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The Urgenda judgment: a “victory” for the climate that is likely to backfire

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The Dutch government has decided to appeal the widely publicised “Urgenda” ruling from the district court in The Hague, ordering the Netherlands to step up its climate change actions. According to Lucas Bergkamp, Partner at Hunton & Williams and Emeritus Professor of International Environmental Liability Law at Erasmus University Rotterdam, there are good reasons why we should hope that the court of appeals will overturn the ruling. According to Bergkamp, it sets a dangerous precedent for judicial activism, is inconsistent with European law and will even undermine international climate negotiations.

“Let’s lock-in this victory and change our world for good,” was Urgenda’s message on Twitter on June 24. On that day, a court in The Netherlands made headlines across the world by ordering the Dutch government to beef up the fight against climate change.

At the request of an environmental organisation by the name of Urgenda, a contraction of “urgent” and “agenda”, the court instructed the State to revise its current policies to ensure that greenhouse gas emissions are reduced by at least 25% by 2020, not the 17% it currently aims at.

To produce this result, the court extended an existing tort law doctrine of “social responsibility” for avoiding “unacceptable danger creation.” The court found climate change to be an unacceptable, and, thus, unlawful danger and, ordered the government, based on its duty of care, to take action to protect against it.

In turning to a court to advance climate policy, Urgenda took an innovative approach. Urgenda had concluded that governments are unable to solve the climate crisis, because they are driven by short-term economic interest and locked into a “prisoners’ dilemma.” Therefore, it decided that the judiciary should act as the planet’s saviour of last resort. The courtroom, as Urgenda put it, is “the only place left where one can debate on the basis of facts.” Of course, “the facts” are those that Urgenda approves.

In bringing the law suit against the State, Urgenda was inspired by a book, written by its lawyer, Roger Cox, entitled “Revolution Through Litigation”. As Arthur Petersen notes, it seems that this revolution is now beginning. Urgenda is assisting climate action groups in other countries in Europe and elsewhere to launch similar lawsuits against their governments. Their objective is to push society away from fossil fuels towards renewable energy so as to achieve a circular, zero-carbon sustainable society.

Enormous implications

If this judgment survives appeal and becomes part of Dutch tort law, the implications for climate change litigation would be enormous. Companies emitting greenhouse gases as well as States from which emissions occur, would be exposed.

This would not be limited to Dutch companies or the Dutch State. In principle, Dutch courts have jurisdiction to hear cases against foreign companies that through their conduct create unacceptable danger in The Netherlands. If any emission of greenhouse gases creates an unacceptable danger, any company can be the target of a lawsuit in The Netherlands.

Under the doctrine of restricted sovereign immunity, the Dutch courts can also hear cases against other States for allowing their residents to create danger in The Netherlands. Climate change, the Dutch court rules, creates unacceptable danger, and any contribution to climate change, no matter how small, is enough to be on the hook.

Thus, the Urgenda doctrine might be the beginning a new era of climate change litigation with the Dutch courts ordering the rest of the world to step up their climate change efforts. In addition, the example of Urgenda will no doubt be followed by NGOs in other countries. It could have far-reaching effects.

Judicial activism

The court justified its ruling on two grounds. First, on the basis of the reports of the IPCC, the UN climate body, the court found that climate change poses a serious danger, and that from a scientific viewpoint, this danger must be averted.

Second, the court referred to the grand European principles of environmental law, such as the obligation to provide for a high level of environmental and health protection, the precautionary principle, the human rights to life and to “respect for private and family life,” and the international “no harm” principle. It used these concepts to construe the State’s duty of care with respect to the unlawful danger of climate change.

According to the court, society can no longer hide behind the uncertainty of the science and the cost of prevention, but must comply urgently with the average emission reduction targets agreed at the international level. Thus, a national court may enforce the IPCC reports and international commitments made by States.

Interestingly, on the day the court read its judgment, it also published an English translation of the entire ruling on its website! Surely, it is not common practice for courts in The Netherlands to translate their judgments. Apparently, the court in The Hague felt that the world should know about its ruling. Indeed, Urgenda offered the three judges an opportunity to gain both fame and respect for their courage to stand up against the body politic squandering the planet. This extreme form of judicial activism is unprecedented in the Netherlands.

Separation of powers

Let’s look at some of the problems with the court ruling and the consequences it may have.

First, there is the principle of the separation of powers and the rule of law. It is highly questionable that the judiciary would get involved in the tremendously complicated area of science-based government policy-making. It is doubtful whether such judgments are legitimate and the rulings will be sound. A courtroom is not the right place to debate climate science and the public interest in more protective policies.

Thus, while this court judgment is celebrated as a victory for the climate, it is also a threat to the rule of law and constitutional democracy. At the request of all sorts of action groups, civil law courts could make policies with respect to any risk, from immigration to genetically modified foods, and from chemicals to healthcare. This could lead to policies that are supported only by small minorities and involve high costs of compliance; consequently, it might well spark a political backlash.

