

# LITIGATING INDUSTRIAL AIR POLLUTION IN THE NETHERLANDS: THE IMPACT OF THE EUROPEAN COURT OF HUMAN RIGHTS

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## ABSTRACT

This article will focus on how the development of the European Human Rights Convention (ECHR) by the European Court of Human Rights (ECtHR) prompted Dutch environmental movements and citizens to rely on the ECHR to reduce industrial air pollution. It will further examine the decisive role of human rights in legal proceedings concerning industrial air pollution between environmental movements and affected individuals and the State and/or business entities. The impact of the developing case law by the ECtHR on Dutch cases such as the *Air Quality* cases, the *Urgenda* case and the *Shell* cases will be considered. This article will consider the effects of changing public opinion and scientific developments to understand the changing role of the ECHR in the Netherlands.

**Keywords:** Industrial air pollution; European Court of Human Rights; Public Opinion; The Netherlands; Health

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### 1. INTRODUCTION

Industrial air pollution is once again in the spotlight in the Netherlands. The graphite rains of 2018 and 2019 on the area surrounding Tata Steel Nederland (TSN), a steel plant in IJmuiden, have caused great unrest among local residents and caught continuous media attention.<sup>1</sup> TSN is the largest industrial air polluter in the Netherlands.<sup>2</sup> The media reported extensively on actions by local residents and environmental organizations, e.g., the installation of webcams recording pollution.<sup>3</sup> The media has further reported on incomplete permit applications by Chemours, a chemical plant in Dordrecht, and the current court case regarding penalty payments for polluting incidents.<sup>4</sup> As a result of these publications and public opinion, pressure on the government and industrial air polluters has increased.<sup>5</sup>

In recent decades, scientific developments have led to the establishment of a causal link between industrial air pollution and negative health problems.<sup>6</sup> As a result, many debates have taken place in the Dutch House of Representatives on the best strategies to reduce emissions and its negative consequences and how the costs of the measures should be balanced with other societal interests. Positioning advocacy against industrial air pollution within a human rights framework is not the obvious solution, as no human right to live in a clean and healthy environment is included in the wording of the ECHR, or the Dutch Constitution. Surprisingly, the use of legal proceedings to fight climate change is a new development in the Netherlands. The litigation route has been successful in the *Urgenda* case,<sup>7</sup> which was based on the ECHR and forced the Netherlands to reduce its CO<sub>2</sub> emissions by at least 25% by 2020. Since the *Urgenda* case, environmental movements and individuals have instigated other legal proceedings to fight climate change and to reduce industrial air pollution based on the ECHR. For example, in the *Shell I* case, environmental organizations and individuals

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<sup>1</sup> Veiligheid Ovd, “Industrie en omwonenden: Onderzoeksraad voor de Veiligheid”, (2023); NOS, “Honderden klimaatactivisten op terrein Tata Steel in Velsen-Noord Hilversums: Nederlandse Omroep Stichting”, (2023) <<https://nos.nl/artikel/2476011-publiek-kan-zelf-uitstoot-tata-steel-in-de-gaten-houden-met-webcams>>.

<sup>2</sup> NEA, ‘Emissiecijfers 2021-2022 Den Haag: Nederlandse Emissieautoriteit’, (2024) <<https://www.emissieautoriteit.nl/documenten/publicatie/2022/04/14/emissiecijfers-2021>>.

<sup>3</sup> NOS, ‘Honderden klimaatactivisten op terrein Tata Steel in Velsen-Noord Hilversums: Nederlandse Omroep Stichting’, (2023) <<https://nos.nl/artikel/2476011-publiek-kan-zelf-uitstoot-tata-steel-in-de-gaten-houden-met-webcams>>.

<sup>4</sup> Economieredactie, ‘Chemours doet weer incomplete vergunningsaanvraag voor meer pfas-uitstoot’, (2024) NUnl.

<sup>5</sup> Kraan, J., “Zaak over milieuboetes Tata Steel kan grote gevolgen hebben voor vergroening” (2024) NUnl.

<sup>6</sup> See the report of the Dutch National Institute for Public Health and the Environment (“RIVM”) of 2023 on the negative health effects of emissions: Geelen, L., Bogers, R., Elberse, J., Houthijs, D., Montforts, M., Schuijff, M., et al., “De bijdrage van Tata Steel Nederland aan de gezondheidsrisico's van omwonenden en de kwaliteit van hun leefomgeving.” (The contribution of Tata Steel to the health risks of local residents and the quality of their surroundings), (2023) Rijksinstituut voor Volksgezondheid en Milieu RIVM.

<sup>7</sup> *The State of the Netherlands v Stichting Urgenda*, 20 December 2019, ECLI:NL: HR:2019:2007 [English translation] (‘Urgenda’).

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have tried to force Shell to reduce its CO<sub>2</sub> emissions by 45%.<sup>8</sup> The proceedings were based on the unwritten standard of care of Art. 6:162 of the Dutch Civil Code, which was interpreted by using Art. 2 and 8 ECHR and the UNGP amongst other international (soft) law instruments.

This article will focus on the extent to which the development of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR) prompted Dutch environmental movements and citizens to rely on the ECHR to reduce industrial air pollution. It will further examine the decisive role of human rights in legal proceedings concerning industrial air pollution. The article will consider the effects of changing public opinion and scientific developments to understand the changing role of the ECHR in the Netherlands. This article will focus on Art. 2 and 8 of the ECHR and the related case law of the ECtHR.

## 2. PUBLIC OPINION AND SCIENTIFIC DEVELOPMENTS AS PART OF THE ECHR

The articles of the ECHR have an open formulation and need interpretation before the ECHR can be applied.<sup>9</sup> The ECtHR has concluded that the ECHR is a living instrument and must be interpreted “in the light of present-day conditions”.<sup>10</sup> This interpretation method includes new developments and developing standards under international law, the current European consensus within the majority of the member states, and emerging trends,<sup>11</sup> and is limited by the duty of the ECtHR to assess the values embodied in a disputed right in good faith and maintain consistency in its case law.<sup>12</sup> Despite recurring discussions concerning the perceived anti-democratic features of the living instrument doctrine, the member states of the ECHR (“Member States”) have accepted this doctrine by agreeing to the text of Art. 46 of the ECHR after *Tyrer v. United Kingdom*.<sup>13</sup> Due to the living instrument doctrine, the open wording of the articles of the ECHR, and the fact that many Member States have used the ECHR as the cornerstone for their constitutional rights, the text of the substantive articles of the ECHR was not needed to be changed.<sup>14</sup> This doctrine brings the scope of the ECHR in

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<sup>8</sup> *Vereniging Milieudefensie and Others v. Shell*, ECLI: NL: RBDHA: 2021:5339 [English translation] (*‘Shell I’*).

<sup>9</sup> Theil, S., “Is the ‘Living Instrument’ Approach of the European Court of Human Rights Compatible with the ECHR and International Law?” (2017) 23 (3) *European Public Law* 587-614 at 493.

<sup>10</sup> *Tyrer v. United Kingdom*, App. No. 5856/72, A/26, European Court of Human Rights, 25 April 1978, para 31.

<sup>11</sup> ECtHR, “The Convention as a Living Instrument at 70”. In: *Judicial Seminar 2020 BD*, editor. (Strasbourg: ECtHR, 2020).

<sup>12</sup> Letsas, G., “The ECHR as a living instrument: its meaning and legitimacy”. In: A. Føllesdal, B. Peters, G. Ulfstein editors. *Constituting Europe: The European Court of Human Rights in a National, European and Global Context. Studies on Human Rights Conventions*. (Cambridge: Cambridge University Press, 2013 at 2).

<sup>13</sup> Villiger, M. E., *Handbook on the European Convention on Human Rights*. (Brill, Nijhoff, 2022).

<sup>14</sup> *Ibid*; *Ibid*, n.11.

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line with the times.<sup>15</sup> Due to social and technological developments, these values embodied by the rights change over time.<sup>16</sup> These developments include changing public opinion toward industrial air pollution and scientific developments concerning industrial air pollution.

Even though the living instrument doctrine has widened the scope of the ECHR, the primary protection of fundamental rights lies within the Member States. The ECHR is the subsidiary layer of protection for individuals against the Member States.<sup>17</sup> The ECHR is the minimum standard, and if domestic law offers higher protection to the individual, this higher standard will be applied by the ECtHR.<sup>18</sup> Subsidiarity forms the basis of the concepts of ‘margin of appreciation’ and ‘fair balance’. The margin of appreciation gives States the freedom to implement the ECHR in line with their legal requirements and domestic circumstances while considering the fair balance between the interests of the community and those of the individuals.<sup>19</sup> The ECtHR has not given the Member States a model along which a fair balance must be struck.<sup>20</sup> In the case of Art. 2(2) and Art. 8(2) of the ECHR, fair balance is included in the wording of the articles. Measures taken by the authorities to advance public interests must be proportionate to the restriction of the rights of the individuals.<sup>21</sup>

From the wording of Art. 2 and Art. 8 of the ECHR, negative obligations can be distilled, i.e., the Member States must not interfere with these rights or exercise restraint when interference is justifiable. The ECtHR has found that positive obligations exist where the Member States must guarantee negative obligations, or prevent breaches of ECHR rights between individuals, for instance by implementing legislation that regulates the situation between individuals.<sup>22</sup> Thus, these positive obligations can have an indirect third-party effect. The principles applied when determining whether an infringement is justified or when a positive obligation exists are broadly similar. The main question is whether the Member State has struck a fair balance between individual and community interests within its margin of appreciation.<sup>23</sup>

In the 1980s, cases were brought before the ECtHR regarding noise emissions and vibrations from airports in the United Kingdom. In *Powel and*

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<sup>15</sup> Letsas, G., “ECHR as a living instrument: its meaning and legitimacy” in: Føllesdal A, Peters B, Ulfstein G, editors. *Constituting Europe: The European Court of Human Rights in a National, European and Global Context. Studies on Human Rights Conventions*. (Cambridge: Cambridge University Press, 2013), p. 106-41.

<sup>16</sup> Theil, S., “Is the ‘Living Instrument’ Approach of the European Court of Human Rights Compatible with the ECHR and International Law?” (2017) 23 (3) *European Public Law* 587-614.

<sup>17</sup> *X and Y v. the Netherlands*, App. no. 8978/80, European Court of Human Rights, 26 March 1985, para 29.

<sup>18</sup> *Ibid.*, n.13

<sup>19</sup> *Sporrong and Lönnroth v. Sweden* para 69; *Ibid.* n.13, pp. 193-194.

<sup>20</sup> Çalı, B., “The Balancing Test: European Court of Human Rights”, *Max Planck Encyclopedia of International Law*. (Oxford: Oxford Public International Law, 2018).

