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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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# V.

## CONCLUDING REMARKS

Governments worldwide show themselves hopelessly inapt to address the many environmental crises that our era of the Anthropocene presents to us. Climate change is perhaps the most prominent example. After all, whilst there has been international consensus for decennia that this problem should be addressed collectively, agreement on the measures effectively mitigating global warming has hardly been reached at any level of government. In response, environmentalists have proceeded to the courts, including to courts adjudicating along the lines of European private law – law that in this book is understood as private law (including procedural law) in Europe. Yet ruling upon climate change, in the opinion of many comes down to walking a *political* path where courts as *legal* institutions are not allowed to do this. This tension between law and politics forms the basis of the endeavour undertaken in this book, which reconstructs the paradoxical position of those courts that are asked to rule upon climate change within the framework of European private law. How does Justitia in European private law find a delicate balance between the People’s Power and Mother Earth?

### A. BOUNDARIES

A recurring motive in this reconstruction of Justitia’s position is the notion of *boundaries* to democratically legitimate judicial law-making: legal boundaries and factual boundaries, but also national and temporal boundaries – as well as boundaries to our imagination, as we will see hereafter, in the epilogue. Legal and factual boundaries delineate the legitimate operational space for the judiciary in European private law: courts are bound *legally* in the sense that they may only apply those laws that are democratically enacted by the people, and they are bound *factually* to the statements brought forward by the parties; the latter have the autonomy to delimit the dispute in private law. National, temporal and imaginative boundaries are determinative for the legal boundary – that is, they form the limits of our national democracies, in which we determine

democratically by what law we want to be bound through deliberation in the public sphere. We do this *now*, with fellow *citizens*, who are always *human* beings.

As a matter of *fact*, though, climate change is an issue that transcends the national, temporal and imaginative boundaries of our legal-political system. That is, its most severe impacts occur outside the national boundaries of Europe, in the future, and to the detriment of many non-human beings, such as animals, plants and ecosystems. These facts are raised and usually not disputed by the parties in the climate change cases. Therefore, in respecting the factual boundaries of its role, the judiciary in European private law must look beyond the borders of nation-states, into the future, and at times also at non-human beings, at the very least as a matter of fact.

At the same time, precisely because people abroad, future generations and non-humans are excluded from our deliberations, our public sphere cannot work politically effectively, nor normatively legitimately when it comes to climate change. After all, not all those affected are included in the process – resulting in a fundamental problem of normative legitimacy. As they are excluded, they are unable to exercise restraint on the centre of political decision-making – seriously hampering the political efficacy of the public sphere.<sup>1081</sup> These problems may at least partly explain political inaction on the climate change crisis. If people abroad, future generations and non-humans were included as subjects participating in our political deliberations, then law on climate change would likely look very different.

## **B. JUSTITIA'S PARADOX**

Now the paradox with which the courts in European private law are confronted is the following. Justitia must remain within the legal boundaries of her role and only apply law that was democratically enacted through the People's Power. At the same time, she must take for granted, as a factual matter, how climate change – indeed, the appeal to Mother Earth – is not delimited by national, temporal nor imaginative boundaries as the various national public spheres legitimising law-making in Europe are.

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<sup>1081</sup> The notions of normative legitimacy and political efficacy are borrowed from Fraser and Nash (n 191).

Indeed, the climate cases not only point to the *interests* of people abroad, of future generations and of non-human beings, but these cases advance that people abroad, future generations and non-human beings are holders of *rights*. Thus, the tension between law and politics can be translated in other tensions that have come to the fore in the climate change cases:

- courts applying *private* law are asked to adjudicate the *public* issue of climate change (actually, an issue that even goes beyond the public sphere, which is delimited by national, temporal and imaginative boundaries);
- the courts are asked to have *human rights* prevail over the decisions taken by a majority in democracy representing *popular sovereignty*;
- in other words, they are asked to repair the *public sphere*'s problems of inclusion with an appeal to *rights of individuals*;
- formulated differently, they are asked to repair a fundamental problem of political or *public autonomy*, i.e. the ability to take part in democratic decision-making – to ensure that addressees of the law are also the authors of the law. But they do so with an appeal to endangered *private autonomy*, i.e. the areas of one's life that should be free from interventions of others.