Danger creation

Secondly, the legal basis for State liability in this case is questionable. The novel, expanded doctrine of “danger creation” constructed by The Hague court differs in key respects from the doctrine as it has been interpreted thus far.

Before the Urgenda judgment, the “danger creation” doctrine dealt with situations where a defendant negligently created a serious risk of certain and immediate personal injury or property damage. The landmark case is the 1965 “Cellar Hatch” (“kelderluik”) opinion of the Dutch Supreme Court, in which a Coca-Cola employee created a dangerous situation by leaving a café’s cellar hatch open as a result of which a visitor fell and injured himself. The doctrine covers acts as well as omissions for which the defendant is responsible.

The Urgenda court, however, expands this doctrine in three ways. First, it rules that the doctrine applies to States, not only to private parties. Second, it holds that the doctrine applies to omissions to address dangers created by all activities that are being conducted within Dutch territory; thus, a person (in this case, the State) may be liable for unlawful acts of other persons (in this case, any resident), based on the rationale that the liable person has control over such persons. Third, it finds that the doctrine applies not only to certain, immediate, individualised danger arising from a single cause, but, in light of the precautionary principle and the importance of environmental protection, also to uncertain, long-term, generalised, multi-causal hazards, such as climate change.

In addition, the court sets aside conventional causation requirements. It holds that it does not matter that the emissions controlled by The Netherlands are minor compared to total emissions. So, the court seems to reason, it does not matter that the additional reduction sought by Urgenda would hardly affect global emissions, because every nation has its own independent obligation to cut emissions.

According to the court, the fact that “the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State’s obligation to exercise care”. “After all,” the court continues, “it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO2 levels in the atmosphere and therefore to hazardous climate change.” Its reasoning not only confuses duty and causality, but is also scientifically doubtful, since there is no evidence that minor increases in CO2 levels contribute to hazardous climate change.

To complete its reasoning, the court on weak grounds rejects the Dutch government’s arguments that more stringent emission reductions would cause “carbon leakage” and adversely affect the international competitiveness of carbon-intensive companies based in The Netherlands.

By setting aside conventional causation requirements, the court ignores a critical part of tort law. Causation is the link between a defendant’s act and the damage suffered. In this case, there is no direct causal link, as the court acknowledges by labelling climate change a global problem and Dutch emissions minor, but the State is found liable nevertheless.

Special regime

As noted above, this sets a worrisome precedent. The novel theory of danger creation endorsed by The Hague court opens the door for all sorts of activists to launch lawsuits against the State in an attempt to get courts to change government policies. A plaintiff has to show only that current government policy does not adequately address a danger created either by the State or by private parties.

Interestingly, Urgenda seems to realise the problem. Urgenda’s concern, of course, is that the court of appeals will overrule the lower court and decide that the theory of “unacceptable danger creation” does not apply to government policy, or cannot be applied in the court’s manner.

Thus, Urgenda had to come up with an argument as to why the judgment should stand. Marjan Minnesma, its Director, has now advanced such an argument: “The whole issue of climate change is unique and this uniqueness does not apply to [other] problems.” This would be so because there is broad consensus among 195 countries and scientists, and the court would merely be holding the State to its own prior commitments. Can this argument save the judgment? No, it cannot, as there are serious problems with the argument, which completely undermine Urgenda’s case.

The first problem is that it is simply incorrect as a matter of law. The court rejected the theory that the State had a direct legal obligation to do more. It held that the relevant obligations of the State under international law are not directly enforceable by Urgenda. This implies that Urgenda’s argument that the court merely held the State to its pre-existing commitments is bogus; the court merely referenced such commitments in construing the state’s duty of care with respect to “dangerous climate change”.

In fact, the court endorses Urgenda’s own theory of “unacceptable danger creation,” which it deems to apply generally to any government policy that fails to adequately address an unacceptable danger produced by society, whether pollution, terrorism, or immigration. Urgenda had to propose a general theory, because tort law does not provide specific regimes for specific issues, but works with generally applicable doctrines.

So, after Urgenda lured the court into endorsing its novel theory, it now attempts to mitigate the damage the theory will cause by suggesting, rather disingenuously, it is a unique special regime for climate change after all. By emphasising the uniqueness of climate change and climate change policy, Urgenda demonstrates why it should argue its case before the legislature, not a court of law.

Further, scientific or political consensus is not a sufficient basis for a court of law to impose policy. Urgenda’s argument confuses politics and law. The law also serves to protect citizens and society against the dictates of scientific or political consensus to prevent totalitarian regimes.

European law

Another concern with the ruling of The Hague court is that it appears to be incompatible with EU law.

In the Urgenda case, Dutch policy was found to be insufficient to avert dangerous climate change, even though its policy is entirely consistent with the EU’s Effort Sharing Decision (this establishes binding annual greenhouse gas emission targets for Member States for 2013-20) . So, by finding the Dutch policy insufficient and thus unlawful, the Dutch court implicitly finds the EU Effort Sharing Decision unlawful. National courts, however, do not have authority to rule on the lawfulness of EU legislation; instead, they must seek a preliminary ruling from the European Court of Justice.

