedies: financial compensation can be granted, but also an order or prohibition is possible.

Administrative courts can only annul the alleged decision of the authorities. In case of an annulment the administrative courts can allow a financial compensation for damages caused by the annulled decision. Financial penalties are possible in combination with a condemnation. For instance, if a formal decision is annulled and the authorities refuse to take a new decision, the court can impose a penalty for every day that a new decision is not taken.

Compensation for damages is only possible to the amount that factual damage can be proven.

10. Issues about remedies

There is quite a difference between private law and public law concerning remedies in climate change cases. The administrative courts have a much smaller range of remedies that the civil courts have. Parties are not free to choose an administrative or civil court. Formal decisions of a public body

can only be challenged in an administrative court. Civil courts have a remaining function for claims not related to formal decisions.