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Justitia, the People's Power and Mother Earth

Democratic legitimacy of judicial law-making in European private law cases on climate change

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I.

INTRODUCTION

A. JUSTITIA, THE PEOPLE'S POWER AND MOTHER EARTH

Worldwide, environmental crises loom, but legislatures fail to set out adequate policies to tackle this problem. In reaction, environmentalist claims are being made before courts in European private law. This development imposes the question how these courts should decide upon these claims, given their role in the multi-level legal order of European private law. For example, in Europe, more than thirty cases were filed on air quality in administrative as well as private law courts; and globally more than thousand cases were initiated on the issue of climate change, including many within Europe.

Those who care about **Mother Earth** and her inhabitants might claim that the judiciary – **Justitia** - must do anything to protect the environment. Yet courts must also uphold the rule of law and respect the boundaries of their discretion. Especially in civil law jurisdictions,¹ courts are expected to defer as much as possible to laws written by the legislature, because these are thought to represent the **People's** democratic **Power**. When applying private law rules, courts in Europe traditionally decide private disputes and are often seen as lacking the expertise and democratic legitimacy to consider questions of public policy.

Hence it is not surprising that the environmentalist claims have spurred controversy. In the public debate, it was said that enforcement of climate law through the courts is the 'wrong way';² and the litigating environmentalists have been accused 'not to believe in democracy'.³ In a similar vein, Royal Dutch Shell stated: 'We believe that climate change is a complex societal challenge that should

¹ As opposed to common law jurisdictions.

² Editorial, 'Rechter is geen beleidsmaker' *Trouw* (6 April 2018).

³ Cf 'Milieudefensie Gelooft Niet in Democratie' *De Telegraaf* (3 August 2016).

not be addressed by courts,' after NGO⁴ Milieudefensie (Friends of the Earth Netherlands) initiated a lawsuit in the Netherlands on the oil giant's allegedly tortious business case.⁵

In academia, it is controversial whether NGOs defending environmental interests should have standing at all.⁶ Critical scholars have long warned that the balance between different governmental powers is in danger if judges interfere with politically controversial issues such as climate change. This objection was, for example, articulated by many in reaction to the 2015 Dutch *Urgenda* decision,⁷

⁴ Non Governmental Organisation.

⁵ The letter in which Milieudefensie hold Shell liable for the alleged tort dates from 4 April 2018 and can be read here <https://milieudefensie.nl/publicaties/brieven/brief-van-milieudefensie-aan-shell>. 28 May 2018, Shell officially responded that it finds the claim unfounded, repeating *inter alia* the statement about courts not being the right forum to advance the global energy transition. This made Milieudefensie pursue the lawsuit. See 'Reactie van Shell op eisen Milieudefensie' (*Milieudefensie*) <<https://milieudefensie.nl/actueel/reactie-shell>> accessed 28 May 2018. When in July 2018, a climate lawsuit launched in by the city of New York against a number of oil companies including Shell, both Shell and Exxon repeated to Bloomberg the statement that climate change is something to be solved by policy makers rather than by courts: Bob Van Voris and Kevin Crowley, 'New York's Global Warming Suit Against Oil Companies Tossed' *Bloomberg* (19 July 2018) <<https://www.bloomberg.com/news/articles/2018-07-19/new-york-s-global-warming-suit-against-oil-companies-thrown-out>> accessed 20 July 2018.

⁶ Cf Stolk, Rowie, 'De legitimiteit van strategisch procederende belangenorganisaties (Preadvies Jonge VAR)', *Preadvies Jonge VAR reeks nr 16* (Boom Juridisch 2018) <<http://verenigingbestuursrecht.nl/wp-content/uploads/2017/11/De-legitimiteit-van-strategisch-procederende-belangenorganisaties-Stolk.pdf>>.

⁷ Cf Lucas Bergkamp, 'Het Haagse Klimaatvonnis: Rechterlijke Onbevoegdheid En de Negatie van Het Causaliteitsvereiste' [2015] *Nederlandsch Juristenblad* 2278; Nik Boer, de, 'Trias Politica Niet Opofferen Voor Ambitieuze Klimaatpolitiek' (2016) 73 *Socialisme en Democratie* 40; G Boogaard, 'Urgenda En de Rol van de Rechter. Over de Ondraaglijke Leegheid van de Trias Politica' (2016) 65 *Ars Aequi* 26; KJ Graaf, de and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 *Journal of Environmental Law* 517; MGWM Peeters, 'Europees klimaatrecht en nationale beleidsruimte' (2014) 2014 *Nederlands Juristenblad* 2918; RJB Schutgens, 'Urgenda En de Trias' (2015) 90 *Nederlands Juristenblad* 2270; GA Veen, van der and Pelin Oztürk, 'Onrechtmatige daad en gevaarstelling: reflexwerking en zorgplicht bij milieukwesties' (2015) 2015 *Overheid en Aansprakelijkheid* 113; Wim Voermans, 'Staat Moet Wél in Hoger Beroep Gaan' *De Volkskrant* (28 August 2015) <<http://www.volkskrant.nl/opinie/staat-moet-wel-in-hoger-beroep-gaan~a4130578/>> accessed 14 April 2017; Josephine Zeven, van, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 *Transnational Environmental Law* 339.

