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Report

G. The Netherlands

(1) INTRODUCTION

The Dutch news cycle was mainly dominated by two topics this year: the ongoing COVID-19 pandemic and the formation of a new coalition government. The formation process followed the general elections of March and was accompanied by various scandals and leaked formation notes. After a record nine months, in January 2022, at last a coalition agreement was formed—between the exact four parties that had also formed the preceding coalition. In the meantime, many existing environmental challenges lingered on or were exacerbated, without much political action being taken to address them. There were some notable changes to the political discourse on some of these problems, however. The need to address climate change, for instance, was put high on the agenda of the formation talks after the intense rainfall and high water of July 2021 in the south of the Netherlands and neighbouring areas in Belgium and Germany. In a press conference in early August, prime minister Mark Rutte (at the time, demissionary, now prime minister again) stated that 'the Netherlands became seventh during the Olympic games. In the Olympic Games of the Climate, we can be number one too' (translated by author). It remains to be seen, of course, whether this ambitious spirit will be met with corresponding actions. Considering various political and socio-economic developments in 2021, there are reasons to be both optimistic as well as pessimistic, as will be discussed below.

(2) BRANCHING OUT: A NEW CHAPTER FOR CLIMATE LITIGATION

Home of the famous *Urgenda* ruling, the Netherlands will be known to many as a catalyst for climate litigation across the globe. At the national level, *Urgenda* has also paved the way for new legal challenges to follow suit. This year, the Dutch branch of the environmental non-governmental organization (NGO) Friends of the Earth (Milieudefensie) successfully sued Shell Plc for failing to reduce their emissions. The origins of the case lay in early April 2018, when Milieudefensie sent a notice letter to the chief executive officer of Shell to explain why it is of the position that the company, through its corporate activities and strategy, is breaching its duty of care by causing climate damage across the globe and undermining the ambitions of the Paris Agreement. A month later, Shell responded that it did not find Milieudefensie's claims and demands justified. A lawsuit was then initiated by Milieudefensie, in which the environmental NGO was joined by six additional environmental NGOs and more than 17,000 co-plaintiffs from civil society. The case was heard by the District Court in The Hague in December 2020, with the ruling delivered on 26 May 2021 (ECLI:NL:RBDHA:2021, 5339).

In its historic judgment, the District Court found that that Shell must reduce its global net carbon emissions by 45 percent by 2030 as compared to 2019 levels. In detailing its ruling, the court started from the basis that continued emissions will lead to dangerous and irreversible climate change, referring to the reports of the International Panel on Climate Change as well as national climate reports. The court subsequently found that Milieudefensie could bring a collective action pursuant to Book 3, section 305a of the Dutch Civil Code, which reads that a foundation or association with full legal capacity may institute legal proceedings for the protection of similar interests of other persons. Important to add here is that, although the court recognized that the 'entire world population is served by curbing dangerous climate change' (para. 4.2.3), the diffuse manner and time in which climate risks manifest globally mean that the interests of current and future generations of the world's population cannot be bundled. The interests of current and future Dutch generations were considered sufficiently similar for a collective action to be taken by these environmental NGOs, however, meaning that Milieudefensie could take the case on behalf of Dutch residents. Milieudefensie had further requested Dutch law to be applicable on the actions of Shell on the basis of Article 7 of EC Regulation 864/2007 on the Law Applicable to Non-contractual Obligations. The court accepted this on the basis that the corporate policy of the Shell group 'constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region' (para. 4.3.6.).

In detailing its judgment, the court ruled that 'the CO_2 emissions for which [Shell] can be held responsible by their nature pose a very serious threat, with a high risk of damage to Dutch residents and the inhabitants of the Wadden region and with serious human rights impacts' (para. 4.4.54). Based on an unwritten standard of care pursuant to Book 6, section 162 of the Dutch Civil Code, the court ordered Shell to meet a reduction obligation of 45 percent by 2030, provisionally effective, meaning Shell must comply even though an appeal is still open.

