

CHAPTER XXIII

CLIMATE LITIGATION, CLIMATE ACT AND CLIMATE AGREEMENT IN THE NETHERLANDS

Gerrit VAN DER VEEN and Kars DE GRAAF

1. INTRODUCTION

In 2015, a Dutch court case attracted worldwide media attention. For the first time, a court of law had ordered a State to adopt measures to tackle climate change. The Hague District Court ruled that the State must take more action to reduce greenhouse gas emissions in the Netherlands. It ordered the State to ensure that Dutch greenhouse gas emissions in the year 2020 would be at least 25 per cent lower than the 1990 levels. The Urgenda Foundation had requested the court for a ruling.¹

Late 2018, the Hague Court of Appeal confirmed the District Court's judgment, albeit on different grounds.² In the meantime, all branches of Dutch government have been actively involved in climate mitigation efforts. In addition to the judiciary, the legislative and administrative branches within the Dutch system of separation of powers (*Trias Politica*) are now more intensively involved than in 2015.

Dutch Parliament continued working towards the introduction of a Climate Act. The Act of 2 July 2019, setting up a framework for the development of policy aimed at the irreversible and phased reduction of Dutch greenhouse gas emissions in order to reduce global warming and climate change (*Klimaatwet*,

¹ The Hague District Court, 24-06-2015, ECLI:NL:RBDHA:2015:7145, AB 2015/336 note Ch.W. Backes, O&A 2015/58 note T.G. Oztürk and G.A. van der Veen, ECLI:NL:RBDHA:2015:7196 (English translation).

² The Hague Court of Appeal 09-10-2018, ECLI:NL:GHDHA:2018:2591, AB 2018/417 note Ch.W. Backes and G.A. van der Veen, O&A 2018/51 note T.G. Oztürk and G.A. van der Veen, ECLI:NL:GHDHA:2018:2610 (English translation).

or Climate Act), entered into force on 1 September 2019, with the exception of Section 7, which will enter into force on 1 January 2020.

A further development was that the administration, in close cooperation with industry and societal parties, worked towards an agreement on voluntary measures to reduce the emissions of greenhouse gases in the Netherlands (*Klimaatakkoord*, or Climate Agreement) and succeeded in June 2019. The Climate Agreement is an agreement between a multitude of Dutch stakeholders with the aim of devising measures to reduce global warming as a result of greenhouse gas emissions, allowing the Netherlands to meet the European and international targets for 2030 and 2050. Covering 600 measures to reduce greenhouse gas emissions, the Agreement is one of the instruments used to execute the order contained in the judgments of the District Court and the Court of Appeal, although it also refers to the year 2020. The Climate Agreement also complements the Climate Act in the sense that the Climate Act itself does not incorporate any measures to reduce the emission of greenhouse gases but does impose upon the government the obligation to draft a document incorporating such measures for the purpose of achieving the climate targets laid down in the Act.

In this chapter, we will examine the three trends outlined above. A pivotal question we will address in the process is the extent to which climate targets are enforceable in a court of law. The two lower courts were clear on this question, but the *Urgenda* action has not finished yet. An appeal from the 2018 ruling has been brought by the Dutch State to the Dutch Supreme Court, which aimed to hand down its decision before the end of 2019 and has done so at the brink of publishing this chapter. Besides, do the Climate Act and the Climate Agreement offer citizens and civic organisations sufficient arguments to bring legal action to enforce specific international, European and national targets?

2. THE *URGENDA* CASE

The *Urgenda* case revolves around at least two questions. The first question is whether there are any legal grounds that can result in a court ruling ordering the State to adopt (drastic) climate measures. The second question is whether a court of law, when delivering a judgment against the State in this case, would effectively take the place of the legislator.

2.1. DISTRICT COURT JUDGMENT

The District Court started its reasoning by acknowledging that, based on the State's current climate policy, the Netherlands will achieve a reduction of at the most 17 per cent in 2020, which is below the norm of 25 to 40 per cent for

developed countries deemed necessary in climate science and international climate policy, such as Report IPCC 4 (see below).

