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The Urgenda Climate Case in the Netherlands: Separation of Powers and the Rule of Law


相關文獻

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Abstract

The judgement issued by the Dutch Supreme Court in the Urgenda Climate Case (2019) attracted considerable attention, both in the Netherlands and abroad. For the first time, a supreme court in one of EU member states forced the government to take measures to combat climate change. The verdict by the Supreme Court is particularly relevant from the viewpoint of separation of powers and the rule of law. In the Urgenda ruling, the Supreme Court especially considers its own role in the rule of law, while ignoring the interests that are at stake regarding other state authorities, Government and Parliament. The judicial order to create legislation is not compatible with constitutional arrangements regarding the independence of Parliament and its members in the context of the separation of powers. The ruling furthermore clashes with the legality principle in the rule of law. The Supreme Court departs from the principle that a court dispenses justice in accordance with the wording and intention of the law. The Supreme Court does not apply the law but instead bases itself on political and scientific insights. In that way, the Supreme Court assigns itself a role in the political domain.

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1. Introduction

On December 20, 2019 the Supreme Court of the Netherlands ruled that the Dutch government must adjust its climate policy. The Supreme Court ordered the government to initiate legislation to achieve a further reduction of greenhouse gas emissions, of minimally 25% compared to 1990.

The verdict by the Dutch Supreme Court in what has come to be referred to as the Urgenda Climate Case received much attention, both in the Netherlands and abroad, for this was the first time that a Supreme Court in one of the EU member states forced a national government to take measures to combat climate change.

The verdict was extraordinary in the Dutch context. The Dutch constittional system does not include a constitutional court that would have extensive authority to monitor the executive and legislative branches of government.

The Dutch Supreme Court is an ordinary court, although the highest court in civil, criminal and tax matters. In this particular case the Supreme Court issued judgment in a civil law suit introduced by the environmental group Urgenda.

In general, the Dutch Supreme Court is very reticent when it comes to questions that are mainly political, considering that it is the government that, together with the parliament, takes the initiative to establish policy and legislation. Climate policy is such a political subject, and a sensitive subject at that.

However, in the Urgenda climate case the Supreme Court, by way of exception, abandoned this reticence. In that respect the judgment is exceptional by Dutch standards.

The judgment by the Supreme Court evokes a number of interesting constitutional questions.

First, there is reason to consider whether it is acceptable in a system of separation of powers for the Supreme Court to get involved in this way in the political decision-making process regarding climate policy and to order the government and the parliament to initiate legislation. It is

important to note that the Supreme Court decided in the past, in the so-called Waterpakt case, that the court does not have the authority to impose on the state a specific order to create legislation.[1] In the Urgenda climate case the Supreme Court reverses this earlier judgement in part.

Second, the rule of law and, more in particular, the principle of legality play an important role in the Urgenda climate case. The question is whether the Supreme Court has not exceeded the limits of its jurisdictional function by issuing a judgement, even though clear rules of law on whether to decide were lacking.

Before addressing these two questions, we first present a brief description of the Urgenda climate case.

2. Urgenda climate case

The Urgenda Foundation (*Stichting Urgenda*), a Dutch environmental group, sued the Dutch government (the State) in 2013, demanding that the State do more to prevent global climate change.

Urgenda sought a court order that would direct the State to reduce the emission of greenhouse gases so that, by the end of 2020, those emissions would be reduced by 40%, or in any case by at least 25%, compared to 1990.

The District Court of The Hague ordered the State in 2015 to reduce emissions by the end of 2020 by at least 25% compared to 1990.

In 2018, the Court of Appeal in The Hague confirmed the District Court's judgement.

The State then instituted an appeal in cassation before the civil division of the Supreme Court of the Netherlands in respect of the Court of Appeal's decision. On December 20, 2019, the Supreme Court of the Netherlands upheld this decision.[2]

According to the Supreme Court, the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the member states to protect the rights and freedoms established in the convention for their citizens. Article 2 of the Convention protects the right to life, and Article 8 protects the right to respect for private and family life. According to case law of the European Court of Human Rights (ECtHR), a member state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the State is aware of that risk.

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1 Supreme Court, March 21, 2003, ECLI:NL:HR:2003AE8462 (Waterpakt).

2 ECLI:NL:HR:2019:2007, Supreme Court, 19/00135 (rechtspraak.nl). The following is based on the summary of the Supreme Court judgement.

The Supreme Court notes that the obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialize over the long term. Articles 2 and 8 of the ECHR require the State to take measures that are appropriate to avert the imminent hazard as much as reasonably possible.

Pursuant to Article 13 of the ECHR, national law must offer an effective legal remedy against a violation (actual or imminent) of the rights that are safeguarded by the ECHR. According to the Supreme Court, this means that the national courts must be able to provide effective legal protection.

The State is obliged to reduce greenhouse gas emissions from its national territory. This obligation of the State to do 'its part' is based on Articles 2 and 8 of the ECHR, because there is a grave risk that climate change will occur that will endanger the lives and welfare of numerous people in the Netherlands.

In giving substance to this positive obligation imposed on the State pursuant to Articles 2 and 8 of the ECHR, the Supreme Court takes into account broadly supported scientific insights and internationally accepted standards. Relevant in this respect are, among other things, the reports by the IPPC, an intergovernmental organization founded within the context of the United Nations to address climatological studies and developments. The IPCC's 2007 report contained a scenario in which global warming could reasonably be expected to be limited to a maximum of 2°C. To achieve this target, Annex I countries (developed countries, including the Netherlands) would have to ensure reduction of their emissions by the year 2020 by 25 to 40 percent, and by 2050 by 80 to 95 percent, compared to 1990.

