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Judging for Utopia: Climate Change and Judicial Action

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Abstract: When we speak of judges who judge for Utopia, we speak about judges today who pursue a better world through their judging. In this contribution, it is argued that a judiciary that is actively engaged in making the world a better place is good for society, also from a legal point of view. Since the most urgent call for utopian law and utopian judging today is on the issue of climate change, litigation in this field forms the main case for discussion. Controversial issues of utopian judging arise when there is disagreement in society over the direction the judiciary is taking, or when the judiciary is taking a separate way from the legislator or the executive power. In such situations, utopian judges may come under criticism for judicial activism or excessive judicial review. It is submitted here that disagreements and differences are, however, not something that should be avoided; they drive the system forward in the exercise of checks and balances. Climate change litigation is an example where there is a need for this today.

Résumé: Parlant de juges qui jugent pour l'Utopie, nous parlons aujourd'hui de juges qui veulent contribuer à un meilleur monde par leurs jugements. Dans cette contribution, l'auteur est d'avis qu'un pouvoir judiciaire qui s'engage activement dans l'amélioration du monde est bon pour la société, aussi d'un point de vue juridique. Étant donné que l'appel pour un droit utopique est le plus urgent en matière de changement climatique, les contentieux dans ce domaine sont au centre de la présente contribution. Les controverses sur jugements utopiques se présentent lors de désaccords dans la société sur la direction prise par le pouvoir judiciaire, ou lorsque le pouvoir judiciaire suit une autre voie que le pouvoir législatif ou exécutif. Dans telles situations, les juges utopiques peuvent être critiqués pour exercer de l'activisme judiciaire ou un contrôle judiciaire excessif. Ici, il est argumenté qu'il ne faut pas éviter des désaccords et différences; ils contribuent à un système de poids et contrepoids. Les contentieux sur le changement climatique offrent un exemple dont on a besoin aujourd'hui.

Zusammenfassung: Wenn wir von Richtern sprechen, die für Utopia urteilen, sprechen wir heute von Richtern, die durch ihre Beurteilung eine bessere Welt verfolgen. In diesem Beitrag wird argumentiert, dass eine Justiz, die sich aktiv dafür einsetzt, die Welt zu einem besseren Ort zu machen, auch aus rechtlicher Sicht gut für die Gesellschaft ist. Da die dringlichste Forderung nach utopischem Recht und utopischer Beurteilung heute die Frage des Klimawandels ist, bilden Rechtsstreitigkeiten in diesem Bereich den Hauptdiskussionsgrund. Kontroverse Fragen der utopischen Beurteilung entstehen, wenn in der Gesellschaft Uneinigkeit über die Richtung der Justiz besteht oder wenn die Justiz einen anderen Weg als der Gesetzgeber oder die Exekutive einschlägt. In solchen Situationen können utopische Richter wegen richterlichen Aktivismus oder übermäßiger gerichtlicher Überprüfung kritisiert werden. Es wird hier vorgetragen, dass Meinungsverschiedenheiten und Differenzen jedoch nicht

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vermieden werden sollten; Sie treiben das System bei der Ausübung von Checks and Balances voran. Rechtsstreitigkeiten im Zusammenhang mit dem Klimawandel sind ein Beispiel dafür, wo dies heute erforderlich ist.

1. Law and Utopia

Law is in a sense always utopian. The norms of law are prescriptions, they are about how people ought to behave. If everyone behaved in conformity with the prescriptions of law, law would be superfluous. There is a utopian element in the gap between the law in books and the law in action. In this way, law always holds a promise of a different world. But law can also be utopian in a more radical sense, the prescriptions of law can set the path to a transformed society. Active use of the law to make the world a better place is the topic of this article.

Since the most urgent call for utopian law and utopian judging today is on the issue of climate change, I will make this the main case for my discussion of judging for Utopia. To this date cases have been brought to the courts against the state with claims that inaction in relation to climate change is a breach of fundamental legal obligations resting on the state in several European countries, notably the Netherlands, Norway, Sweden and Switzerland.[1] A case has also been brought against the EU.[2] All these cases invite the courts to take an active part in transforming the path society is taking into the future. The cases all raise issues relating to the division of powers between the judicial, legislative and executive powers, and issues of judicial review and judicial activism. My starting point in analysing these issues are from the Norwegian and Nordic perspective, but my aim is to throw light on utopian judging also in a more general sense.

The linguistic difference between a judge *in* Utopia and a judge *for* Utopia is subtle. Both can be called utopian judges. But when we speak of judges *in* Utopia we seem to be either speaking of dreamers, or of judges that could or should be – how would we like judges and judging to be in an ideal world? When we on

1 Hoge Raad 20 December 2019, *The State of Netherlands* v. *Stichting Urgenda*, ECLI:NL:HR:2019:2007, English translation, https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf; (accessed 12 August 2020) Borgarting lagmannsrett 23 January 2020, *Föreningen Greenpeace Norden and Natur og Ungdom* v. *the State of Norway* 18-060499ASD-BORG/03, https://www.regjeringen.no/contentassets/3bc2b9eeb9974cfcb34823db04fe9a29/dom-23.01.20.pdf (in Norwegian); (accessed 12 August 2020) Svea Hovrätt 23 January 2018, *Ideella föreningen PUSH Sverige and 173 others* v. *the State of Sweden*, ; Bundesverwaltungsgericht 27 November 2018, *Verein KlimaSeniorinnen Schweiz and 4 others* v. *Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK*, https://klimaseniorinnen.ch/wp-content/uploads/2018/12/Scan_urteil-BvG_20180512.pdf (in German) (accessed 12 August 2020).