Urgenda based its assertion that the State was acting unlawfully towards it on Book 6 Section 162 of the Dutch Civil Code (DCC) and Articles 2 and 8 of the European Convention on Human Rights (ECHR). Urgenda argued that the State did not meet its duty of care to its citizens and therefore acted unlawfully towards them. The District Court ruled that Urgenda did not meet the requirements to invoke Articles 2 and 8 ECHR, but it accepted the Civil Code as a valid basis for State liability. According to the District Court, the State must do more to avert the imminent danger caused by climate change, also in view of its duty of care to protect and improve the living environment as laid down in the Dutch Constitution. The State's duty of care is further influenced by the international obligations the State has taken on vis-à-vis other States by adopting international treaties. The State is responsible for effectively controlling the Dutch emission levels. Moreover, the costs of the measures ordered by the Court are not unacceptably high. Therefore, the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country, the Netherlands should take the lead in this, according to the District Court. The District Court held that the judiciary does not enter the domain of politics when ordering that the Dutch State must make sure Dutch greenhouse gas emissions are reduced by at least 25 per cent in 2020 compared to 1990.³ The Court considered that its duty is to provide legal protection, also in cases against the government, whilst respecting the government's scope for policymaking. For these reasons, the Court exercised appropriate restraint and therefore limited the reduction order to 25 per cent: the lowest limit of the 25–40 per cent norm that follows from climate science, most notably the IPCC's Fourth Assessment Report 2007.

2.2. COURT OF APPEAL RULING

As stated before, the Court of Appeal upheld the judgment.⁴ This time, though, Urgenda's reliance on Articles 2 and 8 ECHR was successful. In short, the

³ See Eleanor Stein and Alex Geert Castermans, 'Case Comment – Urgenda v. the State of the Netherlands: The "Reflex Effect" – Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13(2) *McGill Journal of Sustainable Development Law*, pp. 305–324; Surapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within comparative climate change litigation' (2016) 34(2) *Journal of Energy and Natural Resources Law*, pp. 165–189; K.J. de Graaf and J.H. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Climate Change' (2015) 27(3) *Journal of Environmental Law*, pp. 517–527.

⁴ See Suryapratim Roy, 'Urgenda II and its Discontents' (2019) 13(2) *Carbon & Climate Law Review*, pp. 1–12; Laura Burgers and Tim Staal, 'Climate action as positive human rights

Court of Appeal ruled that the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which are dangerous by their very nature. If the State knows of the existence of a real and imminent threat, it must take precautionary measures to prevent infringement of the right to life to the extent possible. According to the Court of Appeal, this required the Court to assess the asserted (imminent) dangerous climate change. Having heard the arguments, the Court believed that it is appropriate to consider dangerous climate change a real threat, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. Thus, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.

The Court of Appeal ruled that the reduction in emissions of at least 25 per cent by end 2020, as ordered by the District Court, was in line with the State's positive obligation under Articles 2 and 8 ECHR to put in place an appropriate legislative and administrative framework to provide effective deterrence against threats to the right to life. The Court of Appeal also addressed the argument that it would enter the domain of politics. The State had argued that limiting the cumulated volume of Dutch greenhouse gas emissions, as ordered by the District Court, could only be achieved by adopting new legislation and regulations, either by Parliament or lower governmental bodies. This would mean that from a substantive point of view the District Court's order constituted an obligation to create legislation and that the District Court was not in the position to impose such an order on the State. In fact, such order would be at odds with Dutch ideas on the separation of powers. However, according to the Court of Appeal the District Court correctly considered that Urgenda's claim was not intended to create legislation, either by Parliament or lower government bodies, and that the State retained complete freedom to determine how it would comply with the order. Even if it were correct to hold that compliance with the order can only be achieved through creating legislation by Parliament or lower governmental bodies, the order in no way prescribed the content of such legislation. For this reason alone, the order was not an 'order to create legislation,' according to the Court. The Court of Appeal added that it is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch jurisdiction and, according to the Dutch Constitution, even take precedence over Dutch laws where the latter deviate.

obligation: The appeals judgment in *Urgenda v the Netherlands* in R.A. Wessel, W. Werner, B. Boutin (eds.), *Netherlands Yearbook of International Law 2018*, T.M.C. Asser Press, 2019.

