The Civil Court as Risk Regulator: The Issue of its Legitimacy

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Abstract

Taking the Urgenda case on climate change liability as an example, this article researches the more general question into the legitimacy of risk regulation by civil courts. Which principles determine the legitimacy of a civil court's participation, especially in the domain of societal risk regulation? The central claim is that these principles concern (amongst many other things) the position of the court, the tools of the court, and the attitude of the court. In other words, they have their source in constitutional law, civil (procedural) law, and professional ethics respectively. This claim is substantiated by an analysis of these principles, their interpretation, and the way they contribute to a normative/theoretical framework for the assessment of the legitimacy of judicial rulings.

I. Introduction

In the spring of 2015 the District Court of The Hague issued a ruling that had a tremendous impact across the globe.[1] In the case of *Urgenda ea v the State of the Netherlands* the Court issued an injunction against the Dutch government to reduce the emission of greenhouse gases (GHGs) before 2020 by 25% compared to 1990, whilst the government policy aimed at a reduction of (not more than) 17%.[2] Perhaps even more surprising than the decision – taken only six months before the UN Conference on climate change in Paris in December 2015 – was the reasoning of the Court. After allowing standing to Urgenda as plaintiff, the Court reasoned its way through the key concepts of tort law to motivate its decision that the State had violated its duty of care towards its citizens. In doing so, the Court used international and European obligations to construct wrongfulness under national tort law on the one hand, and displayed all available scientific knowledge to substantiate that wrongfulness on the other. In fact, the Court attributed responsibility for a sustainable development of the atmosphere to the Dutch government, and did this on the demand of a rather haphazard organization

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[1] A Nestlen, "Dutch government ordered to cut carbon emissions in landmark ruling", *Guardian* (24 June 2015), <www.theguardian.com/environment/2015/june/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>, accessed 16 February 2016.

[2] Rb. Den Haag, 24 juni 2015, ECLI:NL:RBDH:2015:7196. For the English translation: Court of The Hague, 24 June 2015, ECLI:NL:RBDH:2015:7145: Rb. Den Haag, C/09/456689/HA ZA 13-1396.

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of worried citizens. Therefore the *Urgenda* ruling raises questions with regard to the role of the civil court as risk regulator, especially with regard to the legitimacy of this role.

The *Urgenda* ruling raised many reactions, of course, some of them critical.[3] Is this ruling not a clear violation of the principle of the separation of powers? Is the Court not misusing tort law to trespass the domain of the politically legitimised legislator? If the judiciary does not hesitate to correct politics on a sensitive topic like climate change, what will be next? Other reactions were more favourable, however, praising the Court for its courage to step in where politics left off.[4] Is this not a clear signal that politics is losing control on the emission of GHGs, since they are too busy fighting about the question of who is to pay for it? Did the Court not understand the signs of the times correctly, as the Warren Court did when it called a halt to segregation in *Brown v Board of Education*?[5] Although there were also more neutral comments[6], the ruling of the Court divides commentators. What is lacking most of the time, however, is a critical reflection on the principles to decide who is right and who is wrong in this debate. What (kinds of) principles are involved? How are they to be interpreted? What effect do these interpretations have in the issue of the legitimacy of this ruling? And what do they imply for the role of the civil court as risk regulator more generally? Is the civil court just there to apply a pre-established scheme by the legislator? Is the scope of its decisions restricted to restore corrective justice between two litigants? Or may its decisions have a wider scope, displaying a more ambitious role? And if so, what limits are to be taken into account here?

In researching these questions, I will try to construct some building blocks of the normative/theoretical framework that provides the background of my answers. This means that I have a smaller and a bigger project on my hands. The smaller one is the question into the legitimacy of the *Urgenda* ruling. The bigger one concerns the issue of the legitimacy of risk regulation by the civil court, or perhaps of civil adjudication as such. Which principles determine the legitimacy of the civil court's participation, especially in the domain or societal risk regulation? I will put my charts right on the table. My claim will be that these principles concern (amongst many other things) the position of the court, the tools of the court, and the attitude of the court. In other words, they have their source in constitutional law, in civil (procedural) law, and in professional

[3] R Schutgens, "Urgenda en de trias: enkele staatsrechtelijke kanttekeningen bij het geruchtmakend klimaatvonnis van de Haagse rechter" (2015) NJB 2015/1675; L Bergkamp, "Het Haagse klimaatvonnis: rechterlijke onbevoegdheid en de negatie van het causaliteitsvereiste" (2015) NJB 2015/1676.

[4] R van Gestel and M Loth, "Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?" (2015) NJB 2015/1849. M Loth, "Climate change liability after all: A Dutch landmark case" (2016) Tilburg Law Review 21. In this line also (but before the Urgenda decision was issued): J Spier, *Shaping the Law for Global Crisis* (Eleven International Publishing 2012); C Drion, "Van een duty to care naar een duty of care" (2007) NJB 2007/45-46; T Hartlief, "Een rechtszaak uit liefde" (2013) NJB 2013/2448.

[5] J Kilinski, "International climate change liability: a myth or a reality?" (2009) 18 Journal of Transnational Law & Policy 378.