in which the District Court of The Hague ordered the Dutch State to increase its greenhouse gas reduction goal.⁸

Exactly because of the political sensitivity, other judges have refrained from rendering judgments in many of these cases. For example, on the 4 January 2018, a Norwegian judge abstained from considering the climate-change related complaints of the youth organisation *Natur of Ungdom* ('Nature and Youth') against authorisations issued for oil extraction: 'Whether Norway is doing enough in the environmental and climate area and whether it was prudent to open fields so far north and east are questions that involve overall assessments which are better evaluated through political processes that the courts are not suited to reviewing.'⁹

Apparently, we are facing tension between law and politics.¹⁰ Environmental activists resort to the judiciary, but many have rejected this strategy because they believe that the environment as a problem belongs to the political domain, subject to the people's power rather than subject to the discretion of a single court.

To fully grasp this tension, it is necessary to assess what are the boundaries of democratically legitimate judicial law-making in European private law. This book builds on, but ultimately departs from the political theory developed by Jürgen Habermas on deliberative democracy.¹¹ It reconstructs the tension between law and politics apparent in the environmentalist claims. More precisely, it reconstructs the tension that captures *Justitia*, between democratic demands of the People's Power and environmental claims concerning the protection of Mother Earth.

⁸ Court of First Instance The Hague (Rechtbank Den Haag) 24 June 2015 Stichting Urgenda/Staat der Nederlanden ECLI:NL:RBDHA:2015:7145, hereafter: *Urgenda* decision.

⁹ This is an unofficial translation of the judgement by the Oslo District Court (Oslo Tringett) 4 January 2018 (judge Hugo Abelsest) case no 16-166674TVI-OTIR/06, §5.2.7

¹⁰ A key thought in Critical Legal Studies is that all law is politics. My analysis of the relation between the concepts law and politics will become fully clear in Chapter II. Here, suffice it to remark that I focus not so much on how political law is, empirically speaking, but rather on how law and politics relate to each other in the normative self-understanding of our legal-political system. I use Habermasian theory on deliberative democracy rather than Critical Legal Studies as an analytical framework.

¹¹ Mainly Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998).

My departure from Habermas centres on the observation that our current understanding of deliberative democracy suffers from serious democratic deficits, which have always been present, yet become prominent in the environmentalist claims. That is, environmental problems typically affect at least three groups not included in the democratic decision-making process: (i) people in other countries, (ii) future generations, and (iii) non-human entities such as animals, plants and ecosystems. Accepted boundaries of democratically legitimate judicial law-making therefore require rethinking. In this book, I aim to reconstruct how judiciaries deal with these deficits, sometimes remaining within old territory, and other times breaking through long-accepted boundaries.

This reconstruction serves to defend the following thesis: the environmentalist claims in European private law illustrate that classical boundaries to democratically legitimate judicial law-making are being challenged, as these claims operationalise the constitutionalisation of the environment, which increasingly encompasses the interests of people in other nations, future generations and non-human entities.

This thesis contains several elements that deserve further clarification: European private law, environmentalist claims, judicial law-making, democratic legitimacy. Allow me to give some definitions for the purposes of this book, say something on its relevance and to unfold its methodology and outline.

B. EUROPEAN PRIVATE LAW

The term European private law can be understood in several ways. In a narrow sense, it may refer to law regulating private relations enacted by the European Union (EU) – the supranational organisation with 27 Member States from the geographical area Europe that primarily aims to establish a common market. It was thought that to promote this single market, it would be convenient to have one set of rules that would govern all private law transactions within the EU. For over two decades, attempts were made to draft a civil code for the European Union. However, no consensus could be reached, which in turn also exposed how politically salient issues of private law are, and what importance civil codes have for national identities.¹² Nonetheless, agreement was reached on specific areas of

¹² Cf also Martijn W Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675.

private law that are now laid down in numerous directives, for example the Consumer Rights Directive and the Unfair Terms Directive.

This process has stimulated research on European private law in a second sense, namely on what constitutes the ‘common core’ of the private law systems in the EU Member States.¹³ The national systems of private law in Europe display overlap, as they are all to a varying degrees influenced by Roman and medieval canon law. This overlap is furthered, of course, by the fact that EU law is now applicable in all Member States, with the EU’s judicial body, the Court of Justice of the European Union (CJEU) issuing common interpretation. Whereas a common core used to be of relevance to explore the potential of harmonisation, it is now also interesting from a purely comparative perspective to fully grasp the continued influence of the cooperation of the EU’s Member States on the ‘ground’ of private law.