#### **Tensions reproduced in the European private law climate cases**

Law	↔	Politics
Justitia	↔	The People's Power
Private law	↔	Public issue
Human rights	↔	Popular sovereignty
Individual rights	↔	Democratic inclusion in public sphere
Private autonomy	↔	Public autonomy
Factual boundary	↔	Legal boundary

Paradoxically, the three groups of people abroad, future generations and non-human beings are advanced by the climate cases as belonging to the left column in the textbox above – but these groups are not minorities. Indeed, numerically, they even form majorities compared to those to whom the right column applies. Whereas people abroad (and certain non-humans) can litigate as individuals and

thus to a certain extent overcome this problem, future generations in the sense of the unborn form a virtually endless group per definition.<sup>1082</sup>

## C. DISSOLVING THE TENSIONS

Answers to these tensions are to be found in: (1) Habermas' co-originality thesis that is, so I argue, presented by the climate cases relying heavily on a transnational movement referred to as environmental constitutionalism, which in turn shakes the model of the nation state that Habermas had in mind; and in (2) the observation that the environmentalist claims as well as the court decisions themselves form contributions to the public sphere. To clarify this submission, allow me to unpack its relevant elements, namely co-originality, environmental constitutionalism and the public sphere. Below, I will explain how co-originality justifies dynamic constitutional interpretations that can be hold against the democratic majority; then I delve deeper into a specific dynamic, namely the increased attention for the environment in constitutional norms; and finally, I elucidate how this environmental constitutionalism is furthered by the lawsuits to break open the national, temporal and imaginative boundaries to the public sphere.

### 1. Co-originality

'[T]he system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized,' Habermas writes on co-originality.<sup>1083</sup> Thus, public autonomy is enabled through private autonomy, *and vice versa*: 'the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy'.<sup>1084</sup> Through our public autonomy, we co-author the laws that demarcate our private autonomy, and only with our private autonomy being protected are we able to participate as full members of society and exercise our political autonomy in the public sphere. This means that fundamental, human or constitutional rights (that I, for the purposes of this book, refer to collectively as they all cover the normative content of Habermas' system of rights) are necessary conditions for a thriving constitutional democracy.

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<sup>1082</sup> The theoretical and legal hurdles that are presented by this observation are elaborately discussed in Chapter IV.

<sup>1083</sup> Habermas, *Between Facts and Norms* (n 51) 104.

<sup>1084</sup> *ibid.*

The co-originality thesis also means that there is one instance where the judiciary may oppose democratic majority decisions, and that is where fundamental rights are at stake, because a violation of such a right means a danger to the democratic project as a whole. Fundamental rights thus form the foundations of democracy; they determine the outer boundaries of legitimate law-making by the legislative branch of government. This is not to say, however, that a single judge or court can determine the scope of fundamental rights, for determining the substance and scope of fundamental rights remains something for the People's Power, at least in our self-understanding of democratically legitimate law-making.

After all, the requirement of political autonomy means that law must be dynamic; we must be able to change the laws that bind us. Obviously, it is normally the legislative branch that codifies changes in binding law, but the judiciary may sometimes affirm a changed interpretation of existing law. After all, the *legitimacy* of democratic law does not lay in the political institutions that form the legislative branch of government, but rather in the intersubjective deliberations in the whole of society. There, in the public sphere, everyone may influence the centre of decision-making, and alert to necessary improvements to the law.

This is true for the democratic legitimacy of any law-making, be it legislative or judicial. The democratic legitimacy of *legislative* law-making is comparatively easy to assess, as elections may clearly correct illegitimate decisions: the electorate can vote away bad leaders. No such tests exist for *judicial* law-making, though, which can make judges more vulnerable to democratic legitimacy critique. *How* they assess whether the interpretation of law has changed in society, is not addressed by Habermas, and this (empirical) question falls out of the scope of the present thesis. In practice, courts are likely to rely on the most authoritative sources available to them: parliamentary debates, (foreign) judicial decisions, texts by legal academics, and other sources generated in the public sphere, as well as with the submissions by the parties. In other words, courts interact with the relevant contributions to the public sphere when affirming what interpretation of the law is the best founded at the moment they render their decision.

