

Beyond *Urgenda*: The role of the ECHR and judgments of the ECtHR in Dutch environmental and climate litigation

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Abstract

Human rights have been championed as the new frontier in environmental and climate change litigation, especially since the Dutch *Urgenda* case. However, little is known about whether this alleged turn to rights is really happening beyond a few high-profile judgments. This article examines how and when courts have relied on the European Convention on Human Rights (ECHR) and case law of the European Court of Human Rights (ECtHR) in environmental cases in the Netherlands since 2016. In doing so, it will show the broad potential and wide range of environmental cases in which rights are used. Rights talk is at the same time frequently overlooked or avoided by the parties and the courts, partly because the added value is limited in the light of specific national (EU-inspired) statutory provisions. To date, the actual impact of the EC(t)HR has been rather minimal beyond *Urgenda*, partly because of the limitations in the ECHR. This article sketches avenues for further (empirical) research.

1 | INTRODUCTION

The literature abounds with claims about the 'turn to rights' in environmental and climate litigation, especially following the high-profile judgment of *Urgenda*.¹ In this case, the Dutch Supreme Court ordered the State to reduce greenhouse gas emissions by at least 25 per cent by the end of 2020 compared to 1990. It relied, among others, on Articles 2 (the right to life) and 8 (the right to respect for private life and home) of the European Convention on Human Rights (ECHR). It referred extensively to the case law of the European Court

of Human Rights (ECtHR) that interpreted these provisions as obliging States to take appropriate measures when the State is aware that there is a 'real and immediate' risk to the life or well-being of persons. The most revolutionary aspect of this judgment is that the Supreme Court applied this jurisprudence to climate change that threatens the population, as a whole, in the future and in the long term.² *Urgenda* has inspired and encouraged litigation in other countries. In the Netherlands, *Urgenda* paved the way for proceedings by the nongovernmental organization (NGO) Milieudefensie against the oil company Shell to order Shell to reduce its carbon dioxide (CO₂) emissions by 45 per cent by 2030 compared to 2019. With reference to *Urgenda* and Articles 2 and 8 ECHR, The Hague District

¹S Adelman and B Lewis, 'Rights-Based Approaches to Climate Change' (2018) 7 *Transnational Environmental Law* 9; J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation' (2018) 7 *Transnational Environmental Law* 37; A Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 *International and Comparative Law Quarterly* 759; OW Pedersen, 'The Networks of Human Rights and Climate Change: *The State of the Netherlands v Stichting Urgenda*, Supreme Court of the Netherlands, 20 December 2019 (19/00135) (2020) 22 *Environmental Law Review* 227; C Bakker, 'Baptism of Fire?' The First Climate Case before the UN Committee on the Rights of the Child' (2021) 77 *Questions of International Law* 5.

²HR 20 December 2019, ECLI:NL:HR:2019:2006; Hof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2591; Rb. Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145. See, e.g., CW Backes and GA van der Veen, 'Urgenda: The Final Judgement of the Dutch Supreme Court' (2020) 17 *Journal for European Environmental and Planning Law* 307; Pedersen (n 1) 231.

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Court indeed heeded this order.³ Greenpeace also relied on *Urgenda* in its unsuccessful challenge of the State aid granted to Dutch airline KLM, claiming that the aid imposed insufficient conditions relating to the climate.⁴ These cases illustrate that human rights are considered (one of) the new frontier(s) and one of the most promising avenues for environmental and climate litigation. Others have criticized the limited legitimacy of relying on open and broad human rights norms that fail to refer to the environment.⁵

The enthusiasm is surprising for two reasons. First, it is unclear whether the 'turn to rights' is empirically justified beyond *Urgenda* and several decisions of international courts.⁶ We know surprisingly little about the role of fundamental rights in national environmental cases beyond these high-profile judgments.⁷ Second, several other recent landmark judgments of national courts eschew the language of rights or – at least – they do not rely on the ECHR and the case law of the ECtHR, with the prominent recent exception of the decision of the German Federal Constitutional Court concerning the Federal Climate Change Act of 2019.⁸ The United Kingdom (UK) Court of Appeal relied on European Union (EU) law and the Paris Agreement in challenging the plan for a third runway at Heathrow and ruled that the UK government had failed to take into account 'its own firm policy commitments' on climate change under the Paris Agreement.⁹ Another example of a case omitting any reference to the EC(t)HR is the French 'Urgenda in the making' about France's commitments to reduce greenhouse gas emissions. The highest administrative court, the *Conseil d'Etat*, found the challenge in which refusal by the government to take additional measures to meet the objectives of the Paris

Agreement in relation to a coastal city particularly exposed to the effects of climate change was admissible.¹⁰ Earlier, the French Constitutional Council determined that protection of the environment constitutes an objective of constitutional value on the basis of the Charter for the Environment, a 2005 amendment to the Constitution.¹¹

This article, thus, takes stock of whether there has been a 'turn to rights' at the national level in a country that has been hailed as being at the forefront of environmental and climate change litigation, namely the Netherlands. The Netherlands poses a most likely case study when examining reliance on the EC(t)HR in national court judgments because it adopts a monist approach to international law and gives the ECHR the same legal ranking as the 'law of the land'. Courts in other (dualist) countries prefer to rely on national laws instead of external sources.¹² At the same time, the Netherlands lacks a true constitutional right to a healthy environment.¹³ More specifically, this article addresses the research question as to how and when courts have relied on the ECHR¹⁴ and judgments of the ECtHR in domestic environmental cases in the Netherlands in the period 2016–2020. This article intentionally takes a broad view, looking at cases beyond high-profile judgments such as *Urgenda*, and including 'smaller scale, more banal' (planning) cases, land-use, natural resource conservation, air quality and the siting of wind farms.¹⁵ The focus on the role of human rights before national courts in environmental and climate cases is not surprising because no international complaint and dispute settlement mechanisms exist with specific

³Rb. Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5339; See <<https://en.milieudefensie.nl/climate-case-shell>>.

⁴The Court did not examine the ECHR specifically. It concluded that there were no legally enforceable obligations for the Dutch State beyond the targets set by the International Civil Aviation Organization, because international climate treaties such as the Paris Agreement do not apply to international aviation; Rb. Den Haag 9 December 2020, ECLI:NL:RBDHA:2020:12440.

⁵CV Giabardo, 'Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate Change?' in B Pozzo and V Jacometti (eds), *Environmental Loss and Damage in a Comparative Law Perspective* (Intersentia 2021) 393; C Voigt and E Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes' (2015) 6 *Journal of Human Rights and the Environment* 131; C Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019).

⁶Cf J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *WIREs Climate Change* 1.

⁷Cf K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483. Application of EU environmental law at the national level is largely a black box; see M Peeters and M Eliantonio, 'On Regulatory Power, Compliance, and the Role of the Court of Justice in EU Environmental Law' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 475, 499.

⁸Bundesverfassungsgericht 24 March 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, paras. 99 and 147; See, however, earlier the *German Family Farmers* case (Verwaltungsgericht Berlin 31 October 2019, VG 10K 412.18); T Schomerus, 'Climate Change Litigation: German Family Farmers and Urgenda – Similar Cases, Differing Judgements' (2020) 17 *Journal for European Environmental and Planning Law* 322.

⁹*Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] WLR(D) 122 [283]; S Gordhan, 'Plan B Earth v Secretary of State for Transport: Airport Expansion, the Paris Agreement and the Planning Act 2008' (2020) 32 *Journal of Environmental Law* 559; Pedersen (n 1) 233.

¹⁰Conseil d'État n. 427301, *Commune de Grande Synthe I*, ECLI:FR:CECHR:2020:427301.20201119; N de Arriba-Sellier, 'Another Urgenda in the Making: The Conseil d'Etat's first Ruling in Grande Synthe' (Verfassungsblog, 20 November 2020).

¹¹Conseil Constitutionnel n. 2019-823 QPC, *Union des industries de la protection des plantes*, ECLI:FR:CC:2020:2019.823.QPC.

¹²H Keller and A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 686; LR Helfer and AM Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 332–333; This, however, does not preclude the possibility that the case law of international courts such as the ECtHR played a role and was considered in the deliberative and heuristic phase. See J Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 *Utrecht Law Review* 8.

¹³Article 21 of the Dutch Constitution (<<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>>) stipulates: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.' What is more, constitutional review of parliamentary acts is also precluded in the Netherlands on the basis of Article 120 of the Constitution. There is, nonetheless, a rich and extensive practice of review on the basis of international treaties because of the open monist constitutional system following from Article 93 and 94 of the Constitution.

¹⁴Other United Nations human rights treaties can arguably also play a role, especially the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child; see Bakker (n 1). To date, these treaties did not play a role in Dutch case law, except Articles 3, 6 and 12 of the latter Convention; ABRvS 3 July 2019, ECLI:NL:RVS:2019:2217, para 17.

¹⁵Bouwer (n 7) 484. Climate change only figures at the periphery in 77 percent of non-United States climate cases, J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679, 683; S Theil, 'Excavating Landmarks: Empirical Contributions to Doctrinal Analysis' (2020) 32 *Journal of Environmental Law* 221.

jurisdiction for environmental and climate protection.¹⁶ To capture this 'domestic rights turn', a case law database search was performed. Throughout this article, a distinction is made between explicit citations of ECtHR judgments and 'silent cases' that lack an explicit reference to the ECtHR. To find both types of cases, search terms related to the ECHR and ECtHR were used to search a platform publishing all (published) Dutch court judgments, case comments and legal journal articles in the period 2016–2020.¹⁷ It was deliberately decided to focus on this period because – as Section 2 will show – the number of references to the EC(t)HR only really picked up in 2017, also because the *Urgenda* judgment was handed down by the District Court of The Hague in June 2015.¹⁸ Judgments of all courts were included: district courts, courts of appeal, the Supreme Court and the three highest administrative courts: the Administrative Jurisdiction Division of the Council of State, the Trade and Industry Appeals Tribunal (dealing with economic administrative law) and the Central Appeals Tribunal (dealing with social security and civil service). In total, 71 relevant judgments were found, of which the majority (38) are silent cases that do not refer to the case law of the ECtHR. Beyond this structured database search, several other judgments not engaging with the EC(t)HR were also found on the basis of a wider literature scan (see Section 3.2).¹⁹

The choice was made to focus solely on substantive fundamental rights norms, including Articles 2 and 8 ECHR, as well as the right to property and the peaceful enjoyment of possessions in Article 1 of Protocol No. 1 to the ECHR.²⁰ In addition to feasibility, one reason to restrict the scope of this article to substantive rights is the considerable attention in the literature to procedural norms, such as the right to a fair trial in Articles 6 and 13 ECHR. The rise of procedural environmental rights or the so-called 'Aarhus-ization' has been documented extensively.²¹ As a result, the following legal issues that have also played a role in the Netherlands are not discussed: the level of

court fees,²² the amount of administrative fines,²³ the number of judicial (appeal) stages,²⁴ the use of expert opinions,²⁵ the reasonable time of court proceedings²⁶ and the requirement of relativity.²⁷ This also means that this article will not address questions in the literature about the compatibility of environmental legal protection in the Netherlands and the Aarhus Convention.²⁸ In addition, criminal environmental cases were not considered because they involve, to date, only procedural fundamental rights questions related to due process and reasonable time.²⁹

This article has three objectives. The first aim is to illustrate the broad potential and wide range of environmental cases in which substantive fundamental rights are used in the Netherlands. The 'turn to rights' has not only been a turn to *environmental* rights, but also a turn to other fundamental rights to challenge environmental measures. The ECHR is used in different and opposing ways in environmental cases. On the one hand, Articles 2 and 8 ECHR have been used in an *Urgenda* way as a 'sword' in the interest of environmental protection to force the authorities to act and provide a higher level of environmental protection (Section 2.1).³⁰ On the other hand, the right to property (Article 1 of the First Protocol to the ECHR; '1 FP') has been used as a 'shield' to protect private interests against government measures that were partly taken to protect the environment (Section 2.3). There is also a group of in-between cases in which Articles 2 and 8 are used to prevent the construction of wind farms (Section 2.2).³¹ The latter cases show that longer-term climate goals could clash with more short-term and local environmental considerations. In simplistic or cynical terms, the property cases can be described as 'anti-environmental' and not really part of a 'turn to environmental rights' or the 'greening' of existing (international)

²² ABRvS 13 March 2019, ECLI:NL:RVS:2019:783, para 4.