In a third, wider sense, European private law is understood as the field of law comprising the rules governing private legal disputes within the multi-level legal order of both EU law and national private laws.¹⁴ This book sees European private law in this wider sense. It studies claims made before national courts with private (procedural) law as a legal basis. We will see that not only EU law, but also other sources of meta-national law are relevant. All EU Member States are party to the European Convention on Human Rights (ECHR) of the Council of Europe – an intergovernmental organisation with 47 Member States, many of which are not members of the EU, like Russia. This Convention, as interpreted by the European Court of Human Rights (ECtHR), has effects on national laws, including on private law matters. Moreover, the EU Member States and the EU itself are parties to international environmental law laid down in treaties, protocols and agreements.

Particularly relevant for this book is the influence these sources (should) exercise on the role of the judiciary in the national private legal orders in Europe, and how national understandings of this influence, in turn affect an understanding at the European level: the book also studies one claim made before the CJEU in-depth. While fully acknowledging the differences between the various legal systems

¹³ Within the inter-European research project *The Common Core of European Private Law*, numerous books have been published that search for similarities and differences in the national systems of private law in Europe.

¹⁴ Cf Chantal Mak, ‘Rights and Remedies - Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters’ (Social Science Research Network 2012) SSRN Scholarly Paper ID 2126551 <<https://papers.ssrn.com/abstract=2126551>> accessed 4 July 2018.

interacting in the realm of European private law, the book seeks to abstract from these so as to make a more general point about the role of the judiciary in European private law when responding to environmentalist claims.

C. ENVIRONMENTALIST CLAIMS

The term ‘environmentalist claims’ consists of two elements: environmentalist and claims. The term *claims* refers to legal claims, i.e. to pleas made before a judicial institution. The word ‘claim’ rather than ‘case’ indicates that the book does not limit itself to cases in which a court has reached a decision, but departs from the pleas of environmentalists and looks at how courts in European private law (should) respond to these. Chapter II will argue that claims, as well as court decisions, can be conceptualised as exceptionally strong contributions to the so-called public sphere. The term *environmentalist* merits a more detailed explanation.

Since the 1960s, the world’s human population has doubled and today, almost five times as many people live on earth as in the year 1900.¹⁵ Such statistics make a compelling case- even for typically mathematically averse lawyers - to understand that this population rate must somehow influence the planet we live on. Geologists say we no longer live in the Holocene and call our current era the *Anthropocene*.¹⁶ Referring to the Greek word for human, *anthropos*, the name indicates that human activity now significantly impacts the Earth’s geology and ecosystems. The term was quickly picked up by philosophers and got soon contested because environmental problems are not due to mankind as a whole, but rather a result of capitalist, formerly colonising countries led mostly by white men.¹⁷ Therefore, the alternative term ‘capitalocene’ has been proposed.¹⁸

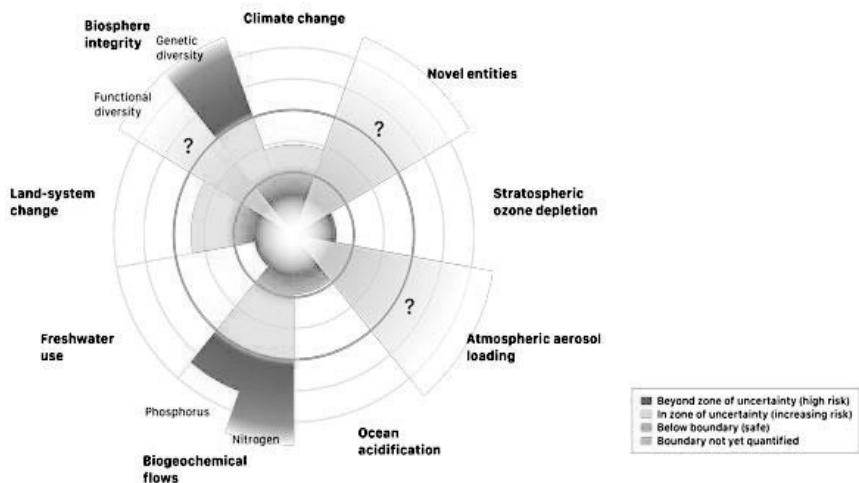
¹⁵ ‘World Population by Year - Worldometers’ <<http://www.worldometers.info/world-population/world-population-by-year/>> accessed 5 July 2018.

¹⁶ No consensus exists about the start date of this era. Some situate it only decades ago, while others find the Anthropocene started with the agricultural revolution in the Neolithic period, 125000 years ago. Cf. SI Lewis and MA Maslin, ‘Defining the Anthropocene’ (2015) 519 *Nature* 171.

¹⁷ For a breathtaking analysis unfolding the ‘anthropos’ in the Anthropocene in its optimal form is the corporation, see Anna Grear, ‘Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ (2015) 26 *Law and Critique* 225.

¹⁸ Cf Elmar Altvater and others, *Anthropocene or Capitalocene?: Nature, History, and the Crisis of Capitalism* (Jason Moore ed, PM Press 2016).