The Supreme Court considers that there is broad consensus on the urgent need for Annex I countries to reduce their greenhouse gas emissions by at least 25 to 40 percent by 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 of the ECHR. The urgent need for a reduction of 25 to 40 percent by 2020 also applies to the Netherlands on an individual country basis.

The State has asserted that it is not up to the courts to undertake the political considerations necessary for a decision on the reduction of greenhouse gas emissions. In the Dutch system of government, the decision-making on greenhouse gas emissions belongs to the executive and legislative branches of government. They have a large degree of discretion in deciding the political considerations that are necessary in this regard.

Nevertheless, the Supreme Court notes that it is up to the courts to decide whether government and parliament, in making their decisions, have remained within the limits of the law

by which they are bound. Those limits ensue in part from the ECHR. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to the courts to offer legal protection, even against the executive government, is an essential component of a democratic state under the rule of law.

The Court of Appeal's judgment is consistent with the above, as this court held that the State's policy regarding greenhouse gas reduction obviously does not meet the requirements under Articles 2 and 8 of the ECHR to take suitable measures to protect the Dutch population from dangerous climate change.

Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed minimum necessary reduction of 25 to 40 percent in 2020.

The order that was issued leaves it up to the State to determine which specific measures it will take to comply with that order. If legislative measures are required to achieve such compliance, it is up to the State to determine which specific legislation is desirable and necessary.

3. Separation of powers (trias politica)

In de Urgenda climate case, the Supreme Court understandably gives much attention to the separation of powers, also referred to as the *trias politica*. After all, the question at issue is whether the court can oblige the national government and parliament to take measures against climate change through legislation. The Supreme Court acknowledges in the Urgenda judgement that there is a division of tasks between the state authorities, but a closer examination of the division of powers between the executive, legislative and judiciary authorities in the context of the separation of powers is lacking in the judgement.

The Supreme Court places the issue of the division of tasks and powers between the state authorities completely in the key position of the courts in the rule of law and the possibility of a judicial order to initiate legislation. The approach taken by the Supreme Court is as follows. The prime consideration is that a fundamental element of the rule of law is that the court can oblige the government to comply with a requirement, based on the claim of a rightholder. The Supreme Court refers in this context specifically to the fundamental right to effective legal protection under art. 13 of the ECHR.

As explained above, however, as to compliance with obligations by the government, the

Supreme Court in earlier judgements made an exception with regard to the order to legislate.[3] In the Waterpakt case in 2003 the Supreme Court decided that the court is not empowered to order the State to create specific legislation. This prohibition for the court to order legislation is based on two considerations. First, the court must not get involved in the political decision-making process that leads to the creation of legislation. Second, such a court order would lead to establishment of a regulation that would also apply for other parties than those involved in the proceedings. The Supreme Court does, however, note that this does not imply that the court may not enter the area of political decision-making at all. After all, the court can decide that legislation shall not apply in situations where this leads to a violation of, for example, treaty provisions.

In the Urgenda judgement, the Supreme Court next qualifies the principle that a court order to create legislation is out of the question. Specifically, it states that the court must not, by issuing an order to legislate, get entangled in the political decision-making process regarding the opportuneness of creating legislation with a specific and concretely described substance. As the Supreme Court puts it: 'It is, considering the constitutional relations, strictly up to the legislature involved to decide whether legislation involving a certain substance shall be established. The court may therefore not order the legislature to create legislation with a specific substance.'[4]

This qualification of the Waterpakt judgement means that the Supreme Court regards an order to legislate permissible '… in order to achieve a specific goal, so long as such an order to legislate is not tantamount to an order to establish legislation with a certain specific substance.'[5] When the court limits itself to a general order to take measures, then, according to the Supreme Court, there is not the drawback that third parties would be indirectly bound by the judgement. After all, the Supreme Court reasons, the court does not by means of its order determine the content of the regulation; that remains within the sphere of authority of the legislature involved. With this reasoning the Supreme Court thus justifies its decision that a general order to create legislation regarding the reduction of CO_2 by 25 percent by the year 2020 is justified.

The argumentation by the Supreme Court is not convincing. It gives evidence of a one-sided interpretation of the constitutional relations between the state authorities. As explained above, the Supreme Court mainly regards its own role in the rule of law. It stresses the importance of effective safeguarding of legal rights (art. 13 of ECHR), but it fails to acknowledge the interests that are at issue with regard to the other state authorities.

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3 Supreme Court, March 21, 2003, ECLI:NL:HR:2003AE8462 (Waterpakt).

4 Supreme Court, December 20, 2019, legal ground 8.2.2-8.2.5.

5 Supreme Court, December 20, 2019, legal ground 8.2.5.

An informed opinion why the court may not issue a specific order to legislate but only a general order to create such is not presented in the judgement. The Supreme Court limits itself in the context merely to a reference to another judgement, but even then it is doubtful whether this judgement should be read as a qualification of the Waterpakt judgement.[6]

To get a better picture of the constitutional relations between the state authorities in the context of whether or not an order to legislate can be issued, it is necessary to examine the role of the legislature (government and parliament) and the courts in the separation of powers. The Dutch Constitution, like the constitutions of many other Western nations,[7] has traditionally accepted the principle of the separation of powers. That applies not only to the functional context of the separation of powers but also to the organizational context. The three main functions in the State – legislative, executive, and judicial powers – are assigned by the Constitution to the States General (parliament), the government and the judicial branch.[8] This principle of law, set out in the Constitution, assumes that three separate, equal and independent governmental organizations in the State exercise the three most important government functions.[9]