[6] J Lin, "The first successful climate negligence case: a comment on Urgenda Foundation v The State of the Netherlands, Ministry of Infrastructure and the Environment" (2015) 5 Climate Law 65; RB McKinstry Jr, "Potential implications for the United States of the Urgenda Foundation v The Netherlands decision holding that the UNFCCC and international decisions required developed nations to reduce emissions by 25% from 1990 levels by 2020" (2015), http://ssrn.com/abstract= 2632726, accessed 17 July 2015; J van Zeben, "Establishing a governmental duty of care for climate change mitigation: will Urgenda turn the tide?" (2015) 4 Transnational Environmental Law 339.

ethics respectively.[7] Therefore I will first address the constitutional principles (Section II), then the civil (procedural) law principles (Section III), and finally the moral attitudes with which they are both interpreted (Section IV).

In doing so my presupposition is that there is an element of choice in judging, which may be used for strategic reasons.[8] This implies that within the normative/theoretical framework developed here, different choices may be legitimate, even irreconcilable ones, as long as they stay within the framework. This seems to be in line with the common legal sense that different judicial decisions in one case may be correct, and are in fact the subject of continuous debate, as long as they do not fall outside the scope of legal reason. One of my conclusions will be that the *Urgenda* ruling is legitimate in this sense, since it falls within the scope of our framework (Section V). It is my contention that this framework may be used in other cases as well, and as such contributes to the bigger project referred to above.

II. Constitutional principles

The argument most often used against the *Urgenda* ruling is that it violates the principle of the separation of powers ("Trias Politica"). The central idea is, of course, that the doctrine of the separation of powers specifies a certain division of labour between politics and the judiciary, and that the Court in the *Urgenda* ruling trespasses the political domain.[9] The Court reviews such a highly sensitive topic for governmental policy as the emission of GHGs, and even gives an injunction to the government to adapt its democratically established policy. In doing this, the Court makes decisions that are essentially political by nature and therefore ought to be taken by the legislator or the government, but in any case not by the judiciary. One of the main arguments of the State was therefore that the debate on the emission of GHGs belongs in Parliament, not in a court of law.

For this reason, the Court explicitly addresses the argument, but refutes it.[10] The Court reminds us that under Dutch constitutional law there is no strict separation of powers, but a balance of powers. With regard to lawmaking the role of the judiciary is a subordinate one. Although it is generally recognised that the judiciary is legitimised to interpret statutes and even to fill the gaps in the legal system, this still restricts its role to that of a substitute for the legislator. When it comes to the grand design of society and the formulation of policy, the Court has to show restraint. With regard to legal protection, however, the judiciary is in the lead. The government is the defendant and its conduct is

[7] Since the position of the court is established in constitutional law, its tools are provided by civil (procedural) law, and its attitudes are part of their professional ethics. It is important to note right from the start that my claim is that the interpretation of the constitutional and the civil (procedural) law principles involved ultimately rests on diverging moral attitudes displayed by the courts (which are regularly conceptualised as "restraint" and "activism"). My claim is not that the choice of attitude is in some way facilitated by the principles involved, although that is not entirely nonsensical. There is always an element of circularity in justification.

[8] See L Epstin and J Knight, *The Choices Justices Make* (CQ Press 1988).

[9] R Schutgens, "Urgenda en de trias: enkele staatsrechtelijke kanttekeningen bij het geruchtmakend klimaatvonnis van de Haagse rechter" (2015) NJB 2015/1675.

[10] I have rephrased the following lesson in constitutional law in my own words, especially with regard to the distinction between the subordinate role of the judiciary in lawmaking, and its leading role in legal protection.

subject to judicial review. Since this system of legal protection is guaranteed by law, it is democratically legitimised. Urgenda's claims do not stretch outside the judicial domain since they do not ask for an order to legislate (which is prohibited under Dutch case law).[11] Furthermore, the requested injunction may be executed by different means, which is left to the discretion of the State. For these reasons, the Court itself sees no violation of any constitutional principle or rule if it orders the State to adjust its climate policy.

Although this is a subtle enough reasoning, it clearly has not convinced the critics. The core of their criticism still is (and will be) that the Court ought to have rejected the claims of Urgenda under the separation of powers doctrine. The discussion focuses largely on the independent position and the impartial role of the judiciary, especially in cases of legal protection against the government. An activist court in politically sensitive issues runs the risk of jeopardising its impartiality. There is a clear phrasing of this risk: "*The extra man on the field: Hey! Wasn't that the umpire*?"[12] Of course, if the umpire becomes an extra player, this distorts the whole logic of impartial conflict resolution. From then onwards, it will no longer be a game of one against one, decided by a third party, but a game of two against one.[13] For a court wanting to execute its own legal policy there may be strong reasons to step in, especially in case of government failure. On the other hand, this temptation may – according to some: must – be tempered by institutional concerns about the legitimacy of the decision.[14]

What strikes me in this debate is that the critics have overlooked an important change in the legal landscape, namely the development from a single- to a multilayered legal system. In the *Urgenda* case, the Court was not only confronted with national tort law, of course, but also with norms of international law, European law, and human rights law, to mention only the most important ones. What is more, these systems of norms are not separated ball-games anymore; they mutually influence one another and have to be interpreted into one coherent applicable legal framework. To continue on the metaphor of sports: "*The extra field to play: Hey! Wasn't that a separate game*?" Less metaphorically, the Court sees itself confronted with norms of different legal systems, each with their own legal sources, institutions, norms, conditions of satisfaction, legal consequences, and binding force. Although most of the norms of transnational origin are not directly applicable under Dutch law, the Court argues that they may have "reflex effect" on the open norms of national tort law.[15] This means that they substantiate the

[11] *Waterpakt* [2003] ECLI:NL:HR:2003:AE8462 (HR).

