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Working session: The potential of constitutional courts in tackling climate change: their possibilities and limitations in the political process

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*The potential of climate change cases for a sustained and resilient judiciary**

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I. Introduction

Climate change is a main issue of our time. According to the website Envirotech Online, the Dutch are clear frontrunners. This indication is not given in relation to climate change as a challenge for constitutional law and courts, but concerns the allegation that almost half of the population of the Netherlands will be underwater by 2100 if emission trends continue.[1] Together with other main topics, like digitalization, ongoing armed and unarmed conflicts in Europe, or the trust of people in facts that are disseminated by private and public bodies, climate change issues invoke questions of fact and law with a mix of familiar and new aspects. As an example we may consider the familiar aspect to what extent a court may base a judgment on scientific or expert evidence, even though the court may not be able to assess this evidence throughout. Mixed with new aspects of current main issues, we could for instance wonder if it will one day be permissible for a public body to base a decision against a citizen on evidence generated by a machine through artificial intelligence from which the reasoning cannot be disclosed, or if it would be permissible for a private or public body to base its policy to tackle climate change on forecasting models which estimate a far smaller impact of climate change on the environment than other models.

Without denying the complexity of factual, social, economic, environmental and legal aspects of global sustainability issues of our time, nor the accompanying challenges for courts, it is my perception that courts in all times have to deal with questions of law that may be complex for them in their world at that moment. It is a core task of courts to provide legal certainty to the people amidst the known and unknown uncertainties of their time, location and societies. We can observe an element of this task in for instance Grotius' "The Free Sea", first published in 1609. He understood that the global rise of sea trade showed new needs for legal certainty within the existing legal order and formulated the then new principle that the sea was international territory and all nations were free to use it for seafaring trade. It is hardly imaginable that he could assess the impact of this

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[1] Envirotech-online.com, data of 2015, website consulted 15 April 2023, https://www.envirotech-online.com/news/environmental-laboratory/7/breaking-news/which-countries-are-most-at-risk-of-rising-sea-levels/35807.

principle, and certainly not for people and oceans he was not familiar with. Refraining from developing such new principles is no option for lawyers who prefer prosperity and well-being to conflict.

However, this does not mean that the courts of today are as free as Grotius was as a scholar to develop rules or principles in tackling climate change. Courts like our constitutional and supreme courts interpret and apply the law within the state model of a rule of law based democracy which respects human dignity and human rights. Within the scope of the legal system and the functioning of the legal order in society, courts may contribute to the development of the law, in addition to providing legal unity and legal protection. The legal system obliges constitutional and supreme courts to provide judgments in sole or last judicial resort in cases brought before them, regardless what these cases are about. Nevertheless, is answering questions of law in cases about climate change, first and foremost a matter of legality? The legitimacy and effectiveness of judgments in this area are also subject of debate.[2] For instance, if legal obligations of private and public bodies with regard to climate change are not clear-cut or even imperfect, further clarification by courts in judgments will probably contribute to the development of the law. Will such a judgment be perceived as legitimate just because the court exercises judicial power on the basis of the law? Probably, also other elements will be essential for its acceptance and credibility, such as the authority of courts in society, the confidence in the judiciary (which the courts in a democratic society must inspire in the public[3]), the validity of the establishment of facts, and expectations regarding the effectiveness of the judgment.[4]

The potential of constitutional and supreme courts in tackling climate change and their possibilities and limitations in the political process, which is the topic of this working session, depend of course on lots of aspects. In this contribution, I will touch upon the potential of climate change cases for a sustained and resilient judiciary. Thus far, Dutch courts have dealt with and are dealing with several climate change cases. On the one hand, these cases show the availability of access to constitutional adjudication in the Netherlands. On the other hand, they are accompanied by challenges in the fulfilment of constitutional tasks. These challenges are mixed with familiar and new aspects of the legal system. In climate change cases, courts may have to answer complex legal questions about for instance the impact of climate change on state sovereignty, the significance of scientific expectations on future environmental developments for measures to be taken by public bodies, or intergenerational justice[5] and equality regarding climate change. I would like to share some observations about the development and employment of constitutional tasks of the Supreme Court of the Netherlands, including some references to relevant judgments from long ago until now, against the background of my presumption that attention to legality, legitimacy and effectiveness supports a sustained and resilient judiciary.

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[2] See for instance C.A.J.M. Kortmann et al., *Constitutioneel recht*, 8th rev. ed., Deventer, Wolters Kluwer, 2021, pp. 20-23 and 402; Rowin Jansen et al., *Trouble in de Trias*, Nijmegen, Ars Aequi Libri, 2021; Contributions by several authors, joint title "Urgenda en de wetgever", 37 *RegelMaat* 3 (2021); Contributions by several authors, joint title "Hoe politiek is de rechter?", *Rechtstreeks* 1 (2022); J.L. Smeehuijzen, "De veroordeling van Shell tot 45% CO_2-reductie in 2030: over legitimiteit en effectiviteit", in: Van Veen et al., *De klimaatzaak tegen Shell*, Deventer, Wolters Kluwer, 2022, pp. 19-32.