²³ CBb 22 May 2018, ECLI:NL:CBB:2018:187.

²⁴ ABRvS 6 Februari 2019, ECLI:NL:RVS:2019:349, para 5.5.

²⁵ ABRvS 17 October 2018, ECLI:NL:RVS:2018:3389.

²⁶ ABRvS 8 August 2018, ECLI:NL:RVS:2018:2627.

²⁷ Following the opinion of Advocate-General (A-G) Widdershoven, the Council of State concluded that Article 8:69a of the Dutch General Administrative Law Act (Awb) is not in conflict with Article 2 read in conjunction with Article 13 of the ECHR. E.g. ABRvS 16 March 2016, ECLI:NL:RVS:2016:732; ABRvS 21 December 2016, ECLI:NL:RVS:2016:3408, para 5; ABRvS 11 November 2020, ECLI:NL:RVS:2020:2706, para 5.

²⁸ This includes questions that have been referred to by the District Court of Limburg to the European Court of Justice (ECJ) about the compatibility of the requirement in Article 6:13 of the Awb that makes the right of access to justice for 'the public concerned' dependent on prior participation in environmental administrative public participatory procedures with Article 9(2) of the Aarhus Convention and 47 of the EU Charter. The ECJ held that the requirement is inconsistent with EU law; see Case C-826/18, *Stichting Varkens in Nood and Others*, ECLI:EU:C:2021:7.

²⁹ E.g. proportionality of fines in Rb. Rotterdam 20 March 2020, ECLI:NL:RBROT:2020:2370, para 5.1; Rb. Noord-Nederland 13 June 2017, ECLI:NL:RBNNE:2017:2140.

³⁰ See, with respect to the case law of the ECtHR, OW Pedersen, 'European Court of Human Rights and Environmental Rights' in JR May and E Daly (eds), *Human Rights and the Environment* (Edward Elgar 2016) 463.

³¹ LBA Tigelaar, 'Could Local Residents Living Close to Wind Turbines Be Compensated for Damage to Their Health and Loss of Value of Their Homes?' (2020) 17 *Journal for European Environmental and Planning Law* 333.

¹⁶ L Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 *Transnational Environmental Law* 17; Peel and Lin (n 15) 695; D Bodansky and J Brunnee, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 *Review of European Community and International Environmental Law* 11.

¹⁷ Searched for 'EHRM & milieu', 'EHRM & klimaat', 'EVRM & milieu' and 'EVRM & klimaat' on <opmaat.sdu.nl> in the legal area 'omgevingsrecht' for the period 1 January 2016 until 31 December 2020. Opmaat contains not only all published judgments of courts, but also commentaries and case notes about judgments in professional legal journals. Most silent cases were found because the court 'only' referred to the ECHR ('EVRM') without a reference to the case law of the ECtHR (e.g. Hof Den Haag 6 October 2020, ECLI:NL:GHDHA:2020:1920).

¹⁸ Rb. Den Haag 24 June 2015 (n 2).

¹⁹ E.g. GiEA Sint Maarten 26 July 2019, ECLI:NL:OGEAM:2019:61, as discussed in RAJ van Gestel and J Sybesma, 'Annotatie bij de Vonnissen ECLI:NL:OGEAC:2017:259, ECLI:NL:OGEAC:2019:17, ECLI:NL:OGEAC:2019:172 en ECLI:NL:OGEAM:2019:61' (2019) 4 *Caribisch Juristenblad* 329.

²⁰ Sanderink concluded that these provisions cover nearly all environment-related situations in the case law of the ECtHR; DGJ Sanderink, *Het EVRM en het Materiele Omgevingsrecht* (Wolters Kluwer 2015). The Avosetta group conducted an extensive study on the links between property rights and environmental protection: <https://avosetta.jura.uni-bremen.de/reports_maribor2014.html>.

²¹ C Hilson, 'Substantive Environmental Rights in the EU: Doomed to Disappoint?' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and beyond* (Hart 2018) 87; cf D Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6 *Journal of Human Rights and the Environment* 139.

human rights law.³² It was decided deliberately to include these property cases to illustrate that the 'turn to rights' can also backfire with the opposing parties using the same vocabulary. This means that environmental and climate litigation essentially involves a conflict or tension between opposing fundamental rights that need to be balanced. A second goal is to demonstrate that the actual impact of the EC(t)HR has been rather minimal beyond *Urgenda*. This is partly due to limitations and the generally low level of protection in the ECHR and the case law of the ECtHR with respect to the environment (Section 3.1). A third objective of this article is to show that rights talk is frequently overlooked or avoided by the parties and the courts, partly because the added value is limited in the light of specific national (EU inspired) statutory provisions (Section 3.2).

2 | THE EC(t)HR IN DUTCH ENVIRONMENTAL LAW CASES

This overview raises the question how Dutch courts have dealt with the limitations of the EC(t)HR framework. The figures below, depicting the results of the structured (case law) database search, show that there has been a steady growth of shield cases over time (Section 2.3). The number of sword cases, most closely related to the *Urgenda* cases, also exploded since 2017 (Section 2.1). A similar, albeit slightly less dramatic picture can be sketched for the wind farm cases (Section 2.2). Figure 1 shows that, in all three types of cases, the number of environmental law judgments explicitly citing the ECtHR has overtaken the number of silent cases omitting a reference to the case law of the ECtHR. This section will, nonetheless, show that this quantitative growth is not matched by more substantive engagement with the case law of the ECtHR and/or successful 'pro-environmental' outcomes.

2.1 | The right to life and private life and home as an environmental sword

Almost half of the Dutch cases that were found (33 of the 71 cases) involve 'sword' cases in which Articles 2 and 8 ECHR, and sometimes Article 1 FP, are used to force the authorities to provide a higher level of environmental protection (Figure 2).³³

Since 2015, the ECHR provisions have been invoked in several civil and administrative law cases related to the earthquakes in Groningen.³⁴ These earthquakes are the result of the extraction of natural gas in the northern province of Groningen following the

³²A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.

³³The prohibition of torture and inhuman and degrading treatment in Article 3 ECHR is invoked in some cases, albeit with no success; ABRvS 21 September 2016, ECLI:NL:RVS:2016:2518, para 3.4.

³⁴The Netherlands Institute for Human Rights framed the issue in terms of human rights in November 2013; Sanderink (n 20) 6. The Council found that these ECHR provisions applicable to gas production, ABRvS 18 November 2015, ECLI:NL:RVS:2015:3578.

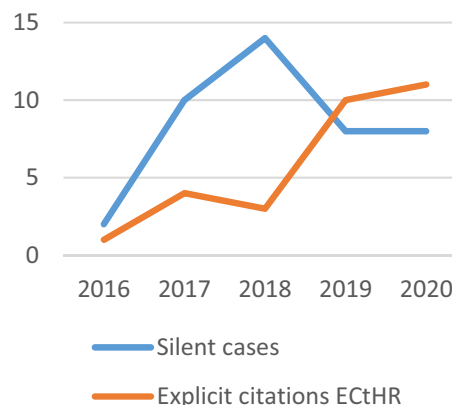


FIGURE 1 Reliance on the ECtHR [Colour figure can be viewed at wileyonlinelibrary.com]

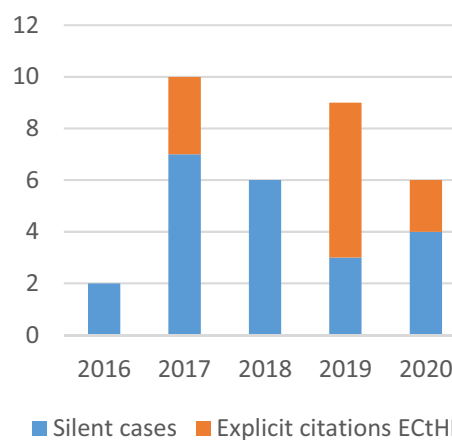


FIGURE 2 Sword cases [Colour figure can be viewed at wileyonlinelibrary.com]

discovery of the largest natural gas field in Europe in 1959. There have been more than a thousand small tremors since the 1980s, but the magnitude has increased in the last decade resulting in considerable damage to buildings. Especially the earthquake in Huizinge in 2021, with a magnitude of 3.6, led to protests demanding an end to gas production and compensation for damages. In 2017, the District Court Noord-Nederland ruled that the (partially) State-owned company NAM (Nederlandse Aardolie Maatschappij), as an operator of mining works, was liable for the damage suffered by the residents. Without discussing the case law of the ECtHR, the Court determined that the burden exceeds the limits of what plaintiffs can accept as an ordinary nuisance in social life given the nature, seriousness and duration of the activities and that it constitutes a violation of their property rights and of their right to the undisturbed enjoyment of their residence. The Court, thus, found a serious breach of their fundamental right to enjoy undisturbed living conditions and noted the far-reaching and long-term degradation of people's immediate private living environment.³⁵ The Court, nonetheless, dismissed the claims

³⁵Rb. Noord-Nederland 1 March 2017, ECLI:NL:RBNNE:2017:715, paras 4.2.4 and 4.4.6.

for damages against the State, partly because of an absent causal link between the duty of care to take measures and the damage claimed. In a subsequent civil liability case, a couple living above the Groningen gas field claimed compensation from the (partially) State-owned companies (NAM and Energie Beheer Nederland) and the State for damage suffered by them as a result of the earthquakes caused by gas production from the Groningen gas field. The District Court Noord-Nederland referred questions to the Dutch Supreme Court for a preliminary ruling on the assessment of these claims. Contrary to the 2017 liability case, the Court asked explicitly about Articles 2, 3 and 8 ECHR. The Supreme Court provided the referring court with a brief overview of the case law of the ECtHR and the minimum requirements that must be taken into account by the referring court.³⁶