[12] This phrasing is borrowed from MA Glendon, *A Nation under Lawyers, how the crisis in the legal profession is transforming American society* (Harvard University Press 1994).

[13] M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).

[14] Because they are institutional concerns, they not address the content of the decision (the duty of care or the remedy), but the position of the court (its place in the institutional organisation of the State).

[15] I refrain from explaining the binding force of the different legal sources mentioned here. It suffices here to notice that under the Dutch Constitution the Court is under the obligation to apply self-executing provisions in international agreements directly in the Dutch legal system (Art 93, 94). This has resulted in a lively practice of human rights adjudication, as contained in the ECHR. Next, the courts of the Member States of the EU are European courts as well, which means that they are considered to be under the obligation to apply EU law within the national legal system, and to interpret the last in terms of the first. Finally, provisions of international agreements that have no direct effect for citizens in the national legal system, may have an indirect effect. The State is presumed to comply with its international obligations. This implies that a norm of national law may not be interpreted or applied in such a manner as to infringe such an international obligation, unless no other interpretation is available. This principle of consistent interpretation has the consequence that the Court is under an obligation to take into account these international obligations in interpreting

open norms of national tort law and thus have an indirect but substantive and normative effect on the case at hand. As such, they do bind the government's policy on the emission of GHGs, and it is for the Court to interpret and execute this amalgam of norms.[16]

This change in the legal landscape does not just effect substantive law, it has wider implications for the principle of the separation of powers as well. In a multi-layered legal system like this one, the Court is not only engaging with the national government and parliament, but also with European courts, international courts, and other European and international institutions. There are many more players on the field now, each with their own mission and responsibilities. If we take the principle of the separation of powers seriously – not just referring to the relation between the national legislator and judiciary, but to the idea and value of checks and balances – we must extend its scope to these new players as well.[17] This extension of the principle of the separation of powers to the transnational stage has two, intertwined implications, for the dialogue between the institutions involved.[18] The first is that the transnational institutions involved share a common responsibility to establish and maintain a system of checks and balances between them. This common responsibility underlines the need for cooperation. The second implication, however, is that if this balance is disturbed for whatever reason, this may justify for each institution to operate strategically, in order to restore the balance.[19]

At this point Eyal Benvenisti has claimed that this implies that national courts may be justified to engage in a counter-veiling coalition against new political powers at the transnational stage.[20] The *Urgenda* ruling provides a perfect illustration. The reason for the Court to correct the government's policy on the emission of GHGs might very well

(F'note continued)
national open norms and concepts (like that of due care). This so-called "reflex effect" of international law applies to norms of European origin as well.

[16] See K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

[17] The picture that it only applies to the relation between the national government and parliament, is already complicated by the fact that democratic decision-making is to be combined with the supposedly undemocratic character of judicial review (the so-called "counter-majoritarian difficulty"). The concept of "constitutional dialogue" is first presented in this context, to solve this difficulty by claiming that the courts engage in a dialogue with the legislator about the interpretation and application of constitutional norms. See C Bateup, "The dialogue promise; assessing the normative potential of theories of constitutional dialogue" (2006) 71 Brooklyn Law Review 1109; C Bateup, "Expanding the conversation: American and Canadian experiences of constitutional dialogue in comparative perspective" (2007) 21 Temple International Comparative Law Journal 1.

[18] See A Meuwese and M Snel, "Constitutional dialogue: an overview" (2013) Utrecht Law Review 99. See also M Loth, "Who has the last word? On judicial lawmaking in European private law" (2017) European Review of Private Law 45.

[19] Although some writers have stressed the communicative attitude of courts towards each other (see for example AM Slaughter, "Judicial globalization" (1999/2000) Virginia Journal of International Law 40; JH Weiler, "The transformation of Europe" (1991) Yale Law Journal 100), others have focused on their strategic attitude, while in fact they are both at play (see M Loth, "De Hoge Raad in dialoog; over rechtsvorming in een gelaagde rechtsorde" (2014) Tilburg University; E Paunio, "Conflict, power and understanding – judicial dialogue between the ECJ and national courts" (2010) 7 NoFo 5. See also A Dyevre, "Domestic judicial defiance in the European Union: a systematic retreat to the authority of EU law?" (2016) Yearbook of European Law 14.