[3] ECtHR, *Micallef/Malta* (GC), no. 17056/06, judgment of 15 October 2009, § 98.

[4] Vicky C. Jackson, "Comparative Constitutional Law: Methodologies", in: Michel Rosenfeld / András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 68: "Part of the task of courts is to issue decisions that are likely to be compied with."

[5] German Constitutional Court, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, paras. 1-270.

II. Some remarks about constitutional tasks of the Dutch judiciary

1. Spread powers on common ground

Parliament, government and judiciary exercise divided state powers in the trias politica, autonomous, in touch with society as well as by balancing each other.[6] All three institutions are founded on the rule of law based democracy that respects human dignity and human rights. From time to time, they will enter each other's premises in the course of exercising their power. One could argue this means the trespasser opens the door for a debate between state powers about possibilities and limitations in the political process. Some years ago, the word dikastocracy revived in the Netherlands.[7] However, the demarcation of territory needlessly distracts attention of what is at stake. In the essence, the fundamental common task of guaranteeing and upholding the values on which the state model is based, obliges all state institutions to respect each other and to be engaged in a dialogue that serves the values. A value-based dialogue includes that courts apply the common principles of logic, truthfulness, fairness and contradiction. This leaves no space for fake information as basis for their judgments. The value-based approach of the rule of law based democracy in Europe is traditionally anthropocentric, which is expressed by words like human dignity and human rights.[8] This anthropocentric concept is sometimes disputed in the context of climate change, as other living creatures also play a role in the assessment of the global impact of climate change. In this regard, a question of law could for instance be whether the scope of the protection of environmental law is limited to human beings.[9]

2. Locus standi

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[6] Early and still present traces of the trias politica in Dutch legislation are Articles 11 and 12 of the Law on General Provisions of 1829. Article 11 says that courts have to rule according to the law and may under no circumstances judge the inner value or fairness of the law. Article 12 says that no court may rule on matters subject to its decision by way of general regulation, order or statute.
For writings on dividing, spreading and balancing the powers of the trias politica please refer to for instance W.J. Witteveen, *Evenwicht van machten (oratie Katholieke Universiteit Brabant)*, Zwolle, W.E.J. Tjeenk Willink, 1991; J. Goossens et al., *Rechtsvorming in een hypercomplexe samenleving: Bundel n.a.v. de Staatsrechtconferentie 2022 (Tilburg University)*, Oisterwijk, Wolf Legal Publishers (WLP), 2022.

[7] In 2020, the Dutch Parlementary Commission for Internal Affairs organised a roundtable discussion entitled "Dikastocratie?",
https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2020A00508.

[8] Compare Article 2 of the Treaty on European Union.

[9] According to Dutch law, "the intrinsic value of the animal" has been a principle of regulation for decades (*Parliamentary proceedings II* 2007/08, 31 389, no. 3, p. 19, https://zoek.officielebekendmakingen.nl/kst-31389-3.pdf). In addition to the rule that animals are not things, the Dutch Civil Code contains the rule that provisions relating to things are applicable to animals, with due observance of the limitations, obligations and legal principles based on statutory rules and rules of unwritten law, as well as of public order and public morality (Article 3:2 Dutch Civil Code). Likewise, there are national and international judgments about (the value of) flora and ecosystems. On 5 April 2018, the Supreme Court of Colombia recognised the Amazon River ecosystem as a subject of rights (Supreme Court of Colombia, STC4360-2018, judgment of 5 April 2018, https://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf) and on 27 January 2022, the Constitutional Court of Ecuador ruled that wild animals are subjects of rights (Constitutional Court of Ecuador, *Estrellita*, no. 253-20-JH, judgment of 27 January 2022, https://aldf.org/wp-content/uploads/2023/01/Final-Judgment-Estrellita-w-Translation-Certification.pdf). Nevertheless, on 14 June 2022, the New York Court of Appeals decided that Happy, an elephant residing at the Bronx Zoo, could not be regarded a 'person' subjected to illegal detention (State of New York Court of Appeals, *Matter of Nonhuman Rights Project, Inc. v Breheny*, no. 52, judgment of 14 June 2022, https://www.nycourts.gov/ctappS/Decisions/2022/Jun22/52opn22-Decision.pdf).