There have also been several administrative law cases challenging decisions of the Minister of Economic Affairs as to the amount of gas production. Applicants have argued that gas production should be reduced to zero as quickly as possible. With extensive reference to ECtHR case law in relation to Articles 2 and 8, the Council of State determined already in 2015 that the assessment of the Minister was insufficiently substantiated as to whether (further) restrictions on gas production should be imposed to protect the right to life and private life. It, nonetheless, noted that the Minister had a wide margin of discretion in relation to Article 2 ECHR, especially given the complex social and technical nature of the issue.³⁷ It further determined that the scope of the positive obligations of the State arising from Articles 2 and 8 in the case of dangerous activities largely overlap. The Council, thus, primarily applied the procedural dimensions of the ECHR. In a judgment 2 years later, the Council merely referred in general terms to 'fundamental rights' without relying on the ECHR, even though it ruled in a similar fashion that the Minister had not taken the risk to the people in the earthquake zone sufficiently into account.³⁸ In subsequent cases, the applicants had less success because the Minister had indeed taken into account the fundamental rights to life and private home. The Council, without relying on the ECtHR, considered that the Minister had done so by balancing the importance of the safety of persons in the earthquake area (reducing gas production to zero as quickly as possible) with the importance of the security of supply (disruption if consumers of the gas have not been able to switch to another resource in time). The Council pointed to the wide margin of discretion.³⁹ In another case, the Council also found no violation, given the expected limited impact of gas production from this small field alone. It held that it was not likely that serious consequences, as referred to in the ECtHR's judgment in *Hutton*, would occur as a result of gas production.⁴⁰

The ECHR also figured prominently in civil proceedings initiated by the interest groups Milieudefensie and Stichting Adem. They claimed that the State had not done enough to reduce the presence of nitrogen dioxide (NO₂) and fine particulate matter (PM₁₀) in the air to acceptable levels.⁴¹ They maintained that this heavy air pollution resulted in damage to health and untimely deaths. In interlocutory proceedings, the District Court prohibited the State from taking measures leading to further exceeding the limit values. The Court of Appeal eventually decided against the applicants and quashed the decision of the District Court. The State did not appeal two other points decided by the District Court, however, without recourse to the ECHR, namely the order to draw up an air quality plan in the shortest possible time and the making of an inventory of all locations where the limit values are exceeded within 2 weeks.⁴² The Court of Appeal acknowledged that the State violated its obligation in the Ambient Air Quality Directive (2008/50/EC) to comply with the limit values for PM₁₀ and NO₂ on 11 June 2011 and 1 January 2015. The Court, however, determined that the applicants were inadmissible and had insufficient interest in what they were claiming because the State had adopted a modified air quality plan (NSL) with concrete measures and deadlines, following the judgment of the District Court.⁴³

The Court of Appeal (and earlier in the proceedings on the merits in the District Court⁴⁴) determined on the basis of an extensive analysis of the case law of the ECtHR and in relation to the ECHR that the binding ECHR standards invoked by the plaintiffs contain a margin of discretion that the State has not exceeded. Both courts noted that the State is already taking measures to improve air quality that those measures have led to an improvement in air quality, that the World Health Organization (WHO) guidelines have been taken into account when determining the limit values of the Directive and that the State is working towards the WHO guidelines. It, furthermore, pointed to many different economic and social interests that should also be taken into account by the State.⁴⁵ The Court of Appeal attached value to the social and economic consequences of reducing air pollution caused by traffic or emissions from livestock farms. It also pointed to the diversity of the sources of pollution scattered throughout the country and the fact that the present case does not concern a single specific source of pollution, such as a specific factory, but a multitude of sources of different kinds, from all over the country.⁴⁶

The applicants tried, unsuccessfully, to convince the court to apply more stringent WHO guidelines, as was done in several wind parks cases, which will be discussed in Section 2.2.⁴⁷ The EU limit

³⁶HR 19 July 2019, ECLI:NL:HR:2019:1278.

³⁷ABRvS 18 November 2015, ECLI:NL:RVS:2015:3578, para 39.5.

³⁸ABRvS 15 November 2015, ECLI:NL:RVS:2015:3156.

³⁹The applicants also invoked, albeit unsuccessfully, articles 3, 6 and 12 of the Convention on the Rights of the Child; ABRvS 3 July 2019, ECLI:NL:RVS:2019:2217, para 17. Cf. ABRvS 15 July 2020, ECLI:NL:RVS:2020:1665, para 19.1.

⁴⁰*Hutton v the United Kingdom* App No 36022/97 (ECtHR, 8 July 2003); ABRvS 1 April 2020, ECLI:NL:RVS:2020:938, paras 13.2 and 13.3; ABRvS 23 December 2020, ECLI:NL:RVS:2020:3092, para 43.2.

⁴¹Hof Den Haag 7 May 2019, ECLI:NL:GHDHA:2019:915.

⁴²Rb. Den Haag 8 September 2017, ECLI:NL:RBDHA:2017:10171.

⁴³Hof Den Haag 7 May 2019 (n 41) paras 3.43–3.44.

⁴⁴Rb. Den Haag 27 December 2017, ECLI:NL:RBDHA:2017:15380.

⁴⁵Hof Den Haag 7 May 2019 (n 41) para 3.16.

⁴⁶ibid paras 3.20–3.21.

⁴⁷The Dutch Health Council has even advised implementing more stringent target values than the WHO; Gezondheidsraad, 'Gezondheidswinst door Schonere Lucht', Advice to the Staatssecretaris van Infrastructuur en Waterstaat nr. 2019/01 (2018).

values in the Air Quality Directive are lower than the 2005 WHO air quality guidelines. The modified NSL includes the objective to merely *strive* to reach the WHO guidelines by 2030. Given their aspirational formulation, these targets cannot be enforced before the court.⁴⁸ Not meeting the non-binding WHO guidelines was not deemed contrary to Articles 2 and 8 of the ECHR or the precautionary principle.⁴⁹ The Court of Appeal acknowledged that the WHO guidelines reflect a scientific consensus on what constitutes permissible concentrations of NO₂ and PM₁₀. They, thus, play a role in answering the question of whether the State has fulfilled its obligations under Articles 2 and 8 ECHR. The Court, nonetheless, stipulated that these norms are not decisive for determining a State's action, even if the immediate application of these norms would lead to greater protection of public health.

The approach of the Court of Appeal contrasts with the earlier judgment of the (same⁵⁰) Court of Appeal in *Urgenda*. The Court of Appeal (and District Court) adopted a less intense review in *Vereniging Milieudefensie*, whereby the broad margin of appreciation is emphasized more clearly.⁵¹ Scholars tried to explain the seeming differences. Schutgens explained the less intense review in *Vereniging Milieudefensie* on the basis of the less acute and world-threatening risks of air pollution when compared to the devastating effects of climate change.⁵² Douma attributed the difference to the broad scientific consensus in relation to the effects of CO₂ emissions as evidenced by the Intergovernmental Panel on Climate Change.⁵³ At the same time, he was critical about the courts' lack of review of the (amended) air quality plan NSL in the light of Article 23 of the Directive. The Court of Appeal only noted that the NSL, before modification, did not comply with Article 23, which stipulates: 'In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible'.⁵⁴ Douma wondered at which point the State goes beyond its margin of appreciation in relation to air quality because the EU values were clearly breached. One can, thus, doubt whether the

differences between *Urgenda* and *Vereniging Milieudefensie* are justified from a legal perspective. There seems to be room for a more intensive judicial review in *Vereniging Milieudefensie*.

The outcome in *Vereniging Milieudefensie* not only contrasts with *Urgenda* but it also contrasts with a judgment of the court of first instance of Curaçao in *Clean Air Everywhere*.⁵⁵ A foundation took legal action against the government of Curaçao to take action against air pollution caused by emissions from gas refinery installations in the industrial area below the Schottegat. The Court declared that Curaçao acted unlawfully towards the foundation Clean Air Everywhere and 29 individual plaintiffs in respect of air quality, by failing to establish a proper system of standards with regard to the degree of air pollution, by failing to take effective measures aimed at protecting private life and the living environment and by failing to provide sufficient information about air pollution and the risks thereof. It ordered the authorities to meet air quality standards for sulphur dioxide (SO₂) and fine particulate matter (PM) as laid down in the 2005 WHO guidelines before 1 September 2020 or alternative standards that are in line with those of the EU. The Court did not specify these alternative standards because it considered it to be beyond the remit of the court to flesh out the content of those standards in concrete terms. It merely noted that the standards must be able to stand the test of Article 8 ECHR in relation to which the WHO guidelines have significance as well.⁵⁶ The court used the WHO guidelines to determine whether the infringement of Article 8 ECHR is sufficiently serious and goes beyond what is inherent in life in a modern society in the light of the ECtHR case law.⁵⁷

There are two notable differences between *Clean Air Everywhere* and *Stichting Milieudefensie*. First, the court in Curaçao easily dismissed the argument of multiple sources of pollution. It simply held that the air pollution does not have to come from a single source.⁵⁸ Second, the court seemed to attach more value to the WHO guidelines than The Hague Court of Appeal, even though it still did not treat them as binding. The Court determined that it is an established fact that these guidelines are based on widely supported scientific insights. Despite these substantive differences, the different outcome in *Clean Air Everywhere* is not so much to be attributed to a stricter judicial review by the court of Curaçao, but it seems related to the more flagrant violation by the Curaçao authorities. The authorities failed to regulate environmentally damaging activities *in practice* and had not taken concrete steps beyond monitoring air pollution to reduce the air pollution observed.⁵⁹ The Court also held that the authorities have not provided any insight into the actual balance of conflicting interests and the claim that stricter air quality standards would have major consequences for employment and energy supply. It determined that the authorities focused unilaterally

⁴⁸WT Douma, 'Verwezenlijking van Schonere Lucht via het Europees Recht' (2020) 3 Jurisprudentie Milieurecht 16.

⁴⁹Schutgens applauded this reticence and held that positive obligations from the ECHR should not be fleshed out with recommendations from an international advisory institute such as the Intergovernmental Panel on Climate Change or the WHO; RJB Schutgens, 'Rb. Den Haag 27 december 2017 (Vereniging Milieudefensie e.a. tegen Staat)' (2018) 3 Overheid en Aansprakelijkheid 124.

⁵⁰One of the three Court of Appeal judges in *Urgenda* was subsequently involved in the air quality case decided by three judges, namely S.A. Boele.

⁵¹Schutgens (n 49).

⁵²The effects are real, however. One could also argue that the measures requested in *Vereniging Milieudefensie* would have more effect in practice. *Urgenda* relates to a worldwide problem whereby the Netherlands only contributes a small percentage of CO₂ emissions. Cf Backes and van der Veen (n 2).

⁵³Nonetheless, the WHO has calculated that the WHO advisory norms would prevent 8.8 million premature deaths and lead to significant health effects; Douma (n 48).

⁵⁴Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1; Hof Den Haag 7 May 2019 (n 41), para 3.45. Earlier, the District Court pointed to the margin of appreciation and the indeterminate language ('appropriate' and 'as short as possible'); Rb. Den Haag 27 December 2017 (n 44) paras 4.123–4.124.

⁵⁵GiEA Curaçao 26 August 2019, ECLI:NL:OGECAC:2019:172.

⁵⁶*ibid* para 2.36.