Relevant also is that the Dutch Constitution is subject to revision soon, with a general provision to be included in the Constitution, which reads: 'The Constitution guarantees the fundamental rights and the democratic rule of law'. The explanatory notes to this general provision regard the separation of powers as one of the four key elements of the rule of law. This entails that '… three categories of governmental power, namely legislative, executive and judicial power, are exercised by three separate authorities.'[10] In the interplay of Chapters 2 (the executive government), 3 (the States General), and 6 (the judiciary), the three authorities and their respective tasks, powers and mutual relations are explained in detail.[11]

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6 Supreme Court, April 9, 2010, ECLI:NL:HR:BK4549; cf. L.F.M. Besselink, Rechter en politiek: Machtenscheiding in de Urgenda-zaak, TvCR 2020, pp. 139 e.v..

7 See, for example, art. 20, second paragraph, of the German Grundgesetz and Articles I, II and III of the U.S. Constitution.

8 See also, regarding the separation of powers in the old Constitution, P.J. Oud, Het constitutioneel recht van het Koninkrijk der Nederlanden, part II, 2nd edition, Zwolle: W.E.J. Tjeenk Willink 1970, p. 90. See, regarding the separation of powers as the starting point of the democratic rule of law, M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen, and R.J.G.M. Widdershoven, Beginselen van de democratische rechtsstaat, 8th edition, Deventer: Kluwer 2017, pp. 18-19. Cf. also C.A.J.M. Kortmann, Constitutioneel recht, 7th edition, Deventer: Kluwer 2016, pp. 43 e.v..

9 See P.P.T. Bovend'Eert, Het rechtsbeginsel van de machtenscheiding, in: R.J.N. Schlössels, A.J. Bok, H.J.A.M. van Geest, S. Hilligers, In beginsel. Over aard, inhoud en samenhang van rechtsbeginselen in het bestuursrecht, Deventer: Kluwer 2004, pp. 243 e.v..

10 Parliamentary Papers II 2015/16, 34516, nr. 3, p. 6.

11 Parliamentary Papers II 2015/16, 34516, nr. 3, p. 6.

The Dutch Constitution thus has a guarantee function when it comes to the rule of law and the separation of powers.[12] In various places it explicitly expresses the fact that the executive government, the States General and the judiciary each take an independent position with regard to each other.

The most conspicuous element is the independent position of the judiciary: it is independent (art. 117 of the Constitution) and exclusively empowered to decide legal cases. The executive government and the parliament may not partake in the exercise of the judiciary function.

But also the independent position of the parliament gets special attention in the Constitution. Such constitutional provisions regarding parliamentary immunity (art. 71 of the Constitution), the independence of its working (art. 72), the swearing-in of members of parliament (art. 60), the free mandate (art. 67, paragraph 3), and incompatible positions (art. 57) give evidence of the independent position of the parliament and of a clear separation from the executive and judiciary authorities.[13]

It is enshrined in the Constitution that the power to create laws lies exclusively with the central government and the States General (art. 81 ff. of the Constitution). The courts are thus excluded from participation in the creation of laws.

It is clear that the trias politica in the Constitution does not entail any absolute functional and organizational separation. In particular the central government and the parliament are intimately linked with each other in a parliamentary democracy through all sorts of checks and balances.[14] Consider, for example, their joint roles in the creation of laws and the national budget (art. 81 and 105 of the Constitution), the ministerial responsibility (art. 42), the vote of no confidence, and the dissolution of parliament (art. 64).

Control mechanisms are also to be found in the relation between, on the one hand, government/parliament and, on the other hand, the courts. Such mechanisms are evident, for example, in the appointment of judges by the government (art. 117 of the Constitution) and the monitoring function of the courts with respect to the executive and legislative branches (art. 112).

The checks and balances are intended to ensure an equilibrium between the branches of government. This means that these control mechanisms are not allowed to jeopardize the principles of independence and equivalence of the three branches of government versus each other.

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12 Parliamentary Papers II 2015/16, 34516, nr. 3, p. 3.

13 See, regarding this, Parliamentary Papers II 1976/77, 14222, nr. 3, pp. 3-4, 8, 11, 17.

14 See Parliamentary Papers II 2015/16, 34516, nr. 3, p. 6: 'In the Netherlands, this separation of powers has been implemented in particular in a system of mutually controlling structures that keep each other in balance (checks and balances).'

When it comes to the order to legislate contained in the Urgenda judgement, the question arises whether this control mechanism of a court order to legislate is compatible with the principle of the separation of powers, where the three branches of government are expected to hold an independent and equivalent position versus each other.[15]

The following objections can be raised.

First, it is to be noted that the issuance by the court of an order to legislate implies that the central government and the States General take on a hierarchical relationship to the courts. The legislature is instructed by the court to create a law and to adhere to this. The court order to legislate places the judiciary, as it were, above the legislature. An instruction issued by the court clashes with the principle of the separation of powers, that central government and parliament should exercise their legislative powers on their own and independently, and that they should take on an independent position versus the courts. A relation based on orders is hardly compatible with this.

Second, the Constitution, in its Article 81, assumes that the central government and the States General together exercise exclusively the authority to establish laws. Same as central government and parliament are not to get involved in the issuance of a court decision, the courts are not to involve themselves in the creation of legislation. The courts play no role whatsoever in this, even where it concerns the question whether a law has come about in the way prescribed by the Constitution.[16] Decisions to draft a legislative bill, to introduce or discuss it, to amend, repeal, adopt or reject it, are to be made, depending on the situation, by party chairpersons and political parties in a government formation, the cabinet members, the government, members of parliament. In other words, the decisions and resolutions are assigned to public office holders in government and parliament.