Under Dutch law, a natural or legal person that would start a case to oblige the state to exchange the anthropocentric approach in the law for an approach in which all living creatures are protected on the basis of equality before environmental law, would presumably have to demonstrate its interest in a judgment about this issue. This example illustrates the distinction between submitting a case to court and getting access to court by way of obtaining effective legal protection. Any person may start a case, but the Dutch Civil Code includes the principle of *point d'intérêt, point d'action*.[10] This principle applies to class actions and public interest litigation as well. Dutch class action law has originally been developed in the context of environmental law. In 1986, the Supreme Court ruled that the mere definition of the purpose of a legal person does not enable it to file a civil claim in respect of an infringement of the interests which, according to that definition, it has undertaken to represent, but exceptions to this are conceivable. In its judgment, the court accepted such an exception in the case of a claim by a legal person for a ban on the dumping of dredged material from Amsterdam's canals into the lake called "Nieuwe Meer" until the required permits were issued by the municipality. The Supreme Court ruled that the claimant sought to obtain effective legal protection, within its legally defined purpose as a legal person and within the scope of tort law, for collective interests in the prohibition on further environmental degradation. Under administrative law, the legal person was qualified to represent those interests. Therefore, to demand further requirements for admissibility of this claim under civil law would be contrary to legal unity.[11] Similar cases followed, in essence about the compliance of the executive branch with legal provisions of environmental law. The codification of class action law in the Dutch Civil Code in 1994 continued this case-law.[12] The main requirements for admissibility of a claim were that the claimant was an association with full jurisdiction or a foundation that represented similar interests according to its statute, and that it had sufficiently tried to achieve the claimed result through consultation with the other party. After passing the admissibility test, the claimant had access to court on the basis of tort law and could claim an injunction or prohibition with regard to imminent or actual infringement. In the course of time, other requirements were added, as well as a possibility to claim damages.[13]

The legal possibility of class actions implicitly expresses the social notion that people need different legal instruments to influence their living situations in order to live their life in peace and well-being and to stay prepared to contribute to society. In this regard, the right to participate in elections every couple of years is important but probably not enough. Every now and then, class actions are put under pressure in the political process, regardless of whether they are about climate change or some other issue.[14] Sometimes, criticism on the right to class actions even does not pay attention to the rules setting requirements to groups and their application by the courts. Often, such

[10] Article 3:303 Dutch Civil Code: Without sufficient interest no one has a right of action.
[11] Dutch Supreme Court, *Nieuwe Meer*, ECLI:NL:HR:1986:AD3741, judgment of 27 June 1986, para. 3.2.
[12] Article 3:305a Dutch Civil Code. See for instance E. Bauw, J. Biezenaar and J. van Mourik, *Commentaar & Context Wetgeving collectieve actie*, Den Haag, Boom juridisch, 2020, p. 11-13.
[13] See for instance E. Bauw, J. Biezenaar and J. van Mourik, *Commentaar & Context Wetgeving collectieve actie*, Den Haag, Boom juridisch, 2020, p. 16-23.
[14] On 21 February 2023, Dutch parliament passed a resolution of its members Stoffer and others (*Parliamentary Proceedings II* 2022/23, 36 169, no. 37) in which Dutch government was requested to explore to what extent interest groups with an idealistic purpose should be subject to further representativeness requirements under Article 3:305a of the Dutch Civil Code. The resolution was dissuaded by the Minister for Climate and Energy on behalf of government, in the context of consideration of the European Climate Change Implementation Act. To the subsequent request for a letter explaining how the government will implement the resolution, the Minister for Legal Protection answered that the representativeness requirements of Article 3:305a of the Dutch Civil Code were changed and intensified as from 1 January 2020, that it is widely acknowledged that the representativeness of interest groups in cases is intensifely scrutinized by the courts and that (the functioning of) the new regime will be evaluated in 2025 (*Parliamentary Proceedings II* 2022/23, 36 169, no. 39, https://zoek.officielebekendmakingen.nl/kst-36169-39.pdf).

criticism tends to go back and forth between two extremes, without striking a balance. At the beginning of the 20th century, the Dutch Supreme Court was criticized for, as we call it today, excessive formalism. In about 85% of the cases the claim for cassation was rejected. Like its predecessor the Court of Holland at the end of the 17th century, the Supreme Court was perceived as a "Court of Rejection". Fifty years later, the number of granted cassations had almost doubled and one could hear the opposite: the fear that too free interpretations of the law by the Supreme Court would be a danger for legal certainty.[15]

In the fifty years between and thereafter, we may distinguish three features of the gradual development of the constitutional tasks of the Supreme Court with significance for possibilities and limitations in the political process. Those features are about access to justice, applicable law and the multilayered legal order. From a comparative constitutional law perspective, these tasks relate to two common elements of constitutional adjudication: protecting fundamental rights of individuals and ensuring that the legislative, the executive and the judicial power respect the constitutional boundaries in the exercise of their power.