True, the European Court of Justice has created a doctrine of Member State liability, also known as “Francovich liability.” Under this doctrine, a Member State can be held liable for damages caused by a failure to implement EU legislation, if that legislation confers a right on the claimant and there is a causal link between the State’s breach and the loss suffered by the claimant. In the Dutch case, however, there

was no breach of EU law, nor did the EU law concerned grant any individual right. To the contrary, the State of The Netherlands complied perfectly with the EU Effort Sharing Decision! But even if there had been a breach, the EU climate change laws do not grant any individual rights.

Then there is the EU Environmental Liability Directive (ELD), aimed at the prevention and restoration of environmental damage. The ELD, however, does not apply to diffuse, widespread damage, where it is impossible to link the damage with individual actors. In these cases, as the ELD explicitly recognises, “liability is not a suitable instrument.” Accordingly, under the ELD, Member States are not required to prevent or restore diffuse damage, or take any other measures with respect to it. There is no doubt that climate change causes widespread (in casu, global), diffuse damage, and, as a result, Member States are not required to address it. Exactly with respect to such diffuse climate-related damage, however, the court imposes liability.

Thus, there is more than one reason for the EU to be worried about climate change litigation against Member States. The supremacy of EU law is at stake. The rule of law and the separation of powers are threatened by court-made climate policies, which cannot be coordinated, nor adapted to changing circumstances. On appeal, the Dutch court will therefore likely refer the case to the European Court of Justice.

Unintended effects

The Urgenda ruling, if it is upheld, may have several other negative unintended effects.

If the Dutch government were to comply with the court order, there is a significant risk that the State will be held liable for the cost that such a sudden change in policy would impose on industry. After all, companies made investment decisions based on the current policy and have legitimate expectations that the policy will not suddenly change to their detriment. The law protects these expectations.

In addition, the State may be liable based on the doctrine of “unlawful adjudication.” This doctrine provides a cause of action against judgments that violate fundamental principles of law or reflect a serious neglect of the judiciary’s task. In the Urgenda case, the court violated the fundamental principles of the trias politica, the separation of powers. It also neglected to independently examine the relevant science, and relied entirely on what the parties agreed, while its judgment has serious implications for all citizens that amounts to serious neglect of its task.

Paris summit

Another question is what the effects of the ruling may be on the COP-21 climate summit in Paris later this year. Although Urgenda and other NGO’s have hailed the ruling as a victory for the climate, it may well impede rather than help the international climate negotiations.

For one, court judgments may influence the strategy of States at the conference. States may be reluctant to agree to legally binding commitments so as to avoid possible court judgments holding them to their commitments. Vague, aspirational statements might then be preferred.

Further, those States that have been ordered by courts to revise their climate policies, may be reluctant to do more than what their courts have ordered. This could limit their ambitions.

States that are not exposed to possible lawsuits may try to exploit the vulnerability of States that are so exposed and saddle them with disproportionate obligations. Of course, State legislatures might also proceed to adopt legislation to shield themselves against climate activists’ lawsuits.

Scientific necessity

The “single issue” activist mind typically does not appreciate the vagaries of “multi-task” government and politics. It also has a hard time dealing with the discipline imposed by law, which accommodates a wide range of concerns and interests. Under the law, the ends do not necessarily justify the means. Law is not politics.

Urgenda is right when it says that “one should be concerned, instead of angry, about this judgment”. But citizens should not be concerned about “the seriousness of the problem and the lack of action,” as Urgenda suggests, because these issues are political concerns and are addressed by the body politic. Rather, they should be concerned about the judicial activism inherent in the judgment, the court usurping the legislature’s powers, and the ruling’s many adverse effects.

The Urgenda ruling conflicts with the laws of The Netherlands, as well as European law. As demonstrated, the ruling’s consequences would be draconian for climate change litigation, other public interest litigation, and international climate negotiations. The Urgenda court’s ruling is so at odds with the existing tort law doctrines of “unacceptable danger creation,” the government’s duty of care, and causation theory, that it sets aside the rule of law.

It is very fortunate, then, that the Dutch government, on the 1st of September, announced that it has decided to appeal the ruling.

There is precedent that does not bode well for Urgenda’s prospects in an appeal. In a case brought by environmental groups, including Waterpakt, against the State of The Netherlands over its failure to implement the Nitrates Directive, the Dutch Supreme Court opined that the judiciary is not empowered to order the legislature to enact legislation.

Another case from the 1970s centered on the fluoridation of drinking water, which was deemed “scientifically necessary” by the water company to combat caries. This practice was challenged by a group of citizens before the courts on principle. The Supreme Court found that scientific necessity was an insufficient basis, and required specific legislation. Not science, but the legislature had the final word on the policy. This would appear to be logical, because science cannot prescribe laws.