2.3. EXPECTATIONS ABOUT THE UPCOMING SUPREME COURT DECISION

Both the District Court judgment and the Court of Appeal ruling have captured considerable attention, though also drawing a great deal of criticism. When writing this chapter, our wait was for the Supreme Court's decision. While we waited, we pondered the question whether the Supreme Court will hand down a decision of its own or essentially pass off the case to the highest court concerned with the interpretation of the human rights laid down in the ECHR: the European Court of Human Rights (ECtHR). The Supreme Court, after all, recently gained the authority to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR. This option is laid down in Protocol no. 16 to the ECHR,⁵ which entered into force in the Netherlands on 19 January 2019.⁶

The Supreme Court did not pass the case on so that the ECtHR did not have to focus on the interpretation of Articles 2 and 8 ECHR. The Supreme Court decided to review the case and therefore it had to contemplate those articles itself.

This was not a first. Two prominent decisions, handed down on 19 July 2019, serve as notable examples. In the first decision, the Supreme Court addressed the action brought against the State by relatives of the victims of the Srebrenica massacre on the basis that in 1995 the State acted wrongfully in the period before and after the fall of the town of Srebrenica, when Dutch UN peacekeepers in the region did too little to stop the advance of the Bosnian Serbs and protect the Bosnian Muslim population. The action was based in part on Articles 2 and 3 ECHR. In relation to Article 2, the Supreme Court considered that a State has a positive obligation to take appropriate action in order to protect the right to life of citizens within its jurisdiction. This positive obligation is to be interpreted

in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.⁷

⁵ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report.

⁶ Staatsblad 2019/8.

⁷ Referring to ECtHR 20 December 2011, Application no. 18299/03 (*Finogenov e.a. v Russia*), §209.

If the argument is made that a State failed to fulfil its positive obligation arising from Article 2 ECHR, the ECtHR holds that the question that needs to be reviewed is whether

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁸

As comes across from the decision, the ECtHR emphasises that the question whether a State took all such measures it could reasonably be expected to take needs to be answered by considering all relevant circumstances of the case. For this reason, the Supreme Court will examine whether the military command at the time knew or, judged reasonably, ought to have known of the existence of a real risk that the rights afforded to the Bosnian refugees under Article 2 (and Article 3) ECHR would be violated and, if so, whether the peacekeepers failed to take measures which, judged reasonably and with due observance of all circumstances, might have been expected to avoid that risk.⁹

The second decision handed down on 19 July 2019 concerned the extraction of natural gas in the Dutch province of Groningen. About 15 to 20 years ago, the area started experiencing earth tremors caused by the gas extraction since 1963. The damage from these tremors was reason enough for the Dutch authorities to scale down and, eventually, they plan to stop extraction altogether. The Supreme Court was asked to review whether the gas extraction could be deemed unlawful. It held that the State is liable in tort within the meaning of Section 6:162 DCC if it knows or ought to know (i) that the Groningen gas extraction presents a danger in view of the seismic movement, (ii) that there is a real risk of such danger materialising, and (iii) that the materialisation of such danger can result in severe or widespread damage, yet nonetheless fails to take such timely and appropriate measures as the State, in view of the circumstances, might reasonably be expected to take in order to avoid that damage. The Supreme Court made reference to articles from the ECHR, including Articles 2 and 8. According to the Supreme Court, the inevitable conclusion was that the State knows or ought to have known, at least from 1 January 2005 onwards, (i) the dangers associated with the Groningen gas extraction, (ii) the real risk of these dangers materialising,

⁸ Referring to ECtHR 28 October 1998, Application no. 23452/94 (*Osman v United Kingdom*), §116; ECtHR 28 March 2000, Application no. 22492/93 (*Kiliç v Turkey*), §63.