3. Access to constitutional adjudication by civil law

The first feature is about the legality of a civil action against the state and of its scope. In 1901, a judgment of the Supreme Court accepted that a municipality was a legal person subject to civil law.[16] Nowadays, the Civil Code states that all bodies to which legislative power has been granted under the Dutch Constitution, the State included, have legal personality.[17] Whereas civil, criminal and administrative cases now and then give rise to questions of constitutional law, civil law also offers a more specific path for submitting constitutional issues to court: access to justice exists for claimants who bring a case to court against a state body that is a legal person as meant in article 2:1 of the Civil Code. Those claimants may invoke tort law to contest the legality of actions or omissions of such bodies.[18]

The legality of the scope of such a tort claim was widened in 1919. The Lindenbaum/Cohen judgment of the Supreme Court[19] introduced, in accordance with a draft of a new legal provision about tort, alongside more closed standards in the Civil Code, also an open standard for tort liability, which is that one can be held liable for damage on the basis of an unwritten rule not to act contrary to what has to be regarded as proper social conduct. It took until 1992 before the Dutch Civil Code included among the grounds for civil liability an act contrary to what has to be regarded as proper social conduct. In the meantime, the rule of unwritten law pertaining to proper social conduct was applied by Dutch civil courts as a ground for civil liability. It is possible to claim an infringement or a prohibition to prevent such an act.[20]

The second feature of the gradual development of the constitutional tasks of the Supreme Court with significance for their possibilities and limitations in the political process, is about the

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[15] E. Korthals Altes and H.A. Groen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht deel 7. Cassatie in burgerlijke zaken*, 5th rev. ed., Deventer, Wolters Kluwer, 2015, no. 31.
[16] Dutch Supreme Court, *Boels/B&W Rotterdam*, no. W 7606, judgment of 10 May 1901.
[17] Article 2:1, paragraph 1 Dutch Civil Code.
[18] See for instance Dineke de Groot, "Some observations on judicial decision-making and observational research in health and environmental matters", in the context of the seminar *Complexity and the public role of civil courts in health and environmental matters*, Utrecht University, 22 April 2022, https://www.hogeraad.nl/publish/pages/964/seminar_complexity_and_the_public_role_of_civil_courts_in_health_and_environmental_matters_utrecht_2.pdf.
[19] Dutch Supreme Court, *Lindenbaum/Cohen*, ECLI:NL:HR:1919:AG1776, judgment of 31 January 1919.
[20] See for instance J.J. van der Helm, *Het rechterlijk bevel en verbod als remedie (dissertation Leiden University)*, Deventer, Wolters Kluwer, 2023.

constitutional law a Dutch court may apply in cases in which the protection of fundamental rights is invoked by individuals against a public body.

The Dutch Constitution charges the Supreme Court with cassation of judgments for breaches of law, in the cases and within the limits provided by law.[21] Until 1963, cassation was only possible because of the wrongful interpretation of a legal act by the court in previous instance. In 1963, the grounds for cassation were expanded. Also violation of international treaties which are valid in the Netherlands, government policies, and laws and policies from provinces and municipalities could lead to an appeal in cassation. In addition, procedural mistakes and an insufficient substantiation of a judgment by a previous court could trigger cassation.

Constitutional law in the Netherlands is embedded in a rather open legal system.[22] The main sources of constitutional law are the Dutch Constitution, institutional laws (like for instance electoral law or the Law on the Judicial Organisation), the Statute of the Kingdom of the Netherlands, the law of the European Union, the European Convention on Human Rights (ECHR) together with the case-law of the European Court of Human Rights (ECtHR) concerning the rights enshrined in the Convention,[23] and unwritten constitutional law.

The general task of a Dutch court to examine whether a legal rule is in conformity with law of a higher order is embedded in the law of the European Union[24] and in Dutch unwritten law,[25] which is further defined in the Dutch Constitution.[26] Articles 93 and 94 of the Dutch Constitution illustrate that international law may directly influence the national legal order.[27] These provisions became part of the Constitution in 1953 and continued the line of another judgment of the Supreme Court in 1919, in which the court assumed the possibility of a treaty to directly impact the national legal order, with the potential of providing legal protection to an individual.**[28]** Article 120 of the Dutch Constitution prohibits courts to review the constitutionality of Acts of Parliament and treaties.[29] It