That is, for that matter, not an arbitrary choice. Under democratic rule of law and in a parliamentary democracy the creation of legislation is a responsibility of the democratically elected parliament together with the executive government, where the cabinet ministers are accountable to

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15 On separation of powers and legislative order, see R.J.B. Schutgens, Onrechtmatige wetgeving, (dissertation Nijmegen), Deventer: Kluwer 2009, pp. 85 e.v.; Geerten Boogaard, Het wetgevingsbevel. Over constitutionele verhoudingen en manieren om een wetgever tot regelgeving aan te zetten (dissertation Amsterdam UvA), Oisterwijk: WLP 2013, pp. 61 ff.; Rob van der Hulle, Naar een Nederlandse political question-doctrine. Een beschouwing over de rol van de rechter in politieke geschillen (dissertation Nijmegen), Deventer: Kluwer 2020, pp. 232 e.v..

16 As ruled by the Supreme Court in HR January 27, 1961, ECLI:NL:HR:1961:AG2059 (Van den Bergh judgement).

the parliament and require the trust of that parliament.[17]

Assigning legislative powers, such as an order to legislate, to a court that has no democratically elected basis, leads to unwanted intrusion in the process of legislative development.[18]

In the Waterpakt judgement the Supreme Court still had regard for this allocation of roles. It considered: 'In a formal sense, laws are established, under art. 81 of the Constitution, by the government and the States General, where the question whether, when and in what form a law will be created must be answered on the basis of political decision-making and consideration of the interests involved. The division of powers of the various public bodies, based on the Constitution, implies that the courts shall not intervene in those proceedings of political decision-making.'[19]

In the Urgenda judgement the Supreme Court no longer seems to concern itself much about these implications of art. 81 of the Constitution. The Supreme Court does not consider a specific order to legislate to be acceptable, but that consideration does not apply to a general order to legislate. Considering the above, it should be clear that neither a specific nor a general order to legislate is compatible with the constitutional principle of the separation of powers and the exclusive allocation of powers to the central government and the States General under art. 81 of the Constitution.

For that matter, the distinction between a general and a specific order to legislate is rather vague. Is a general order to legislate a reduction of CO_2 by 25 percent by 2020 in fact not quite specific? And what exactly is the difference between a general order to legislate and a specific order to legislate? An answer to this question can hardly be given on the basis of the Urgenda judgement.[20]

Third, there is the question whether an order to legislate, whether general or specific, does not infringe in an unacceptable manner on the independent position of parliament. Prior to the judgement, a number of special constitutional guarantees applied to ensure the independence of the States General and its members. This independence comes under pressure when it must be assumed that the court can order the State, and thus parliament and members of the parliament, to create legislation. How can such an order to legislate be reconciled with the free mandate (art. 67 of the

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17 Parliamentary Papers II 2015/16, 34516, nr. 3, p. 5.

18 A special constitutional court, such as the Bundesverfassungsgericht in Germany, might have far-reaching powers in light of its function to ensure that the political offices in the legislative process adhere to the Constitution. However, this is not the case in the Dutch situation.

19 Supreme Court, March 21, 2003, legal ground 3.5.

20 My impression is that the judgement was rather tantamount to a knee-jerk solution.

Constitution), which assumes that members of parliament are not bound but have a free mandate and can vote on legislative proposals based on personal insight? Does such an order to legislate entail that the houses of parliament must adopt its legislative proposals and that the members must vote in favor? This can hardly be intended from the perspective of the separation of powers and the constitutional structure. Also the constitutional principle that the parliament regulates its mode of operation altogether independently and decides without intervention regarding the subjects to be covered (art. 71 of the Constitution), is incompatible with a court order to legislate.

The constitutional guarantee of parliamentary immunity is likewise problematic in this context. Such immunity assumes that members of parliament are not legally accountable for their contributions to parliamentary debates. Forcing an order to legislate is thus not possible, considering art. 71 of the Constitution.

In its Urgenda judgement the Supreme Court does not attend to any of these special constitutional guarantees for the parliament and its members in the context of the separation of powers. As mentioned, the Supreme Court only considers art. 13 of the ECHR (effective legal protection), but that is a far too limited perspective when it comes to the question whether an order to legislate is acceptable when considering the separation of powers.

The fact that a general order to legislate actually compromises the constitutionally guaranteed autonomy of government and parliament in the creation of legislation, is illustrated by the aftermath of the Urgenda judgement. With reference to the Supreme Court's reduction order, a legislative proposal is now being debated that would impose a production limitation for coal-fired power plants, such in the run-up to the prohibition of coal-based energy that will apply as from 2030.[21] This example makes clear that there are clearly possibilities in practice to ensure via the courts, in the context of general interest actions, that the government and the States General are required to create legislation in all sorts of policy fields – temporary or otherwise, policy-related or not – in order to achieve certain policy objectives. Imposing such obligations is nonetheless unconstitutional, as explained above.

Lastly, it should be noted, with regard to the position taken by the Supreme Court in the Urgenda judgement – that the courts are authorized to require compliance by the government – that an exception is made in principle for an order to legislate, since a regulation is established by such a judicial order that would also apply for parties that are not involved in the proceedings. With that in mind, the Supreme Court regards a specific order to legislate to be inadmissible. A general order to legislate, however, is, according to the Supreme Court, permissible.