<sup>21</sup> *Ibid.*

<sup>22</sup> *X and Y v. The Netherlands*, 26 March 1985, para 23.

<sup>23</sup> *Powell and Rayner v. The United Kingdom*, 21 February 1990, para 41; *Fadeyeva v. Russia*, 9 June 2005, para 94; *Ibid.*, n.13.

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*Rayner v. The United Kingdom*,<sup>24</sup> the ECtHR confirmed noise could constitute violations under Art. 8 of the ECHR, and positive obligations could rest on the Member State, which had to strike a fair balance and a certain margin of appreciation to ensure compliance with the ECHR. In this case both parties agreed that a negative impact on the environment cannot be avoided when running an international airport.<sup>25</sup> The ECtHR did not request proof of health detriments from the applicants, implying a violation does not need to be based on such proof in this case.<sup>26</sup>

This case and similar cases allowed individual applicants to defend their rights in cases of noise under Art. 8 of the ECHR and opened the possibility of defending their rights in cases of industrial air pollution and other environmental problems. Significantly, air pollution is not part of the text of the ECHR and there is no right to a clean and quiet environment.<sup>27</sup> The admissibility was based on the newly developed European consensus on environmental issues amongst the Member States, as the ECtHR concluded in *Fredin v. Sweden (No. 1)*: “In today’s society the protection of the environment is an increasingly important consideration”.<sup>28</sup> Since then, the responsibility of the Member States for environmental problems has been established by the ECtHR based on Art. 2 and 8 of the ECHR and takes many forms.<sup>29</sup>

### 3. SCIENTIFIC DEVELOPMENTS AND CONSENSUS IN PUBLIC OPINION

The judgments of the ECtHR interpreting protection against industrial air pollution in the text of Art. 2 and Art. 8 of the ECHR based on the living instrument doctrine reflect the increased scientific knowledge and changes in public opinion on this topic. The first cases occurred around the same time the Intergovernmental Panel on Climate Change (IPCC) presented its first report. Since then, environmental issues have remained firmly on the political agenda in The Netherlands. The development of standardization of measurements and methodologies made it possible to work with complex models concerning industrial air pollution. These models were the basis for legislation and European Union (EU) Directives containing clear standards for business entities causing industrial air pollution.<sup>30</sup> These form the basis

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<sup>24</sup> Para 40-41.

<sup>25</sup> *Powel and Rayner v. The United Kingdom*, App no. 9310/81, European Court of Human Rights, 21 February 1990, para 42.

<sup>26</sup> Theil, S., *Towards the Environmental Minimum: Environmental Protection through Human Rights*. (Cambridge: Cambridge University Press, 2021 at 138).

<sup>27</sup> *Hatton and Others v. The United Kingdom* App no. 36022/97, European Court of Human Rights, 8 July 2003, para. 96.

<sup>28</sup> *Ibid*, para 48.

<sup>29</sup> Pedersen, O. W., “The European Court of Human Rights and International Environmental Law” In: J.H Knox, R. Pejan, editors. *The Human Right to a Healthy Environment*. (Cambridge UK: Cambridge University Press, 2018), p. 86-96 at 86.

<sup>30</sup> Miller, C. A., “Fifty years of EPA science for air quality management and control”, (2021) 67 *Environmental Management* 1017-28.

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of the minimum standard for the Member States under the ECHR. Further, global epidemiological research has proven the connection between health problems and industrial air pollution. For instance, it was shown that particulate matter (PM) caused high levels of mortality and morbidity, and there are no safe thresholds for PM.<sup>31</sup> This epidemiological research has influenced the case law of the ECtHR as set out below.

Scientific developments, in combination with Dutch and EU legislation, resulted in significantly improved air quality in the Netherlands by the 2000s<sup>32</sup> (see Figure 1). However, the overall problem of industrial air pollution was not solved and new problems, like PM, had been discovered. People in the Netherlands started to feel powerless due to the enormity and global scale of the problems, grew accustomed to their existence, and averted their attention to problems they found more pressing and solvable, resulting in temporary lapses in active interest in these problems.<sup>33</sup> Despite these reservations, a third of the Dutch population were members of an environmental organization by 1995, however, only 5% were willing to take part in demonstrations.<sup>34</sup> Since being sponsored by the public, environmental organizations became increasingly institutionalized and worked together intensively on the international level.<sup>35</sup>

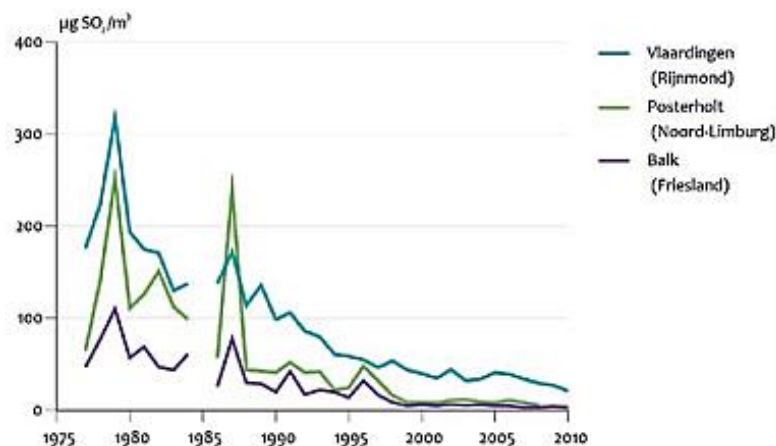


Figure 1: SO<sub>2</sub>; 98-percentile of daily mean concentrations. This graphic shows the occurrence of peak concentrations of SO<sub>2</sub> (Buijsman, 2012, p. 27)<sup>36</sup>

<sup>31</sup> Kelly, F. J. & Buijsman, E., “Smog de maat genomen. Een terugblik op smog in Nederland, 1960-2010”, (2012) 2 Lucht.

<sup>32</sup> Ibid.

<sup>33</sup> Nas, M., “Duurzaam milieu, vergankelijke aandacht: Een onderzoek naar meningen, media en milieu” (Den Haag: Sociaal en Cultureel Planbureau, 2000).

<sup>34</sup> Nas, M., Dekker, P. & Hemmers, C., “Maatschappelijke organisaties, publieke opinie en milieu 9 Social organization, public opinion and the environment” (Rijswijk: Sociaal en Cultureel Planbureau (SCP), 1997).

<sup>35</sup> Van der Heijden, H. A., “De milieubeweging in de twintigste eeuw. Belgisch Tijdschrift voor Nieuwste Gechiedenis (The environmental movement in the twentieth century)”, (2004) 3 Belgian Journal of Contemporary History 445-83.

<sup>36</sup> Buijsman, E., ‘Smog de maat genomen. Een terugblik op smog in Nederland, 1960-2010’ (2012) 2 Lucht. <<https://doi.org/10.13140/RG.2.2.28597.93922>>.



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As scientific knowledge of the complexity of the problems grew the public started detaching from these problems since it seemed one needed to have scientific expertise to understand and comment on the problems.<sup>37</sup> In the 2000s, the focus of environmental organizations and public opinion transferred to the responsibilities of business entities for the whole production chain. In 2007, the government and the business community entered into a covenant to reduce CO<sub>2</sub> emissions by 30% by 2020. There were high hopes for a third industrial revolution and a circular economy<sup>38</sup> which so far has not materialized. Additionally, pressure on business entities, like TSN, grew due to media efforts. The current affairs program 'Zembla' highlighted the negative effects of industrial air pollution by TSN. In response, the Rijksinstituut voor Volksgezondheid en Milieu (RIVM) (National Institute for Public Health and Environment) was commissioned by parliament to conduct research. However, the RIVM concluded that only negligible negative health effects of TSN's emissions were observed in its report in 2009.<sup>39</sup> This ambiguity by the public regarding environmental problems becomes clear in the very low number of cases addressing this issue and the low number of cases in the Netherlands that have applied Art. 2 and Art. 8 the ECHR.

### 4. THE RIGHT TO LIFE AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

The fast-paced scientific developments and the concerns in public opinion in Europe on industrial air pollution are reflected in the case law of the ECtHR. The ECtHR has determined industrial air pollution may infringe on Art. 2 of the ECHR and Art. 8 of the ECHR if the industrial air pollution interferes with the human rights of individuals. Industrial air pollution might interfere with substantive rights, e.g., life-threatening toxic emissions occur, or procedural rights, e.g. the right to information about such emissions is not adhered to.<sup>40</sup> The Member States are prohibited from interfering with the right to life based on Art. 2 (1) of the ECHR unless they can justify this interference based on Art. 2 (2) of the ECHR. Apart from this negative obligation, the ECtHR has determined that positive obligations to prevent infringements of the right to life rest on the Member States based on Art. 2

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<sup>37</sup> Lintsen, H., & Veraart, F., "The Tensions between Well-Being and Sustainability. Well-being and Sustainability Around 2010" in: H. Lintsen, F. Veraart, J-P. Smits, J. Grin, editors. *Well-being, Sustainability and Social Development: The Netherlands 1850–2050*. (Cham: Springer International Publishing, 2018, p. 459-79).

<sup>38</sup> Ibid.

<sup>39</sup> Schols, E., "De invloed van Corus op de luchtkwaliteit in de leefomgeving". Deelrapport 1 in de reeks rapporten over de invloed van uitstoot van Corus op de omgeving (The impact of Corus on the air quality in the living environment. Part report 1 in the series of reports on the impact of Corus emissions on the environment). (Bilthoven: RIVM, 2009).  
<<https://www.rivm.nl/bibliotheek/rapporten/609021079.pdf>>.

<sup>40</sup> Council of Europe, *Guide to the case-law of the European Court of Human Rights*. Environment. (Strasbourg: Council of Europe, 2022).

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(1) of the ECHR.<sup>41</sup> To invoke this article, individual applicants must prove that lives have been lost or a serious, immediate threat to life exists. This threshold is so high that there is limited case law on this topic. If this threshold cannot be met, Art. 8 of the ECHR might be applicable.<sup>42</sup> Based on Art. 8 (1) of the ECHR, Member States are prohibited from interfering with the right to respect for private and family life, the home, and correspondence unless this interference can be justified based on Art. 8 (2) of the ECHR. Similar to the situation with Art. 2 of the ECHR, positive obligations may rest on the Member States.<sup>43</sup> Not every occurrence of industrial air pollution leads to an infringement of Art. 8 of the ECHR. It depends on the specific circumstances of the case and the severity of the nuisance.