⁹ Supreme Court, 19 July 2019, ECLI:NL:HR:2019:1223.

and (iii) the circumstance that materialisation of these dangers can lead to serious or widespread damage.

In both decisions, the Supreme Court attached much weight to the State's awareness of direct, serious dangers to human life. We had doubts as to whether the Supreme Court would be willing to take the step of classifying long-term dangers such as the risk of (dangerous) climate change as a risk within the meaning of Articles 2 and/or 8 ECHR.

The Supreme Court considered the case itself and arrived at the verdict that Articles 2 and/or 8 ECHR were violated. Next, it reviewed the question whether the Court of Appeal entered the domain that is the legislator's prerogative. After all, if the order is to be considered an order to create legislation, it might constitute an inroad on the judicial tasks of the judiciary.¹⁰ This applies likewise to the violation of human rights referred to by the Supreme Court.¹¹ It is the – tentative – view of these authors that several options are available to the State to comply with the judicial orders, but that it nonetheless tends to be necessary to introduce legislation to force society to reduce emissions. In the appellate proceedings, the State had failed to make a sufficiently plausible argument that the only useful action would be to create legislation. In that case, the choice to create legislation after all amounts to nothing but the legislator's own choice rather than an obligation on the part of the State as a consequence of the order contained in the ruling. It follows that this interpretation does not imply the judiciary's infringement on the legislator's domain. The decision of the Supreme Court will gain at least as much attention as the two decisions before did.¹²

3. THE DUTCH CLIMATE ACT

The Dutch legislator has now chimed in as well. After a long run-up and several readings, the Dutch Climate Act came finally into operation on 1 September 2019. The Climate Act sets targets and provides for a number of instruments to ensure that these targets can be achieved. An important question in light of the above would be to what extent the targets set by the legislator can be enforced, in a court of law, for instance.

¹⁰ Supreme Court, 21 March 2003, ECLI:NL:HR:2003: AE8462 39, with commentary from Ch.W. Backes, NJ 2003/691, with commentary from T. Koopmans (*Waterpakt*).

¹¹ Supreme Court, 09 April 2010, ECLI:NL:HR:2010: BK4549 190, with commentary from F.J. van Ommeren, NJ 2010/388, with commentary from E.A. Aikema (*Staat en SGP v Clara Wichmann c.s.*).

¹² Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006.

3.1. TARGETS OF THE CLIMATE ACT

Section 2 of the Climate Act sets out the main objective of the Act, which is to reduce greenhouse gas emission levels by 95 per cent by 2050 (compared with 1990). The Act provides 'a framework for developing policy aimed at an irreversible and gradual reduction of Dutch greenhouse gas emissions' by the aforesaid 95 per cent.

It also sets two other targets. Pursuant to Section 2(2), the relevant ministers aim to reduce the greenhouse gas emissions by 49 per cent by 2030 and to make energy production carbon-neutral and fully reliant on renewables by 2050. The purpose of these two targets is to make it easier to achieve the overarching objective. Strikingly, though, the 2030 target is nothing more than a goal to strive for; in fact, it is the only intermediate target in the Act. The ambition to have Dutch energy production fully carbon-neutral by 2050 is not beyond reproach either. For example, there is no obligation for Dutch energy consumption to be carbon-neutral. In addition, the Act allows for Carbon Capture and Storage by power plants, meaning that CO₂ is produced after all.

In summary, the Act establishes one key binding objective: the 95 per cent emissions reduction by 2050. The other two aims are mere targets.