⁵⁷*ibid* para 2.6.

⁵⁸*ibid* para 2.19.

⁵⁹*ibid* paras 2.12–2.13.

on the (possible) negative consequences, without taking into account the negative economic consequences of air pollution for tourism and health costs. In summary, the court found that the authorities had exceeded the broad margin of appreciation by not achieving a fair balance.⁶⁰

The ECHR has also been used, albeit generally unsuccessfully, in some challenges by neighbouring residents of holders of environmental permits for livestock farming. In one case about the building of a poultry farm, the Council of State held that the applicants are not affected to such an extent that it should be regarded as an unjustified or disproportionate infringement of their rights protected by Article 8 ECHR.⁶¹ The Council, in a similar vein, struck down an earlier judgment of the District Court in a case about an environmental permit for a dairy goat barn. The District Court annulled the decision by the municipality because it had paid insufficient attention to the correctness of the conclusions that no significant disadvantages for the environment were to be expected and that it was not certain that all legal environmental standards had been met. Without citing ECtHR case law, the Court found that it could not be excluded that Article 8 ECHR was violated.⁶² Relying on *Fadeyeva*, the Council found that the District Court had not recognized that no minimum level of environmental damage was exceeded.⁶³ In another case involving a poultry farm, the applicants pointed to scientific evidence showing health risks of intensive livestock farming, such as Q fever. The applicants relied on an advisory value mentioned in a 2012 report of the Dutch Health Council (namely endotoxin 30 EU/m³). The Council, nonetheless, emphasized the absence of a binding legal framework and the authority's margin of discretion in weighing the risks. It held, without mentioning the jurisprudence of the ECtHR that it is up to the municipal authorities to determine whether and, if so, which measures for endotoxins are necessary in the interest of environmental protection. The Council also put the burden of proof on the applicants invoking the existence of a risk to health to make it plausible on the basis of 'generally accepted scientific insights' that the standards used by the authorities are inadequate. It eventually concluded that the applicants had failed to do so and had not proven sufficiently that the authorities should have applied the advisory value and, hence, refused the requested permit. The Council pointed to unanswered questions requiring further scientific research as a basis to reject reliance on the precautionary principle.⁶⁴

These livestock farming cases are an illustration of the wide margin of appreciation for authorities and the limited scope of judicial review. The last case also shows that parties are in an unequal procedural position and are confronted with standard-of-proof problems, whereby the burden of proof is basically reversed, contrary to the logic implicit in the precautionary principle. Kegge has noted that

the latter phenomenon also prevails in other cases.⁶⁵ This includes a case about the construction of high-voltage pylons and the alleged exposure to magnetic fields and noise nuisance. The Council underscored the major public interests in terms of public safety and the economic welfare and the problems to be expected in the event of a break in the power supply.⁶⁶ In a more recent case, the Council dismissed the Article 8 ECHR claim, relying on the 'standard case law' of the ECtHR requiring sufficiently serious negative effects (see Section 3.1). It also specified that it is not for the municipal authorities to make it plausible that no health complaints will accompany the granting of the license.⁶⁷

Article 8 ECHR has also been used to challenge the so-called *tracébesluiten* (infrastructure planning procedures decisions) in relation to infrastructure projects, such as the construction of motorways or railways.⁶⁸ The applicants have primarily invoked fundamental rights in relation to noise and air pollution. The chances of success have been limited. As with the building of wind parks, the Council has generally dismissed such claims easily, while relying on the earlier mentioned standard phrase referring to a minimum level of severity in the ECtHR case law. Illustrative of this approach is the judgment of the Council in relation to the road extension Schiphol-Amsterdam-Almere. The applicants observed that the legal limit values for specific environmental effects *individually*, such as noise pollution, air quality and (traffic) safety, may be met. They, nonetheless, held that the coexistence of nuisances is insufficiently protected by Dutch (environmental) legislation. The applicants also held that the legal limit values are insufficient, as shown by the advice from the Dutch Health Council and the WHO.⁶⁹ In addition to the standard phrase, the Council held that the road would result in an improvement of the living environment because of various adjacent noise abatement measures. It also pointed to further research to be carried out into possible exceedances of the value of 41 dB, which must be reduced to 38 dB if necessary. The Council considered this consistent with the ECtHR judgment in the *Oluic v Croatia*, in which the ECtHR established a violation of Article 8 ECHR because the limit values prescribed by law were exceeded over a longer period of time, without the relevant government bodies taking effective enforcement action.⁷⁰ The Council also dismissed the reliance on the

⁶⁰Articles 2 and 8 ECHR must be interpreted in a way that does not impose an impossible or disproportionate burden on the government; GiEA Curaçao 14 January 2019, ECLI:NL:OGECAC:2019:17, para 4.9.

⁶¹ABRvS 26 February 2020, ECLI:NL:RVS:2020:620, para 9.

⁶²Rb. Zeeland-West-Brabant 31 October 2017, ECLI:NL:RBZWB:2017:7253, para 10.

⁶³ABRvS 7 August 2019, ECLI:NL:RVS:2019:2713, para 7.

⁶⁴ABRvS 27 February 2019, ECLI:NL:RVS:2019:644, para 5.6.

⁶⁵R Kegge, 'The Precautionary Principle and the Burden and Standard of Proof in European and Dutch Environmental Law' (2020) 13 Review of European Administrative Law, 127 and 130. In cases concerning environmental permits for temporary UMTS-antenna masts for mobile telecommunications, courts found that no causal link could be established between the exposure to electromagnetic fields and the reduction of well-being and damage to health. Rb. Midden-Nederland 16 October 2018, ECLI:NL:RBMNE:2018:5031; ABRvS 21 September 2016, ECLI:NL:RVS:2016:2518, para 3.4. Civil proceedings against the State by the Stop5GNL to prohibit the State from promoting or facilitating the rollout of 5G were also unsuccessful partly for the lacking causality. Rb. Den Haag 25 May 2020, ECLI:NL:RBDHA:2020:4461.

⁶⁶ABRvS 14 April 2010, ECLI:NL:RVS:2010:BM1021; ABRvS 24 February 2016, ECLI:NL:RVS:2016:465; ABRvS 8 August 2018, ECLI:NL:RVS:2018:2672, para 57.2.

⁶⁷ABRvS 22 April 2020, ECLI:NL:RVS:2020:1118, paras 2.2 and 2.6.

⁶⁸ABRvS 15 May 2019, ECLI:NL:RVS:2019:1573, para 62; ABRvS 2 August 2017, ECLI:NL:RVS:2017:2087, para 57.5; ABRvS 21 November 2018, ECLI:NL:RVS:2018:3748, para 7.4.

⁶⁹ABRvS 27 February 2019, ECLI:NL:RVS:2019:596, para 22.

⁷⁰*Oluic v Croatia* App No 22330/05 (ECtHR, 5 February 2009), paras 62–63.

advice of the Dutch Health Council and the WHO on the health effects of noise and air pollution because such advice is of a general nature.

Summing up, the analysis shows that the ECHR and EC(t)HR case law has worked in opposite directions. The ECHR, on the one hand, has been successful in framing particular problems as human rights issues. The best illustration, thereof, are the Groninger gas production cases, in which the ECHR made it possible to frame the underlying issue in terms of fundamental rights. In these cases, there was wide societal agreement that the ongoing situation is unacceptable. On the other hand, the ECHR and especially the case law of the ECtHR have not prevented courts from granting a wide margin of appreciation to the authorities and employing a limited scope of judicial review favourable to economic interests. Also, the minimum level of severity required by the ECtHR in its 'established case law' has been used by courts to dismiss environmental appeals easily on the basis of an often-used standard phrase.

2.2 | Using the right to life and private life and home to prevent the construction of wind parks

Articles 2 and 8 ECHR have also been used to try to prevent the construction of wind farm projects since 2017 (Figure 3).⁷¹ One could argue that this represents a clash of longer-term climate goals with more short-term and local environmental considerations or with the intent to protect property rights. Twelve of the 71 judgments found involve challenges of decisions to construct wind parks on the basis of Articles 2 and 8 ECHR, and sometimes also *Urgenda*.⁷² The ECHR has particularly been referred to in relation to the low-frequency noise produced by wind turbines. The Council of State has rejected claims in relation to Article 2 without providing reasoning.⁷³ With respect to Article 8, the Council often relied, more or less, on the same standard phrase when referring in passing to the 'established case law of ECtHR'. The Council of State mentioned the fact that the ECHR does not grant an explicit right to a clean and quiet environment. It emphasized that the right protected in Article 8 may be interfered with if the nuisance is such that it 'seriously affects' the person concerned regarding his health or prevents him from enjoying his private or family life. The Council has, thus, required 'severe nuisance', which has never been established.⁷⁴ The Council has often cited *Jugheli v Georgia*⁷⁵ or *Fäger skiöld v Sweden*.⁷⁶ The Council generally conducts a relatively short analysis in relation to the ECHR, whereby it refers back to

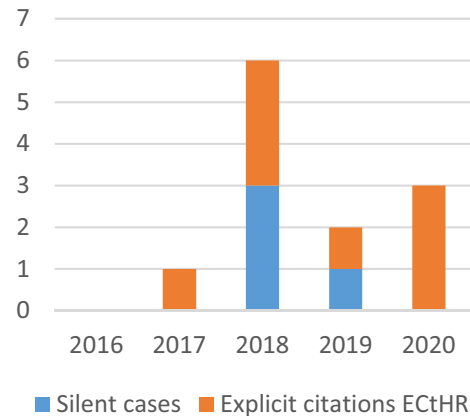


FIGURE 3 Wind parks cases [Colour figure can be viewed at wileyonlinelibrary.com]

earlier considerations in relation to the assessment of statutory noise standards and WHO guidelines, as well as health risks and the precautionary principle. With respect to the former, the Council has maintained the noise standards for wind turbines in Article 3.14a of the Activities Decree, namely a maximum of 47 dB Lden.⁷⁷ The Council has rejected a reliance on stricter WHO guidelines that recommend a maximum noise level of 45 dB Lden, given the associated negative health effects beyond this level. It has noted that the WHO guidelines are of a general nature and lack a mandatory status. Hence, these norms are not regarded as binding treaty provisions within the meaning of Article 94 of the Dutch Constitution.⁷⁸ Additionally, the (revised) WHO guidelines of 2018 were not considered because they were released after the wind farm decision-making process.⁷⁹

With respect to alleged health risks, the Council relied on expert reports, including a 2017 report entitled 'Health effects related to wind turbine sound', showing that there is a relationship between sleep disturbance and wind turbine noise, but that there is insufficient scientific evidence for a *direct* relationship.⁸⁰ The Council also dismissed an argument based on the precautionary principle in Article 191 of the Treaty on the Functioning of the European Union and the necessity to conduct further research into the health effects. It held that there was no reason to refrain from planning the disputed park on the basis of publications which only show a *possible* link between wind turbines and health complaints. The Council emphasized that such risk management-related decisions are inherently political in nature. The Council can only assess whether the authorities could have reasonably taken the decision, without substituting its own judgment for that

⁷¹Sanderink (n 20) makes no mention of such cases in his thorough PhD dissertation on the role of the ECHR in environmental law.