[20] See E Benvenesti, "Reclaiming democracy: the strategic uses of foreign and international law by national courts" (2008) The American Journal of International Law 241. Compare E Benvenesti and GW Downs, "Going Global to Preserve Domestic Accountability: The New Role of Domestic Courts" in S Muller and S Richards (eds), *Highest Courts and Globalization* (The Hague Academic Press 2010). The only court exempted from this development is the US Supreme Court, since it does need to participate in these judicial fronts. Compare S Breyer, *The Court and The World, American Law and the New Global Realities* (Alfred A Knopf 2015).

have been that *supranational* decision-making was failing accross the board (apart from its judgment that the *national* reduction policy was substandard). If so, the decision of the Court does not violate the principle of the separation of powers, on the contrary, it is legitimised by this principle, now understood in its new extended application at the transnational stage. If all other institutions fail to develop a common policy that really addresses excessive global warming, the court is justified in its attempt to initiate a judicial counterveiling move that does just that. So I conclude, for now, that taking the transnational context into account sheds new light on the debate about the principle of the separation of powers, as well as on its role in the debate on the *Urgenda* ruling. Therefore the relevance of this change in the legal landscape is not restricted to the substantive law to be applied; it affects the constitutional position of the courts as such.

III. Civil (procedural) law principles

I switch now from the Court's position to its tools, and from the constitutional principles to the civil (procedural) law principles.[21] The starting point is that *Urgenda* displays both resemblances and differences to classical tort cases. The *Urgenda* case resembles classical tort cases in the sense that the Court reasons its way through familiar tort law concepts and standards. The Court applies the Learned Hand formula to establish the conclusion that the State has a duty of care towards its citizens to prevent a dangerous temperature rise of 2°C or more (compared to industrial times).[22] However, the government's policy is to the best of our knowledge not sufficient to prevent this from happening, as the Court argued extensively. The conclusion of the Court is therefore that this policy is substandard, which constitutes a wrongful act that justifies an injunction to adjust the policy of the defendant on the emission of GHGs. This whole argument finds its home in the context of national tort law, the very substance of which is, of course, the attribution of risks.[23]

However, *Urgenda* differs from classical tort cases in the sense that it is a class-action as well as a case of public interest litigation.[24] As class-action it started off as a claim of

[21] The distinction between position, tools and attitudes suggests a clear-cut distinction, while in fact the relations between constitutional law, civil (procedural) law, and professional ethics are not that simple. My intention, however, is not to deny the mutual influences such as the horizontal effects of human rights in private relations. It is just to make clear that for our purposes – the legitimacy of civil adjudicating – we need to address both constitutional law and civil (procedural) law.

[22] The original formulation is: "Since there are occasions when every vessel will break away from her moorings, and since, as she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury if she does; and (3) the burden of adequate precaution" (see J Spier, "Uncertainties and the state of the art: a legal nightmare" (2011) Journal of Risk Research. See for the Dutch version [*The Dutch Cellar Hatch*] ECLI: NL:HR:1965:AB7079, NJ 1966/136 (HR). Another formulation is provided by Art 4:102 of the Principles of European Tort Law (PETL): "The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and the value of the protected interests involved, the dangerousness of the activity, (…) the foreseeability of the damage (…) as well as the availability and the costs of precautionary or alternative measures".

[23] See, among many others, T Honoré, *Responsibility and Fault* (Hart Publishing 1999). He speaks of the attribution of risks ("the risk-principle") on the basis of distributive justice ("risk-distributive justice"). This goes for both known (falling into a cellar hatch) and unknown risks (asbestos, nano particles), which differ only in degree but not in principle. See E de Jong, "Voorzorgsverplichtingen, over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's" (2017) MvV.

[24] See L Enneking and E de Jong, "Regulering van onzekere risico's via public interest litigation?" (2014) NJB 2014/1136. As the *Urgenda* case illustrates, public interest litigation may be a strong instrument against powerful

the Urgenda foundation and 886 individual plaintiffs, filed against the State of the Netherlands.[25] This combination already blurs the differentiation between individuals involved. A Dutch supporter of Urgenda may rightly identify herself with both the plaintiff and the defendant. Besides, the public interest at stake is phrased in the by-laws of Urgenda as "to stimulate and steer up transition-processes to a sustainable society, to start in the Netherlands". For the definition of "sustainability", Urgenda refers to the Bruntland-report, which reads: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own ends."[26] The public interest of a sustainable society encompasses both an international and an intergenerational dimension. The decision of the Court to grant access to Urgenda implies that it is allowed to represent citizens of this country, people abroad, as well as future generations. This unlimited representation is not just an accident, it is the "raison d'être" of Urgenda. This poses serious problems for the traditional patterns of legitimation in tort law.

As far as the legitimation of the Court's decision is concerned, there are roughly two options, of which one justifies too little, and the other too much. If we stick to the deontic paradigm of tort law, our traditional legitimations stop short.[27] First, liability of the State cannot be justified by any compensatory scheme within the framework of the principle of corrective justice.[28] This can be illustrated by the Court's rejection of the defence of the State that the contribution of the Netherlands in the worldwide emission of GHGs is too small to be significant (only 0.5%, which is not more than "a drop in the ocean"). Starting from the notion of proportional liability, the Court argues that the State cannot escape responsibility for its fair share by pointing to its small contribution. This fair share is substantiated by the commitments the Netherlands has undertaken on the transnational stage on the one hand, and the relative high proportion of emissions per capita of the Dutch population on the other. Whatever the merits of these standards, they are applications of the principle of distributive justice and a far cry from the regular patterns of legitimation of tort liability that stick to the principle of corrective justice.[29]

(F'note continued)
repeat-players; see JH Nieuwenhuis, "Op gespannen voet: een evenwichtstheorie over de betrekkingen tussen het publieke en het burgerlijke recht" (1998) NJB.