The impact of humanity on our ecosystem is not limited to climate change. In fact, the Stockholm Resilience Centre has identified nine so-called *planetary boundaries* - biophysical boundaries that are intrinsic to the operation of earth as a system. Crossing them means irreversible changes to the system as we know it from the Holocene era. Apart from climate change, these boundaries include ozone depletion and ocean acidification, for example.¹⁹ Four of the nine boundaries have already been crossed: the extinction rate of certain species, deforestation, atmospheric CO₂ and the flow of nitrogen and phosphorus. The other five are likely to be crossed in the near future: the scarcity of freshwater, for instance, is expected to become a serious problem by 2050.



Nine planetary boundaries.²⁰

Scientific findings like these, although descriptive, are so alarming that they imply a need for action (just like the descriptive statement ‘a baby is lying on that chair!’ can be understood as an order not to sit down).²¹ They have led to an abundance of environmental law at national, regional and international levels.

¹⁹ Cf Stockholm Resilience Centre, ‘The Nine Planetary Boundaries -’ (17 September 2009) <<http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html>> accessed 5 July 2018.

²⁰ Graph taken from Will Steffen and others, ‘Sustainability. Planetary Boundaries: Guiding Human Development on a Changing Planet’ (2015) 347 *Science* (New York, N.Y.) 1259855.

²¹ I borrow this example from Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (John Wiley & Sons 2017) 47.

Yet the global economy is so driven by pollutants such as combusted fossil fuels, that environmental measures are unpopular and therefore difficult to implement by government leaders who want to be re-elected.²²

In reaction, environmental activism has often taken the form of civil disobedience: think of Greenpeace actions on the high seas, or of animal rights activists who break into a slaughterhouse. In the past decades, however, environmentalists increasingly try to achieve their green goals by means of litigation.²³ Oftentimes these attempts are not undertaken in the private law domain, but instead in administrative law, and often not in Europe.²⁴ Accordingly, this book refers at times to cases outside the field of European private law. Sometimes this is done to show that European private law cases follow in a global trend, whilst other times this is done to contrast Europe with other areas in the world.

To characterise how I understand the word *environmentalist*, I prefer to use the planetary boundaries framework rather than the well-known legal concept ‘sustainable development’. The reason is because sustainable development not only includes ‘sustainability’, but also ‘development,’ which is an inherently economic and thus human component, whilst my aim is to (at least initially) contrast the People’s Power with Mother Earth. Sustainable development was introduced in the 1987 ‘Brundtland report’ entitled *Our Common Future*, commissioned by the UN Secretary General.²⁵ It led up to the United Nations’ (UN’s) Sustainable Development Goals (SDGs), which were critiqued precisely for presenting irreconcilable ambitions regarding economic growth and ecology.

²² Cf the analysis by Elizabeth Ellis, ‘Democracy as Constraint and Possibility for Environmental Action’ in Teena Gabrielson, John M Meyer and David Schlosberg (eds), *The Oxford Handbook of Environmental Political Theory* (Oxford University Press 2016) <<http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199685271.001.0001/oxfordhb-9780199685271-e-12>> accessed 10 July 2018.

²³ Animal rights activists are reported to have deradicalized in a more general sense. Cf. de Vos Evert and Wyns, Quinten, ‘Gederadicaliseerde dierenbevrijders behalen het ene succes na het andere’ [2018] *De Groene Amsterdammer* <<https://www.groene.nl/artikel/als-we-maar-geen-communicatiebureau-worden>> accessed 20 July 2018.

²⁴ Cf the excellent databases of climate change cases litigated worldwide kept up to date by The Sabin Center of Climate Change Law of Columbia University at <http://climatecasechart.com/>, and one of the London School of Economics available at <https://climate-laws.org/>.

²⁵ This report was drafted by a commission led by former Norwegian prime minister Gro World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987). Brundtland upon the request of the UN:

²⁶ In other words, the concept of sustainable development is less useful as an analytical tool for the purposes of this book, because it is *reproducing* the tension under study, between legally recognised ecological needs and the political incapacity to fulfil them.

D. CASE SELECTION

This book does not aim to undertake comparative research, as it does not study cases to single out their similarities and differences. It rather uses cases to illustrate the input that environmentalist claims have delivered on the role of the judiciary in European private law. This implies a relevant ‘case population’ consisting of all claims made in European private law, with one of the nine planetary boundaries as its substance matter. Ideally, this research would encompass all these claims. However, due to time and space limitations, they could not all be scrutinised in the book. Therefore, like comparative research, this book needs criteria for case selection.

Since the topic of the book is concerned with European private law as a whole, the book is not confined to one national jurisdiction, such as Germany or Poland. Instead, the book chooses to study a specific set of cases in-depth that could be referred to as ‘typical’;²⁷ they are representative of the tension that is the subject-matter of this book. That is, the book considers *all* claims made in Europe with private law, including civil procedural law, as its legal basis, in which the planetary boundary of climate change is central to the dispute. These are: a claim in Belgium,²⁸ a case in Germany,²⁹ two cases from the Netherlands,³⁰ one from

²⁶ Cf e.g. Jason Hickel, ‘The Contradiction of the Sustainable Development Goals: Growth versus Ecology on a Finite Planet’ [2019] *Sustainable Development* 1.

²⁷ Cf eg Jason Seawright and John Gerring, ‘Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options’ (2008) 61 *Political Research Quarterly* 294.