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[21] Parliamentary Papers II 2020/21, 35668.

I fail to understand why a specific order to legislate is not admissible whereas a general order to legislate is. The qualification escapes me. After all, both situations involve an order to create a regulation that also applies to parties other than those involved in proceedings. This aspect, too, affects the separation of powers. It is up to the legislature to establish legislation (art. 81 of the Constitution). It is up to the courts to issue a verdict in concrete disputes between parties to proceedings (art. 112 and 113 of the Constitution). The courts are not authorized to make decisions that have a general effect.

4. The legality principle in the rule of law

I commented earlier that the separation of powers is regarded as one of the key elements of the democratic rule of law. Another key element is the legality principle. What this entails is that power may only be exercised by a government on the basis of a law and within the limits set by the law.[22]

Under the democratic rule of law, government actions must find their basis in the law.[23] The government must act in accordance with the law. This legality principle applies not only to the national administration or the legislature that is bound by the Constitution, but also to the courts. Its administration of justice must comply with the law. In the rule of law, the legality principle assumes that a democratically elected legislature arranges in the law the basis for the rules that bind citizens, prior to government action.

The courts being bound by the law is an indispensable element of the legality principle. Same as it would be unacceptable for a government to evade the legality principle and to act indiscriminately and use its own discretion, just the same it would be unacceptable in a democratic rule of law to assume that the courts are not subject to the law, that they could create new rules of law at their own discretion, and establish a new system of justice without a basis in the law.

Exactly because the courts are bound by the law, it can be solidly argued in a democratic rule of law that they are a public body that exercises governmental power, even though they are not elected in a democratic fashion.

In the Dutch legal literature it is argued that the Supreme Court can develop law in different ways. Three variants of law development are distinguished: (1) application of the law (elaboration of vague or open legal standards in written law), (2) development of new law within the legal

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[22] Parliamentary Papers II 2015/16, 34516, nr. 3, p. 6. For details see P.P.T. Bovend'Eert, Wetgever, rechter en rechtsvorming. Partners in the business of law?, RM Themis 2009, pp. 145 ff.

[23] This may also include treaty provisions.

system, and (3) development of new law outside the legal system.[24] The first two variants present no problems in the context of the legality principle. The third variant pertains to the situation where a legal provision is incompatible with a treaty provision, where the court must not apply the legal provision. The court must then, with a view to the rule of law and to the interest of effective legal protection, fill the gap. It will then first need to examine whether it can provide effective legal protection by not applying the legal provision. If that is impossible, the court can then fill the legal gap by creating new legislation or by leaving the creation of new legislation to the legislature for the time being.[25] Normally, the Supreme Court is reticent, but an intervention by the court, with an appeal to the importance of effective legal protection, is nonetheless justified, so long as the legislature provides no solution for the legal problem.

These considerations do not speak of unconditional binding of the courts to the law. While the legislature has primacy in this, the court is authorized under certain circumstances to develop new law without a basis in the legal system. As justification for this, the Supreme Court refers in particular to the importance of effective legal protection.

However, the importance of offering effective legal protection to citizens can, in my opinion, not be justification in a constitutional state for the courts to decide legal matters outside the system of the law according to personal insight, conviction or conscience. Without a legal basis, derived from the law or the system of law, the courts can by definition not come to a decision. In that respect the court is held to strictly offering effective legal protection, so long as it can give a decision within the system of the law. If such a legal reference point is missing, then the court falls into the impossible situation that it can only provide a political or policy-based opinion as basis for its decision, but that is in fact unacceptable under the rule of law, considering the legality principle.

The question is how the Urgenda judgement should be assessed from this constitutional perspective. At first view, the Supreme Court appears to decide the dispute within the system of the law. The Supreme Court applies art. 2 (the right to live) and art. 8 (the right to a family life) of the ECHR to the dispute between Urgenda and the State. In doing so, the Supreme Court follows the ECtHR, which already earlier integrated in its judge-made law the governmental duty of care with regard to taking environmental measures.[26] Based on that, the Supreme Court concludes in a general sense that Articles 2 and 8 of the ECHR imply for the State the duty of care to take

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[24] S.K. Martens, De grenzen van de rechtsvormende taak van de rechter, NJB 2000, p. 747. Supreme Court, January 30, 1959, NJ 1959, 548 (Quint/Te Poel).

[25] Cf. for example Supreme Court, May 12, 1999, BMB 1999, 271 (Arbeidskostenforfait).

[26] See Supreme Court, 20-12-2019, legal ground 5.1 e.v..

measures to counter a perilous level of climate change.[27] Next, the Supreme Court must answer the question what concrete obligation the State is bound to. Must the State adhere to the 25 to 40 percent reduction goal of CO_2 emissions, and must the State realize a minimum reduction goal of 25 percent by the year 2020?

In answering these questions, the Supreme Court's judgement in my opinion risks running off the rails, in the sense that the path is abandoned where the court bases its verdict in accordance with the system of the law. The Supreme Court first properly notes that answering the above questions belongs in principle to the public domain, but it then adds that there may be circumstances that involve such views, arrangements and/or consensus in the international context and in the context of climate science that the court may determine what can be deemed to be the minimal fair share obligation of the State.[28] The result is that the Supreme Court does not base its opinion on standards that have a legal basis, but on scientific and political views, arrangements and (alleged) consensus.[29]

The Supreme Court thereby follows an approach that is incompatible with the legality principle of the rule of law. It does not apply the law and the legal system based thereon, but instead applies political and scientific insights. In the end the Supreme Court considers that the State has not sufficiently provided supporting arguments that it would be a sound option to realize a reduction of less than 25 percent for the year 2020. And that, according to the Supreme Court, provides sufficient grounds to require the State to ensure a reduction goal of minimally 25 percent. Besselink rightly asks the following rhetorical question: 'Is there legal evidence that 25 percent is in fact sufficient to protect the right to life and privacy, while a lower percentage is not?'[30]

The Urgenda judgement thus evidences a serious legal defect from a constitutional viewpoint. A practicable legal norm to decide the dispute is missing. The court should have acknowledged this fact and have dismissed the action by Urgenda.