[21] Article 118, paragraph 2 Dutch Constitution.
[22] C.A.J.M. Kortmann et al., *Constitutioneel recht*, 8th rev. ed., Deventer, Wolters Kluwer, 2021, p. 87.
[23] C.A.J.M. Kortmann et al., *Constitutioneel recht*, 8th rev. ed., Deventer, Wolters Kluwer, 2021, p. 30.
[24] CJEU, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, judgment of 5 February 1963; CJEU, Case 6-64, *Flaminio Costa v E.N.E.L.*, judgment of 15 July 1964.
[25] C.A.J.M. Kortmann et al., *Constitutioneel recht*, 8th rev. ed., Deventer, Wolters Kluwer, 2021, p. 408.
[26] Articles 93, 94 and 120 of the Dutch Constitution. The Dutch Constitution is available in Dutch (https://wetten.overheid.nl/BWBR0001840/2023-02-22) English, French, German and Spanish (https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands).
[27] Article 94 of the Dutch Constitution states: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding for everyone. According to Article 93 provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their content shall become binding after they have been published."
[28] Dutch Supreme Court, *Grenstractaat Aken*, *NJ* 1919, p. 371, judgment of 3 March 1919. See for instance: C.A.J.M. Kortmann et al., *Constitutioneel recht*, 8th rev. ed., Deventer, Wolters Kluwer, 2021, p. 26; R. Passchier, "Formal and Informal Constitutional Change in The Netherlands", in: F.F. Ferrari, R. Passchier and W. Voermans (eds.), *The Dutch Constitution beyond 200 Years. Tradition and Innovation in a Multilevel Legal Order*, The Hague, Eleven International Publishing, 2018, pp. 153-168.
[29] Dutch Supreme Court, *Harmonisatiewet*, ECLI:NL:HR:1989:AD5725, judgment of 14 April 1989. In the coalition agreement of 15 December 2021, Dutch governing parties agreed to further develop constitutional adjudication in the Netherlands, further to the advice of the State Committee on the Parliamentary System, and to seek which form would be most appropriate for the Dutch legal system. On 1 July 2022, Dutch government issued a letter with their thoughts on various ways of implementing constitutional adjudication (https://www.rijksoverheid.nl/documenten/kamerstukken/2022/07/01/kamerbrief-over-hoofdlijnen-constitutionele-toetsing).

does not prohibit courts to review the constitutionality of so-called lower legislation. As a consequence of Article 120 of the Dutch Constitution, court cases about the compatibility of national law with fundamental rights enshrined in the Dutch Constitution are rare, compared with court cases about the compatibility of national law with fundamental rights enshrined in the law of the European Union and the European Convention on Human Rights.

The judgment of the Supreme Court in the climate change case of the Urgenda Foundation against the State[30] provides an example, amongst examples in many other judgments, of constitutional adjudication by Dutch courts in cases in which legal obligations of the State, possibilities of a court to order the State to comply with them, the margin of appreciation of the State and the right to effective legal protection are addressed through sources of constitutional law.

4. Possibilities and limitations in the political process

As the first and the second feature show some possibilities and limitations for individuals and groups to constitutional adjudication in cases about protection of fundamental rights and public interest litigation, the third feature brings us closer to the possibilities and limitations of courts in the political process, while ensuring that the legislative, the executive and the judicial power respect the constitutional boundaries of their state power. The third feature is about the legal instruments of Dutch courts in cases in which it is disputed that the application of some part of the law can be united with some part of EU or Dutch constitutional law. This is a broad topic.[31] Here, only some aspects will be highlighted in relation to climate change cases in which a claimant seeks to persuade a natural or legal person, on the basis of its legal obligations, to take measures against the current and/or future impact of climate change.

If someone claims in a case that a particular rule violates a binding rule of higher order, the court examines whether the contested rule can be interpreted and applied in conformity with this rule of higher order. If this is not possible, a rule that violates a binding rule of higher order may be disapplied or declared ineffective by the court. This is for instance addressed in cases where it is claimed that national legislation violates the prohibition of discrimination, both – when so-called lower legislation is challenged – with regard to the higher rule of Article 1 of the Dutch Constitution,[32] and – when Acts of Parliament are challenged – with regard to the higher rule of Article 14 of the ECHR and Article 26 of the International Covenant on Civil and Political Rights.[33]

With regard to Article 120 of the Dutch Constitutio, please refer to for instance: J. Uzman, "Changing Tides: The Rise (and Fall?) of Judicial Constitutional Review in The Netherlands", in: F. Ferrari, R. Passchier and W. Voermans (eds.), *The Dutch Constitution beyond 200 Years. Tradition and Innovation in a Multilevel Legal Order*, The Hague, Eleven International Publishing, 2018, pp. 257-271; Maartje de Visser, *Constitutional Review in Europe. A comparative Analysis*, Oxford, Hart Publishing, 2014, pp. 79-82.

[30] Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (English translation). The first instance judgment of the District Court of The Hague mentioned that the legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution (District Court of The Hague, *Staat/Urgenda*, ECLI:NL:RBDHA:2015:7196, judgment of 24 June 2015, paras. 4.36, 4.52 and 4.55 (English translation)). Article 21 of the Constitution reads: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment." The judgment of the Supreme Court does not include considerations of the Supreme Court about Article 21 of the Constitution.

[31] See for an overview for instance: L.A.D. Keus, "De relatie tussen burgerlijke rechter en wetgever", 33 *RegelMaat* 5 at pp. 255-273 (2018).