²⁸ Since the launch of the Belgian *Klimaatzaak* on the 1st September 2014, a battle concerning the appropriate language of the case has taken some time but came to an end with the decision of the Supreme Court (*Hof van Cassatie*) of 20 april 2018, which announced the start of the substantive legal battle.

²⁹ The case of Saül Luciano Lliuya against RWE was filed the 24th November of 2015. The District Court of Essen dismissed the claim at the 15th December 2016, but at the 30th November 2017, the Higher Disctrict Court Hamm (*Oberlandesgericht Hamm*) decided to have the case entered the evidentiary phase.

³⁰ The *Urgenda* case was launched 12 November 2012, the Court of First Instance of The Hague (*Rechtbank Den Haag*) rendered a judgment on 24 June 2015; the Court of Appeals (*Hof Den Haag*) published its decision on 9 October 2018. In April 2018, association *Milieudefensie*

Norway,³¹ one in Sweden,³² one in France,³³ and one claim before the CJEU.³⁴ A tort case on the alleged climate-related human rights violations against the Italian government is also in the making, but it will be launched after I complete the manuscript for this book in March 2020.³⁵ I included cases launched up until the end of January 2020.

Importantly, this means I have excluded those cases where climate change is mentioned in passing to support a claim on another topic, or cases that have an implicit impact on climate policy – even though such cases definitively merit attention in (other) scholarly research.³⁶ My set of cases also excludes cases from outside Europe, whereas non-European cases form the majority in the databases compiling climate change litigation.³⁷ Most climate change litigation is occurring in the USA: a 2019 ‘snapshot’ by scholars of the London School of Economics counted 1023 American cases and some 200 other non-European cases.³⁸ Also

announced a lawsuit against the oil company Dutch Royal Shell, which was launched in April 2019.

³¹ The action of proceedings in the case of *Natur of Ungdom & Greenpeace* against the Norwegian State (or *The People v Arctic Oil*) were filed at the 18th of October 2016. The claim was dismissed by the District Court of Oslo (*Oslo Tingrett*) at the 4th January 2018; the appeal will take place in November 2019 before the Court of Appeals (*Borgarting*) of Oslo.

³² The *Magnolia* case was launched by two youth organizations and 176 individuals with the District Court of Stockholm (*Stockholms Tingsrätt*) on the 15th September 2016, which rejected the claim at 30 June 2017. 23 January 2018, the Court of Appeal (*Hovrätt*) declined the appeal. Due to this assessment and to resource shortages, the plaintiffs decided not to appeal to the Supreme Court. Cf *Fältbiologerna red., ‘Överklagan nekas’ (Fältbiologerna, 1 February 2018)* <<https://www.faltbiologerna.se/overklagan-nekas/>> accessed 4 September 2018.

³³ This case was launched in January 2020 before the civil court of Nanterre (*tribunal judiciaire de Nanterre*), by the NGO Notre Affaire à tous cum suis, against the company Total S.A, cf <https://notreaffaireatous.org/wp-content/uploads/2020/01/Assignment-NAAT-et-autres-vs-TOTAL-VDEF.pdf> (accessed 11 March 2020).

³⁴ Case T-330/18, *Carvalho and Others v Parliament and Council or People’s Climate Case* was brought to the CJEU at 25 May 2018 and accepted on the CJEU’s bench on 13 August 2018. Cf ‘Official Journal of the European Union C 285 Vol 61’.

³⁵ So I was told by Luca Saltalamacchia, one of the lawyers working on this case.

³⁶ As was argued by Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30 *Journal of Environmental Law* 483.

³⁷ Cf note 24 above.

³⁸ Joana Setzer and Rebecca Byrnes, ‘Global Trends in Climate Change Litigation: 2019 Snapshot’ (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2019) 3.

excluded is European climate change litigation that is not of a private law variety, but rather pertains to administrative law matters.³⁹

E. JUDICIAL LAW-MAKING

Whereas legislatures are thought to be the creators of law, judiciaries should only apply law. Yet when speaking of the work of judges, it is impossible to make a clear-cut distinction between law-application and law-making. Legal rules are typically formulated in the abstract; judicial decisions render the rules applicable to new factual situations. Any court decision thus contributes to further concretisation of the law, as even non-contentious court decisions render a certain abstract rule applicable to a concrete set of facts. In this way, court decisions always are constituent elements of law; they represent the most authoritative contribution to the public debate on how to interpret (what are) the applicable rules.

Thus, this book considers all judicial decisions to fall under the heading of ‘judicial law-making’. Yet it studies the boundaries of democratically legitimate judicial law-making, which implies the possibility of democratically *illegitimate* judicial law-making. ‘Judicial activism’, although sometimes used descriptively or even positively, often refers to some form of illegitimate judicial law-making.⁴⁰ Because of its divergent and therefore confusing connotations, the term ‘judicial activism’ is not used in this book, except when citing other authors.