[25] Article 3:305a of the Dutch Civil Code allows for class-actions by a legal person with the purpose of serving a general, collective or public interest, which is mentioned in its by-laws. This may result in an injunction of the court, not in the compensation of damage.

[26] World Commission on Environment and Development, "Report of the World Commission on Environment and Development: our Common Future" (1987) Bruntland Report.

[27] For an overview of the traditional legitimations I refer to W van Gerven, J Lever, and P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing 2000).

[28] Aristotle, *Nicomachean Ethics*, Book V, para. 2, no. 12, and paras. 4 and 5. There are different versions of the Aristotelian version of corrective justice, however, compare E Weinrib, *Corrective Justice* (Oxford University Press 2012), E Weinrib, *The Idea of Private Law* (Oxford University Press 2012), revised edition, with J Coleman, *Risks and Wrongs* (Oxford University Press 2002), and J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2003). See also R Wright, who compares "Weinrib's explicit formalism" with "Coleman's de facto formalism": R Wright, "Substantive Corrective Justice" (1992) Iowa Law Review.

[29] Because the decision of the Court on the fair share of the Dutch State rests not just on an attempt to right wrongs committed (as justified by the principle of corrective justice), but on a notion of the distribution of the burdens of precaution between states (as justified by its ideas on distributive justice).

Next, the liability of the State in *Urgenda* cannot be justified by the notion of satisfaction either. Generally we take the notion of satisfaction to include an element of recognition of the plaintiff's suffering, mirrored in the penance the remedy inflicts upon the defendant. But whose suffering is recognised by this ruling, and who does penance? If everybody is a victim as well as a perpetrator of excessive GHG emissions, then no one in particular is. We simply lack an identifiable victim or perpetrator here – or a group of victims or perpetrators – except for those who favour or oppose a sustainable society. So again, the traditional legitimation patterns within the deontic paradigm of tort law stop short.

If we switch to the law and cconomics paradigm, however, we may find that it justifies too much. From this perspective, tort law is just another mechanism for deterrence and risk regulation, next to for example public law.[30] The decisions of a court in tort law may be assessed by its effects on the prevention of dangerous risks, or they may be judged by their consequences for the distribution of the benefits and burdens of risk-causing behavior. In this view, tort law is a focal point for the distribution of risks. Only when a redistribution is required – in case of disturbance – the principle of corrective justice comes in.[31] Although this may seem a plausible approach at first sight – especially from the standpoint of risk regulation – at closer inspection it turns out that it provides a distorted image of tort law adjudication. Of course, tort law adjudication may have implicit consequences for risk regulation, but it was not designed for that purpose.[32] Tort law was designed to right wrongs, not more or less. For that reason, the courts decide tort cases one by one, ex post facto, and on the ground of the concepts and doctrines of tort law. From the external point of view of the law and economics scholar, the court's decisions may be justified by their deterrent effects, their consequences for rational risk regulation, or their contribution to a fair distribution of the burdens of precaution. From the internal point of view of the court itself, however, these legitimations are out of sight. They are not in the court's toolkit and therefore not available as patterns of legal reasoning. In that sense, they legitimise too much, aiming at goals far out of reach for a regular court.[33]

I hope this is sufficient to justify the conclusion that the available paradigms of tort law leave us empty handed. Of course, one could seek refuge in an alternative paradigm that focuses on the loss-spreading effects of tort law instead of its loss-shifting effects, and that assesses the distributive effects from some conception of social justice. But then the question is which conception of social justice, and on what grounds?

[30] See for example PGJ van den Berg, *Rechtvaardigheid en privaatrecht* (Gouda Quint 2000). See also MG Faure, "The complementary roles of liability, regulation and insurance in safety management: theory and practice" (2014) 17 (5–6) Journal of Risk Research 689.

[31] For this "distributive justice takes priority view" see R Dworkin, *Law's Empire* (The Belknap Press 1986), and RL Lippke, "Torts, corrective justice, and distributive justice" (1999) Legal Theory 149. For criticism see SR Perry, "On the relationship between corrective and distributive justice" in J Holder (ed.), *Oxford Series of Jurisprudence, Fourth Series* (Oxford University Press 2002) 237, and S Scheffler, "Distributive Justice, the basic structure and the place of private law" (2015) Oxford Journal of Legal Studies 213. See also P Benson, "The basis of corrective justice and its relation to distributive justice" (1992) Iowa Law Review 515.

[32] For a thorough analysis of tort law as mechanism for risk-regulation see HA Cousy, "Risks and uncertainties in the law of tort" in H Koziol and BC Steiniger (eds), *Tort & Insurance Law* (Springer Verlag 2008).

[33] One exception seems to be the Learned Hand formula, which is adopted in Dutch law in the form of the Cellar Hatch standard for the assessment of the wrongfulness of risk setting. One has to take into account, though, that as standard in law it is not applied as an algorithm, but as a catalogue of circumstances to be taken into account. This means that its application does not rest on an economic calculation, but on a legal decision.