### 4.1 Interference with Art. 2 and 8 of the ECHR

The ECtHR will find an interference with Art. 2 of the ECHR in the event of loss of life, or the real and immediate risk to lives, caused by dangerous activities conducted by the state itself or third parties on its territory.<sup>44</sup> Industrial activities are qualified as dangerous activities, e.g. nuclear testing,<sup>45</sup> or the operation of a municipal waste site.<sup>46</sup> Potential radiation exposure was claimed to be a threat to life and thus an infringement on the right to life in *L.C.B. v. The United Kingdom*.<sup>47</sup> A methane explosion resulting in a landslide causing the deaths of the applicant's family was found to be a violation of Art. 2 of the ECHR in *Öneryıldız v. Turkey*.<sup>48</sup> Thus, the threshold for interference under Art. 2 of the ECHR is high, requiring a higher intensity of air pollution to be present. Scientific development influences what is considered intense air pollution.

When the threshold of Art. 2 of the ECHR cannot be met, Art. 8 of the ECHR can be invoked. The first successful case for Art. 8 of the ECHR based on industrial air pollution was *López Ostra v. Spain*.<sup>49</sup> An interference with Art. 8 of the ECHR requires a serious nuisance that impairs the quality of life or the enjoyment of the applicant's home. For Art. 8 of the ECHR to be invoked, it is not necessary to prove severe environmental pollution seriously endangered the health of the applicants, instead, it suffices that an individual's quality of life was significantly impacted.<sup>50</sup> A serious nuisance must exceed a minimum threshold of adverse effects based on the case's

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<sup>41</sup> *L.C.B. v. The United Kingdom* App no. 14/1997/798/1001, European Court of Human Rights, 9 June 1998, para 36.

<sup>42</sup> Theil, S., *Towards the Environmental Minimum: Environmental Protection through Human Rights*. (Cambridge: Cambridge University Press, 2021 at 132).

<sup>43</sup> *López Ostra v. Spain* App no. 16798/90, European Court of Human Rights, 9 December 1994, para 51.

<sup>44</sup> *L.C.B. v. The United Kingdom* para 36; *Öneryıldız v. Turkey* App no. 48939/99, European Court of Human Rights, 30 November 2004, para 71.

<sup>45</sup> *L.C.B. v. The United Kingdom* para 24.

<sup>46</sup> *Öneryıldız v. Turkey* paras 60, 71.

<sup>47</sup> *L.C.B. v. The United Kingdom* para 28.

<sup>48</sup> *Öneryıldız v. Turkey* para 70.

<sup>49</sup> *López Ostra v. Spain*, App. No. 16798/90, European Court of Human Rights. 9 December 1994.

<sup>50</sup> *López Ostra v. Spain* para 51



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specific circumstances, “the intensity and duration of the nuisance, and its physical or mental effects”.<sup>51</sup> A serious nuisance can be caused by smells, noise, and emissions.<sup>52</sup> A physical breach of the home is not required, emissions suffice.<sup>53</sup> Due to scientific progress, e.g. on the effects of industrial air pollution, and societal change, e.g. acceptance of mental problems caused by industrial air pollution, the same constellation of facts might be seen as an infringement at a later date, making this a very dynamic area of the law.

Under Art. 8 of the ECHR, industrial activities are dangerous activities, however for an infringement to occur, the applicant’s home, family, or private life must be directly affected.<sup>54</sup> An infringement might be justified by the Member States under Art. 8 (2) ECHR if the interference complied with the law, served a legitimate aim, e.g. the economic well-being of the country, or was necessary.<sup>55</sup>

### 4.2 Causality between Industrial Air Pollution and the Infringement on the Rights

Especially important is the answer to the question about the causality between industrial air pollution and the specific infringements on the rights of the applicants.<sup>56</sup> The ECtHR requires the applicants to prove the close link between the industrial air pollution and the infringement of rights beyond a reasonable doubt.<sup>57</sup> This proof of causality relies on trustworthy scientific evidence, the content of which may change due to new scientific developments or changing societal values. The ECtHR sets a minimum standard for such proof, requiring the link between industrial air pollution and its consequences to be objective.<sup>58</sup> In cases where industrial activities cause deaths, especially when well-known risks occur, the close link between the event and the action is seen as a given.<sup>59</sup> An example for Art. 2 of the ECHR is *Öneryıldız v. Turkey*,<sup>60</sup> where causality was based on the authorities’ knowledge about the risk and their lack of preventive action. However, in *L.C.B. v. The United Kingdom*,<sup>61</sup> it was held that the available knowledge at the time must be sufficient to prove the causal link. Thus, a similar new case might have a different outcome based on new scientific knowledge.

Scientific evidence and expert opinions are used to prove causality under Art. 8 of the ECHR.<sup>62</sup> Causality is based on the knowledge at the time.

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<sup>51</sup> *Fadeyeva v. Russia* App no. 55723/0, European Court of Human Rights, 2005, para 69.

<sup>52</sup> *López Ostra v. Spain* para 8, 34; *Taşkın and Others v. Turkey* para 13.

<sup>53</sup> *Giacomelli v. Italy*, App no 59909/00, European Court of Human Rights, 2 November 2006, para 76.

<sup>54</sup> *Fadeyeva v. Russia* para 66, 68

<sup>55</sup> *Ibid.*, n.13.

<sup>56</sup> *Ibid.*, n.39, p. 80.

<sup>57</sup> *Fadeyeva v. Russia*, para 79.

<sup>58</sup> Jasanoff, S., “Serviceable truths: Science for action in law and policy” (2015) 93 Texas Law Review 1723-49.

<sup>59</sup> Stoyanova, V., “Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR” (2018) 18 Human Rights Law Review 309-46.

<sup>60</sup> *Oneryıldız v Turkey*, paras 100-102.

<sup>61</sup> *L.C.B. v. The United Kingdom*, paras 39, 41.

<sup>62</sup> *Ibid.*, n.57 at 1741.

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The ECtHR often relies on scientific evidence, which domestic courts have accepted.<sup>63</sup> In *López Ostra v. Spain*,<sup>64</sup> the ECtHR relied on the acceptance of the existence of nuisance caused by industrial activities in domestic judgments, as proof that the authorities knew or should have known of the interference. Similarly, the ECtHR relied on the acceptance of a sufficiently close link between the interference and industrial activities by domestic courts in *Lemke v. Turkey*<sup>65</sup> on the identification of a sufficiently close link in an Environmental Impact Assessment (“EIA”) procedure in *Taşkın and Others v. Turkey*<sup>66</sup> and on the classification of a plant as very high risk by domestic authorities in *Guerra and Others v. Italy*.<sup>67</sup> The EIA-procedure has thus become a relevant factor within the procedural part of the positive obligations of the Member States, as it shifts the burden of proof of the applicant in those cases where the EIA-procedure has identified potential hazardous effects of a dangerous activity and established a clear and direct connection between the activity’s dangers and the applicant’s private and family life. The applicant does not have to independently provide such evidence in those cases. In *Gaicomelli v. Italy*, it became clear that the ECtHR views the EIA-procedure as an obligation resting on the Member States before permits for dangerous activities are issued and the delay of such procedure and the implementation of relevant measures does not hinder the court to find a violation up until that time.<sup>68</sup> In *Tătar v. Romania*, it was confirmed that the outcome of this procedure must be available to the public, as the public has a right to information.<sup>69</sup> In *Thibaut v. France*, the ECtHR determined that the EIA-procedure must already take place when the dangerous activity is still in its project stage.<sup>70</sup> The ECtHR thus makes use of a tool from international environment law, as this case law is similar with *Pulp Mills Case* of the International Court of Justice, where it was determined that “EIA-procedures are a requirement under general international law in international contexts, where there is a risk that the proposed industrial activity may have a significant adverse impact”.<sup>71</sup>

Despite the required high standard of proof, the ECtHR remains flexible in the case of evidentiary difficulties, especially where access to decisive information is limited to the government. In *Fadeyeva v. Russia*, the ECtHR did not accept medical evidence but based causality on the

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<sup>63</sup> Shelton, D., “Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role” In: J.H. Knox, R. Pejan, editors. *The Human Right to a Healthy Environment*. (Cambridge: Cambridge University Press, 2018), p. 97-121 at 111-112.

<sup>64</sup> *López Ostra v. Spain*, paras 50, 52-53.

<sup>65</sup> *Lemke v. Turkey*, App no. 17381/02, European Court of Human Rights, 5 June 2007, para 36.

<sup>66</sup> *Taşkın and Others v. Turkey* para 113.

<sup>67</sup> *Guerra and Others v Italy*, App no. 116/1996/735/932, European Court of Human Rights, 19 February 1998, para 57.

<sup>68</sup> *Gaicomelli v. Italy*, App no. 59909/00, European Court of Human Rights, 2 November 2006, para 94-96.

<sup>69</sup> *Tatar v Romania*, App. No. 6702 1/01, European Court of Human Rights, 27 January 2009, para 113.

<sup>70</sup> *Thibaut v France*, App No. 41893/19, European Court of Human Rights, 14 June 2022, para 38.

<sup>71</sup> Case Concerning Pulp Mills on the River Uruguay, *Argentina v Uruguay*, Judgment on the merits, ICGJ 425 (ICJ 2010), 20th April 2010, (“*Pulp Mills*”) para 204.

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exceedance of the domestic norms by emissions from the steel plant during the entire period.<sup>72</sup> This fact could have caused the health deterioration, at least made the applicant more vulnerable to illness, and negatively influenced the quality of her life at home. In addition, the interference was well-known and not unexpected.<sup>73</sup> The specific circumstances of the case inform whether a sufficient level of proof has been reached. No clear rule has been established. This shows again the influence of scientific developments and public opinion, to answer questions on when someone's home life is negatively influenced.

If it is difficult to separate the negative effects of serious industrial pollution from other negative factors in an individual's life, like age and profession.<sup>74</sup> Therefore, these factors need to be weighed. The ECtHR has relied on domestic courts to weigh these factors in *Ledyayeva and Others v. Russia*.<sup>75</sup> In cases of lacking scientific consensus, the precautionary principle may apply. The precautionary principle applies when there is a reasonable likelihood of severe harm. In that case, the chosen level of protection by the State must be consistent with the potentially dangerous effects.<sup>76</sup> The ECtHR applied the precautionary principle in *Tătar v. Romania*<sup>77</sup> where the medical proof was insufficient to prove the toxic pollutants caused health problems, as the quantity of these toxic pollutants could not be determined.

The precautionary principle is used by the ECtHR as the basis for its reasoning on positive obligations. These positive obligations vary from taking precautionary measures to informing the population of dangers.<sup>78</sup> However, the use of the precautionary principle is limited to cases concerning specific individuals and to specific geographical spaces, i.e. only children within the direct vicinity of extra-high-voltage power lines.<sup>79</sup> In *Tătar v. Romania*, the precautionary principle led to a shift of the burden of proof, but did not play a decisive role in determining a violation. As a result of the precautionary principle applicants can be considered to be victims by the ECtHR in cases concerning Art. 8 of the ECHR, as long as they give sufficient evidence that the industrial air pollution is a plausible cause for their suffering.<sup>80</sup> Further, the precautionary principle does not lead to general rules for the Member States. The limitation of this principle to very specific instances where scientific proof is not certain about the impact of dangerous activities reflects the status of the international debate around the principle.