This book is *not* about judicial review – as it is not concerned with a highest, typically constitutional court determining whether a certain statute can be considered constitutional *in abstracto*. The cases under study are actual environmental claims, argued along lines of European private law. However, because of the so-called constitutionalisation of private law⁴¹ – the increased

³⁹ There are quite a few, including two cases from Ireland, one from England, one from Switzerland, one from Germany, one from France, and one from Austria. See note 24 above.

⁴⁰ Cf Kd Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’ (2004) 92 California Law Review 1441.

⁴¹ Cf *inter alia* T Barkhuysen and ML Van Emmerik, ‘Constitutionalisation of Private Law: The European Convention on Human Rights Perspective’, *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers 2006); Aurelia Colombi Ciacchi, Gert Brüggemeier and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Volume 1, A Comparative Overview* (1st edn, Cambridge University Press 2010); Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental*

influence of constitutional values to private law – the procedures might often come very close to declare certain governmental action unconstitutional.⁴² The claims thus spur controversy similar to controversies around judicial review (see further Chapter II).

F. DEMOCRATIC LEGITIMACY

The concept of legitimacy, in my case of judicial responses to legal claims on climate change, comes in many forms. A choice for one form has immediate consequences for the appropriate methodology: Whereas a question of *philosophical* legitimacy – ‘when should a ruling be acceptable?’ – leads to a philosophical methodology, a question into *social* legitimacy – ‘have people accepted the ruling?’ – requires empirical research. When studying court cases, one can focus on the legitimacy of the *procedure* or on the legitimacy of the *outcome*. Legitimacy can be perceived differently by the *defendant* and the *claimant*. Legitimacy can also be understood differently, depending on whether one takes the perspective of *national*, *European* or *international* law.

In this book I focus on *democratic* legitimacy as the core of my normative framework. This choice flows directly from the problem I want to address, namely to what extent the judiciary in European private law can legitimately contribute to law-making when responding to environmentalist claims. What constitutes democratically legitimate judicial law-making will be elaborately discussed in Chapter II. For now, let it suffice that, when I talk of democratically legitimate judicial law-making, I am referring to judicial practice that does not illegitimately encroaching on the tasks of the other branches of government: the legislative and executive branches of government. I deliberately choose this negative formulation – it means that I do not define an area of democratically legitimate judicial law-making, but instead only draw outer boundaries. This concept of legitimacy is thus directly related to the notion of the separation of powers, or the *trias politica*, and to the doctrines on judicial discretion and political questions.

Rights on Contractual Relationships in Germany, the Netherlands, Italy and England (Kluwer Law International 2008).

⁴² Hugh Collins notes the core idea of the constitutionalisation of private law is ‘that the laws of contract, tort, or property have to be designed or developed by the judges in a way that aligns all fields of private law with constitutional rights’. Hugh Collins, ‘Private Law, Fundamental Rights, and the Rule of Law’ (2018) 121 *West Virginia Law Review* 1, 3.

Democracy is a highly celebrated value in the EU and its Member States. Democracy is praised in the preamble and the Articles 2, 20 and 21 of the Treaty on the European Union (TEU); Articles 165(2) and 222 of the Treaty on the Functioning of the European Union (TFEU); the preamble and the Articles 14, 39 and 40 of the Charter on Fundamental Rights of the European Union (CFREU). Furthermore, all EU Member States employ democratic systems. Therefore, I depart from the presumption that European private law should be democratically legitimate, including the European private law coming about through judicial law-making.⁴³

Exactly because democracy is seen as a necessary condition in European private law, judges cannot escape from this prerequisite, also not when dealing with environmental issues. Undemocratic systems are possibly better at tackling environmental issues.⁴⁴ China has been successful in combatting air pollution into certain regions thanks to its top-down decision-making process.⁴⁵ Yet this also led to people suffering from cold when coal-heating was phased out before alternatives were installed.⁴⁶ Similar sacrifices are unacceptable in Europe, where decision-makers cannot do anything to protect the environment; the tension between The People's Power and Mother Earth is real.

Thus, I deemed it essential to select a procedural rather than a substantive normative framework, as this better fits the central problem of this book. It is only interesting to select a framework that will presumably render legitimacy issues more manifest, rather than one that obscures them. Theories of justice that are focused on outcomes rather than on procedure will too easily favour Mother Earth, whereas the concept of democratic legitimacy stresses the importance of The People's Power.⁴⁷ Furthermore, even when formulating a substantive theory of justice, there still needs to be a procedure that can lead to the desired result. A

⁴³ This is of course not to say that democratic legitimacy is the same in every European state; depending on the context, it can take different dimensions.

⁴⁴ Cf. Mark Beeson, 'The Coming of Environmental Authoritarianism' (2010) 19 *Environmental Politics* 276.

⁴⁵ Richard P Suttmeier US, 'How China Is Trying to Invent the Future as a Science Superpower' (*Scientific American*, 29 June 2018) <<https://www.scientificamerican.com/article/how-china-is-trying-to-invent-the-future-as-a-science-superpower/>> accessed 11 July 2018.