This move would only shift our problem to the legitimation of the right theory of social justice, and would therefore still leave us empty handed. There are a few caveats though. First, this is not to say, of course, that tort law lacks legitimation, even from an internal point of view.[34] The development of tort law – and private law in general – displays the influence of both the principle of corrective and of distributive justice.[35] For this reason, all kinds of mixed theories have emerged, stressing the interplay between both founding principles.[36] The question for research is then what their respective jobs are, and how they both influence the regulation of risks in tort law.[37] In this context, we are warned, though, of the principle of distributive justice. Like a cuckoo in the nest, the principle of distributive justice has the tendency to dominate the deliberation process, squeezing out other considerations.[38] I will not elaborate on this here, however, since it is beside our project.[39]

Next, if the paradigms of tort law leave us empty handed, this does not mean that no legitimations are available. If focusing on tort law turns out to be a dead-end street, we may have to look elsewhere. In my view, the key is to be found on the more general level of the view one holds on the role of civil courts in the political system.[40] For clarity we may distinguish two opposing paradigms here, which have been phrased the "problem-solving conception" and the "public life conception" of adjudication respectively.[41] In the problem-solving conception the civil court is there to litigate between opposing parties, roughly in the same manner an arbitration committee would do the job. This perspective on civil adjudication is dominant in neo-liberal policy-making, comparing adjudication with other mechanisms for conflict-resolution. In the public life conception, however, civil adjudication is claimed to have added value for society. In litigating conflicts civil courts develop new norms, enforce established ones, review public policies, and thus maintain the rule of law. Civil adjudication therefore has an inherently public dimension, which is lacking in the problem-solving conception.[42] In fact civil adjudication is part of the way a political community governs itself, and thus of the political decision-making process (where "political" is used in the broad sense of self-governance). Of course there are different responsibilities here. The grand design of society and the formation of policy belong to the political domain, but the review

[34] I am using the notions of "internal point of view" and "external point of view" here roughly in the meaning of accepted legal practice since the work of HLA Hart and N MacCormick, that is, referring to participator's and the spectator's perspective respectively.

[35] See for empirical research on this topic G Mitchell and PE Tetlock, "An empirical inquiry into the relation of corrective to distributive justice" (2006) Journal of Empirical Legal Studies 421.

[36] See W Lucy, *Philosophy of Private Law* (Oxford University Press 2007) 266: "Mixed theories are where the (intellectual) action is (and that's a good thing too)".

[37] See for example J Gardner, "What is Tort Law for? Part 1: The Place of Corrective Justice" (2011) Law and Philosophy 50: "So there is no tort law without corrective justice, on the other hand, there has to be more to tort law than corrective justice".

[38] Lucy, supra, note 36.

[39] See M Loth, *Rechtvaardige aansprakelijkheid: over herstel van autonomie, beginselen in het aansprakelijkheidsrecht, en de "maatmens benadeelde*" (Kluwer 2016).

[40] This is a shift to an external point of view, although it has internal dimensions as well, since both conceptions to be distinguished have adherents in the judiciary as well (although they might not always be aware of it).

[41] On this distinction between the "problem-solving conception" and the "public life conception" of adjudication, see D Luban, "Settlements and the erosion of the public realm" (1995) Georgetown Law Journal 2619.

[42] This same conception is to be found in the contribution of Douglas Kysar, elsewhere in this issue.

and even the correction of policy in the light of established rights and interests is a judicial responsibility.[43]

The legitimation of the *Urgenda* ruling is to be found in this public life conception of civil adjudication. In this case the Court was not just litigating between opposing parties. The Court clearly pretended to offer legal protection to citizens against a government that infringed their right to protection against a dangerous temperature rise occurring. As such, the Court placed itself in a position to review the government's policy on the emission of GHGs. Amongst many other things, tort law is an instrument for legal protection. So this is a legitimate use of tort law by a court that keeps an open eye for the limits of its reviewing role. It is important to note that there is a small but decisive difference between the design of a distribution scheme with regard to the burdens of precaution, and the review of such a scheme. The first is the prerogative of the government, the last is a judicial responsibility. Of course, the Court's own conceptions of distributive justice may creep in its deliberations, as we have seen in its rejection of the State's defence that it is only responsible for a small proportion of the worldwide emission of GHGs. This is just another example of the cuckoo effects of the principle of distributive justice. But as long as these conceptions back up the reviewing role of the Court, their application is legitimised by the public role of the Court as part of the political decision-making process.

IV. Moral attitudes

Finally, the constitutional and civil (procedural) law principles involved are to be interpreted in the light of the moral attitudes of the court. In any plausible account the legitimation of principles, rules, cases and other linguistic standards, ends in non-linguistic practices, customs, or forms of life.[44] It would exceed the purpose of this article, however, to go into depths in the form and substance of what might be called a "judicial form of life", but one fragment needs to be mentioned. I am referring to the notion that courts and judges adjudicate with restraint or in an activist manner.[45] Judicial restraint is commonly defended on constitutional grounds (referring to the constitutional position of the judiciary) and on methodological grounds (concerning the craft of judging).[46] Judicial activism, on the other hand, is often justified by a selected choice of examples, which display a positive impact of judicial intervention on societal problems.[47] For some writers the choice between judicial restraint and judicial activism is an ideological credo, expressing their personal

[43] Again, subject to all the restrictions already mentioned, deciding case by case, ex post facto, on the ground of the concepts and doctrines of tort law.