2 Action brought on 23 May 2018 – *Carvalho and Others* v. *Parliament and Council* (Case T-330/18), Official Journal of the European Union 13 August 2018.

the other hand speak of judges who judge *for* Utopia, we speak about judges today who pursue a better world through their judging. They believe that the world can be made a better place by law, and that they have a part in this task. This judge may also be an ideal, and thus have a utopian aspect in the first sense. But, in contrast to their colleagues in Utopia, they must consider and confront the realities and normative expectations of today. Judges for Utopia are realists with a vision.

'Utopian judging' has also been employed to characterize a judge who goes beyond making choices between claims that have varying degrees of legal merits.[3] This is not the sense in which the term is employed here. I want to argue that a judiciary that is actively engaged in making the world a better place is good for society, also from a legal point of view. The reservations many may have that this means that judges step out of their proper role of being 'the mouth voicing the content of the law' are misplaced.

The notion that parliaments legislate, executives develop and implement policy and courts adjudicate is a central part of the Western tradition of the rule of law. The lines are never sharp. There is a constant and voluminous discussion on when an active judicial role represents an illegitimate judicialization and an encroachment upon the role of parliaments. How far should the courts go in substituting their discretion on social matters for the decisions taken by legislators, and what is the basis for the legitimacy of courts taking upon them such a role?[4] The answer is that in a society with well-functioning political and legal institutions judges and legislators should work together. But judges have a responsibility to ensure that the institutions are well-functioning, and to correct them when they are not.

Social development requires innovative thinking, and the judiciary must take part in this. Law has demonstrated its innovative powers previously in the history of the Western world. Nobel laureate Douglass C. North, along with the well-known political scientist Francis Fukuyama, both ascribe the economic and political success of the West to legal innovations that took place in the middle ages.[5] At that time, the basis for what we know today as the rule of law was established. Together with innovations in commercial law such as marine insurance and the stock company, this enabled the economic and social innovations that led to the success of the West. The challenges the world faces today with global warming calls for similar radical innovations in law in order to secure future

3 See S. Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014), p 177.

4 See the overview in A. Kaufman & M. B. Runnels, 'The Core of an Unqualified Case for Judicial Review: A Reply to Jeremy Waldron and Contemporary Critics', 82. *Brooklyn Law Review* 2016, pp 163–216.

5 See D. C. North, *Understanding the Process of Economic Change* (Princeton University Press 2005) and F. Fukuyama, *The Origins of Political Order From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux 2011), part III.

prosperity. Judges are sometimes better placed than other institutions of the law to respond to social needs. When judges engage in innovations, they establish conditions for a societal deliberation of the relations between attitudes and recognized values and the solution of specific cases.[6]

Deliberate use of the law in shaping the future belongs to the modern view on law and represents a view that law is an instrument of social change. It grew out of the belief in social engineering of the 1920s and 1930s and peeked with the welfare state in the latter part of the century. Modern international law also has a utopian character. The international human rights regime after the Second World War entailed a promise of a better future and a belief that human beings can make a better life for themselves by using the toolkit of democracy and human rights.[7] The integration of the EC, later the EU Member States, was a project of integration through law. In recent times, environmental law is a field where law is used to shape our common future. That law is a tool for modelling the future seems self-evident to many today.

Utopian lawyers see law as an instrument. Both the legislator, the executive power and the courts have roles in the operation of this instrument. The legislator uses the law to set goals, provide means and prescribe actions to reform society. The executive power often has a leading role to play. The regulatory state is an offspring of utopian law. The judges too, are engaged in transforming society by interpretation and application of the law based on policy considerations.

2. Actors of Utopian Law

2.1. The Legislator

Active use of legislation to transform society conforms to a legal-philosophical approach to law that sees the legislator as the central shaper of law. This is the view of legal positivism that developed in English law in the nineteenth century with Bentham and Austin and in German law in the twentieth century with Radbruch and Kelsen. The social and political background for this view is the development of the idea of parliamentary sovereignty. That Parliament is sovereign means that legislation determines the law, and that law is the expressed will of Parliament. Legal positivism is the acceptance by legal theory of this sovereignty of Parliament.

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6 C. Mak, 'Judges in Utopia – Fundamental Rights as Constitutive Elements of a European Private Legal Culture' (2012). Amsterdam Law School Research Paper No. 2012-89; Centre for the Study of European Contract Law *Working Paper Series* No. 2012-12; Postnational Rulemaking Working Paper No. 2012-06. Available at SSRN, https://ssrn.com/abstract=2127137 (accessed 12 August 2020) or, http://dx.doi.org/10.2139/ssrn.2127137 .