⁴⁶ Tom Phillips, 'Blue-Sky Thinking: How China's Crackdown on Pollution Is Paying Off' *The Guardian* (22 February 2018) <<http://www.theguardian.com/world/2018/feb/22/blue-sky-thinking-how-chinas-crackdown-on-pollution-is-paying-off>> accessed 11 July 2018.

⁴⁷ In this line, Robert Goodin noted: 'To advocate democracy is to advocate procedures, to advocate environmentalism is to advocate substantive outcomes'. Robert E Goodin, *Green Political Theory* (John Wiley & Sons 2013).

lack of substantive justice, therefore, inevitably is solved by means of procedure. Social psychology also indicates that a fair procedure is more important than the result itself if people are to accept a certain outcome.⁴⁸

Thus confining myself to *democratic* legitimacy renders it necessary to offer an understanding of democracy. Many models of democracy have been conceived.⁴⁹ I choose to work with the deliberative democracy concept by the German philosopher Jürgen Habermas in his book *Faktizität und Geltung*,⁵⁰ which was translated into English as *Between Facts and Norms*.⁵¹ Choosing another model could possibly have led to equally interesting results. My choice, to start with this theory, is made for the following reasons.

Habermas is a European thinker whose model fits well to the European reality. In his book, he reconstructs the ‘self-understanding’ of constitutional democracies:⁵² when do citizens themselves deem the law legitimate – rightly valid – so they will comply with it? His theory thus elegantly balances between philosophical and sociological accounts of democratic legitimacy – although theoretical, it goes beyond the aspirational. Habermas’ theory builds on many democratic theories and attempts to reconcile them, or to derive from them how we understand our constitutional democracies.

Rightly because the emphasis of this theory on the procedural, it is inclusive towards substantive theories or conceptions of the right and the good. Thus, it may very well be possible that other theories play a role in the deliberations amongst rational citizens within a Habermasian discursive, legally constituted process of legislation. This inclusiveness of Habermas’ theory is essential in the context of the EU with its 27 Member States, where different conceptions of justice flourish.⁵³ Habermas’ theory respects value-pluralism.⁵⁴ It also fits well to

⁴⁸ Cf eg Tom R Tyler, ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006) 57 375.

⁴⁹ Cf David Held, *Models of Democracy / David Held* (3rd [updated] ed, Polity Press 2006).

⁵⁰ Habermas, *Faktizität und Geltung* (n 11).

⁵¹ Throughout this book, I cite from this translation so as to make my argument accessible for those who do not read German: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Reig tr, John Wiley & Sons 2015).

⁵² With constitutional democracy, I refer to the German term *Demokratische Rechtsstaat*: a democratic State guided by the rule of law.

⁵³ Cf e.g. MW Hesselink, ‘Five Political Ideas of European Contract Law’ (2011) 7 *European Review of Contract Law* 295.

⁵⁴ Although Habermas’ work has been subject to the criticism that it excludes certain groups, such as women. Compare e.g. Prins’ analysis of Benhabib’s and Noddings’ criticism of

the perspective of this book, being the perspective of a judge in European private law confronted with an environmentalist claim.⁵⁵ Moreover, reconstructing some critique to the Habermasian framework advanced by the environmentalist litigants, the book is able to address the most painful points of the controversy around judicial law-making on climate change.

G. METHODOLOGY

The methodology is interdisciplinary. It covers various fields of law, including national private law, national constitutional law, international human rights law, international environmental law and European law. Apart from these legal elements, the methodology makes use of political theory, as it starts from Habermas' account of legitimate law-making in constitutional democracies and continues to criticise it on its own inclusive premises with the aid of thinkers such as Fraser, Dryzek and Pickering. The theory I develop throughout the book is grounded in actual environmentalist claims brought before courts in the field of European private law. I reconstruct how the climate cases, as a contribution to the public sphere, question the boundaries of legitimate law-making in European constitutional democracies.

It is in this methodology section that I wish to disclose that as a private person, I am someone who cares about ecological matters. Politically, I am on the green side of the spectrum.⁵⁶ Yet I am also a democrat at heart, deeply fearing any kind of authoritative government, including green dictatorship. Therefore, the perspective of *Justitia* befits me as a person; the tension between the People's Power and Mother Earth is not one that I intuitively solve.

Habermas: Prins, Baukje *Ethiek als tekstuele praktijk; Over vrouwen, moraal en uitsluiting* (Amsterdam: Krisis, 1990). For an insightful and concise oversight, see also Myra Marx Ferree and others, 'Four Models of the Public Sphere in Modern Democracies' (2002) 31 *Theory and Society* 289. It is in this tradition that I will also discuss people in other nations, future generations and non-humans in this book.

⁵⁵ Habermas explicitly aims to "remain open to different methodological standpoints (participant vs. observer), different theoretical objectives (interpretive explication and conceptual analysis vs. description and empirical explanation), the perspectives of different roles (judge, politician, legislator, client, and citizen), and different pragmatic attitudes of research (hermeneutical, critical, analytical, etc.)."

⁵⁶ In high-school, I was nicknamed the 'Minister of the Environment' by my group of friends. (We also had a prime minister – Hui Shan, who was definitively the smartest among us.)