⁷²E.g. ABRvS 29 January 2020, ECLI:NL:RVS:2020:301.

⁷³ibid para 32.

⁷⁴ABRvS 26 July 2017 ECLI:NL:RVS:2017:2025, para 8.2.

⁷⁵E.g. ABRvS 16 September 2020, ECLI:NL:RVS:2020:2226, para 23.2; ABRvS 5 February 2020, ECLI:NL:RVS:2020:375, para 34.1.

⁷⁶E.g. ABRvS 21 February 2018, ECLI:NL:RVS:2018:616.

⁷⁷RJJ Aerts and AJ van der Ven, 'Hoor de Wind Waait... Juridische Aspecten rond het Geluid van Windturbines!' (2016) 1 Nederlands Tijdschrift voor Energierecht 12.

⁷⁸E.g. ABRvS 24 December 2019, ECLI:NL:RVS:2019:4442, para 14.2.

⁷⁹ABRvS 29 January 2020 (n 72), para 24.3.

⁸⁰GP van Berg and I van Kamp, 'Health Effects Related to Wind Turbine Sound' (Netherlands Environmental Assessment Agency 2017) <<https://windparkderietvelden.nl/assets/Projecten/Uploads/WindparkDeRietvelden/Downloads/Onderzoek-GGD-en-RIVM.pdf>>; ABRvS 21 February 2018 (n 76) para 119.2.

of the authorities. The Council, thus, merely assessed whether the decision is based on sufficient knowledge of the relevant facts and interests, is properly reasoned and does not have disproportionate consequences for interested parties in relation to the objectives served.⁸¹

The Council also dismissed claims that aimed to protect interests beyond the interest of the parties on the basis of the requirement of relativity in 8:69a Awb. Applicants often submit grounds of appeal that rely on legal norms that do not protect any interests of those applicants. The Council, thus, dismissed an appeal to the public interest in the Nature Conservation Act (Wnb) and the alleged harm to Natura 2000 areas.⁸² The Council even held that a distance of 900 metres between the plot of the applicant and the Gelderland Nature Network was too far to be considered part of the direct living environment.⁸³ Likewise, the requirement of relativity precluded an assessment of the argument about soil and groundwater pollution because this does not relate to the interests of the applicant and his living environment.⁸⁴ In a similar vein, the Council has strictly monitored the objectives that associations pursue. It dismissed the argument of the association representing village interests of Gasselternijveenschemond in relation to the felling of trees, given the more limited scope of the objectives of the association which are aimed at the living and working climate in the village. This did not cover the felling of trees at a distance of more than 100 metres outside the village.⁸⁵ The Council's application of the requirement of relativity mirrors, and to a certain extent, the second feature of the approach of the ECtHR, are discussed in Section 3.1.

The preceding analysis of case law shows that ECHR claims have not been successful in wind park cases to date. It is noteworthy that the Council has dismissed such claims on the basis of standard phrases with passing references to the EC(t)HR. A more substantive assessment of the health risks and the necessary noise standards is not made in relation to the ECHR.⁸⁶ An important aspect of the lack of success experienced by the applicants can be attributed to the limitations inherent in the requirement of relativity. Section 3.1 shows that the ECHR adopts a similar anthropocentric approach, whereby it is nearly impossible for (individual) applicants to start a case to protect the environment, as such, when individuals are not directly affected. Another explanation for the limited chance of success is that ECHR claims have often been insufficiently substantiated and included in pleas as a mere long shot.⁸⁷

⁸¹ABRvS 29 January 2020 (n 72) paras 31.3–31.4. Cf. ABRvS 14 November 2018, ECLI:NL:RVS:2018:3713, para 9; ABRvS 18 July 2018, ECLI:NL:RVS:2018:2447, para 24.2; ABRvS 19 December 2019, ECLI:NL:RVS:2019:4210, paras 29–29.3.

⁸²ABRvS 16 September 2020, ECLI:NL:RVS:2020:2226, para 58.2.

⁸³ABRvS 5 April 2018, ECLI:NL:RVS:2018:1146, para 8.4.

⁸⁴ABRvS 19 June 2019, ECLI:NL:RVS:2019:1947.

⁸⁵The applicants did not rely on the ECHR, ABRvS 24 June 2020, ECLI:NL:RVS:2020:1480, para 81.2.

⁸⁶One exception is ABRvS 26 July 2017 (n 74) para 8.2.

⁸⁷ABRvS 19 September 2018, ECLI:NL:RVS:2018:3067, para 124.1.

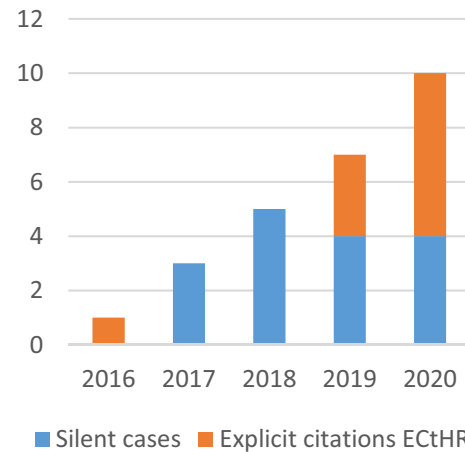


FIGURE 4 Shield cases [Colour figure can be viewed at wileyonlinelibrary.com]

2.3 | The right to property as a shield against environmental measures

Twenty-six of the 71 judgments concern cases in which the applicants, usually companies, car owners or farmers, challenge restrictive government measures that aim to protect the environment (Figure 4).

The right to property has been invoked in several cases relating to the delivery of unaddressed printed advertising, albeit to no avail. In recent years, several municipalities have introduced an 'opt-in system' requiring residents to make clear that they want to receive advertising by putting a YES/YES sticker on the letterbox. The new system aims to reduce the environmental impact of unread advertising leaflets and packaging material, to prevent wasting paper. Both the District Court and Court of Appeal Amsterdam determined that Article 1 FP was not infringed. The reduced delivery option, as a result of the opt-in system, only concerns the loss of future income and does not qualify as property.⁸⁸ Interestingly, the District Court did not engage with the case law of the ECtHR, while the Court of Appeal relied on, and quoted, seven judgments. Both courts also explicitly addressed the environmental rationale of the opt-in system. The Court of Appeal referred to research commissioned by the municipality showing that the system will reduce the amount of printed material that is distributed in Amsterdam and is then thrown away (unread). The cassation case is currently pending before the Supreme Court. The pending cassation case was one reason for another court to delay the introduction of the system in the city of Rotterdam between 1 April 2020 and August 2021. It held that a longer preparation time for the affected companies is required to convert their business processes and reduce costs. The court gave priority to this interest over the environmental objectives of the municipality, without explicitly referring to fundamental rights or the ECHR.⁸⁹ The

⁸⁸Hof Amsterdam 24 September 2019, ECLI:NL:GHAMS:2019:3423, para 3.32; Rb. Amsterdam 22 November 2017, ECLI:NL:RBAMS:2017:8565, para 5.27.

⁸⁹Rb. Rotterdam 28 February 2020, ECLI:NL:RBROT:2020:1794, paras 4.7–4.8.

Hague Court of Appeal, nonetheless, quashed this decision on appeal and ruled in line with the Court of Appeal in the City of Amsterdam case. It easily dismissed the reliance on Article 1 FP by holding that the applicants had insufficiently substantiated why their rights to property were affected.⁹⁰ Another Court of Appeal, nonetheless, ruled that the interference with the freedom of expression and press in Article 10 ECHR could not be justified by environmental protection being a pressing social need in a case about a free local newspaper (Stadsblad Utrecht). Relying on several ECtHR judgments, the Court noted, among other things, that this provision protects the free receipt of information.⁹¹ This different outcome can be attributed to the fact that it concerned a local newspaper and not 'mere' printed advertising.

The right to property has also played a substantial role in cases related to phosphate reduction by (dairy) farmers. This phosphate rights system forces dairy farmers to gradually reduce the number of female cattle, otherwise they must pay a levy.⁹² The Trade and Industry Appeals Tribunal, the highest administrative court dealing with economic administrative law, has generally found no violation of Article 1 FP and applied a strict approach.⁹³ In line with the ECtHR case law, courts have only found a breach in the absence of a fair balance between the environmental interests underlying the system and the interests of the dairy farmer as a result of which the farmer is confronted with an 'individual and excessive burden'. The rationale is that, in principle, the farmer bears the consequences of risks inherent in decisions to invest in the means of production. Most of the cases include passing references to Article 1 FP, without an explicit mention of specific ECtHR judgments.⁹⁴ In one case, the Tribunal relied on the ECtHR case *O'Sullivan McCarthy Mussel Development Ltd* and held that the legislature could reasonably attach a heavy weight to the protection of the environment and public health and the fulfilment of the obligations arising from the EU Nitrate Directive by bringing the national phosphate production below the manure production ceiling.⁹⁵ In another earlier case, the Tribunal referred to the ECtHR judgment in *Lohuis and others v the Netherlands*, in which the ECtHR acknowledged that the protection of the environment and compliance with the obligations of the EU Nitrate Directive are general interests within the meaning of Article 1 FP.⁹⁶

There are two related cases that were decided by the District Court The Hague that involve stricter emission requirements for

cattle farmers in the province of Noord-Brabant, to protect Natura 2000 areas.⁹⁷ Without reaching a final decision on the merits of the case, the court determined that the requirements in the provincial Interim Environmental Ordinance 'pass the 1 FP test' *in abstracto*, citing no fewer than 12 ECtHR judgments. The Court found that the tightening of the measures before 2028, the end date stipulated in the 2009 Covenant (voluntary agreement) about nitrogen deposition in Natura 2000 areas, was justified on the basis of the precautionary principle and a lack of certainty that the measures would be sufficient to achieve the necessary reduction in depositions of ammonia on the overburdened Natura 2000 sites.⁹⁸ Nonetheless, the effects for individual farmers need to be assessed. An individual and excessive burden may arise when farmers cannot benefit from compensation schemes or hardship clauses. Farmers can also be disproportionately affected by the province's choice of a generic approach when they make high investments with no or limited environmental benefits for a Natura 2000 site. This may differ per Natura 2000 site because each Natura 2000 site has its own species and habitat types.

Article 1 FP was also referred by the court on its own motion in a challenge of the refusal of a permit for an extension of a livestock farm on the basis of the requirement (*stalderingseis*) that, for each extension of barn space, a barn must be demolished or relocated elsewhere.⁹⁹ The rationale behind this requirement was to prevent a further regional concentration of intensive livestock farming that would eventually limit the size of livestock and reduce the impact on the environment. The District Court translated the plea of the applicant into '1 FP' terms, without, however, performing an intense review of this provision in the light of ECtHR case law. It held that there is no unrestricted right to expansion if the intended expansion conflicts with the zoning plan.