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27 See Supreme Court, 20-12-2019, legal ground 5.10.

28 See Supreme Court 12-2019. Cf. Geerten Boogaard & Roel Schutgens, Grensrechters in eigen zaak, AA 2020, p. 888.

29 At the time of the verdict by the Supreme Court, there was still little consensus worldwide about climate change and necessary measures. For example, the government of the US, the largest economy in the world, originally took a strongly deviating position. Other foreign governments, such as the British, were or still are skeptical, and in some countries it is clear that their governments give no more than lip service to climate agreements and in practice continue climate-threatening activities. In that respect, there is still much to be done before any consensus and concrete results are achieved. Against this background, several legal grounds in the Supreme Court's verdict are highly academic and reflect little realism.

30 Besselink 2020, p. 143.

5. Conclusion. A coup d'état by the court?

The above makes clear that, from the viewpoint of the separation of powers and the legality principle of the rule of law, there is much to be said against the Urgenda judgement. But that obviously does not mean that the Dutch courts often disregard these important constitutional principles of law. In general, the courts are reticent when it comes to the assessment of disputes that are heavily impacted by the political climate and that affect the division of powers between the state authorities. As opposed to the Urgenda judgement, there are many other judgements in which the Supreme Court does decide wisely from a viewpoint of separation of powers and the rule of law. The Waterpakt judgement mentioned earlier is an example of this. In the Afghanistan judgement the Supreme Court considers, with regard to the causes introduced by action groups, to forbid the State to cooperate with the deployment of armed forces in Afghanistan, that these causes relate to questions regarding the policy of the State in the field of foreign policy and defense, a policy that heavily depends on political considerations in connection with the circumstances of a specific case. The Supreme Court adds to this: 'Including when it comes to issues of national defense, it is not up to the civil court to make political assessments and, based on a citizen's desire, to prohibit the State (the government) from taking specific actions involved in carrying out political decisions in the field of foreign policy or defense, or to order it to follow a specific course of action.'[31]

A rather ill-considered judgement such as the Urgenda judgement, does not automatically mean a threat to the rule of law. This judgement can, however, produce a high-risk precedent, not only because the Supreme Court thereby regards an order to legislate as being acceptable as yet, but also because this is simply not the first time that a court is asked to decide, based on a cause introduced by action groups, in a dispute with a strong political content, where practicable norms with a legal basis to decide the dispute are lacking. It is against this background that the Supreme Court ought to reflect on its administration of justice regarding orders to legislate, which in my opinion is unconstitutional. The Supreme Court must have more consideration for the constitutional relationship between the executive, legislative, and judicial branches in the separation of powers and the rule of law.♣

[31] Supreme Court, February 6, 2004, ECLI:NL:HR:2004:AN8071, NJ 2004, 329 (Afghanistan).

When Constitutional Law Meets Private International Law: Comments on Taiwan Constitutional Court's Judgment Xian-Pan 8 of 2022

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Abstract

Taiwan Constitutional Court's Judgment Xian-Pan 8 of 2022 relates significantly to the ROC Constitution, the Constitutional Court Procedure Act and private international law. The provisions and comments of the 1989 UN Convention on the Rights of the Child and the 1980 Hague Convention on the Civil Aspects of International Child Abduction were referred but not well cited and correctly interpreted. This problem was not found or touched by the dissenting opinions. This paper argues that the child's right to be heard, rooted in its constitutional basic rights, is a higher norm above the rules requiring evaluation of a child's will to determine its best interests, and is the possible, if any, reason to rule the relevant court decisions unconstitutional. The child was wrongfully removed and detained. The righteous guardian petitioned in due time in Taiwan's court for prompt return of the child. However, the Constitutional Court ignored these facts, misunderstood the two cited exceptional clauses of the Hague Convention without mentioning its basic principle, and regretfully delivered the opinions leading to the effects that a wrongful detention lasting long enough may legitimize it. This paper concludes that it is contradictory to protecting the human rights of child and urges it to be corrected. The Supreme Court and lower courts are hoped to look to private international law and to keep away from the misguiding opinions.

Keywords: Constitutional Review of Court Judgments or Decisions, Best Interests of the Child, Private International Law, Convention on the Rights of the Child, Hague Conference on Private International Law, International Child Abduction, HCCH Child Abduction Convention

Judicial Constitutional Review as the Practice of the Objective Value Order of Fundamental Rights: The 111-Xian-Pan-8 Decision Focusing on the Children's Best Interest

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Abstract

The 111-Xian-Pan-8 Decision was the first judgment made by the Constitutional Court in adjudicating constitutional review cases after the implementation of the Constitutional Court Procedure Act. There are two main points of contention in this case: 1. The objective value order of basic rights is no longer a mere academic theory. The radiation effect of basic rights will affect the specific cases of courts at all levels in the future. Although this change is a concomitant effect of the judicial review system, at the same time, it is necessary to examine whether the basic rights determination of the reasons for this judgment is sufficient? 2. Although the reasons for this judgment have already explained why the petition in this case satisfies the requirements of the Constitutional Court for a substantive judgment, that is, the subject matter of review is necessary for the practice of fundamental rights or of constitutional importance. However, the different opinions are that the application in this case has not explained the requirements for acceptance, so the application in this case should be rejected in the procedure, resulting in a dispute over whether this case should be the "elements of Constitutional Court Procedure Act"!