More importantly, although my analysis is undeniably informed by my political preference – for it is impossible to escape such a bias for anyone – this thesis is not a personal political manifesto. As Habermas notes, a procedural understanding of democracy does mean that a political theorist (or any single mind, including writers of PhD theses) can never solve the substantive debates reigning in society, for that is up to the citizens themselves.⁵⁷ What I can do is reconstruct in legal-theoretical terms what the climate cases are aiming to convey so as to ensure that their message is compatible with the legal-theoretical notion ‘the role of the judiciary in European private law’ and answer the question how the judiciary should respond to the climate cases.

H. RELEVANCE

When confronted with a legal claim, a judge must render a decision. As Hans Petter Graver remarks in his book *Judges against Judges*, referring to Hannah Arendt: there is no neutral choice – either judges enforce the (possibly unjust) law, or they do not.⁵⁸ Thus, the central question of this book is imposed by the actual claims made – forcing the judiciary to react in one way or the other. Given the fact that environmentalist claims are made in European private law, how can the judiciary respond democratically and legitimately? I do *not* claim that the judiciary is the best institution to address environmental problems.

The role of the judiciary is a controversial matter in European private law (and far beyond).⁵⁹ The planetary boundaries in turn pose a pressing societal issue. The environmentalist claims made through European private law combine these theoretical and societal problems and therefore require investigation. The innovative nature of this book can be found in addressing both the legal/political problem of the role of the judiciary in European private law *and* the globally

⁵⁷ Habermas, *Between Facts and Norms* (n 51) 126–127, 384.

⁵⁸ Hans Petter Graver, *Judges against Justice: On Judges When the Rule of Law Is under Attack / Hans Petter Graver*. (Springer 2015) 289, 292.

⁵⁹ Indeed, what judges (should) do is a central topic of legal theory, of which contributions by H.A.L Hart, Ronald Dworkin and Duncan Kennedy are only examples. The multi-level legal order of European private law further complicates this topic, cf eg Chantal Mak, “‘Do Justice, Justice’: Over Rechterlijke Rechtsvorming in Het Europees Consumentencontractenrecht’ (2015) 4 Tijdschrift voor Consumentenrecht & Handelspraktijken 175; Chantal Mak, ‘First or Second Best? Judicial Law-Making in European Private Law’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2847586 <<https://papers.ssrn.com/abstract=2847586>> accessed 6 May 2017; Roel Westrik, *Hidden Civil Law: How Can You Know What the Applicable Law Is?* (Uitgeverij Paris 2016).

urgent problem of a sustainable environment. To combine these problems is original and reveals how the changing role of the judiciary in European private law is exposed through the environmentalist claims. Moreover, by criticising a deliberative concept of democracy on its own terms in view of these recent cases, the theory is extended and elaborated and thereby given renewed significance to our present-day society.

I. OUTLINE

Chapter II contains the main theoretical analysis underlying the central thesis of the book.⁶⁰ According to Habermas' account, the boundaries of democratically legitimate law-making are defined by the will of the citizens, revealed and created through society-wide deliberations. However, whilst using the work by Nancy Fraser, and John Dryzek and Jonathan Pickering, I see this account as problematic, because the group 'citizens' does not include people across borders, future generations and non-human entities - whereas these are severely affected by environmental problems. This exclusion poses a fundamental problem to Habermas' account of democratically legitimate judicial law-making. It may also institutionally explain politics' environmental inaction. At the same time, Habermas' understanding of law is dynamic and hinges on the co-originality thesis of fundamental rights and democracy – loosely translated as law and politics. The book argues that we are facing a global dynamic, pulling the environment out of the political domain, into the system of rights, which is and can be affirmed – i.e. made operational - by those courts adjudicating the environmentalist claims. The climate is constitutionalised through appeals to private law.

In this way, the book provides a bottom-up reconstruction, from actual case law, that is further substantiated in Chapters III-IV, which serves as 'data' to underpin the theoretical analysis outlined in Chapter II. It must be noted that this reconstruction is entirely mine – Habermas' *Between Facts and Norms* mentions the word 'ecological' only six times. I put forward that the environment is increasingly drawn outside the political domain through what I label as an 'environmentalisation' of the law that is operated and brought about *inter alia* by means of European private law. Not only is the environment seen as one of the constitutional fundamentals of democracy, the very concept of the 'environment'

⁶⁰ This chapter shows great overlap with an academic article of my hand: Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 *Transnational Environmental Law* 55.

emancipates underrepresented groups as it forces the judiciary to take them into account. The book illustrates this for two of the classically underrepresented groups: people across borders (Chapter III) and future generations (Chapter IV); non-human entities only discussed briefly in an epilogue. This order is not coincidental: the book moves from the least to the most controversial cases.

This reconstruction serves to prove the thesis the environmentalist claims are indicative of an increasing realisation that the environment is a constitutional matter and therefore a prerequisite of democracy, which can be legitimately protected by judges who thereby at times help with the democratic emancipation of people from other nations, future generations, and non-human entities.

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