Article 1 FP also played a role in five compensation cases. An owner of a port area successfully relied on Article 1 FP and the case law of the ECtHR because the Minister failed to address the argument by the applicant that the extension of the Natura 2000 area led to an individual and excessive burden.¹⁰⁰ The applicant requested compensation because it held that it would become more difficult to obtain permits for further development in the vicinity of Natura 2000 areas. The Council of State also rejected applications for compensation for planning damage due to the designation of parts of the land as 'temporary water storage'.¹⁰¹ The District Court had found that flooding of the water storage area hinders agricultural business operations and, hence, led to a lower land value. The Council, nonetheless, held that the designation of these lands as temporary water storage is a normal societal development that can

⁹⁰Hof Den Haag 6 October 2020 (n 17) para 4.4.

⁹¹*Mustafa and Tarzibachi v Sweden* App No 23883/06 (ECtHR 16 december 2008); Hof Arnhem-Leeuwarden 25 February 2020, ECLI:NL:GHARL:2020:1528.

⁹²E.g. CbB 25 February 2020, ECLI:NL:CBB:2020:114; CbB 25 February 2020, ECLI:NL:CBB:2020:117.

⁹³For criticism, see DW Bruil, 'Fosfaatrechten' (2020) 64 *Overheid en Aansprakelijkheid* 164.

⁹⁴E.g. Hof Den Haag 31 October 2017, ECLI:NL:GHDHA:2017:3067; Rb. Den Haag 4 May 2017, ECLI:NL:RBDHA:2017:4633.

⁹⁵CbB 23 July 2019, ECLI:NL:CBB:2019:291.

⁹⁶*Lohuis v the Netherlands* App No 37265/10 (ECtHR, 30 April 2013), para 54; CbB 15 June 2016, ECLI:NL:CBB:2016:149; CbB 15 June 2016, ECLI:NL:CBB:2016:150.

⁹⁷Rb. Den Haag 15 July 2020, ECLI:NL:RBDHA:2020:6377; Rb. Den Haag 15 July 2020, ECLI:NL:RBDHA:2020:6375.

⁹⁸The Court referred to the precautionary principle of Article 191(2) on the Treaty on the Functioning of the European Union as incorporated in the Habitat Directive; Rb. Den Haag 15 July 2020 (n 97) paras 4.38, 4.46 and 4.81.

⁹⁹Rb. Oost-Brabant 22 May 2018, ECLI:NL:RBOBR:2018:2436.

¹⁰⁰ABRvS 29 April 2020, ECLI:NL:RVS:2020:1166.

¹⁰¹ABRvS 26 September 2018, ECLI:NL:RVS:2018:3120.

be expected. The Council easily dismissed the '1 FP' claim, without relying on the case law of the ECtHR. The Council similarly held that the province and the responsible minister could reasonably give greater importance to maintaining the value of the dike as a national monument compared to the interests of the real estate company Pampus in keeping their grounds safe from the strengthening of the dike.¹⁰² The Council also directly dismissed a 1 FP challenge of the duty to tolerate the construction and maintenance of eight wind turbines.¹⁰³ The Electricity Act provides for such a duty in relation to public works in the public interest. The Council was a bit more elaborate, albeit without referencing ECtHR case law, in another unsuccessful appeal in relation to development plan that provided for a phased cessation of the Nauerna landfill site and the development of a recreational area and the alleged decline in the value of his home.¹⁰⁴

Another category of cases deals with municipal environmental zones prohibiting the use of older and polluting vehicles. These measures are based on commitments under the national air quality plan aimed at meeting the air quality limit values set out in the Environmental Management Act. In the first cases decided by the Council of State in relation to the zones in Utrecht and Rotterdam, no reference was made to the ECHR by the applicants, an association representing the interests of motorists as well as several car owners.¹⁰⁵ In more recent proceedings, perhaps because of the limited success in these two cases and the growing saliency of ECHR rights due to *Urgenda*, the applicants (owners of affected vehicles) appealed to the ECHR. The Council of State did not need to spend much time on these pleas as it noted, without recourse to ECtHR case law, that Article 1 FP is without prejudice to the application of laws which may be considered necessary to regulate the use of property in accordance with the public interest, namely preventing or limiting the environmental impact caused by traffic.¹⁰⁶ The use of older diesel delivery vans can be regulated in accordance with the general interest in preventing or limiting the impact of traffic on the environment.¹⁰⁷ These cases show that the Council offers the authorities a broad margin of appreciation in weighing up the interests involved, which results in a limited judicial review with a rather loose proportionality test. The Council does not require the existence of significant environmental effects. It is not necessary that every measure leads to a significant impact in absolute terms, if the individual environmental measure is part of a larger package of measures to improve air quality.

The preceding analysis shows that there is a wide variety of cases in which fundamental rights are used in an 'anti-environmental' way to challenge environmental measures that are allegedly too

stringent. This mirrors the environmental case law of the ECtHR that also covers such 'shield' cases to a large extent. A similar development has been reported in relation to the European Court of Justice (ECJ). In *Standley*, UK farmers unsuccessfully challenged the Nitrates Directive (91/676/EEC) for infringements of their right to property.¹⁰⁸ In *Križan*, the Grand Chamber held that the annulment of a permit for infringing the Integrated Pollution and Prevention and Control Directive (2008/1/EC) does not interfere with the right to property in Article 17 of the Charter.¹⁰⁹ The overview of cases shows that the chance of success has been generally low, primarily because of the broad margin of discretion for the authorities to strike a fair balance. It is, furthermore, remarkable that 'only' half of the cases (13 of 26) do not refer to the case law of the ECtHR.

3 | EXPLAINING THE ABSENCE OF A SUBSTANTIVE IMPACT OF THE ECtHR

The previous section showed that the number of citations of the ECtHR in Dutch environmental cases has grown in quantitative terms in recent years. Nonetheless, in substantive terms, the impact of this 'turn to rights' has been limited. This section examines two important explanations for this: the limitations of the EC(t)HR framework (Section 3.1) as well as the prevalence of detailed environmental (EU) norms (Section 3.2).

3.1 | The limitations in the case law of the ECtHR

The limited transformative effects of the ECHR and the case law of the ECtHR in the Netherlands are not surprising and are inherent in the set-up of the ECHR system as monitored by the ECtHR. This is because the case law of the ECtHR includes a considerable number of shield cases dealing with property rights that challenge environmental measures that are allegedly too stringent. In addition, the sword provided by the EC(t)HR is rather short and dull, as the rest of this section illustrates. Scholars have noted – and sometimes criticized – the ECtHR for being (too) cautious in such cases and for being reluctant to formulate precise positive obligations to protect the environment.¹¹⁰ Lambert even noted recently that the ECtHR 'has

¹⁰⁸Case C-293/97, *Standley*, ECLI:EU:C:1999:215 para 54.

¹⁰⁹Case C-416/10, *Križan*, ECLI:EU:C:2013:8; Hilson (n 21).

¹¹⁰E Lambert, 'The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights (Report prepared at the request of the Steering Committee for Human Right 2020); KF Braig and S Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as Hilfscherriff in Combating Climate Change?' (2020) 35 *Journal of Environmental Law and Litigation* 261, 269; M Fitzmaurice, 'The European Convention on Human Rights and Fundamental Freedoms and the Human Right to a Clean Environment: The English Perspective' in TM Ndiaye and R Wolfrum (eds), *Law of the sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff 2007) 53; NM de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' (2012) 9 *Journal of European Environmental and Planning Law* 63; F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 41, 55; Boyle (n 32) 631.

¹⁰²ABRvS 22 April 2020, ECLI:NL:RVS:2020:1125.

¹⁰³ABRvS 18 December 2019, ECLI:NL:RVS:2019:4326.

¹⁰⁴ABRvS 15 August 2018, ECLI:NL:RVS:2018:2728.

¹⁰⁵Another applicant was a foundation that was dedicated to combating air pollution in the city and region of Utrecht (SSLU). SSLU argued that having an environmental zone does not improve air quality; ABRvS 8 February 2017, ECLI:NL:RVS:2017:300.

¹⁰⁶ABRvS 20 November 2019, ECLI:NL:RVS:2019:3864.

¹⁰⁷ABRvS 23 January 2019, ECLI:NL:RVS:2019:190.

reached the end of the road with regard to environmental protection'.¹¹¹ It is also far from clear what the position of the ECtHR is with respect to the link between climate change and the ECHR, given the absence of cases.¹¹² As will be further discussed below, the pertinent legal questions involved are whether the ECHR applies to future generations and anticipated harm and whether a State has obligations beyond its own territory.¹¹³ The Dutch Supreme Court answered those questions in the positive in *Urgenda*.¹¹⁴ One can wonder whether the ECtHR would have come to a similar conclusion had the Dutch Supreme Court made a preliminary reference on the basis of Protocol 16.¹¹⁵ It, thus, remains to be seen whether the ECtHR will adopt a comparable approach to the Dutch Supreme Court in future climate cases, such as the pending Portuguese youth case.¹¹⁶ The limited number of climate change cases before the ECtHR can be attributed to the difficulty for NGOs to bring a case before the ECtHR because the NGOs are not the direct 'victims'.¹¹⁷ There is no *actio popularis*.¹¹⁸ The limited level of protection in sword cases can be attributed to the following six features of the EC(t)HR framework.

First, the ECHR itself does not provide for a self-standing right to a healthy or clean environment, as has also been emphasized by the Dutch courts at times.¹¹⁹ The ECtHR has 'greened' existing rights and relied on other provisions, such as Article 2 and especially Article 8, to construct such a right.¹²⁰ In several more recent judgments, the ECtHR did not mention the construction of this right.¹²¹ In *Jugheli v Georgia*, a judgment that has been relied upon frequently by the Dutch Council of State, the ECtHR held explicitly that 'there is no explicit right in the Convention to a clean and quiet environment'.¹²² In *Kyrtatos v Greece*, the ECtHR determined: 'Neither Article 8 nor

any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect'.¹²³

Second, the ECHR only offers indirect protection to the environment. The ECHR has an anthropocentric nature and only protects the environment in relation to the rights of human person(s) and does not protect the right to nature preservation as such.¹²⁴ For this reason, it has been put forward that human rights norms and regimes are 'ill-suited' to protect the environment.¹²⁵ There is no right to an undisturbed panoramic view¹²⁶ or surroundings of scenic beauty or wild habitat.¹²⁷ Damage to the environment is, as such, not a problem.¹²⁸ Only the environment in the immediate vicinity is covered when persons are personally and directly affected.¹²⁹ In *Cordella*, individuals not living in the 'zones of high environmental risk' were not regarded as victims.¹³⁰ In *Kyrtatos v Greece*, the destruction of a marshland and forest area was found not to interfere with the applicants' private and family life, even though the applicants lived nearby. The ECtHR has not yet addressed the question whether future generations are protected under the ECHR.¹³¹

Third, the review of the ECtHR is limited given that it has a subsidiary supervisory role. The ECtHR grants States a wide margin of appreciation in the complex factual and legal environmental context because the national authorities are in the best position to weigh different conflicting considerations and set priorities on the basis of available resources.¹³² It has emphasized in this context that impossible or disproportionate burdens should not be put on States.¹³³ Furthermore, the ECtHR has not granted environmental considerations a special or preferential status in the fair balance test. Such considerations are just one of the elements considered in the test. Some scholars argued that this has led to an overemphasis on economic considerations.¹³⁴ In *Hatton*, the ECHR found the economic importance of night flights more important than the individuals' right

¹¹¹Lambert (n 110) 14. Cf Slight retreat in *Kegge* (n 65) 113; OW Pedersen, 'The European Court of Human Rights and International Environmental Law' in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 86.