3.2. INSTRUMENTS PROVIDED BY THE CLIMATE ACT

Section 3 of the Act obliges the government to formulate, for the first time in 2019 and then every five years, a climate plan setting out the policy aimed at achieving the climate targets for the following 10 years. Section 3(2) lists some of the required elements of these climate plans. They include the measures to be taken in order to achieve the objectives of Section 2, the projected share of renewables, the projected primary energy consumption savings, the measures to be taken to stimulate the share of renewables and primary energy consumption savings, an analysis of the most recent scientific insights into climate change reduction, and a number of analyses of a different nature.

Pursuant to Section 4, the first climate plan is due to be adopted in 2019, after which it will be reviewed at least once every five years.¹³ Progress reports are scheduled to be delivered every two years after adoption and subsequent reviews. If so warranted by the reports in view of the objectives of the Act, measures will be taken. The first climate plan relates to the 2021–2030 period.

The climate plan offers an important opportunity to frame the European and international obligations the Dutch State has to comply with. When drafting the

¹³ A draft climate plan on the basis of the Climate Act has been published online (www.internetconsultatie.nl/klimaatplan) on 24 August 2019.

climate plan, the legislator sought to align with the substance and procedures of the integrated National Energy and Climate Plan (NECP), which all EU Member States are required to prepare pursuant to EU Regulation on the Governance of the Energy Union.¹⁴ Each Member State's NECP must set out action plans implementing the Energy Union's energy and climate objectives. NECPs have time horizons of 10 years and may be updated after five years. Member States are required to submit progress reports every two years, which may give rise to policy adjustments, nationally and EU-wide. The first draft NECP relates to the 2021–2030 period, offering a glance towards 2040. The NECP cycle dovetails with the ambition cycle of the Paris Agreement, the signatories to which agreed to raise their ambition levels – also known as Nationally Determined Contributions, or NDCs – every five years. Translated to the Dutch situation, the climate plan will help define the terms of the NECP and the NDCs. The better part of the Climate Plan is likely to incorporate the agreements made as part of the Climate Agreement (Section 4).

The Act also provides for a climate and energy outlook. Once a year, the PBL Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*) will present the responsible minister with a climate and energy outlook. A scientific report, this document charts the consequences of the climate policy conducted in the previous year. For that year, the outlook maps at least the greenhouse gas emissions, including a sector-by-sector overview, as well as the developments and measures impacting the emissions. The *Planbureau voor de Leefomgeving* is an autonomous research agency advising the Dutch government. Essentially, the idea is for this agency to map the past, but it is not entirely clear whether they are also expected to provide forward-looking analyses. It is likely that 'the consequences of the climate policy conducted in the previous year' include a calculation of the effects of said policy for a subsequent period and, more particularly, an assessment as to whether this policy moves us closer to or in fact away from achieving the objectives. The minister is obliged to present the outlook to Parliament in a policy document. This document will provide an overall picture of the realisation of the climate policy as set out in the climate plan, represent the key aspects of this realisation broken down by ministry, represent the consequences of each ministry's budget for climate policy, as well as the financial consequences for households, companies and government bodies resulting from significant climate policy developments that are not in line with the climate plan. The purpose of the climate policy document and the climate and energy outlook is to enable Parliament to check the executive's implementation of its climate policy and demand changes to it if necessary.

¹⁴ See Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

3.3. ENFORCEABILITY OF THE CLIMATE ACT

It is obvious that the legislator does not want the Climate Act to be enforceable in a court of law. This is illustrated by a quote from a 22 November 2018 memorandum to the Lower House of Parliament:

The difference between the 2050 objective and the 2030 target is relevant in that it determines the way in which Parliament can compel the government to adhere to the targets. Neither target constitutes an obligation that can be enforced in a court of law. The texts of the bill and the explanatory notes are so abundantly clear that the persons introducing the bill regard the odds of a court ruling differently to be low. This does not alter the fact that courts have their own responsibility to judge on the scope and substance of acts and treaties.¹⁵