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<sup>72</sup> *Fadeyeva v. Russia* paras 80, 87-88.

<sup>73</sup> *Fadeyeva v. Russia* paras 90-91.

<sup>74</sup> Barton, H. & Grant, M., "A health map for the local human habitat" (2006) 126 (6) *Journal of the Royal Society for the Promotion of Health* 252-3.

<sup>75</sup> *Ledyayeva and Others v. Russia* App no.53158/99; 53247/99, European Court of Human Rights, 26 October 2006, para 97.

<sup>76</sup> *Ibid.*, n.57.

<sup>77</sup> Paras 102-107.

<sup>78</sup> *Ibid.*, n.13, p. 453.

<sup>79</sup> *Thibaut v. France* para 40 - 48.

<sup>80</sup> Theil, S., "Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?" (2017) 23 (3) *European Public Law* 587-614, p. 161.

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This debate concerns the fact that it is not clear what the scientific outcome will be, which causes uncertainty about the outcome of the use of the precautionary principle, as normative aspects play a significant role in the outcome of its application.<sup>81</sup>

Other aspects the ECtHR has addressed in its judgments are whether the applicants created the situation themselves or could have remedied or easily prevented the situation, for instance by obtaining information about the pollution beforehand or moving away after they knew this.<sup>82</sup> Further, there needs to be a sufficiently close link between the location of the applicant's home and the source of the pollution. Examples include *Guerra and Others v. Italy*,<sup>83</sup> where emissions were often channeled toward the applicants' homes due to their location, and *Fadeyeva v. Russia*, where the location of the home within a designated buffer zone was crucial.<sup>84</sup>

### 4.3 Positive Obligations to Protect the Right to Life and the Right to Private and Family Life

As briefly set out in section 2, the ECtHR has built up a system of positive obligations resting on the Member States, which can lead to an indirect third-party effect. For cases of industrial air pollution, the positive obligations for dangerous activities under Art. 2 and 8 of the ECHR mostly mirror each other.<sup>85</sup> The ECtHR grants the Member States a wide margin of appreciation due to the complicated technical and social sphere of environmental problems. Member States can choose the right means for their legal system and the circumstances of the case. However, they are obliged to do everything within their power to protect their inhabitants from immediate and known risks resulting from dangerous activities. They also have a legal obligation to deliver adequate protection and deterrence.<sup>86</sup> This confirms the subsidiarity of the ECtHR.<sup>87</sup> Subsidiarity also becomes clear when a finding of violations is based on the breach of or disregard for domestic rules and legislation by the Member States.<sup>88</sup>

The positive obligations under Art. 2 ECHR oblige the Member States to take all reasonable and necessary measures to ensure people's lives are not put at risk or lost on their territory.<sup>89</sup> An effective legislative and administrative framework addressing specific dangers and functioning as a deterrent is compulsory.<sup>90</sup> This framework must comprise preventive measures, an obligation to give information and access to the decision-

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<sup>81</sup> Ibid, p. 86.

<sup>82</sup> *Ledyayeva and Others v. Russia* para 90, 99.

<sup>83</sup> *Guerra and Others v. Italy* para 57.

<sup>84</sup> *Fadeyeva v. Russia* paras 10-11.

<sup>85</sup> *López Ostra v. Spain* para. 51; *Powell and Rayner v. The United Kingdom* para 44.

<sup>86</sup> *Öneryıldız v. Turkey* paras 107, 109, 118.

<sup>87</sup> Pedersen, O.W., "The European Court of Human Rights and International Environmental Law" In: J.H. Knox, R. Pejan, editors. *The Human Right to a Healthy Environment*. (Cambridge UK: Cambridge University Press, 2018, p. 86-96).

<sup>88</sup> *López Ostra v. Spain* paras 54-58.

<sup>89</sup> *Öneryıldız v. Turkey* para 71.

<sup>90</sup> Ibid, paras 89-90.

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making process to the public, and a judicial framework meeting minimum effectiveness standards. Further, the relevant authorities must take practical measures, e.g. install procedures to identify faults in the system, *Öneryıldız v. Turkey*. If people are exposed to a mortal risk, the State must proactively provide all relevant information.<sup>91</sup>

The ECtHR assesses compliance with the positive obligations under Art. 8 of the ECHR on the substantive and the procedural merits of the government's decision.<sup>92</sup> The assessment of the substantive merits is based on the specific circumstances of the case, the proper use of the wide margin of appreciation, and the achievement of a fair balance. This was conformed in *Hatton and Others v. The United Kingdom*,<sup>93</sup> *Powell and Rayner*<sup>94</sup> as well as *Taşkın and Others v. Turkey*.<sup>95</sup> Further, Member States must set up an effective legislative and administrative framework, including the obligation to provide information. The Court confirmed this in *Hatton and Others v. The United Kingdom*,<sup>96</sup> *Guerra and Others v. Italy*<sup>97</sup> and *Giacomelli v. Italy*.<sup>98</sup> A fair balance might be based on a report showing economic interests.<sup>99</sup> If a domestic court has decided no fair balance has been struck, the ECtHR, in principle, does not review this decision.<sup>100</sup>

The procedural assessment is based on the specific circumstances of the case and requires a decision-making process to be in place. This process must include investigations and studies relevant to the specific problems, their disclosure and that of relevant information to the public, the views of individuals as part of the process, and procedural safeguards, e.g. the option to request information.<sup>101</sup> If such a system is in place but the authorities do not comply with a ruling or even continue the process, a violation has taken place.<sup>102</sup> The ECtHR determined the effective legislative and administrative framework necessary to fulfill the positive obligations of Art. 8 of the ECHR. Member states can also fulfil these positive obligations through their actual practice.<sup>103</sup> In *Kolyadenko and Others v. Russia*,<sup>104</sup> the ECtHR widened this rule to Art 2. Finally, if a Member State has delegated activities to a private agency, it remains responsible for the actions of the private agency as if it were the actions of the state.<sup>105</sup>

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<sup>91</sup> *L.C.B. v. The United Kingdom* paras 38-41.

<sup>92</sup> *Hatton and Others v. The United Kingdom* para 99.

<sup>93</sup> Para 103.

<sup>94</sup> *Powell and Rayner* para 44.

<sup>95</sup> *Taşkın and Others v. Turkey* para 116

<sup>96</sup> *Hatton and Others v. The United Kingdom* para 98.

<sup>97</sup> *Guerra and Others v. Italy* paras 58-60.

<sup>98</sup> *Giacomelli v. Italy* para 78; *Ibid*, n.13.

<sup>99</sup> *Hatton and Others v. The United Kingdom* paras. 123 – 127.

<sup>100</sup> *Taşkın and Others v. Turkey* para 117.

<sup>101</sup> *Tătar v. Romania*, App. No. 67021/01, European Court of Human Rights, 5 July 2007.

<sup>102</sup> *Taşkın and Others v. Turkey* paras 121-122, 125.

<sup>103</sup> *Brincat and Others v. Malta*, App no. 60908/11; 62110/11; 62129/11; 62312/11 European Court of Human Rights, 24 July 2014, para 112.

<sup>104</sup> Paras 212, 216.

<sup>105</sup> *Di Sarno and Others v. Italy*, App no. 30765/08, European Court of Human Rights, 10 January 2012, para 111.

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Thus, positive obligations for Art. 2 and Art. 8 of the ECHR have resulted in a framework that allows European citizens to fight industrial air pollution based on the minimum European standards as laid out in their domestic laws or resulting from European Directives and legislation and other clear international obligations.<sup>106</sup> An example is the case of *Brincat v. Malta*,<sup>107</sup> where a clear international obligation on the state to protect its citizens was derived from international scientific evidence about asbestos. This framework empowers European citizens to act in case of interference with their rights if such interference is caused by industrial air pollution.

### 5. THE ECtHR IN THE NETHERLANDS

By the end of the 1970s, the Netherlands had a good track record regarding compliance with the ECHR. It complied proactively and implemented judgments involving other countries in its legal system.<sup>108</sup> In 1980, ten years after lawyers in the UK started using the ECtHR,<sup>109</sup> Dutch lawyers actively turned to the ECHR. By this time, it was clear to the general population, legal experts, and the judiciary that the ECHR added an important layer of protection for individual applicants against the Dutch state. A general growing public interest in human rights led to the renewal of the Dutch Constitution in 1983. The renewal of the Dutch Constitution did not lead to enforceable obligations on the Dutch government but merely established the intentions of the government.<sup>110</sup> The Dutch Constitution includes a duty on the state regarding the environment, namely Art. 21: “It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment”. This article is part of the chapter on social rights of the Dutch Constitution. This limits the government's obligations to include environmental interests in its considerations and actions and ensure environmental legislation contains procedural rights for the population.<sup>111</sup> Additionally, the protection of the environment may not deteriorate. Jurisprudence based on this article confirms that Art. 21 of the Dutch constitution is not enforceable.<sup>112</sup> Therefore, the ECHR is the only human rights option for Dutch citizens to use in court wishing to attempt to protect themselves against the negative consequences of industrial air pollution.

The first case concerning the ECHR occurred in the Dutch courts in 1978, and the first environmental case based on Art. 2 of the ECHR was the

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<sup>106</sup> Theil, S., *Towards the Environmental Minimum: Environmental Protection through Human Rights*. (Cambridge: Cambridge University Press, 2021).

<sup>107</sup> *Brincat v Malta* (note 100) para 106.

<sup>108</sup> Sap, J. W., “De verankering van mensenrechten in Europa en Nederland werd geïnspireerd door Amerika” (2009) *Groniek* (September 2009) 145-160. <<https://research.vu.nl/en/publications/de-verankering-van-mensenrechten-in-europa-en-nederland-werd-ge%C3%AFn>>.

<sup>109</sup> *Ibid*, n.13 at 10.

<sup>110</sup> Fleurke, F. M., *Commentaar op Artikel 21 van de Grondwet* (Tilburg: Tilburg University, 2014 at 1). <[https://pure.uvt.nl/ws/portalfiles/portal/27007969/NLrechtsstaat\\_GWartikel21\\_1\\_.pdf](https://pure.uvt.nl/ws/portalfiles/portal/27007969/NLrechtsstaat_GWartikel21_1_.pdf)>.

<sup>111</sup> Verschuuren, J., “The Constitutional Right to the Protection of the Environment in the Netherlands” (1994) *Revue Juridique de l'Environnement* 82-83.