The case is groundbreaking in that it is the first time that a court of law found a private company to have a legal duty to reduce emissions. On top of that, the court ordered a concrete emission reduction target binding upon the company. Environmental groups across the world are now reflecting on what can be learned from this case, and how the case can be replicated in other jurisdictions and sectors. The Dutch court has helpfully published an English translation of this case that may be of assistance to such groups.

It is important to emphasize here that the final word on this case has not been said. In fact, Shell has already confirmed it will appeal the judgment, with the company's chief executive officer noting that, although they agree that 'urgent action is needed and we will accelerate our transition to net zero,' the company will appeal the ruling because 'a court judgment, against a single company, is not effective' (see 2021 media releases <http://www.shell.com>). Instead, the company advocates in its press release for clear, ambitious policies that can promote change across the entire energy system, and at a global level. Whether Shell thus far has played a constructive part in driving such changes to government policies can be debated, of course.

Interestingly, this was not Milieudefensie's only win against Shell in 2021. In fact, on 29 January, the Court of Appeal of The Hague ruled that Shell's Nigerian subsidiary is liable for the consequences of two oil spills in Nigeria (ECLI:NLGDHA:2021, 132, 133, and 134). This case, brought by four Nigerian farmers and Milieudefensie, had been continuing for thirteen years and relates to oil leaks that took place between 2004–7. Shell disclaimed liability, stating that the oil spills had been caused by sabotage, as a result of which there would be no liability under Nigerian law. The Court of Appeal did not follow this reasoning.

That a Dutch court could have jurisdiction and competence to judge compliance with Nigerian law had been decided in an earlier ruling in 2015, due to the fact that the parent company of the Nigerian subsidiary was based in the Netherlands (ECLI:NL:GHDHA:2015, 3586, 3587 and 3588).

A final note regarding climate litigation relates to the impact of climate litigation in practice. In 2015, the District Court of The Hague ruled that the Dutch State would have to ensure that carbon dioxide emissions are reduced by 25 percent in 2020 as compared to 1990. Even though the government decided to (unsuccessfully) appeal this judgment all the way up to the Supreme Court level, the fact remains that the emission reduction requirement was binding from the start. In 2021, there were no signs that the state had lived up to the Court's judgment. As a consequence, Urgenda decided to initiate new proceedings to request the judge to impose a penalty payment on the state to secure compliance with the judgment. In early 2022, final emissions data were published by the Dutch Environmental Assessment Agency, which showed that in 2020, 25.5 percent less carbon dioxide had been emitted, compared to 1990. The most recent data shows that in 2021, however, emissions had gone up again, towards a 23.9 percent reduction compared to 1990. It is important to note here that the original reduction requirement relates to the absolute *minimum* needed from industrialized countries to remain below a temperature rise of two degrees Celsius (not 1.5 degrees Celsius). As it turns out, not even a court judgment has thus far incentivized the Dutch government to indeed meet this minimum reduction. Besides being problematic from a climate action perspective, such non-action also threatens the functioning of the rule of law—*rechtsstaat*, in the Dutch context—in which governments are bound by the law and must respect the judgments of independent judges. In both respects, it seems crucial to remain vigilant of the country's commitment to climate action in the years to come, ensuring that the *Urgenda* judgment is in fact respected.

(3) THE NITROGEN SAGA CONTINUED

In the previous report on the Netherlands in this Yearbook, Lorenzo Squintani explained in detail how the country entered a societal and political gridlock when the Dutch Council of State, in its judgment of 2019, found the Dutch Programmatic Approach to nitrogen oxides to be incompatible with EU nature conservation law. Squintani described in his report how the 'search for a solution to the low quality of soil in Natura 2000 sites is greatly overshadowed by the search for a solution for economic interests' (at 382). This observation, in many ways, holds true today, and an unmistakable amount of scientific evidence shows that excessive nitrogen emissions remain a core threat to biodiversity and nature values in the country.