¹¹²Pedersen (n 1) 228.

¹¹³See, e.g., B Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties' (2021 fc) 115 *American Journal of International Law*; M Meguro, 'State of the Netherlands v. Urgenda Foundation' (2020) 114 *American Journal of International Law* 729, 732.

¹¹⁴HR 20 December 2019 (n 2).

¹¹⁵Pedersen held that 'the ECtHR itself would very likely not have been able to distil from its own case law' the obligations that the Supreme Court derived from the case law of the ECtHR; Pedersen (n 1) 232.

¹¹⁶*Agostinho and others v Portugal and other states* App No 39371/20.

¹¹⁷*de Sadeleer* (n 110) 65; *Asselbourg and 78 others and Greenpeace Association Luxembourg v Luxembourg* App No 29121/95 (ECtHR, 29 June 1999), para 4.

¹¹⁸Legal entities can only rely on the ECHR when they act as 'collective bodies' or intermediaries protecting the interests of their members. See N Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in HT Anker and BE Olsen (eds), *Sustainable Management of Natural Resources: Legal instruments and Approaches* (Intersentia 2018) 99, 106 and 109; Pedersen (n 1) 230.

¹¹⁹E.g. ABRvS 26 July 2017 (n 74) para 8.2.

¹²⁰Boyle (n 32).

¹²¹E.g. *Leon and Agnieszka Kania v Poland* App No 12605/03 (ECtHR, 21 July 2009); *Hatton v the United Kingdom* (n 40); J Verschuuren, 'Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe' in W Scholtz and J Verschuuren (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar 2015) 363, 383; Lambert (n 110).

¹²²*Jugheli v Georgia* App No 38342/05 (ECtHR, 13 July 2018) para 62.

¹²³*Kyrtatos v Greece* App No 41666/98 (ECtHR, 22 May 2003) para 52.

¹²⁴*Atanasov v Bulgaria* App No 12853/03 (ECtHR, 2 December 2010) para 66.

¹²⁵B Peters, 'The European Court of Human Rights and the Environment' in S Mead, B Samson and E Sobenes (eds), *International Courts and Tribunals and the Protection of the Environment* (Asser Press fc).

¹²⁶*Unver v Turkey* App No 36209/97 (ECtHR, 26 September 2000) para 106.

¹²⁷*Kyrtatos v Greece* (n 123) paras 46 and 53; *Valentina Viktorovna Oglobina v Russia* App No 28852/05 (ECtHR, 26 November 2013) paras 20–22 and 28. *Fadayeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) para 70; Braig and Panov (n 110) 273.

¹²⁸Lambert (n 110) 13.

¹²⁹*Kyrtatos v Greece* (n 123) para 52. The ECtHR nonetheless found a violation in a case where the applicants lived 50 kilometres from a polluting gold mine; *Atanasov v Bulgaria* (n 37) para 76.

¹³⁰*Cordella v Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019) para 102.

¹³¹Lambert (n 110) 14.

¹³²*Fadayeva v Russia* (n 127) para 103; *Öneryildiz v Turkey* App No 48939/99 (ECtHR, 18 June 2002) para 71; M Fitzmaurice, 'Case Note. The European Court of Human Rights, Environmental Damage and the Applicability of Art 8 of the European Convention on Human Rights and Fundamental Freedoms' (2010) 13 *Environmental Law Review* 107, 109.

¹³³*Kolyadenko v Russia* App No 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012) para 160.

¹³⁴Lambert (n 110) 13.

to noise-free nights.¹³⁵ This economic focus also means that the chances that individuals can win their case before the ECtHR are higher when the industry in the vicinity has a limited economic value or is outdated.¹³⁶ The limited intensity of judicial review is also evidenced by a procedural turn in the case law of the ECtHR. The ECtHR examines the quality of the decision-making process and focuses on whether the individual's interests were duly considered. It, thereby, pays attention to the wider legislative and environmental context.¹³⁷ According to some, this procedural test has led to a 'debasement of the proportionality test'.¹³⁸

Fourth, and related to that, is the ECtHR's focus on the legislative framework in place. The ECtHR limits its assessment to the question of whether States complied with their own existing rules.¹³⁹ It is more difficult for the ECtHR to find a breach where the environmental standards prove inadequate. De Sadeleer argues that this could encourage States to operate 'in a cynical manner' by not regulating pollution or by setting relaxed emission targets.¹⁴⁰ This approach has resulted in relatively infrequent findings of violations. It is rare that the ECtHR finds a violation of Article 8 ECHR for heavy air pollution.¹⁴¹ As a matter of fact, 30 per cent of applications found a breach of Article 8 ECHR, whereas the overall rate of violations is 84 per cent.¹⁴² Furthermore, a successful result does not necessarily mean that the level of environmental protection necessarily improves. Ms. Fadayeveva, for example, received compensation for her health problem, but the polluting steel mill is still in operation.¹⁴³

Fifth, the ECtHR requires that adverse effects must attain a certain minimum level of severity. This is one of most substantial obstacles to environmental litigation, as the analysis of Dutch court judgments will also demonstrate.¹⁴⁴ The ECtHR has employed a relative assessment depending on the circumstances of the specific case, examining factors such as the periodicity, intensity, duration and location in the light of the general environmental context.¹⁴⁵ The rationale behind the high threshold is the necessity of achieving a fair balance with economic considerations.¹⁴⁶ The casuistic nature of the case law in relation to this requirement has led to limited guidance from ECtHR.¹⁴⁷ The mere fact that pollution is unlawful is not,

in itself, enough.¹⁴⁸ The assumption that the effects of 'every day nuisances' should be tolerated is implicit.¹⁴⁹ The rationale behind this is that the affected individuals can choose to leave the area.¹⁵⁰

Sixth, the reactive nature of the ECHR is not very helpful for *future* or potential risks because the dangers or risks need to be 'serious, specific and imminent' or 'real and immediate'.¹⁵¹ For example, in *Asselbourg*, the ECtHR required 'reasonable and convincing evidence of the likelihood that a violation affecting him personally would occur: mere suspicion or conjecture is insufficient in this regard'.¹⁵² Mainly speculative health risks, such as electromagnetic radiation, are not enough.¹⁵³ The latter also illustrates that the ECtHR does not strictly adhere to the precautionary principle and applies a high threshold of *potential* adverse effects.¹⁵⁴ As was discussed in Section 2.1, the Dutch Council of State has also adopted this approach in some cases. One ECtHR exception is *Tatar*, in which the applicant was exempted from the burden of proof and did not need to prove the existence and certainty of the risk. The ECtHR followed the precautionary logic because of conflicting scientific evidence as to the impact of sodium cyanide from a gold mine on health.¹⁵⁵ Several scholars, nonetheless, observed that the ECtHR has not applied the precautionary principle in recent cases.¹⁵⁶

3.2 | More specific (EU) environmental law standards

Another reason for the limited substantive impact of the ECtHR in Dutch environmental cases is that, in many cases, fundamental rights are not necessary to secure environmental protection. Courts (and lawyers) prefer to rely on clear, precise and unconditional statutory obligations and standards over vaguely defined and general fundamental rights provisions in the ECHR or the EU Charter for Fundamental Rights.¹⁵⁷ There have been various cases in which substantive ECHR rights and/or the case law of the ECtHR were not relied upon, even though this was possible. This section will discuss prominent examples of such 'silent cases' in which more detailed

¹³⁵ *Hatton v the United Kingdom* (n 40) para 122.

¹³⁶ *Fitzmaurice* (n 132) 114. See, however, *Lopez-Ostra v Spain* App No 16798/90 (ECtHR, 9 December 1994).

¹³⁷ See, e.g., *Cordella v Italy* (n 130), with the emphasis on failure of Italian authorities to provide information and effective legal remedies.

¹³⁸ F Sudre, 'Convergence des jurisprudences de la Cour européenne des droits de l'homme et du Comité européen des droits sociaux et droit de l'homme à un environnement sain' in *Mélanges en l'honneur du Professeur H. Oberdorff* (LGDJ) 25, 36.

¹³⁹ *Pedersen* (n 30) 467; *Lambert* (n 110) 13.

¹⁴⁰ *de Sadeleer* (n 110); cf *Verschuur* (n 121) 383.

¹⁴¹ *Bacila v Romania* App No 19234/04 (ECtHR, 3 March 2010); *Greenpeace v Germany* App No 18215/06 (ECtHR, 12 May 2009).

¹⁴² *Lambert* (n 110) 13.

¹⁴³ *Shelton* (n 21) 154; *Voigt and Grant* (n 5) 135.

¹⁴⁴ *Voigt and Grant* (n 5) 137.

¹⁴⁵ *Fadayeveva v Russia* (n 127) para 69.

¹⁴⁶ *Lambert* (n 110) 13.

¹⁴⁷ *de Sadeleer* (n 110) 66.

¹⁴⁸ *Mileva v Bulgaria* App No 43449/02 and 21475/04 (ECtHR, 25 November 2010) para 91.

¹⁴⁹ *Pedersen* (n 30) 466.

¹⁵⁰ *Hatton v the United Kingdom* (n 40).

¹⁵¹ *Fadayeveva v Russia* (n 127) para 70; *Öneryildiz v Turkey* (n 132) paras 100–101; *Hilson* (n 21) 1603; *Setzer and Vanhala* (n 6).

¹⁵² *Asselbourg and 78 others and Greenpeace Association Luxembourg v Luxembourg* (n 117) para 1.

¹⁵³ *Luginbühl v Switzerland* App No 42756/02 (ECtHR, 17 January 2006).

¹⁵⁴ *de Sadeleer* (n 110) 67; *Kobylarz* (n 118) 112.

¹⁵⁵ *Tatar v Romania* App No 67021/01 (ECtHR, 27 January 2009) paras 109–120.

¹⁵⁶ *Lambert* (n 110) 14; *Kobylarz* (n 118) 112; *Pedersen* (n 1) 231; *Hardy and Maile v the United Kingdom* App No 31965/07 (ECtHR, 14 February 2012).

¹⁵⁷ S Bogojević, 'Human Rights of Minors and Future Generations: Global Trends and EU Environmental Law Particularities' (2020) 29 *Review of European, Comparative and International Environmental Law* 191, 199. Cf D Misonne, 'The Emergence of a Right to Clean Air: Transforming European Union law through Litigation and Citizen Science' (2021) 30 *Review of European, Comparative & International Environmental Law* 34; Peeters and Eliantonio (n 7) 496.