<sup>112</sup> *Ibid*, n.109



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*Nuclear Missiles* case in 1989. The contested issue was the placement of nuclear weapons in the Netherlands. One constituting element of the complaint was the substantial danger to the population's lives in case of accidents, Art. 2 of the ECHR. The Supreme Court of the Netherlands decided the mere possibility of accidents with life-threatening consequences does not constitute a violation of Art. 2 of the ECHR.

The Dutch parliament, other legislators, and the administration did not have an adequate policy or framework for implementing the ECHR norms. There was reluctance to implement the ECHR norms, as policy goals were considered to trump individual rights, and there was a lack of expertise on the topic. This lack of expertise was also visible in the courts resulting in insufficiently argued case law.<sup>113</sup> Until 2000, the ECHR was relied upon in isolated cases, and there were only a few cases related to environmental problems and Art 2. and Art. 8 of the ECHR. In its case law, the Supreme Court decided the possibility of reviewing Dutch legislation against the ECHR was restricted to the minimum standards the ECtHR established. The Supreme Court of the Netherlands and the Administrative Law Division of the Council of State interpreted the ECHR similarly, specifically as much as possible in line with national legislation and jurisprudence. Lower courts usually referred to the case law of the highest Dutch court instead of the ECtHR case law.<sup>114</sup>

Despite the increasing reluctance to use the ECHR, individuals started to use the ECHR more and more in legal proceedings, and legal proceedings regarding industrial air pollution including the ECHR began to occur. The constant concern about industrial air pollution among the public, and the new scientific developments seem to align with the willingness of individuals and NGOs to take legal action. At the start of the 2000s, several cases concerning pollution based on Art. 8 of the ECHR were decided. In these cases, the Dutch administrative courts either ignored Art. 8 of the ECHR in their judgments or determined that there was no violation of Art. 8 of the ECHR because the procedures of the specific legislation had been complied with, which negates serious nuisance. The courts did not underpin their conclusions regarding the correct use of the margin of appreciation or the fair balances that were supposedly struck.<sup>115</sup> In the *Schiphol Nuisance* case,<sup>116</sup> the Administrative Law Division of the Council of State determined that a fair balance had been struck without setting out their arguments. It merely referred to conducted studies that led to a restriction regarding the use of Schiphol but not to ECtHR case law, nor did it weigh the economic interest of the community against individual interests.<sup>117</sup>

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<sup>113</sup> Barkhuysen, T., "Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht" (Den Haag: Boom Juridische uitgevers, 2004), p.7-113 at 94-96.

<sup>114</sup> Gerards, J., "Grondrechten in de Nederlandse rechtspraak" (2013) 3 Rechtstreeks 17-39 at 26.

<sup>115</sup> Verschuuren, J. M., "Invloed van het EVRM op het materiele omgevingsrecht in Nederland." In VAR-reeks 132. De betekenis van het EVRM voor het materiele bestuursrecht. (Boom Juridische Uitgevers, 2004), p.253-312 at 286-288.

<sup>116</sup> Ibid, para. 2.35.1-2.35.2.

<sup>117</sup> Ibid.

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The case law of the civil courts is similar. In the *Chlorine Train* case, the District Court of Almelo ignored the fact that Art. 8 of the ECHR was invoked.<sup>118</sup> In the *Fireworks Tragedy Enschede* case, the District Court of The Hague determined that no violation of Art. 2 and 8 of the ECHR had taken place because the risk to the applicants was not known before the explosion happened.<sup>119</sup> This has been confirmed by the Court of Appeal of The Hague §16, which stated there was no immediate danger of an explosion that the State or the municipality could have foreseen. There is no further underpinning of this part of the decision.

The Dutch government complied with its obligations under the ECHR, although sometimes with significant delays. Thus, a greater reliance on the ECHR might not have changed the outcome of legal proceedings. However, cases concerning severe pollution might have benefitted if the fair balance had been explicitly argued.<sup>120</sup> Such argumentation could have resulted in a reinforcement of individual interests.<sup>121</sup> These instances of brief reasoning shows the reluctance to review Dutch legislation and the actions of authorities, and also by the lack of good arguments brought forward by the parties.<sup>122</sup> Despite this lack of argumentation, the ECHR was increasingly used in Dutch case law, according to Gerards this was due to the manageability of the substantive rights, the clear criteria in the ECHR articles, and the growing familiarity with these concepts, not the possibility to review legislation.<sup>123</sup>

Although the case law of the ECtHR has been very successful in Europe, it did not take off immediately in the Netherlands. The visible impact of the case law regarding Art. 2 and Art. 8 of the ECHR in the Netherlands was also limited due to the relatively good adherence of the Dutch government to European Directives. However, it did become an established part of Dutch case law by the 2000s. The compliance of the Dutch government can be seen as an expression of Dutch public opinion and the acceptance of scientific developments by the government so that legal proceedings were not often necessary.

An important difference between the ECHR and Dutch law is access to the court by non-governmental organizations (NGOs) in industrial air pollution cases, as the ECtHR does not accept an *actio popularis*, i.e. claims by unspecified numbers of persons. Claims must be directly relevant to individual applicants and specify how actions or omissions of the Member States have directly impacted them or might realistically impact them if

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<sup>118</sup> Ibid.

<sup>119</sup> Para 27.3.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid at 288-289.

<sup>122</sup> Barkhuysen, T., *Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht*. (Den Haag: Boom Juridische uitgevers, 2004), p.7-113 at 48-49.

<sup>123</sup> Gerards, J., “Grondrechten in de Nederlandse rechtspraak” (2013) 3 Rechtstreeks 17-39 at 30.

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domestic legislation and regulations would realistically be expected to be carried out, which cannot be proven for NGOs.<sup>124</sup>

### 6. SCIENTIFIC DEVELOPMENTS AND A NEW FOCUS OF PUBLIC OPINION

The Netherlands have continued to prosper since 1960. Despite the more recent financial crises extreme poverty does not exist anymore in the Netherlands. This privileged position has ensured that the environment remained a topic in public opinion and is part of discussions about the future.<sup>125</sup> In comparison to other EU countries the Netherlands has a high dependency on energy, higher than average per capita greenhouse gas emissions, and a smaller share of renewable energy.<sup>126</sup> The goal for the Netherlands is to be climate-neutral in 2050.<sup>127</sup> The main focus of public opinion has changed, and scientific developments have had an impact on the case law of the ECtHR and on Dutch case law.

#### 6.1 New Focus of Public Opinion on Climate Change

People are aware that prosperity comes at a cost. In Europe, in 2013, air-related health issues such as respiratory disorders, cardiovascular diseases, and asthma/allergies were viewed as serious problems by the majority of the public. Kelly and Fussell argue that if people had better information about the consequences of (industrial) air pollution on health, it would lead to behavioural changes. These would be reflected in politics and lead to policy and legislative changes.<sup>128</sup>

Between 2015 and 2019 the percentage of people naming the climate as a problem increased, simultaneously to media attention for the Paris Agreement in 2015 and the Climate Accord in the Netherlands in 2019. The environment is now strongly linked to discussions about climate change and sustainable development, and not to industrial air pollution. People are convinced they are the most willing, and industry is the least willing, to act in favor of the environment, although industry is expected to be able to make the most significant difference. A governance network is expected to provide

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<sup>124</sup> *Asselbourg and Others v. Luxembourg*, App no. 29121, European Court of Human Rights, 29 June 1999, p. 6; *Besseau and Others v. France*, App no. 73893/0, European Court of Human Rights, 7 February 2006, p. 9-10; *Greenpeace and Others v. Germany* App no. 18215/06, European Court of Human Rights, 12 May 2009, p. 4, *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği against Turkey* App no 37857/14, European Court of Human Rights, 7 December 2021, para 39-43; *Ibid*, n.13 at 177.

<sup>125</sup> Lintsen, H. & Smits, J. P., "The Long-Term Development: In Search of a Balance". In: H. Lintsen, F. Veraart, J. P. Smits, J. Grin, editors. *Well-being, Sustainability and Social Development: The Netherlands 1850–2050*. (Cham: Springer International Publishing, 2018), p. 483-508 at 485.

<sup>126</sup> Eurostat. *Key figures on Europe* 2024 edition. 2024.

<sup>127</sup> Verbeek-Oudijk, D., Hardus, S. Broek, A., & Reijnders, M., "Sociale en Culturele Ontwikkelingen" (2023) Stand van Nederland 90.

<sup>128</sup> Kelly, F. J. & Fussell, J. C., "Air pollution and public health: emerging hazards and improved understanding of risk" (2015) 37 (4) *Environ Geochem Health* 631-49 at 640.

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the best ideas for sustainable development. This is seen as a shared responsibility between the government, businesses, and citizens.<sup>129</sup>

Industry was presumed to be the main threat to air quality in public opinion in the Netherlands in 2013.<sup>130</sup> According to public opinion, air quality deteriorated between 2013 and 2019 and improved between 2019 and 2022. Despite this improvement, people still felt that the air quality was poor compared to 2013.<sup>131</sup> This more negative perception of air quality might be linked to the loss of trust in the government and industry, as the amount of emissions in the Netherlands has decreased and been significantly lower than that of, for instance, Germany and the United Kingdom for NO<sub>x</sub>, SO<sub>2</sub>, CO, BC, NH<sub>3</sub>, and NMVOC since 1945, see as examples figure 2 for nitrogen oxide and figure 3 for ammonia. Despite this, the Dutch public is the most dissatisfied with the efforts of public authorities and large industrial installations to promote air quality, which might lead to its strong preference for stricter pollution control and better enforcement of legislation.<sup>132</sup>

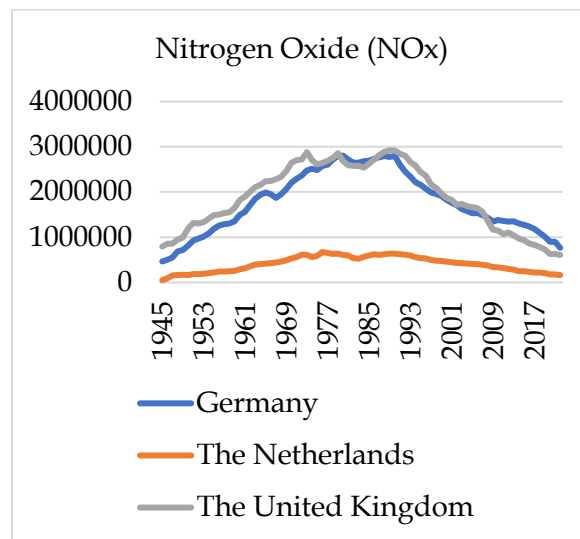


Figure 2: Created by Jaïke Wolfkamp based on the Nitrogen Oxide (NO<sub>x</sub>) data set, extracted 13.06.2024 from <https://ourworldindata.org/air-pollution> (Community Emissions Data System, 2024)<sup>133</sup>

<sup>129</sup> den Ridder, J. & Dekker, P., “Publieke opinie”. In: A. Wennekers, J. Boelhouwer, C. Campen, J. Kullberg, editors. *De sociale staat van Nederland* 2019. (Den Haag: Sociaal en Cultureel Planbureau, 2019 at 61-63).