Keywords: 111-Xian-Pan-8 Decision, Judgment Constitutional Review, Objective Value Order, Children's Best Interest, Elements of Constitutional Court Procedure Act

A Study on the Procedures of Non-Contentious Casesof Parent-Child — Focusing on the Protection of the Best Interests of Minor Children

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Abstract

The Taiwan Family Procedure Law does not stipulate that the place of residence of the children, the right to meet and interact, and the procedures related to the delivery of the children and the harm to the interests of the children should take precedence over other procedures and to deal with them promptly. The court is required to determine the discussion conference within one month after the start of the procedure, and it is necessary to analyze it from the viewpoint of safeguarding the rights of the participants in the procedure to have a verbal discussion date and to proceed with the child relationship issue promptly. In order to protect the interests of minor children, should this priority and prompt procedure be implemented? Will the Taiwan Family Procedure Law also add the same and similar provisions in the future? All of these require more research.

Article 108 of Taiwan's Family Procedure Law stipulates that before the court makes a ruling on the incident in Article 107 and other parent-child non-litigation, it shall inform the child in an appropriate manner, both inside and outside the court, according to the child's age and physical and mental conditions such as ability to identify. The influence of the judgment result gives them the opportunity to express their wishes or express their opinions; if necessary, children psychologists or other professionals may be requested to assist. It does not clearly stipulate that in the event of personal care of a child, the child should state his opinion in “words”. In principle, the family court should listen to the statement of his opinion and consider it. For very young children (such as children under the age of three), should the court not have the impression of being in person, should they be notified of their

presence? Moreover, the current law does not clearly stipulate which exceptions are not suitable for hearing opinions. In the case that the court should personally hear the opinions of minor children verbally, in practice, how should the court proceed with the opinions of minor children verbally? Can parents and litigation representatives be present when the child is making a statement? Should procedural assistants be present? All these are necessary to analyze and discuss from the perspective of protecting the best interests of minor children. What are the deficiencies of Taiwan‘s Family Procedure Law regarding the constitutional protection of minor children’s right to request a hearing for representation? To protect the right of minor children to express their opinions in these procedures, should it be recognized that they can directly invoke the provisions on the protection of the right to a hearing request in the Constitution?

Keywords: Non-Contentious Cases of Parent-Child, Cases of Delivery of Children, Cases of Meeting with Children, Preliminary Injunctions

The Intent to Enter Into A Contract: Intent of Effect or Intent of Declaration

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Abstract

A contract is established where the parties have an intent to be bound by a contract in addition to an agreement between them. The intent to be bound is manifested by the declaration of intention of the parties. Under the prevailing comment of scholars, the subjective elements of the declaration of intention (i.e., the intent of effect and intent of declaration) are not the fundamental requirements to set up a declaration of intention. The end result is that the only requirement to establish a declaration of intention is the external act of the parties, without taking into account of the parties' subjective intents. This conclusion is contradictory to the basic idea that a contract can be established only after the parties are willing to be bound by it.

This paper contends that where the intent of effect is not the basic requirement of a declaration of intention, the intent of declaration is such a basic requirement, which demonstrates the parties' willingness to be bound by a contract. The intent of declaration includes both a subjective and an objective intent of declaration, with the latter being judged by the good faith and social customs. As a result, a declaration of intention cannot be established where a party has neither a subjective nor an objective intent of declaration.

Keywords: Declaration of Intention, Intent of Effect, Intent of Declaration, Intent of Being Bound by a Contract

Speculation about Autonomous Driving from Legal Aspect —the Test Drive of Self-Driving Law

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Abstract

This article explores the responses and adjustments adapted by the legal system to cope with the autonomous vehicle system formed by the self-driving and vehicle-to-everything (V2X) technology; meanwhile, to bring reflexivity to this topic from a legal perspective. The main argument is illustrated first from 'autonomous driving and regulations' and investigates the relationships between facts and rules in this topic, which indicates a significant gap between technology development and law and reminds the possible error when applying a comparative law approach. Secondly, this article analyses the regulatory thinking and problems for self-driving and highlights the differences between 'regulations before on-road' and 'responsibility afterwards'. The former has been emphasised especially in this article since it functions as the premise of the latter. The common issues of data and organisations have also been identified in this section. This article further explores the legal foundation and responsibility for autonomous vehicles based on the foundation of prior discussions, examines the main features of current regulations, and tries to find a way to deal with the digital transformation trend. This article brings the reflexivity in the end, focusing on the regulative relations between autonomous driving technology and human dignity, and concludes with the inherent humanity connotation of the idea 'AI exists wherever humans exist.'