Important is that in our legal-political system's *self-understanding*, a reigning interpretation of the law can only change where the legitimacy of law is situated: in the public sphere. The judiciary is the most authoritative institution to affirm a changed interpretation of fundamental rights, and it articulates this new

interpretation in its decisions.<sup>1085</sup> This is true for any law, but in the context of democratically legitimate judicial law-making, constitutional law is particularly relevant, as it legitimises contra-majoritarian decisions.<sup>1086</sup>

## **2. Environmental constitutionalism**

This *dynamic* character of law-making in constitutional democracies is vital to understand the democratic legitimacy of adjudication in climate cases. After all, a recent and ongoing development has led to law, notably constitutional law, having become ‘environmentalised’. This constitutionalisation of the environment, which also goes by the name ‘environmental constitutionalism’, takes place at local, national, regional and international levels. That is, about three quarters of national constitutions show a degree of environmental constitutionalism,<sup>1087</sup> with varying legal force, that is to say in terms of justiciability. For example, the CFREU, signed in 2000 and entered into force in 2009, includes a provision safeguarding environmental protection.<sup>1088</sup> Transnationally, the fundamental right to a clean, healthy or sustainable environment is increasingly recognised through an ‘environmental rights revolution’.<sup>1089</sup> Environmental constitutionalism can also happen more implicitly, through the so-called ‘greening’ of other human rights in case the relevant legal source lacks an explicit reference to the environment. This means these other fundamental rights are increasingly interpreted as applicable in situations where the environment is deteriorated such that it affects individuals’ lives. The European Court of Human Rights engaged in such a greening practice by applying Articles 2 and 8, the rights to life and to private life, in environmental situations on numerous occasions.

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<sup>1085</sup> Surely, this approach differs sharply from the view of constitutional originalists, who believe that constitutional interpretations should be as close as possible to the intentions of the original drafters. In contrast, the Habermasian conception of constitutional interpretation (that I adopt) starts from the premise that postmodernity made it impossible to find an absolute truth – the closest we can get to (moral) truth is the intersubjective agreements that we reach through deliberations and therefore are necessarily provisional. See further Chapter II of this thesis.

<sup>1086</sup> Precisely because fundamental or constitutional rights form the foundation of the constitutional democracies, practice put in place extra difficult legislative procedures to change their codifications in texts of constitutions and international human rights treaties, for instance requiring a qualified majority in parliament. This makes changed interpretations of the constitution, as affirmed by the judiciary, extra relevant: it may happen faster than legislative constitutional law-making.

<sup>1087</sup> Cf O’Gorman (n 177).

<sup>1088</sup> Article 37.

<sup>1089</sup> Boyd (n 176).

The climate cases advance this environmental constitutionalism to dissolve the tensions identified above. For if we understand a constitutional right to the environment in terms of Habermas' co-originality thesis, then the environment – Mother Earth – forms one of the very foundations of the constitutional democracy. She represents a matter that is, therefore, worthy of judicial protection against majority decisions. It means that the environment – which is developing, dynamically, into fundamental right – can legitimately be opposed to majoritarian decision-making in the constitutional democracies of European private law.

Whereas the *co-originality thesis* and *environmental constitutionalism* thus explain why judicial law-making on climate change may occur with increasing legitimacy, we need the concept of the *public sphere* to understand how the climate cases signal that the political community as we know it needs to be reconceptualised to include people abroad, future generations and non-humans.

### **3. Public sphere**

Climate lawsuits form contributions to the public sphere. Yet unlike normal contributions to the public sphere, lawsuits do not address the *political* branches of government. Regular contributions – for example an op-ed in a newspaper, a demonstration, or signatures to a petition – address the political institutions, asserting that the law should be changed. Contrastingly, lawsuits are directed at the *legal* institution of the courts. This means they do contribute to the public sphere in a particularly strong manner; not by putting forward the law should change in the future, but rather that the law *has already changed and that the court merely needs to affirm this*.

Such an appeal to allegedly changed law can either fail to be affirmed by the judiciary – in case of which it will at the very least initiate a debate regarding the scope of (environmental) fundamental rights and thus stimulating deliberations in the public sphere – or it can be successful, and then the judge will affirm the constitutionalised environment and hold it against the defendant in the climate case. If successful, this does not mean the end of the discussion though: questions around the proper implementation of the judgment necessarily will arise, which puts the climate even more prominently on the political agenda of the constitutional democracy.