[44] There is a vast amount of legal theory on this (including HLA Hart's reflections on the open texture of legal concepts and law in general, see HLA Hart, *The Concept of Law* (Clarendon Press 1961), referring (mostly) to Wittgenstein, *Philosophical Investigations* (Basil Blackwell 1978); Wittgenstein, *On Certainty* (Basil Blackwell 1979). Also interesting is Searle's interpretation in the concept of the "Background" of our mental representation. See JR Searle, *Intentionality, an Essay in the Philosophy of Mind* (Cambridge University Press 1983).

[45] See for example B Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007), and E Tsen Lee, *Judicial Restraint in America* (Oxford University Press 2011).

[46] Compare A Scalia, *A Matter of Interpretation, Federal Courts and the Law* (Princeton University Press 1997).

[47] S Breyer, *Active liberty, interpreting our democratic constitution* (Albert A Knopf 2005).

professional beliefs.[48] For others, however, they may be used descriptively, referring to opposing but legitimate judicial philosophies.[49] I use the predicates "restraint" and "activist" also in this neutral meaning.[50] In this sense, they may be helpful in clarifying diverging interpretations of the (constitutional and civil (procedural) law) principles. The moral attitudes of judicial restraint and activism therefore, constitute the rock bottom underlying the diverging interpretations of the principles involved.

An activist interpretation of the constitutional principles is nowadays generally connected with a transnational outlook, in which the court sees its own position as part of a transnational system of checks and balances.[51] The *Urgenda* ruling provides an example. The reference to transnational sources and their "reflex effect" on the open norms of national tort law, reflect a broader outlook than the national arena. Of course, under Dutch constitutional law European law and directly applicable provisions of international treaties are part of national law. But the eagerness with which the Court in *Urgenda* has interpreted the open norms of national tort law in the light of transnational law (through the use of the notion of their "reflex effect") exceeds far beyond what is considered necessary. This outlook may even extend outside the strictly legal domain, since judicial activism is not only motivated by the ideal of legal protection, but also by that of responsiveness.[52] At the time, national and transnational political institutions failed to reach agreement on the reduction of GHGs, which in itself legitimises the courts to step in. From this perspective, it may be perfectly justified for the court to intervene if politics fails. One may even conceive *Urgenda* as an attempt to start a counterveiling judicial force to tip the balance. In an activist interpretation of the constitutional principles this is not a violation of the principle of the separation of powers, but on the contrary, a validation of this principle, since it restores the balance.

As we have seen, the Court received criticism for this approach. In their objection that the Court trespasses the borderline between the judicial and the political domain, the critics focused mainly on the national arena.[53] From this perspective, the Court should have exerted more restraint, even in the face of political failure. This argument might be backed up by referring to the virtues of judicial restraint ("the art of silence"). Civil courts are there to litigate conflicts, case by case. They perform this task in a subordinate position vis-à-vis politics. Their primary responsibility is the application of the law, not the solution of societal problems, nor the pursuit of political ideals. For all these reasons,

[48] A Barak, *The Judge in a Democracy* (Princeton University Press 2006). See also A Barak, *Purposive Interpretation in Law* (Princeton University Press 2005), and M de Visser and W Witteveen, *The Jurisprudence of Aharon Barak* (Wolf Legal Publishers 2010).

[49] CR Sunstein, *One Case at a Time, judicial minimalism on the Supreme Court* (Harvard University Press 1999).

[50] I prefer the predicate "activist" over alternatives like "progressive", since an activist stand with regard to progressive legislation may result in conservative outcomes (and vice versa). There is nothing inherently progressive in judicial activism.

[51] One can even speak of a "globalist" and a "localist" mindset of judges, see E Mak, *Judicial Decision-making in a Globalized World, a comparative analysis of the changing Western practices of Western highest courts* (Hart Publishing 2013).

[52] In a historically important phrasing this ideal was formulated by P Nonet and P Selznick, *Law and Society in Transition: toward responsive law* (Harper & Row Publishers 1978).

[53] See R Schutgens, "Urgenda en de trias: enkele staatsrechtelijke kanttekeningen bij het geruchtmakend klimaatvonnis van de Haagse rechter" (2015) NJB 2015/1675; L Bergkamp, "Het Haagse klimaatvonnis: rechterlijke onbevoegdheid en de negatie van het causaliteitsvereiste" (2015) NJB 2015/1676 (n 4).

the Court was way out of line with *Urgend*, at least in this restrictive interpretation of the constitutional principles involved.

The moral attitude of the Court is relevant for its interpretation of the civil (procedural) law principles involved as well. An activist interpretation of these principles is generally connected with the role of the civil court as part of the political decision-making process (in the sense of the self-governance of society). Of course, there are limitations here. A court is not there to formulate policies, but it has the legal responsibility to review the government's policy, if called upon. Again, *Urgenda* provides an example. The review of the government's policy on the emission of GHGs requires highly political decisions with regard to the distribution of the burdens of precautionary measures. Although these decisions transcend the regular case-load of the Court, this need not withhold it. Its intervention is legitimised by its reviewing role and is therefore restricted to the correction of the policy under consideration, if this infringes individual rights.