<sup>130</sup> TNS, *Political & Social Attitudes of Europeans towards air quality* (2013).

<sup>131</sup> Kantar, “Attitudes of Europeans towards air quality” (2019); Kantar, “Attitudes of Europeans towards air quality” (2022).

<sup>132</sup> Ibid.

<sup>133</sup> <https://ourworldindata.org/explorers/air-pollution>

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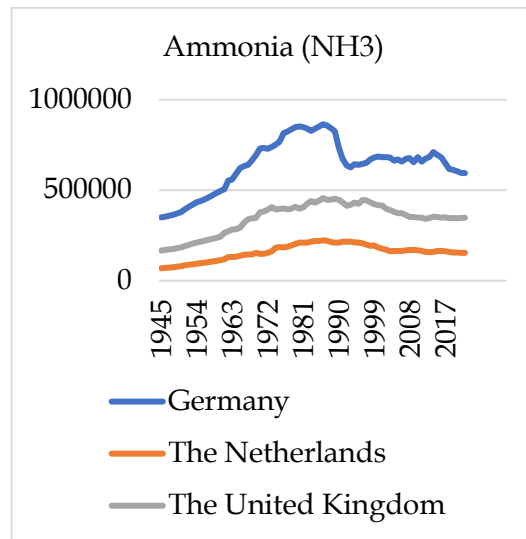


Figure 3: Created by Jaike Wolfkamp based on the Ammonia (NH<sub>3</sub>) data set, extracted 13.06.2024 from <https://ourworldindata.org/air-pollution> (Community Emissions Data System, 2024)<sup>134</sup>

Most European air quality plans, including the Dutch one, are focused on the transport sector (70%), and only 8% of the plans are focused on the industry. For the Netherlands, this is logical because between 2014 and 2022 the limits placed on emissions were mostly exceeded in places with heavy traffic.<sup>135</sup> However, industry in the Netherlands contributed around 40% of the total emissions for SO<sub>2</sub>, 30% of NMVOC, 35% of PM<sub>2.5</sub>, 15% of NO<sub>x</sub>, and 2% of NH<sub>3</sub> from 2010 to 2021, and should not be ignored.<sup>136</sup> Dutch emissions, except for NMVOC, are below the European reduction commitments, but higher than the requirements of the new WHO Guidelines.<sup>137</sup> Due to the prioritization of climate change, local residents of industrial plants are at a disadvantage in improving their living environment.

### 6.2 Scientific Developments Regarding Industrial Air Pollution and Health

In 2015, new research showed that the WHO guidelines were not stringent enough, because there is no safe threshold for humans regarding PM<sub>2.5</sub> and PM<sub>10</sub>. Higher levels of PM cause increased respiratory and cardiovascular health problems and negatively impact health issues ranging from diabetes to the reduction of cognitive functions. Air pollution was proven to be the most important environmental factor leading to premature mortality. The positive news is that any improvement of air quality directly

<sup>134</sup> Ibid.

<sup>135</sup> “Managing air quality in Europe” [press release]. Copenhagen: European Environment Agency, 2021.

<sup>136</sup> EEAA, “Netherlands - air pollution country fact sheet” (2023).

<sup>137</sup> EEAb, “Netherlands - air pollution country fact sheet” (2023).

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leads to health improvements.<sup>138</sup> In Europe, air pollution is estimated to cause 400,000 premature deaths per year, especially in cities, and is mainly caused by exposure to PM and NO<sub>2</sub>.<sup>139</sup> The WHO Guidelines were much stricter overall than the EU limits of air pollution concentrations between 2015 and 2017.<sup>140</sup> The WHO Guidelines of 2021 are even stricter.

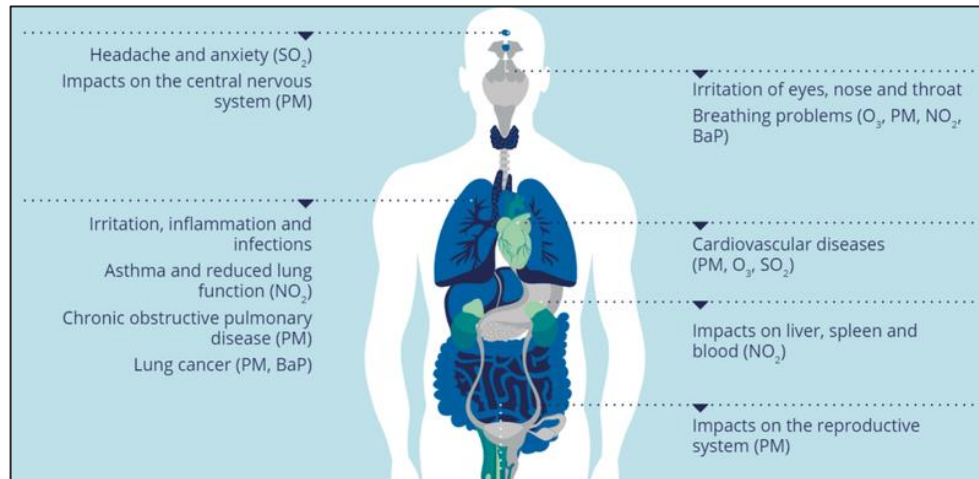


Figure 4: Researchers have observed the impact on health of air pollution and linked specific pollutants to various consequences (EEA, 2023a).

Climate change is a global problem with extensive consequences for human health and ecological systems. Policies aiming to reduce climate change will often also reduce industrial air pollution, especially those focused on reducing short-lived climate pollutants – methane, black carbon, and hydrofluorocarbon (in the atmosphere for less than 15 years). Methane and black carbon are also an important cause of premature death; e.g. methane emissions cause ground-level ozone (O<sub>3</sub>), and black carbon (i.e. soot) is a component of PM<sub>2.5</sub>.<sup>141</sup> An epidemiological study in the south-west of the Netherlands, a region with a lot of industrial air pollution and little pollution related to transport, concluded there was a strong correlation between high levels of pollutants and health problems in direct relation to the duration of the exposure.<sup>142</sup> See figure 5 for the connections between pollutants and various health problems.

Based on scientific proof and the outcome of the health problems caused by industrial air pollution Art. 2 or 8 of the ECHR might be violated.

<sup>138</sup> Kelly, F. J. & Fussell, J. C., “Air pollution and public health: emerging hazards and improved understanding of risk” (2015) 37 (4) *Environ Geochem Health*. 631-649 at 633-635.

<sup>139</sup> EEA, “Assessing air quality through citizen science” (Copenhagen: European Environmental Agency, 2019).

<sup>140</sup> Ibid.

<sup>141</sup> Fuller, R., Landrigan, P. J., Balakrishnan, K., Bathan, G., Bose-O'Reilly, S., Brauer, M., et al., “Pollution and health: a progress update”, (2022) 6 (6) *Lancet Planet Health* e535-e47.

<sup>142</sup> Bergstra, A. D., Been, J. V., & Burdorf, A., “The association of specific industry-related air pollution with occurrence of chronic diseases: A register-based study” (2022) *Environ Res*. 209.



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In *Brincat and Others v. Malta*<sup>143</sup>, it was determined that Art. 2 of the ECHR was not applicable in the case of a diagnosis of malignant mesothelioma caused by the work with asbestos on a shipyard. The disease was not considered life-threatening, instead Art. 8 of the ECHR was applicable, confirming the similarities between Art. 2 and Art. 8 of the ECHR in cases concerning dangerous activities. A violation of Art. 2 of the ECHR was only found for the person who did die of the work with asbestos.<sup>144</sup>

The steel industry is one of the main sources of PM because of its use of coal combustion, which is necessary to reach the required temperatures for the melting of steel.<sup>145</sup> Steel is used for many products, from cars to wind turbines, and cannot easily be replaced by renewable materials. Since the 1970s, worldwide steel demand has increased more than threefold and is expected to continue to increase as emerging economies add to the existing demand. To mitigate the effects of this growth and reduce industrial air pollution, decarbonization of the steel industry is essential, and many roadmaps and plans for the circular use of steel have been published.<sup>146</sup> The Netherlands has provided its industry with a guide on industrial emission control techniques to help businesses improve air quality and public health in line with the Dutch rules, regulations, and agreements on the topic.<sup>147</sup> Scientific developments have thus impacted (soft) law in such a way that industrial air pollution should decrease further. The negative impact on health from industrial air pollution has also been more clearly proven.

## 7. THE ECHR IN DUTCH CASE LAW

Dutch courts have often dismissed claims based on the ECHR using standard phrases and giving limited judicial reviews. This seems to be due to the reliance of the courts on the wide margin of appreciation and the apparent preference for economic interests in combination with problems caused by the burden of proof resting on the applicant.<sup>148</sup> The judiciary would find the existing policies of the Dutch government adequate, and parties failed to convince the judges a higher level of protection is required under the ECHR. In the *Odor Nuisance Livestock Farm* case,<sup>149</sup> the Council of State decided the nuisance was permitted based on relevant legislation,

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<sup>143</sup> Paras 82-85.

<sup>144</sup> *Brincat and Others v. Malta* (note 100) para 117.

<sup>145</sup> Kelly, F. J. & Fussell, J.C., “Air pollution and public health: emerging hazards and improved understanding of risk” (2015) 37 (4) *Environ Geochem Health* 631-49 at 638.

<sup>146</sup> Kim, J., Sovacool, B. K., Bazilian, M., Griffiths, S., Lee, J., Yang, M., et al., “Decarbonizing the iron and steel industry: A systematic review of sociotechnical systems, technological innovations, and policy options” (2022) *Energy Research & Social Science* 89.

<sup>147</sup> van der Auweraert, R. & Brouwer, A., “Luchtemissiebeperkende technieken” (2022) *Handreiking TAUW*.

<sup>148</sup> Krommendijk, J., “Beyond Urgenda: The role of the ECHR and judgments of the ECtHR in Dutch environmental and climate litigation” (2021) 31 *Review of European, Comparative & International Environmental Law* 60-74.

<sup>149</sup> *Applicant and others v. the municipal executive of Peel and Maas*, ECLI: NL:RVS:2012:BX7700, para 11.4.