Over the course of the past year, measures were initiated that may hopefully help change this course, however. First, on 1 July, the Act on nitrogen reduction and nature improvement (*stikstofreductie en natuurverbetering*) entered into force, amending existing nature legislation. The Act sets a time-based result obligation for ensuring that protected nature sites have a healthy nitrogen disposition—namely, 40 percent of the coverage of such sites in 2025, 50 percent in 2030, and 74 percent in 2035. In addition, the Act requires the establishment of a governmental program with concrete measures and intermediary goals to realize these binding targets, accompanied by monitoring requirements. In the coalition agreement, presented on 15 December, a total amount of €25 billion was made available to address the nitrogen crisis in the period until 2035, of which €20 billion must have been spent by the year 2030. For spending these funds, the national government puts the responsibility at the provincial level. The aim here is to develop more of a locality-based approach, with

the twelve provinces being required to develop detailed plans on how nitrogen emissions will be addressed per individual area within their province. The provinces must present their plans in 2023—which may then allow for further collaboration and coordination between them—after which, the national government will evaluate these plans and provide the funding. Although the chosen approach may provide provinces with the necessary flexibility to adapt measures to their local circumstances, the success of this approach is very much dependent on the commitment of individual provinces—which has proven to be fiddly in the past.

Besides the stipulated budget, the exact manner in which the nitrogen crisis will be addressed is thus still very much unclear. In the agricultural domain—the main source of nitrogen emissions in the country—the focus still seems to be on financial instruments to incentivize a shift towards circular agriculture with drastically reduced nitrogen outputs. Farms with high emissions that cannot reduce their emissions and are located close to protected nature sites may be offered a government buyout or—although this is not confirmed—may be forced to sell their farm. Such forced buyouts, however, are time-consuming and expensive, on top of being highly politically sensitive, particularly in light of the large-scale farmer protests of 2019–20. As such, this does not seem to be the preferred government option.

Besides measures flowing from the Nitrogen Act, the Dutch draft National Strategic Plan for the Common Agricultural Policy 2023–7 is another instrument that may play an important role in addressing nitrogen emissions. Although the word 'nitrogen' occurs no less than sixty-three times on the in the total 107 pages of this plan, the actual measures that may be used are not made very concrete. Various generic types of interventions are mentioned that may contribute to reducing nitrogen emissions, including the use of eco-schemes, agri-environmental subsidies, enhancing cooperation, and promoting knowledge and information distributing (at 30). In addition, the plan seeks to commit funds towards the strengthening of cooperation between farmers and other area partners, so that problems can addressed at a landscape scale. This includes subsidies for the development of area plans that stipulate concrete measures per area, including the extensification of high emission farms located close to nitrogen-sensitive Natura 2000 sites. Overall, it remains to be seen to what extent instruments of the policy will be employed to help meet the objectives of the new Nitrogen Act.

Despite these new measures, over the course of the year, several new cases were brought (and won) by environmental NGOs to enforce rules on nitrogen, highlighting continued faults in the government's nitrogen approach and particularly the calculation methods of nitrogen permits (see, for example, ECLI:NL:RBOBR:2021, 6389). The only real way to change this course seems to be to for the (provincial) government to stop searching for paper solutions and start addressing the various existing environmental challenges in a holistic, non-isolated manner. This also appears as a central plank in the coalition agreement, in which it is stipulated that nitrogen measures should also help, for instance, to address biodiversity declines and improve water quality. It is not a stretch to say that the Netherlands can rightly anticipate new (legal) challenges about that second aspect, as it is increasingly becoming clear that the Netherlands are nowhere near on track to meet the binding targets of EC Directive 2000/60 Establishing a Framework for Community Action in the Field of Water Policy. A more holistic approach to law and policy making, in which environmental and other societal challenges are no longer dealt with in isolation, will be of key importance here.

(4) ENVIRONMENTAL DEMOCRACY: MOVING CLOSER TO AARHUS REQUIREMENTS?