[32] Dutch Supreme Court, ECLI:NL:HR:2022:752, judgment of 27 May 2022.

[33] In this case, the justice deficit was addressed in Dutch Supreme Court, ECLI:NL:HR:2017:3081, judgment of 8 December 2017, and it was initially decided to leave recovery to the legislator. As the legislator omitted to provide recovery, recovery was eventually made by the judiciary in Central Appeals Tribunal, ECLI:NL:CRVB:2023:218, judgment of 24 January 2023.

Such a judgment has immediate effect for similar cases, but unlike declaring a legal provision null and void, it usually does not have a retroactive effect. The closed system of legal remedies implies that a disapplication or a declaration of ineffectiveness has no effect for cases that have already been disposed of and in which no ordinary remedy is left open. A court may also issue a declaratory decision to the effect that the public body in question is acting unlawfully by failing to enact legislation with a particular content.[34]

A duty to provide effective legal protection may give rise to examine whether a so-called *rechtstekort*, a justice deficit (déficit de justice, Gerechtigkeitslücke) exists. If so, the Supreme Court ruled that it is able to provide recovery in a situation in which the system of the law, the cases regulated therein and the underlying principles clearly show how to do justice. However, the constitutional desired restraint and the limited possibilities of courts entail that the Supreme Court, for the time being, leaves the choice to the legislator when several solutions are conceivable and the choice for a solution partly depends on general considerations of public policy or important choices of a legal-political nature. The Supreme Court does not exclude the possibility to strike another balance if the legislator is aware of the existence of a legal provision contrary to a binding provision of higher order and fails to adopt legislation which eliminates the unlawfulness.[35] In a judgment from 2016 the Supreme Court ruled that the then-existing enforcement practice of a life sentence was incompatible with the requirements of Article 3 ECHR. A letter from government to parliament gave the Court reason to expect that further political decision-making on changes to that practice would take place. The matter was held for over a year to further assess whether a different judgment should be reached on the basis of any then available regulation.[36]

Cases in which litigants demand an injunction or prohibition on the basis of tort law to prevent or stop an unlawful or impending unlawful situation, are aimed at obliging the opposing party to comply with some type of law, be it national, constitutional, international and/or supranational (EU) law. Such claims vary from - at one side – an order for the abiding of a specific legal obligation to do or refrain from doing something (like in the mentioned 1986 “Nieuwe Meer” judgment), to - at the other side – an order for the creation of law to comply with a legal obligation based on law of a higher order. In this respect, the Supreme Court has ruled several times that its ordering possibilities are limited. A public body like the State may be ordered by the court, pursuant to Article 3:296 of the Civil Code, to comply with a legal obligation, unless there are grounds for an exception in accordance with that Article.[37] In the 2019 judgment of the Supreme Court in the case of the Urgenda Foundation against the State, the Supreme Court ruled that its case-law relating to orders to create legislation constitutes an application of this exception and “is based on two considerations. First of all, there is the consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation. Secondly, there is the consideration that such an order should create an arrangement that also applies to parties other than the parties to the proceedings.”[38] The adoption of the possibility to give an injunction for

[34] Dutch Supreme Court, *SGP*, ECLI:NL:HR:2010:BK4549, judgment of 9 April 2010, para. 4.6.2.
[35] Dutch Supreme Court, *Arbeidskostenforfait*, ECLI:NL:HR:1999:AA2756, judgment of 12 May 1999.
[36] Dutch Supreme Court, *Life sentence*, ECLI:NL:HR:2016:1325, judgement of 5 July 2016. See for the follow-up judgment: Supreme Court, ECLI:NL:HR:2017:3185, judgment of 19 December 2017.
[37] Under Article 3:296 of the Dutch Civil Code, an exception arises if the law provides so or if it follows from the nature of the obligation or the legal act. Constitutional aspects of Article 3:296 of the Dutch Civil Code are mentioned in para. 8.2.1 of Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (English translation).
[38] Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (English translation), para. 8.2.3.

legislation goes hand-in-hand with limitations in the political process.[39] According to the 2019 judgment of the Supreme Court in the case of the Urgenda Foundation against the State, this limitation concerns the prohibition to issue an order to create legislation with a particular, specific content, without preventing courts to issue a declaratory decision to the effect that the omission of legislation is unlawful. Courts may also order the public body to take measures in order to achieve a certain goal, as long as that order does not amount to an order to create legislation with a particular content.[40]

In short, the Supreme Court distinguishes mainly three possibilities to deal with the need for effective legal protection in case of a justice deficit: providing recovery by the court, giving a signal to the legislator,[41] or offering time for repair to the legislator, with or without a specific deadline, while announcing the possibility of a follow-up by the court.