Keywords: Artificial Intelligence (AI), Autonomous Vehicle/Self-Driving Car, Vehicle-to-Everything (V2X), Human Dignity, Responsibility, Externality, Disruptive Innovation, Legal Infrastructure

Improving Competition Investigation Procedure and Advocating the Law Amendment in Taiwan

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Abstract

Taiwan Fair Trade Commission (TFTC) is responsible for the antitrust law enforcement and the cases under investigation by TFTC are comparatively complicated than other economic issues handled by other administrative agencies. For the purpose of fulfilling its responsibility, it is imperative, from the author's opinion, to invest TFTC with full and sufficient power for investigation by law, to improve its methods for investigation, and to protect the parties' procedural right during investigation. In this paper, the author examines a variety of legal issues relating to Taiwan's competition investigation procedure, including ex officio discretionary investigation, coercive sector inquiry, full administrative inspection power, and the direct appeal by the undertakings in question to the on-site inspection decision, etc. Following a series of elaboration the author also proposes the relevant articles for amendment of the Fair Trade Act. Hopefully this paper can provide a momentum for further discussions on this subject and ultimately can help improve and enhance the competition enforcement by TFTC in Taiwan.

Keywords: Ex Officio Discretionary Investigation, Sector Inquiry, Administrative Investigation, Administrative Inspection, Dawn Raids

On the Situation about Decedent be in Debts with One of the Heirs

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Abstract

The situation about a decedent is in debts with one of the heirs, has no settled law like that "If one of the heirs is in debts with the deceased, the amount of the debt shall at the time of partition of the inheritance, be deducted from that heir's entitled portion" provided by the article 1172 of the Civil Code to solve the problem of repayment from the heirs at the time of partition of the inheritance. There are three explanations under the current law, which are influenced by the opinions under the old law. The theory of equality of creditors would insist that the heirs should discharge the debts of the inheritance, before the partition of the inheritance. The theory of the article 1171 by way of exception is still staying at the age of the old law. The theory of the article 1172 to be applied by analogy was accepted by Taiwan's legal practice. However, it could get the consequences of ignoring the equality of creditors to be separated into the heirs and non-heir. In my opinion, we should follow the existing legislation to integrate all the theories above, for taking into consideration about the equality of creditors, and admitting the difference between repayment and partition of the inheritance, and the protection of the heirs at the same time.

Keywords: Deduction from Heir's Entitled Portion, Repayment, Partition of the Inheritance before Repayment, Equality of Creditors, Protection of the Heirs

From "Obscene Articles in Infringing Sexual Customs" to "Images or Videos Infringing Sexual Privacy" —The Illegal Nature of Distributing Sexual Images or Videos

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Abstract

The purpose of this research is to explore the changes in the connotation of legal evaluation of the dissemination of other people's sex-related images in criminal law. In the past, the criminal liability of such behavior came from the perpetrator's violation of sexual customs. The punishment also reflected the subjective negative sentiment of the majority towards the "publicization of sexual behavior".

However, a subtle shift in the evaluation of this type of behavior can be seen in the revisions of the criminal law. The criminal liability is instead regarded as the perpetrator's "use of the existence of this custom in order to degrade the person's personality".

The traditional duality of the two legal entitlements, the sexual customs and the sexual autonomy, should not be considered as absolute. Because these regulations, which seem to protect individuals at first sight, still contain sexual moral elements. Since the elements have been internalized as a part of the core field of personality, the interference of criminal law still seemed to be legitimate. However, it remains to be seen whether it can further promote the review of the crime of infringing sexual customs.

Keywords: Distributing Obscene Articles, Sex Offenses, Sexual Privacy, Reputation, Personality

The Validity of Customer-Focused Clauses －The Interpretation of (2008) TW Supreme Court (appeal) No. 1402

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Abstract

The article 15 of the Consumer Protection Act provides:' Any standard terms and conditions shall be null and void when it is contradicted to individually negotiated terms.' here are several different interpretations to this article among scholars and practitioners. Those who focus on the freedom of contract and textual interpretation hold that individually negotiated terms shall be valid. Those who focus on consumer protection hold that individually negotiated terms shall be valid on the condition that standardized terms are not favorable to consumers. In this decision, the Supreme Court held that the buyer of the pre-sale apartment, knowing the standardized terms, signed on the individually negotiated terms, though the individually negotiated terms are not favorable to the consumer, and the individually negotiated terms shall not be null and void. This article agrees the opinion of the Supreme Court decision and expound and propagate it.

Keywords: Customer-Focused Clauses, Individually Negotiated Terms, Standardized Contract, The Art. 15 of the Consumer Protection Act, Freedom of Contract, Should be Included Clauses, Should Not be Included Clauses

Critical Comments on Selected Criminal Decisions: Force and Threat Behavior of Coercion

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Abstract

This article discusses the recent development of Taiwan's Supreme Court Decisions concerning interpretation of force and threat behavior of criminal coercion. The author suggests a narrow interpretation method of both behaviors to legitimately restrict the application of coercion offense. In addition, it might not be necessary to investigate the reprehensibility of coercion behavior.

Keywords: Force, Force on Property, Threat of Harm, Coercion, Reprehensibility Clause

Introduction to Japanese Civil Law: Focusing on its Historical Development

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Abstract

Japan and Taiwan are both oriental countries that have transplanted western laws, but how do they face the transplanted Laws? How do they integrate them with the local society? These are still common problems that both Japan and Taiwan face. Since the enactment of the civil code in the late 19th century, Japanese civil law scholars have been referring to foreign laws in terms of interpretation, but the attitude of scholars toward foreign laws and the meaning given to them have varied from era to era. In view of this, this article will introduce the process of enactment of the Japanese Civil Code and the history of Japanese civil law doctrine in the hope that readers can understand the historical context of the Japanese Civil Code and civil law doctrine.

Keywords: Japanese Civil Law, Meiji Civil Code, History of Japanese Civil Law Doctrine, Suehiro Izutaro, Hoshino Eiichi