Key here is that the lawsuits are usually launched by NGO's and individual petitioners who do form part of the public sphere in the traditionally nationally and temporally restricted sense. Appealing to Mother Earth, the lawsuits



however alert that traditional boundaries require rethinking. They do so by invoking fundamental rights, legitimising their counter-majoritarian request, and also pointing to international climate change law, and many more legal sources that are valid in the European jurisdiction at hand. Thus, *from within* the nationally and temporally constrained, human public sphere, these cases provocatively pull the attention to the cracks in its national, temporal and imaginative boundaries.

For indeed, the environmentalisation of (constitutional) law has made these boundaries porous. The climate cases present people abroad, future generations, and to a lesser extent also non-humans, as *legal subjects* able to counter-balance political decision-making.<sup>1090</sup> The cases thus put these groups on the agenda not as mere issues or interests that are relevant for the ethical self-realisation of the political community, but as subjects who need to be heard because it is their moral right. Thereby, the cases add to the normative legitimacy and political efficacy when it comes to law-making on climate change, or they at least alert to how the public sphere is lacking these two qualities as of now. They aim to have the judiciary affirm that national, temporal and imaginative boundaries have shifted, so that they encompass a wider legally relevant community.

#### **D. JUSTITIA IN EUROPEAN PRIVATE LAW**

In sum, the climate cases advance critique not only to climate policies of the governments and business they are suing, but also to our legal-political system; current boundaries require rethinking. As illustrated by the co-originality thesis, the question should not be in what column – left or right – to place Mother Earth; as a foundation of society she fits in both. The increasing realisation that the environment is a constitutional matter and therefore merits protection by the judiciary might thus work to overcome our deeply problematic national boundaries, temporal boundaries and boundaries of imagination.

To be sure, Justitia in European private law is usually conservative; where not absolutely necessary, she will refrain from questioning, let alone overstepping, the boundaries to her role as she knows it. Illustratively, the courts in the cases of *Urgenda*, *Magnolia* and the *People's Climate Case* against the EU abstained from truly engaging with the claimants' allegations on intergenerational equity.

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<sup>1090</sup> After all, the cases submit these groups are holders of rights, so they no longer belong to the category of legal objects.

Yet at times, if the crack or hole in the legal boundary is large enough, Justitia does take the path less travelled.

Consider the interpretation of the Dutch Supreme Court in *Urgenda* of Articles 2 and 8 of the ECHR, rendering them applicable to climate change following the so-called *common ground method*, following which a consensus amongst Member States of this convention is leading, even when it is not explicitly shared by the Member State under scrutiny. This usage of international human rights law not only affirms environmental constitutionalism, but also relies on opinions stemming from other nations, thereby taking these up as relevant voices in interpreting the law. This has meant emancipation for people abroad. Also consider the Court of Appeal in the Norwegian case of *Arctic Oil*. The Court recognised in its decision how problematic it is that future generations are excluded from our political decision-making process, and therefore, it interpreted the constitutional right to the environment, which the Norwegian Constitution bestows upon future generations as well, as covering the emissions resulting from exported petroleum – something which goes further than required under international climate change law. It meant an emancipation of future generations.

Thus, these courts have affirmed that national and temporal boundaries have expanded, and so they added to the normative legitimacy of the public sphere for people abroad and future generations. That is, they recognised the public *and* private autonomy of these previously excluded groups as factors that may counter-balance majority decision-making in their national constitutional democracies. Whether the same will happen with imaginative boundaries remains to be seen in European private law – the epilogue following these concluding remarks address how the climate claims try to push for an emancipation of non-humans as well.

One thing remains important to emphasise at the end: Justitia will not save Mother Earth. Courts can never replace the legislature. It is for politics to formulate an effective answer to the climate crisis and to fulfil constitutional demands. Courts are no political leaders, they can only deliver opinions in response to cases being brought before them, their task is to ensure that the political institutions practice what they preach without violating fundamental rights. Yet these fundamental rights – the foundations of society – can be reinterpreted through the communicative Power of the People and be affirmed by Justitia to include Mother Earth. This puts climate change back on the agenda of the political branches of government, making them rethink what to do, and it

engages the society-wide public sphere to think along. And as Mother Earth cannot coincide with a legal-political system that is restricted by national, temporal and imaginative boundaries, Justitia is required to rethink the People's Power, so as to have people abroad, future generations and non-human beings become part of it.

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