III. Challenges for courts in climate change cases

The balancing of interests of the parties in a climate change case is in a way also balancing for the court. When the individual interests to be weighed up are broad and general, the assessment of those interests by a court encounters the duty to provide effective legal protection and the primacy of the legislator to weigh up general interests. Cases about climate change may include the question whether the legislator fails or is not able to exercise its task to provide effective legal protection, and if so, whether this legitimizes court action.[42] In 2021, the Venice Commission implicitly told Dutch courts that a general deferential attitude of a court towards Parliament should not be an end in itself, in so far as this is potentially detrimental to the courts' (constitutional) review functions.[43] Even though this illustrates the importance of a sustained and resilient judiciary, it does not alter the fact that courts are not in a position to make rules to protect people from harmful effects of climate change. Apart from their constitutional position, courts generally lack the information which is needed to make rules of such a nature and are not equipped for making the relevant choices in a democratic process.

Furthermore, we may distinguish other good reasons for courts to focus on the legal basis in their judgments in climate change cases. The constitutional tasks of courts in the trias politica and society do not enable them to examine in advance the legitimacy and the effectiveness of a judgment in a case. Nonetheless, a court will usually try to anticipate the possible impact in society of the answer to a certain legal question.[44] The aim of a legal provision, the functioning of the law

[39] Dutch Supreme Court, *Waterpakt*, ECLI:NL:HR:2003:AE8462, judgment of 21 March 2003; Dutch Supreme Court, *Faunabescherming*, ECLI:NL:HR:2004:AO8913, judgment of 1 October 2004; Dutch Supreme Court, *SGP*, ECLI:NL:HR:2010:BK4549, judgment of 9 April 2010; Dutch Supreme Court, *Thuiskopie*, ECLI:NL:HR:2014:523, judgment of 7 March 2014; Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (English translation).

[40] Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (English translation), para. 8.2.6.

[41] Since 2017, the annual reports of the Supreme Court summarize judgments containing signals (of various kinds) to the legislator.

[42] J.L. Smeehuijzen, "De veroordeling van Shell tot 45% CO_2-reductie in 2030: over legitimiteit en effectiviteit", in: Van Veen et al., *De klimaatzaak tegen Shell*, Deventer, Wolters Kluwer, 2022, pp. 19-32.

[43] European Commission for Democracy through Law (Venice Commission), The Netherlands, Opinion on the legal protection of citizens, adopted 15-16 October 2021 (Childcare Allowance Case), paragraph 101, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)031-e.

[44] In the 2022 annual report of the Dutch Supreme Court, the Civil Division mentions in the context of judgments with potential significance beyond the decided case, that it "must be mindful of the aspects of such cases that transcend the case in question and try to asses as best as possible what the social impact of the

within the legal order and society and the effectiveness of a judgment are important points for a courts' considerations. In the reasoning of the judgment a court will provide its arguments by taking into account different foreseeable perspectives of the acceptance of a judgment as well as the confidence courts must inspire in the public. If it is self-evident that a decision on a claim cannot have any effect at all, a lack of so-called legal interest may obstruct the admissibility of the claim. Likewise, the authority of a court would probably not be served by a substantive judgment which is obviously ineffective in advance. Otherwise, questions of effectiveness merge into the substantive arguments in a judgment in a climate change case, as in any other case.

Apart from this, the assessment of the effectiveness of judgments in climate change cases could be seen as mixed with familiar and new factual and legal aspects itself. One could argue that courts have limited power to protect people in their living situations from the impact of climate change. On the level of an individual case, the effectiveness of a judgment on the legal obligations of a person with regard to the reduction of greenhouse gas emissions or the energy transition will be quite hard to estimate. On the level of relevance for the trias politica, the effectiveness could be considered from the perspective of a mature dialogue between the legislator, the executive and the judiciary on the common road to the development and implementation of value-based rules and principles regarding climate change.[45] On the level of courts as institutions that should serve society and individuals in their living situations, history above all will reveal the effectiveness of judgments in climate change cases.[46]

Comparing the first admitted Dutch environmental class action about the dumping of dredged material from Amsterdam's canals with cases about climate change, one might postulate that a major shift in bringing cases is going on, as apparently the initial claim for compliance with existing law by factual action of a public body has moved on to claims for both factual and legal action, related to an alleged deficit in national legislation and regulations. Such a statement loses sight of the fact that every now and then cases are brought before Dutch courts on the cutting edge of the relation between the state powers and their respective institutional roles towards the people in society. These cases often touch upon fundamental rights. Within this context, the Dutch Supreme Court has for instance decided several tax cases. In one case, the question was at stake whether a facility to deduct certain labor costs at a fixed rate, created unequal treatment between workers incurring high labor costs and workers incurring standard labor costs.[47] In another case, it was discussed whether a taxation of a so-called fixed return on savings and investment – which could deviate from the actual return on such assets – was in violation of Article 1 Protocol 1 ECHR and Article 14 ECHR.[48] In these judgments, the Dutch Supreme Court also explicitly discussed under which circumstances it may be appropriate for a court to provide recovery, after a justice deficit has been identified. In the so-called 'SGP case', a case handled by the civil chamber of the Dutch Supreme Court, the question arose whether a political party is allowed to exclude women to be eligible for election, on the basis of religious convictions. The Dutch Supreme Court judged that the Netherlands was acting in violation of the UN Women's Convention by allowing a political party to exclude

Supreme Court's decisions will be. That requires time and attention." Please refer to https://www.hogeraad.nl/jaarverslag/annual-report/the-civil-division/.