(EU) environmental standards are relied upon.¹⁵⁸ What is interesting about these cases, but also several cases discussed in the previous subsections, is the prominence of EU environmental secondary law. As an example, one could think of the EU Nitrate Directive in the earlier discussed cases relating to the phosphate system.¹⁵⁹ The Ambient Air Quality Directive was the focus of the earlier discussed litigation by Milieudefensie. The Environmental Impact Assessment Directive (85/337/EEC) obliges Member States to conduct impact assessments before development consent is given in relation to all public and private 'projects likely to have significant effects on the environment'.¹⁶⁰ The Directive, thus, applies to the wind park and electric pylon cases discussed earlier. It is also applicable in cases involving environmental permits for livestock farming, as was demonstrated by the reference for a preliminary ruling by the District Court of Limburg mentioned in the introduction.¹⁶¹ Other secondary EU law instruments that could trigger the applicability of the Charter in environmental cases are the Habitats Directive (92/43/EEC) and the Birds Directive (2009/147/EC).¹⁶² With respect to several of the cases discussed earlier concerning noise pollution, one could think of the Directive 2002/49/EC relating to the assessment and management of environmental noise.¹⁶³

One first example of a silent 'pro-environmental' case is the Dutch Council of State's reference in relation to the so-called Nitrogen PAS programme. This very complex and technical case dealt with the question as to the compatibility of this programme with Article 6(3) of the Habitats Directive. Just like the earlier discussed NSL air quality monitoring tool, the PAS adopts a programmatic approach and allows for the authorization of nitrogen deposition in Natura 2000 protected sites on the basis of an 'appropriate assessment' carried out in advance in the light of an overall amount of nitrogen deposition deemed compatible instead of an individual assessment.¹⁶⁴ It is problematic that the PAS anticipates future positive effects of measures for protected nature areas and authorizes depositions without having any certainty that the planned measures will actually produce positive results. Following the ECJ judgment, the Council of State concluded that the PAS was inconsistent with the Habitats Directive. The consequences of this judgment were far reaching and many building, farming and infrastructure projects have to be stopped.¹⁶⁵ Neither the ECHR nor the language

of 'rights' was used in the litigation or in the related publications of the NGOs and environmental activists involved. A second example is a case in which neighbouring residents successfully challenged a permit for an intensive livestock barn and manure processing. The District Court deemed it plausible that a plaintiff will experience consequences of any significance if he lives at a distance of 750 metres measured from the heart of the farm. The court ruled that insufficient justification was provided in the environmental impact assessment as to why the odour from the barn and the manure processing plant were assessed separately rather than jointly.¹⁶⁶

Aside from detailed EU standards, the previous sections also illustrated the preference of courts to rely on statutory targets in national legislation. Section 2.2 discussed several wind park cases in which courts stuck to the noise standards for wind turbines in Article 3.14a of the Activities Decree. Even without such a specific standard, the courts have, at times, found it unnecessary to turn to rights, the ECHR or the case law of the ECtHR. One example of such a silent judgment is the interlocutory judgment of the Court of First Instance of Sint Maarten. The court ordered the authorities of Sint Maarten to complete the implementation of the Fire Suppression Plan to prevent the dump site from continuing to emit odours, gases and smoke by 1 May 2020, attaching a penalty payment for every day that the authorities did not comply with the judgment. The court found that the dump was a 'ticking time bomb' and that the continuing spread of stench was unlawful, also given the psychological effects.¹⁶⁷

4 | CONCLUSION

This article showed that, in quantitative terms, there has been a 'turn to rights', both in the sword and shield cases. The turn to rights has so far had a limited substantive impact in the Netherlands in environmental and climate cases beyond *Urgenda*. This suggests that the turn to rights only works under the very particular circumstances of exceptionally urgent cases with devastating effects threatening the population as a whole.¹⁶⁸ Beyond *Urgenda*, the EC(t)HR had some added value when violations were flagrant and/or there was general societal agreement that the situation had become untenable, such as the case *Clean Air Everywhere* and some Groninger gas production cases. These exceptions should, however, not be exaggerated, as was also shown, for example, by the unsuccessful air quality case *Vereniging Milieudefensie*. There have been several successful cases in which the EC(t)HR did not play a role, while courts and lawyers preferred more far ranging and specific EU statutory provisions. It could be that it is simply too soon to reach solid conclusions about the turn to rights, especially since the ink on the decision of the Dutch Supreme Court of December 2019 is hardly dry yet. Nonetheless, it seems that the findings about the Netherlands do not stand alone. Noteworthy pro-environmental decisions of other

¹⁵⁸See the methodology discussed in the introduction (n 17). Rb. Oost-Brabant 3 July 2017, ECLI:NL:RBOBR:2017:3567 was found on the basis of the structured database search, because this judgment contained a reference to Article 6 ECHR, the right to a fair trial. The PAS case was found through an additional literature scan.

¹⁵⁹Hof Den Haag 31 October 2017 (n 94); CBb 26 May 2020, ECLI:NL:CBB:2020:358; CBb 15 June 2016 (n 96); CBb 15 June 2016 (n 96).

¹⁶⁰The 1985 Directive and its three amendments were codified by Directive 2011/92/EU, which was amended by Directive 2014/52/EU. ABRvS 21 February 2018 (n 76); ABRvS 24 February 2016 (n 66).

¹⁶¹*Stichting Varkens in Nood and Others* (n 28).

¹⁶²Rb. Den Haag 15 July 2020 (n 97).

¹⁶³K Pouikli, 'Noise Pollution in Europe: Unpacking a Worryingly "Quiet" Regulatory and Policy Issue' (2019) 16 *Journal for European Environmental and Planning Law* 3.

¹⁶⁴Joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment*, ECLI:EU:C:2018:882.

¹⁶⁵ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259, para 29.5.

¹⁶⁶Rb. Oost-Brabant 3 July 2017 (n 158).

¹⁶⁷GiEA Sint Maarten 26 July 2019 (n 19).

¹⁶⁸Cf Backes and van der Veen (n 2).

national courts, such as the UK Court of Appeal judgment on the third runway at Heathrow airport as well as the French *Urgenda* in the making, also eschew the EC(t)HR. One prominent recent exception is the judgment of the German Federal Constitutional Court declaring the Federal Climate Change Act of 2019 to be incompatible with the fundamental rights in the Constitution.¹⁶⁹ The Court based itself on the German Basic Law and made passing references to three judgments of the ECtHR, while noting that the ECHR does not give further protection than the Basic Law.

Dutch courts have primarily relied on the ECtHR in cases dismissing environmental and climate claims, as several Dutch Council of State judgments illustrate. This is, as such, not surprising given the limitations in the ECHR, namely the absence of a self-standing provision on the right to a healthy environment and the restrictive approach of the ECtHR. An illustration of the limitations of the ECHR framework is evident in the recent judgment of the Norwegian Supreme Court in a case dealing with licences for offshore oil exploration in the Arctic region. The Court held in relation to Article 2 ECHR that the licences did not pose a 'real and immediate' risk because of the uncertain effect of the licences on greenhouse gas emissions and because the effect of climate change is only in the future.¹⁷⁰ The Supreme Court also ruled that Article 8 ECHR is of limited value in relation to climate change, emphasizing that this provision has been applied by the ECtHR to local environmental damage and dangerous activities close to the applicant's home, usually from a few hundred metres to a few kilometres. The Court noted that there has been no judgment of the ECtHR in relation to climate change. It pointed to the pending Portuguese youth case, but it noted that this case concerned a real link to environmental degradation, namely forest fires and heat waves in Portugal.¹⁷¹ The Court also ruled that other international climate obligations cannot be used to interpret the ECHR in the absence of a specific ECHR provision on the right to a healthy environment. The Court, furthermore, held that *Urgenda* 'has little transfer value', since this case did not deal with the validity of an administrative decision and it did not involve the prohibition of a specific measure or source of emissions, but the lowering of the emission targets.

This article also highlighted differences between Dutch courts in their reliance on the EC(t)HR. Even though few environmental cases have reached the Dutch Supreme Court, the Court has undertaken a more environmentally friendly reading of the ECtHR than the Council of State.¹⁷² Just as many other national courts,¹⁷³ the latter has allegedly shown more deference to administrative and political

decisions emphasizing the broad margin of appreciation. The Council has also applied a relatively high threshold of 'real and immediate' risks. The difference between, for instance, *Urgenda* and *Vereniging Milieudefensie* is difficult to explain on the basis of a doctrinal analysis alone. These observations warrant the question as to how the divergences between and within courts within one country can be explained, let alone the differences between States.¹⁷⁴ More (empirical) research, possibly relying on interviews with judges, is necessary to explain the differences in the judicial reception of the EC(t)HR in relation to environmental and climate law. Several research questions come to mind. Who decides whether the decision engages with the EC(t)HR: the plaintiffs or the judges involved?¹⁷⁵ To what extent do judges first arrive at a conclusion and subsequently employ 'the law' in an arbitrary and selective fashion to justify this conclusion? To what extent does the (perceived) legitimacy of human rights-based litigation affect the willingness of courts to rely on the EC(t)HR?¹⁷⁶ Do differences between private tort law cases and administrative law cases play a role?¹⁷⁷ Are courts in States with a strong national human rights judicial tradition reluctant to base their rulings on the EC(t)HR?¹⁷⁸ Do more subjective and personal elements play a role as well?¹⁷⁹ Future research will hopefully shed light on these intricate questions.

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¹⁷⁴Cf Bodansky and Brunnée (n 16).

¹⁷⁵There has been a recent focus in the literature on (bottom-up) transnational litigation strategies. See, e.g., E Barritt, 'Consciously Transnational: *Urgenda* and the Shape of Climate Change Litigation' (2021) 22 *Environmental Law Review* 296; SO Neill and E Alblas, 'Climate Litigation, Politics and Policy Change: Lessons from *Urgenda* and Climate Case Ireland' in D Robbins, D Torney and P Brereton (eds), *Ireland and the Climate Crisis* (Palgrave 2020) 57.

¹⁷⁶J van Zeben, 'Transnational Law's Legitimacy Challenge for International Courts' in P Pinto de Albuquerque and K Wojtyczek (eds), *Judicial Power in a Globalized World* (Springer 2019) 673.

¹⁷⁷L Squintani, 'Tort-Law Based Environmental Litigation: A Victory or Warning?' (2018) 15 *Journal for European Environmental and Planning Law* 277.

¹⁷⁸Keller and Stone Sweet (n 12); Helfer and Slaughter (n 12).

¹⁷⁹J Krommendijk, *National Courts and Preliminary References to the European Court of Justice* (Edward Elgar 2021).

¹⁶⁹Bundesverfassungsgericht 24 March 2021 (n 8) paras 99 and 147; See, however, earlier the *German Family Farmers* case (Verwaltungsgericht Berlin 31 October 2019, VG 10K 412.18); T Schomerus, 'Climate Change Litigation: German Family Farmers and *Urgenda* – Similar Cases, Differing Judgements' (2020) 17 *Journal for European Environmental and Planning Law* 322.

¹⁷⁰The minority opinion found that there was a procedural error for not including climate change considerations during the licensing procedure. Norges Høyesterett 22 December 2020, Case No 20-051052SIV-HRET, para 168.

¹⁷¹ibid paras 170–171.

¹⁷²See in addition to *Urgenda* also its decision on liability in the Groninger gas production case, HR 19 July 2019 (n 36).

¹⁷³Cf *Plan B Earth* (n 9); Pedersen (n 1) 233; Shelton (n 21) 154; KF Koh, 'The Legitimacy of Judicial Climate Engagement' (2019) 46 *Ecology Law Quarterly* 731.