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which meant a fair balance had been struck, and the legislation fell within the margin of appreciation of the legislature. In the *Gas Extraction I* case,<sup>150</sup> the Council of State decided the legislation, while referring to Art. 2 and 8 of the ECHR, was within the wide margin of appreciation, and although, the balancing by the Minister was inadequate, this was nevertheless considered sufficient and to lay within the margin of appreciation. In both cases, there was no substantive argument laid out by the Council of State for the fair balance.<sup>151</sup>

### 7.1 The ECHR in Dutch Case Law Regarding the State

In the *Air Quality* case I, two NGOs, Milieudefensie and Stichting Adem, argued that the Dutch State had failed to adequately reduce NO<sub>2</sub> and PM<sub>10</sub>, resulting in health damage and premature deaths in violation of Art. 2 and Art. 8 of the ECHR.<sup>152</sup> The Preliminary Injunction Judge in The Hague ordered the State to comply with air quality limits set by EU Directives, which the Dutch State did during the appeal from the proceedings on the merits.<sup>153</sup> Further, the court ordered that the State remain within its margin of appreciation by adhering to the EU Directives instead of the WHO Guidelines.<sup>154</sup> Currently, the Dutch State strives to meet the WHO Guidelines of 2005, not the more stringent ones of 2021.<sup>155</sup> Thus, the case benefitted the Dutch public, as during the appeal the State complied with the EU Directives. A new development is also the more extensive argumentation about the margin of appreciation, even though it does not include references to the ECtHR case law, which reflects the importance in the public opinion of this topic and the increased knowledge on this topic.

Increasingly, civil law is chosen over administrative law by potential victims of industrial air pollution. These procedures, or the threat of procedures, might influence the response of the Dutch State to environmental and health risks, as set out above.<sup>156</sup> The turn to human rights in domestic proceedings for environmental and climate protection started in 2016 in the Netherlands.<sup>157</sup> Between the 1<sup>st</sup> of January 2016 and the 31<sup>st</sup> of December 2020, the number of cases either directly or indirectly relying on Art. 2 and Art. 8 of the ECHR grew significantly when one looks at substantive rights, see figure 5 for cases where parties rely on the ECtHR. In silent cases, the reliance is implicit.<sup>158</sup> The rights perspective has been used in different ways in the

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<sup>150</sup> *Applicants v. Minister of Economic Affairs* (“*Gas Extraction I*”) ECLI:NL:RVS:2015: 3578, paras. 639-40.4.

<sup>151</sup> *Ibid.*, n.145.

<sup>152</sup> *Vereniging Milieudefensie and Others v. The State of the Netherlands*, ECLI:NL:RBDHA:2017:10171 (“*Air Quality Case I*”).

<sup>153</sup> *Vereniging Milieudefensie and Others v. The State of the Netherlands*, ECLI:NL:GHDHA:2019:915 (“*Air Quality case II*”) paras 4.17, 3.28.

<sup>154</sup> *Air Quality case II* para 3.23

<sup>155</sup> Veiligheid Ovd, “Industrie en omwonenden: Onderzoeksraad voor de Veiligheid” (2023).

<sup>156</sup> de Jong, E., “Rechterlijke risicoregulering en het EVRM: over drempels om de civiele rechter als risicoreguleerder te laten optreden” (2018) 43 (2) NTM-NJCM Bull..

<sup>157</sup> *Ibid.*, n.145.

<sup>158</sup> *Ibid.*, p. 63.

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Netherlands. First, the rights perspective is used as a sword, e.g. in the *Urgenda* case, to compel authorities to be proactive and increase environmental protection, see figure 6. Further, it is used as a defence against government measures protecting the environment and hybrid cases showing the tension between long and short-term climate and environmental goals and considerations. The first group will be discussed here.<sup>159</sup>

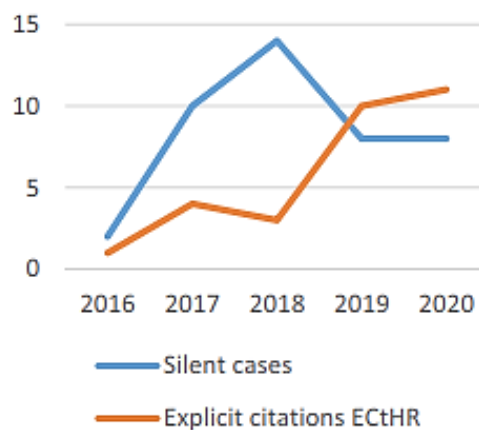


Figure 5: Cases where parties rely on the ECtHR. In silent cases, the reliance is implicit (Krommendijk, 2021, p. 63)

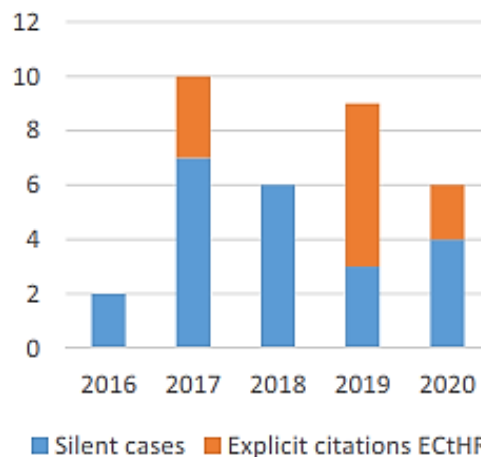


Figure 6: Sword cases (Krommendijk, 2021, p. 63).

The ECHR was used as a sword in the *Gas Extraction* case II,<sup>160</sup> the *Air Quality* case, and the *Urgenda* case. The District Court of Noord Nederland determined in the *Gas Extraction* case II that the State breached its duty of

<sup>159</sup> Ibid.

<sup>160</sup> *Applicants and Others v. Nederlandse Aardolie Maatschappij B.V. and the State of the Netherlands* (Ministry of Economic Affairs) (“Gas Extraction case II”) ECLI:NL:RBNNE:2017:715.

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care under Art. 6:162 of the Dutch Civil Code because it did not reduce gas extraction after the earthquake in Huizinge in 2012 and ignored the report of 2013 advising the State to reduce the gas extraction.<sup>161</sup> However, the remaining claims were rejected, and the Nederlandse Aardolie Maatschappij (NAM) was obliged to compensate the applicants. The *Urgenda* case concerned climate change. The Supreme Court determined, based on Art. 2 and Art. 8 of the ECHR, that the Dutch State must comply with the minimum target of 25% CO<sub>2</sub> reduction by 2020 in line with agreed targets and international consensus, while it is free to choose the means it will use to reach this target.<sup>162</sup> Art. 2 and Art. 8 of the ECHR could be applied because the concept of real and immediate danger was stretched to a period of a lifetime,<sup>163</sup> because climate change is a real threat, and the serious risk will most likely occur during the lifetime of younger Dutch nationals. The Supreme Court underpinned its decision with extensive argumentation.

The *Urgenda* case gave rise to many discussions about the competencies of the judiciary, similar to those relating to the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* case.<sup>164</sup> Part of the legal community sees the *Urgenda* case as part of the law-making role of the judiciary, another part as judges exceeding their competences by taking the place of the legislator, which some consider to be antidemocratic. Striking is the much more intense scrutinization of the actions of the State in the *Urgenda* case than in the *Air Quality* case II. This difference is attributed to the idea that air pollution is considered to be less threatening than climate change. The last one benefits from a broader scientific consensus established by the IPCC (60).<sup>165</sup>

### 7.2 The ECHR in Dutch Case Law Regarding Businesses

In a new development, businesses are seen as essential to achieving international justice for human rights.<sup>166</sup> This has led to action on the international, European, and local level. On the international level, in 2011, the OECD Guidelines inserted a new Chapter IV concerning human rights, and the United Nations published the UNGP, which is based on widely supported ideas about the responsibilities of businesses concerning sustainability.<sup>167</sup> The UNGP expects all business enterprises to have appropriate policies and processes in place to ensure they meet their responsibilities regarding human rights or remedy the situation if they don't,

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<sup>161</sup> Ibid paras 4.1.4, 4.1.12.2, 5.3.1.

<sup>162</sup> *Urgenda* (note 7) paras 7.5.1, 8.2.7-8.3.5.

<sup>163</sup> *Urgenda* (note 7) para 4.7 and 5.6.2 – 5.6.4.

<sup>164</sup> *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App No 53600/20, European Court of Human Rights, 9 April 2024.

<sup>165</sup> Ibid, n.154.

<sup>166</sup> Shelton, D., "Describing the elephant: international justice and environmental law". In: Ebbesson J, Okowa P, editors. *Environmental Law and Justice in Context*. (Cambridge: Cambridge University Press, 2009), p. 55-75.

<sup>167</sup> Limon, M., "The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council: Toward a Universal Right to a Healthy Environment?" In: J.H Knox, R. Pejan, editors *The Human Right to a Healthy Environment*. (Cambridge: Cambridge University Press, 2018), p. 189-214.

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Chapter III, article 15. Although the UNGP is not legally binding, the European Commission has expected all businesses to comply with them since 2011.

On the European level, the Parliamentary Assembly of the Council of Europe finalized the Human Rights and Business Resolution in 2010. The Netherlands responded to these new developments by adopting the National Action Plan on Business and Human Rights (NL B&HR) 2014, in line with international minimum standards, and in line with the UNGP including explicit goals. The Netherlands is willing to instigate negotiations but not to have more stringent regulations than other European countries.<sup>168</sup> Although human rights and the environment are treated as separate issues, this new focus on business entities gave rise to new case law, where businesses are held responsible for obligations under Art. 2 and Art. 8 of the ECHR by interpreting these obligations into their duty of care under Art.6:162 of the Dutch Civil Code.

In the *Gas Extraction* case II the District Court of Noord Nederland held the NAM accountable for the damages caused by the earthquakes triggered by gas extractions. This accountability was based on the duty of care of Art. 6:162 of the Dutch Civil Code, interpreted with Art. 2 and Art. 8 of the ECHR. The scale of the gas extraction was so invasive and long-lasting that the inhabitants of part of the Groningerveld regularly felt earthquakes.<sup>169</sup> This situation infringed on their rights even though the State had approved the gas extraction.<sup>170</sup>

The *Shell I* case was based on climate change and brought before the court by several NGOs. The District Court of The Hague determined that Shell had to reduce its CO<sub>2</sub> emissions to meet its obligations.<sup>171</sup> The responsibility of Shell was based on the use of Art. 2 and 8 of the ECHR and Articles 6 and 17 of the ICCPR and the UNGP for the interpretation of the unwritten standard of care of Art. 6:162 of the Dutch Civil Code. Art. 2 and 8 of the ECHR were deemed essential given the intrinsic significance of human rights and their societal value, which also influence the relationship between the NGOs and Shell.<sup>172</sup> The Court found the UNGP applicable for all business entities regardless of their endorsement of the UNGP.<sup>173</sup> Companies are expected to respect human rights and take action to meet their responsibilities independent of States' responsibilities.<sup>174</sup> The extent of the obligations resting on a specific company depends on the 'influence and control' it can take over its emissions and the chain it is a part of.<sup>175</sup>

The Court found climate change is caused by many sources, and each reduction is crucial; therefore, reducing emissions takes precedence over

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<sup>168</sup> NL B&HR 2022, p.54.