The critics however, focus on a more restrictive interpretation of the principles involved. A civil court should restrict itself to conflict resolution; the rest is up to politics. In tort cases the court is there to right wrongs, nothing more or less. In classical tort cases the decision is legitimised by traditional patterns, such as a compensatory scheme on the ground of the principle of corrective justice, or perhaps the notion of the satisfaction of the plaintiff. Again, from this perspective *Urgenda* shows why one should exert restraint. The Court was engaged in highly political decisions, concerning the distribution of the burdens of precaution between different parts of the world and different nations. This exceeds the tools available to a civil court, both from a conceptual, regulatory, and legitimising point of view. The intervention of the Court in this case therefore cannot be justified in the restrictive interpretation of the civil (procedural) law principles involved.

In the end, the interpretation of both kinds of principles rests on a choice between an activist attitude and an attitude of restraint. Clearly, in *Urgenda* the Court has chosen for an activist attitude, both with regard to the interpretation of the constitutional principles and the civil (procedural) law principles involved. Of course, it could have chosen differently. The Court could have exerted restraint, sticking to a national outlook and to a traditional approach of tort law. That would have resulted in another decision and reasoning, perhaps more mainstream. Does this entail that the actual ruling lacks legitimation, that it falls outside the scope of legal reason? I wouldn't think so: within an activist interpretation of the principles involved the decisions made are perfectly justified. Finally, the Court could have chosen for a purposeful regulation of risks as well, justified by its own assessment of the consequences, or its own standards of distributive justice. However, that would have led the Court outside the domain of tort law, with its distinctive concepts, principles, and legitimations.

V. Conclusions

Our question was which principles determine the legitimacy of a judicial intervention in the domain of societal risk regulation. I have argued that the building blocks of a normative/theoretical framework for the assessment of the legitimacy of the participation by the judiciary in civil cases are provided by constitutional law, civil (procedural) law, and professional ethics. The legitimacy of participation of the civil courts is therefore determined by constitutional principles, civil (procedural) law principles, and moral

attitudes. Of these determinants the moral attitudes are the most fundamental ones, although one may recognise the attitude displayed by the given interpretation of the principles involved.[54]

With regard to the constitutional principles we have found that the principle of the separation of powers may be viewed in a national context (as is traditionally the case), or in a transnational context (as is relevant since the emergence of our multilayered legal system). When courts have an activist attitude they are generally more inclined to interpret this principle in its transnational context. This opens both coordinating and strategic perspectives for the court, engaging in judicial dialogues with other courts. As long as they use this discretion to maintain checks and balances, they are perfectly in line with the principle of the separation of powers. Courts that exert restraint, on the other hand, are inclined to stick to their subordinate role vis-à-vis the political institutions.

With regard to the civil (procedural) law principles we have found that the court may have a self-image as a civil litigator (the traditional view), or as part of the political decision-making process (as many courts do). When courts have an activist attitude, they are generally inclined to the last. For them, tort law may be (amongst many other things) an instrument to correct government's policies if needed. This opens a perspective for the court to correct government's policies with distributive implications, if they infringe individual rights. As long as the courts do not exceed their reviewing authority, they are perfectly in line with the principles involved. Courts that exert restraint, on the other hand, are inclined to stick to their self-image as civil litigator, as well as to the traditional conception of tort law in which legitimations like compensation and satisfaction dominate their decision-making.[55]

It turns out that the choice between an activist and a restrictive interpretation of the principles involved, plays a key role. In general it limits the possibilities for a normative-theoretical framework to assess the legitimacy of judicial rulings. Although one may have a preference for one moral attitude over the other, it is generally recognised that they are both legitimate judicial philosophies.[56] A specific ruling that falls within the scope of one these moral attitudes – and its interpretations of the principles involved – may therefore be considered legitimate, although one may disagree with the decisions taken, or even consider them wrong.[57] The *Urgenda* ruling, for example, may be questioned by its opponents. But even if they are right that it is wrong, it does not fall outside the scope of legal reason, and is therefore legitimate.

[54] One may say that *logically* the attitudes are the most basic determinants, but that *epistemologically* one may identify the attitude displayed by the interpretation of the principles involved. Again, there is always an element of circularity in justification. See H Albert, *Traktat über Kritische Vernunft* (Mohr Siebeck 1975).

[55] Although the building blocks of our normative/theoretical framework are relevant for all judicial lawmaking, their application to the correction of a government's policies with distributive implications clearly is not. This application is what we were looking for, of course, since we started with a research question referring to the domain of risk regulation. The normative/theoretical framework under construction can also be applied to other domains of judicial authority where its role may be disputed, however, like the domain of moral and ethical choices.

[56] As Sunstein has pointed out, activism or restraint may be sensible responses in different circumstances, with regard to the case at hand, the specific characteristics of the domain, the position of the court, the distribution of opinions within the court, and many other circumstances, Sunstein, supra, note 49, 57–60).

[57] This is not to say that anything goes, of course, in the sense that any decision is justified under this model, since it excludes outcomes that fall outside the scope of legal reason. What it does, however, is to ground the accepted possible decisions in legal practice, as it is displayed in judicial behavior. We may dislike some fragments of this practice, as we may like others, but the line between the two clearly does not coincide with the line between what may be considered as legitimate, and what is not.