This year also presented several interesting rulings by the Dutch Council of State on the application of environmental democracy rights flowing from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The point of departure for us here is a ruling by the Court of Justice of the European Union (CJEU) on *Stichting Varkens in Nood and Others*, of 14 January 2021 (C-826/18). In brief, this case dealt with a request for a preliminary reference submitted by the Dutch District Court of Limburg, seeking clarification on Articles 6 and 9(2) of the Aarhus Convention. These provisions respectively provide that a decision to authorize environmental activities must be subject to a public participation procedure, and that there should be a right of access to justice to subsequently challenge such decisions. In the Netherlands, any person can participate in a decision-making procedure by making a submission on a draft decision. There is no obligation for public actors to adapt draft decisions based on submissions received. In Article 6:13 of the Dutch General Administrative Law Act, then, it is stipulated that only interested parties that have submitted observations on a draft decision during the preparatory procedure may subsequently challenge the adopted decision in court. Exceptions to this rule are possible when an applicant is able show that this requirement could not reasonably be met—for instance, because a draft decision was not publicized. In general, however, the rule stands that, without having participated in the decision-making process by making a (written or oral) submission, there is no subsequent access to justice.

In the preliminary ruling, the CJEU found that this requirement is not in line with the Aarhus Convention. Instead, interested parties should have the right to appeal a decision, even if they have not made submissions in the preparatory phase. In addition, the court ruled that people who are deemed interested parties for the purpose of making submissions should also, subsequently, be allowed to appeal a decision before a court of law. If the Netherlands thus allows any person to make submissions, it should also allow any person to subsequently challenge an adopted decision in court.

On 15 April, the Dutch Council of State subsequently ruled that, indeed, interested parties can also appeal decisions if they have not made submissions. For environmental NGOs and other potential applicants, this may be quite the relief. As recent empirical work on the application of the Aarhus Convention shows, the submission requirement can be relatively burdensome in practice, especially for smaller environmental groups. On paper, this submission requirement serves to improve the decision-making process by ensuring that different considerations and perspectives could be considered before a final decision comes to being. In practice, it seems that submissions hardly led to decisions being adapted in the preparatory phase. As such, the main reason for making submissions was purely to be able to challenge a decision, if need be, later. After these judgments, it is now the legislator's turn to decide how to incorporate these rulings into domestic law, ensuring compliance with the Aarhus Convention.

(5) CONCLUSION AND LOOKING FORWARD

With a focus on the domains of climate, nature, and environmental democracy, this report has highlighted reasons to be optimistic as well as pessimistic regarding the development of environmental law in the Netherlands. Looking ahead, there are several matters to keep a close eye on for the future of environmental law in the country.

In relation to climate litigation, in both Shell cases that were discussed, the country of incorporation of the parent company played an important role in the court's conclusion. It can be argued that companies can (for now) evade climate litigation proceedings if they are based in countries with less strict climate obligations, or less judicial enforcement. Whether due to negative experiences with Dutch climate cases or other (tax) concerns, at the end of 2021, Shell decided to relocate its headquarters to London. A striking detail: UK-based environmental NGO ClientEarth has already announced that it will bring an action against the directors of Shell for failing to develop company strategies in line with the Paris Agreement and, in doing so, breaching their duties under the UK Company law. In the next year(s), it should become clear whether climate litigation will branch out also in this new direction or not.

In regard to nitrogen, then, when the new coalition government was presented on 10 January 2022, the Cabinet featured a new minister's post that (to the author's knowledge) is unique in the world—namely, the minister of nature and nitrogen. The ambition of this new minister is to 'strengthen nature and invest in a future-proof agriculture' (translation by author; see <https://www.rijksoverheid.nl/regering/bewindspersonen>). As the new Act on nitrogen reduction and nature improvement is being implemented, and the billions of euros committed to addressing excessive nitrogen emissions are put to use, it can only be hoped that the various, but interconnected, environmental challenges at play will finally be addressed.

Finally, as concerns environmental democracy, it is now thus the legislator's turn to ensure that Dutch administrative law is in line with the new line of case law discussed above. Increasingly, it is also emphasized in the literature that, to live up to the ambitions of the Aarhus Convention, not only legislative changes but also substantial changes in the way that public actors apply environmental democracy in practice are needed. As has also been highlighted in previous year reports, much work remains to be done in this regard.

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