A similar text can be found in the Memorandum of Amendment of 27 June 2018:

The target will be implemented according to the advice provided by the Council of State, as a policy objective with the aim of reducing legal liability. This stresses the policy's aim of being a political mandate for the government rather than a limit value which can be enforced in a court of law.¹⁶

These two passages demonstrate that the legislator had the express aim of keeping the courts out of the picture. It follows that the Climate Act is a purely political document. The explanatory memorandum thus explains that the hard binding target provides a clear signal to industry on the one hand but will not be legally enforceable in a court of law on the other. In other words, the target is meant to be binding on government, while accountability must be discussed in the political arena only, not in court. That leaves the legally relevant fact that according to the explanatory documents the Act does not preclude such legal actions as *Urgenda*. The Climate Act, it follows, leaves intact the option to bring legal action, in the sense that it does not include any provision ruling them out. Apart from that, the Climate Act establishes a policy framework, no more, no less. It is impossible to argue, therefore, that the legislator has drafted a watertight text regulating the reduction of greenhouse gas emissions and that the court would 'consequently' enter the legislator's domain if – in the wake of the Hague District Court and Court of Appeal – it ordered the State to take measures.

Then again, it is not difficult to imagine the State referring to the Climate Act in a future action involving climate issues and invoking the *legislative and administrative framework* it introduced for the very purpose of tackling climate change and eliminating threats to human life. As a result, it might be that

¹⁵ Lower House, session year 2018–2019, 34 534, no. 13, p. 2.

¹⁶ Lower House, session year 2017–2018, 34 534, no. 10, p. 7.

the options to hold the State liable are slightly more limited by the introduction of the Climate Act after all.

4. THE CLIMATE AGREEMENT

The Climate Agreement aims to commit the Dutch State and a multitude of interest groups to climate objectives. It makes concrete the measures necessary to achieve one of the targets of the Climate Act. That target is the objective from Section 2 of the Climate Act: reducing the country's greenhouse gas emissions by 2030 by 49 per cent in comparison with 1990.

This being an agreement, there needs to be *consensus ad idem*, which has been reached. The negotiations were conducted at five so-called 'sector tables', representing the following five sectors: Industry, Electricity, Mobility, Built Environment and Agriculture. Each sector discussed possible measures and delivered a statement on how their sector would achieve the number of megatonnes of greenhouse gases emissions reduction necessary for that sector by 2030 in order to reach the joint 49 per cent reduction target. The measures presented and their consequences for greenhouse gas emissions are indicative. Consequently, the parties at the table only reached agreement on the basis of indicative figures.

The Climate Agreement provides for an immense number of – proposed – measures to be taken by the five sectors. Industry, for example, proposes the introduction of a CO₂ tax for large companies. Large companies that are subject to the EU Emissions Trading System (EU ETS) will be charged with a CO₂ tax from 2021 if they emit CO₂ in excess of the 2030 emission reduction goal. Furthermore, a limitation of carbon capture and storage (CCS) subsidies is anticipated. CCS subsidies will therefore be reduced to a maximum of 7.2 megatonnes of CO₂ and will be subject to strict requirements. In addition, the energy tax on natural gas will go up.

To further illustrate the scope of the agreements, we will provide here a sample of agreements that might affect urban and regional planning. The spatial impact of proposed measures from the Climate Agreement, as far as the classical spatial planning is concerned, will be enshrined in the environmental and spatial planning policy. Nonetheless, the developments within the Agriculture and Land Use sector – the green sector, which tends to fall outside the purview of urban and regional planning in the classical sense – require attention. When it comes to claiming space, Agriculture and Land Use and other 'Built Environment' themes are fierce competitors. The Climate Agreement also provides:

The parties have agreed as follows: The different, increasing and partly conflicting claims for green space arising from the climate and broader sustainability agenda are classified in the National Environmental Strategy (*Nationale Omgevingsvisie*, or NOVI)

under the priority: Future-proof development of rural areas. Closer consideration of such claims and spatial planning will be integrated into regional and local area processes, including the RESEs. As part of the NOVI Monitor, the Planbureau voor de Leefomgeving will issue periodic reports on the safeguarding of the national interests and priorities and monitor progress of the area-specific approach. The trend thus diagnosed may cause parties to confer on the implementation of certain – new – activities and instruments in order to safeguard collective and public interests.¹⁷

The message that comes across from the Climate Agreement is that the objectives agreed upon need to be turned into other instruments, subject to consultation and perhaps parliamentary approval. It cannot be stressed enough that the Climate Agreement is an initial setting to frame policy for the purpose of implementing other legal instruments, which may have mandatory effect. They need not be so, but the possibility is expressly referenced. For example, the Climate Agreement provides for the dairy and feed sectors to make agreements on optimising feed in order to reduce methane emissions, one such agreement being to improve the feed conversion by developing feed that reduces methane emissions. It is noted in the text of the agreement that for any wish to enforce collective measures a consideration must be made about the appropriateness of a covenant or whether in fact declaring agreements to be universally applicable may be a better option.¹⁸

The Climate Agreement is silent on its own enforceability. It states that the details and implementation of the agreement will be entrusted to the participating parties, including central government, to the extent possible. In this way, the parties themselves will bear primary responsibility for the effective implementation of the Climate Agreement. Sector-specific implementing committees will be set up under the supervision of the relevant ministers. The Minister of Economic Affairs and Climate Policy will set up an overarching progress committee.

The idea, it follows, is for the implementation of the agreements to remain in the hands of the participating parties, who will bear responsibility for the effective execution of the Climate Agreement, with each sector being responsible for executing their own specific set of agreements.¹⁹ It is clear from the text of the Climate Agreement itself that it is but a first step, with many aspects still requiring consultation among the parties involved. If necessary, the government will wield a ‘big stick’ in the form of legislation. Neither the Climate Agreement nor the many measures announced can be enforced in law *per se*.

¹⁷ Climate Agreement, pp. 126–127. ‘RESEs’ stands for Regional Energy Strategies.

¹⁸ Climate Agreement, p. 130.

¹⁹ Climate Agreement, p. 14.

5. CONCLUSION

Ever since the Hague District Court handed down its landmark *Urgenda* judgment in 2015, all elements of the Dutch *trias politica* have upped their involvement with mitigating climate change. Although the Dutch government repeatedly expressed its intention to comply with the judgment, it still lodged an appeal. On 9 October 2018, the Hague Court of Appeal upheld the District Court's judgment, although it advanced other grounds for doing so. The Supreme Court confirmed the judgment of The Hague Court of Appeal on 20 December 2019. Not just for reasons of principle, but also because as late as August 2019 the government admitted that it has taken insufficient action to achieve the targets set in the court orders. Measures still need to be taken to ensure that the Dutch emissions of CO₂ are reduced by 9 Megatonnes more before 2021. There is, consequently, a relevant material reason for the parties to continue the case. Although the legislative and executive powers have also chimed in when it comes to climate change mitigation measures, the only actually enforceable measures have thus far been imposed by the judiciary. It is unlikely that this situation will change before long. While the Climate Act has set reduction targets for 2030 and 2050, it is clear from the explanatory notes to the Act that these targets are not enforceable in law. The same applies to the measures proposed in the Climate Agreement. These are the result of consultations with interest groupings and still need to be fleshed out. It is quite possible, though as yet uncertain, that part of these measures will precipitate into legislation or otherwise prove mandatory. Be that as it may, the Climate Act and the Climate Agreement demonstrate, on the one hand, that climate change is now at the centre of the political arena and of the debate in society and, on the other, that there is still a long way to go and that legal enforceability of reduction targets is anything but a done deal.