[45] In the Netherlands, such a dialogue is not uncommon, as the examples of the judgments from 1901 (Dutch Supreme Court, *Boels/B&W Rotterdam*, no. W 7606, judgment of 10 May 1901) and 1919 (Dutch Supreme Court, *Lindenbaum/Cohen*, ECLI:NL:HR:1919:AG1776, judgment of 31 January 1919) demonstrate.

[46] See about the assumed narrative impact of court judgments in climate change cases for instance: Frey Schramm, "Judges as Narrators of the Climate Crisis? An Illustrative Analysis of the Decision of the German Constitutional Court from 24 March 2021", 7 *European Papers* 1 at pp. 361-378 (2022).

[47] Dutch Supreme Court, *Arbeidskostenforfait*, ECLI:NL:HR:1999:AA2756, judgment of 12 May 1999.

[48] Dutch Supreme Court, *Box 3-kerstarrest*, ECLI:NL:HR:2021:1963, judgment of 24 December 2021.

women from the right to stand for election.[49] In a subsequent procedure before the ECtHR, the ECtHR declared the application of the political party inadmissible.[50] A final example concerns several judgments of the civil chamber of the Dutch Supreme Court concerning the right to strike. In the Netherlands, the right to strike was not regulated by national legislation, when, after ratification of the European Social Charter, cases were brought before the Dutch Supreme Court in which this Charter was an instrument in the incorporation of the right to strike in the national legal order.[51] That way, constitutional law, in the form of European and international treaties, enabled the Dutch Supreme Court to provide society with much needed clarity on questions regarding the right to strike.

With regard to climate change cases, both the people in society and other national and supranational institutions may expect that courts will not get stuck in balancing interests but will, to the best of their knowledge and expertise, provide answers on legal questions put forward in the case and arising from the impact of climate change for life on earth, whatever the level of difficulty of a question might be. The values on which the state model is based, oblige individuals as well as state institutions to respect each other in their continuous dialogue. Courts play an authentic and resilient role within this value-based dialogue by giving well-reasoned judgments in which is demonstrated that the decision is based on the law and that its arguments respect the principles of logic, truthfulness, fairness and contradiction. The current and next generations will experience if our time indeed left the option to our courts of contributing to the gradual development of the law in climate change cases, as well as if their judgments in climate change cases supported a sustained and resilient judiciary.

IV. Summary and conclusions

In the past, current and future, constitutional adjudication comprises the need for court judgments about issues which also occupy the legislator, the executive and people in society. As written above, these issues may relate to climate change, but could also encompass other areas, which touch upon fundamental rights as well. The issues may vary. As listed above, cases that have been handled by the Dutch Supreme Court and touch upon constitutional questions may range from personal income tax matters to the enforcement practice of a life sentence, or from the prohibition for political parties to exclude women to stand as a candidate, to regulations on the right to strike.

Climate change cases consist of a mix of familiar and new factual and legal aspects. These cases are generally not so much about familiar questions like the legal consequences of events that took place in the past. What makes climate change cases stand out from (many) other cases on constitutional matters, is that they require a review of complex scientific evidence and complex factual and legal questions, like what short-term and longer-term environmental expectations mean for current and future duties of private and public bodies. When handling these cases, it is essential for the judiciary to make use of the common principles of logic, truthfulness, fairness and contradiction. These principles may also serve to separate reliable information from fake information, and to demonstrate that a value-based approach leaves no space for fake information as basis for court judgments.

When courts are asked to provide judgment in dilemmas of climate change that also preoccupy the legislator and the executive, essentially, the challenge of courts is to provide judgments that fit within the legal system, discuss aspects of legitimacy and anticipate the impact on society whenever possible. The effectiveness of judgments in climate change cases should therefore

[49] Dutch Supreme Court, *SGP*, ECLI:NL:HR:2010:BK4549, judgment of 9 April 2010, para. 4.6.2.
[50] ECtHR, Staatkundig Gereformeerde Partij *v. the Netherlands*, no. 58369/10, judgment of 10 July 2012.
[51] Dutch Supreme Court, *Stakingsrecht*, ECLI:NL:HR:1986:AC9402, judgment of 30 May 1986.

be considered at different levels of abstraction, and will ultimately be experienced by next generations.