<sup>169</sup> *Gas Extraction* case II (note 180) paras 4.4.6-4.4.7

<sup>170</sup> Ibid para 4.2.4.

<sup>171</sup> *Shell I* (note 8) paras 4.5.6-4.5.7.

<sup>172</sup> Ibid paras 4.4.9-4.4.10

<sup>173</sup> Ibid para 4.4.11

<sup>174</sup> Ibid paras. 4.4.14-4.4.15

<sup>175</sup> Ibid paras 4.4.20-4.4.21

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Shell's economic interests.<sup>176</sup> This seems to align with Dutch tort law, which holds each party fully liable for the harm to which they contribute. This makes it theoretically easier to win climate change or industrial air pollution cases in the Netherlands than in other jurisdictions.<sup>177</sup>

Like the *Urgenda* case, the *Shell I* case has led to extensive discussion in legal literature regarding the competencies of the judiciary. It has been argued that the legislature should create climate legislation, and the judiciary could only step in in case of regulatory failure.<sup>178</sup> It was argued that such regulatory failure existed and the Court addressed this.<sup>179</sup> Finally, the effectiveness of the judgment was questioned. It could lead to a more general norm for businesses that are responsible for a high percentage of emissions of greenhouse gases or to the activities of Shell being taken over by other companies, which will not develop green alternatives but solely focus on profit.<sup>180</sup>

Shell successfully appealed the judgment. In the *Shell II* case, the Court of Appeal stated that civil courts can rule on Shell's legal obligation, notwithstanding the granting of the margin of appreciation to the Member States by the ECtHR, and can be more flexible and less restrained in how they assess the legal case than the ECtHR.<sup>181</sup> The Court of Appeal also found that protection against the dangers of climate change is a human right.<sup>182</sup> It confirmed the horizontal effect of human rights and concluded that climate change will interfere with human rights under Art. 2 and 8 of the ECHR, and these rights partly determine the interpretation of the duty of care under Art. 6:162 of the Dutch Civil Code.<sup>183</sup> The Court of Appeal does not agree with Milieudefensie that Shell has a responsibility to achieve a specific result regarding the reduction of CO<sub>2</sub> emissions, nor does it agree with Shell that business entities have no further responsibilities than those required by law. Instead, the Member States have emphasized that business entities have their own responsibilities to reduce their CO<sub>2</sub> emissions. Therefore, the duty of care might oblige individual business entities to reduce their CO<sub>2</sub> emissions.<sup>184</sup>

The Court of Appeal found that Shell had concrete plans to reduce its scope 1 emissions (direct emissions) and scope 2 emissions (indirect emissions caused by the companies where the business entity purchases the electricity, steam or heat for its activities) with more than the requested goal by Milieudefensie, and an imminent violation of these goals could not be

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<sup>176</sup> Ibid paras 4.4.54 – 4.4.55

<sup>177</sup> Howarth, D., "Environmental Law and Private Law" In: E. Lees, J.E. Viñuales JE, editors. *The Oxford Handbook of Comparative Environmental Law*. (Oxford University Press, 2019), p.0.

<sup>178</sup> Smeehuijzen, J. L., "De veroordeling van Shell tot 45% CO<sub>2</sub>-reductie in 2030" (2022) 8 *Nederlands Juristenblad* 540-548.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> *Vereniging Milieudefensie and Others v. Shell and Other*, ("Shell II case") ECLI:NL:GHDHA:2024:2099 (English translation) para 7.11.

<sup>182</sup> Ibid.

<sup>183</sup> Para 7.24-7.25

<sup>184</sup> Para 7.53



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found. Therefore, no further obligations rested on Shell. Concerning the scope 3 emissions (all other indirect emissions within the value-chain of the business entity) the scientific uncertainties and variations across sectors and countries are thus, that the requested claims cannot be granted, §7.111. In climate science, there is currently insufficient agreement on the exact percentage with which individual companies such as Shell have to reduce their emissions.

The question remains whether the right to clean air is also a human right and whether in analogy to the above reasoning, it would be possible to start legal proceedings against the negative health consequences caused by industrial air pollution against business entities, where the duty of care of Art. 6:162 of the Dutch Civil Code is interpreted with Art. 2 and Art. 8 of the ECHR, the UNGP and other soft law. Such questions might be answered in the coming years, as public opinion on climate change and industrial air pollution remains strong.

Milieudefensie has announced its next case, and people are invited to join a case against ING Bank and sign a petition against the major polluters.<sup>185</sup> Other legal proceedings have started, e.g. the public prosecutor's office has started a criminal case against TSN,<sup>186</sup> with a group of affected residents cooperating with Mobilisation for the Environment (MOB). The website of Frisse Wind. Nu! gives information about the criminal case. The goal is to charge TSN and/or its directors for polluting the living environment of local residents. More than 800 people and ten foundations filed a report with the public prosecutor's office. MOB has also started administrative proceedings against TSN to ensure its permit will be reviewed by the Province of Noord-Holland.<sup>187</sup>

On top of these criminal proceedings, a mass tort claim is being prepared by the foundation of Frisse Wind.nu on behalf of local residents. On the 23<sup>rd</sup> of August 2023, a notice of liability was delivered to TSN by the foundation on behalf of more than 1400 people. The underlying goal is not to make sure TSN closes, but to request damages on the one hand and ensure improvements on the other hand. The feeling exists that the Indian shareholders skim the company and refrain from investments in TSN. An example is that a pilot plant using innovative technology is pursued in India instead of in the Netherlands, although it was developed with Dutch and European subsidies.<sup>188</sup>

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<sup>185</sup> Milieudefensie, "About Milieudefensie" (2024). <<https://en.milieudefensie.nl/about-us>>.

<sup>186</sup> OM, "OM eist geldboete van 150.000 euro tegen Tata Steel IJmuiden B.V.: Openbaar Ministerie (OM)" (2022) <[https://www.om.nl/actueel/nieuws/2022/12/22/om-eist-geldboete-van-150.000-euro-tegen-tata-steel-ijmuiden-b.v/#:~:text=Het%20Openbaar%20Ministerie%20\(OM\)%20eiste,2018%20tot%20en%20met%202021](https://www.om.nl/actueel/nieuws/2022/12/22/om-eist-geldboete-van-150.000-euro-tegen-tata-steel-ijmuiden-b.v/#:~:text=Het%20Openbaar%20Ministerie%20(OM)%20eiste,2018%20tot%20en%20met%202021)>.

<sup>187</sup> MOB, "Stand van zaken in dossier Tata Steel" (2023) <<https://mobilisation.nl/index.php?id=65>>.

<sup>188</sup> FrisseWind.Nu, "Frissewindnu: voor een gezonde IJmond", (2024) <<https://www.frissewind.nu>>.

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### 8. CONCLUSION

The ECHR and the ECtHR case law have had a strong influence on Dutch case law, as well as on Dutch legislative activities relating to industrial air pollution. On the one hand, because the Dutch government complied with the ECHR on its own account, and because Dutch citizens have started to rely on the ECHR putting pressure on the government to comply with the ECHR at a later point in time. On the other hand, scientific developments and changes in public opinion have affected the case law of the ECtHR, and also the Dutch case law regarding the negative effects of industrial air pollution.

Even though air quality increased and emissions decreased, the Dutch public remained concerned about industrial air pollution. Criminal proceedings have been instigated, and legal proceedings on industrial air pollution are being prepared. The connection between industrial air pollution and human rights has become a firm part of the European consensus since 1991. Moreover, distrust of the government and industry among the general public is high due to government and industry's tendency to hide behind permits and technological solutions and denying problems regarding industrial air pollution. Together with the insufficiency of environmental legislation this has led to a high willingness to litigate and prompted Dutch citizens and NGOs to rely on the ECHR in their litigation to reduce climate change.

The ECtHR started to build up a system based on Art. 2 and Art. 8 of the ECHR in 1991, when it became clear that there was European consensus on this topic. The system was deemed to protect individuals from severe harm caused by industrial air pollution due to actions by the government or the lack of action by the government. It is a strong system, but the inadmissibility of NGOs as applicants except for climate cases will make it harder for a case concerning industrial air pollution to reach the ECtHR. Despite this system, which was also applicable in the Netherlands, Dutch case law has shown a long history of very little attention for the ECHR and the case law of the ECtHR.

The Dutch courts have broken with this tradition. In the *Air Quality* cases, the *Urgenda* case, and the *Shell* cases in cases concerning climate change the ECHR and ECtHR have been given extensive consideration by Dutch courts. Further, in the *Shell* cases, the ECHR is used to interpret the duty of care under Art. 6: 162 of the Dutch Civil Code, thus horizontalizing the rights of the ECHR and introducing these more strongly into the relationship between NGOs, individuals and business entities. These developments follow the strong ideas in public opinion and international, European, and Dutch (soft) law about businesses and their responsibility for human rights regarding climate change. However, it is not yet clear, whether the same results could be achieved in cases concerning the negative health effects of industrial air pollution. However, the latest ECtHR cases allow epidemiological proof in line with the latest scientific developments, which shows the use of the ECHR for industrial air pollution cases remains relevant

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and continues to be developed alongside new scientific and technological developments.

The question of whether the recent judgments in the *Air Quality* cases, the *Urgenda* case and the *Shell* cases will be applied in cases concerning industrial air pollution is still open. Further, it is uncertain how much change can be based on the ECHR, as a minimum standard, as the impact of the ECHR is limited in the political sphere. Despite the judgment of the Court of Appeal being in favor of Shell, the judgement might lead to stricter responsibilities on business entities in the future based on the interpretation of the duty of care under Art. 6 of the Dutch Civil Code with Art. 2 and 8 of the ECHR, the UNGP, and other Dutch, international, and European (soft) law. Business entities might have to undertake more than drafting corporate responsibility statements; they might be held to their goals and might have to make financial sacrifices or undertake scientific efforts to reduce industrial air pollution caused by the processes from which they make their profits. If the Netherlands, as one of the wealthiest countries on earth, and multinational enterprises like Shell and Tata are forced to be part of this progress, this could have a significant impact on the reduction of industrial air pollution in The Netherlands and beyond.

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**AUTHORS' DECLARATION AND ESSENTIAL ETHICAL COMPLIANCES**

*Authors' Contributions (in accordance with ICMJE criteria for authorship)*

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Conceived and designed the research or analysis	Yes	No
Collected the data	Yes	No
Contributed to data analysis and interpretation	Yes	Yes
Wrote the article/paper	Yes	Yes
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