7 C. Dupré, *The Age of Dignity Human Rights and Constitutionalism in Europe* (Oxford University Press 2015), p 69.

Parliamentary sovereignty and legal positivism are conditions supporting the active use of law to transform society. A third condition must also be in place; a belief that society can be transformed by legislative means and public action, a belief in social engineering. This belief developed with the rise of social science at the beginning of the twentieth century, and was transformed into legislative programs with the Keynesian measures to counter the depression in the 1930s.

This development was not unchallenged. In the US, it led to a confrontation between the Roosevelt administration and the Supreme Court before finally the New Deal was accepted by the judiciary.[8] In Germany, the power of the Weimar legislator was contested by the courts, and legal positivism never achieved the dominant status that it had for example in English law. Instead there was a rise of the school of *Interessenjurisprudenz* and the sociological school of law based on the influential thoughts of Rudolf von Jhering. He saw legal development as the result of a struggle between social forces and interest groups seeking to influence legal development. In the same way as legal positivism, this lay the foundations for an instrumentalisation of law. After the extreme legal instrumentalisation of the Nazi period, German legal though was influenced by natural law and a theory of individual rights from 1945 and onwards. Some of the instrumental character of the law, however, remained.

In the Nordic welfare states, the belief that law was an instrument of social change was predominant through the second half of the twentieth century. The well-known Norwegian legal sociologist Vilhelm Aubert regarded influencing the behaviour of the members of society and allocation of goods and burdens as two main functions of the law.[9] Aubert writes that the weight in law gradually shifted from the traditional law to the modern law's emphasis on social planning and the application of systematic knowledge about the relationships between causes and effects and between ends and means.[10] Scandinavian legal theory developed Scandinavian realism, which in a way was a mix between legal positivism and a sociological approach to law. Law was conceived as positive in that it was tied to social facts; legislative acts and legislation being among the most prominent. What counted as law was only what was enforced by the courts, an approach giving a central status to the judiciary. This distinguished Scandinavian realism from legal positivism and introduced thoughts in Scandinavian legal thinking similar to those of the American legal realists. The Scandinavian judges, however, should base their decisions on positive factors, logical reasoning and arguments of policy and justice.

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8 For a thorough account of this conflict see W. E. Leuchtenburg, *The Supreme Court Reborn. The Constitutional Revolution in the Age of Roosevelt* (Oxford University Press 1995).

9 V. Aubert, *Rettssosiologi* (Universitetsforlaget 1982), p 50.

10 V. Aubert, *Continuity and Development in Law and Society* (Norwegian University Press 1989), p 325.

This gave a dominant position to legislation and the policy considerations behind the legislation.[11]

2.2. The Executive Power

Transforming society is not possible without knowledge about social and natural conditions and the factors that influence these. This calls for technical expertise over a wide range of fields from the natural sciences and the social sciences. Systematic building of the future is a task for experts. An ambitious legislator requires a regulatory state. Employing experts in the task of building the future also requires legislation that is adapted to this mission. The legal regulation that developed at the transition from the nineteenth to the twentieth century has been characterized in many ways. Max Weber's analysis of the development from formal to substantive rationality is well known, as are the terms autonomous law and responsive law of Nonet and Selznick. Regardless of the terms employed, there are some key features of the law of this period. 'The previous norm-oriented decision-making method is replaced to a greater extent of policy analysis for finding the purposes of law. The new responsive law also requires new institutional and organizational structures', writes the Swedish legal sociologist Håkan Hydén.[12] The laws of the regulatory state are open-ended frameworks that set aims, institutions and procedures. Legislation of this time unleashed the power of the experts.

This transition of law was particularly successful in the Scandinavian welfare states. The combination of law, administration and participation of civil society in the reform of the social order became known as 'the Nordic Model'. Nowhere was the legislator more ambitious; nowhere was it more successful in creating democratic, egalitarian and prosperous societies. In a sense, the increased use of legislation and legal means to regulate social and economic relations represented a juridification of society. At the same time 'the traditional deductive mode of legal reasoning (...) lost ground to other types of rationalities, internal in the law itself as well as through a transfer to other professionals and experts'.[13] The public sector expanded as the role of legal professionals in the public service decreased, being replaced by experts from different fields such as engineering, medicine, economics and political science.

The rising powers of the executive gave rise to concern. Initially these concerns followed the division between the political left and right, the right being troubled about a lack of legal security of market operators in an increasingly

11 See my account of Scandinavian legal reasoning in *Judges Against Justice. On Judges when the Rule of Law is under Attack* (Springer 2015), pp 233–236.

12 H. Towards, 'A Theory of Law and Societal Development', 60. *Scandinavian Studies in Law* 2014, pp 443–472.

13 V. Aubert, *Continuity and Development in Law and Society*, pp 23–24.

regulated economy. With the expansion of the welfare bureaucracy, voices from the political left started to protest on behalf of welfare clients, patients and recipients of public services. Together with the political and economic liberalization of the 1980s this led to a new type of juridification, the introduction of legal rights as limits to administrative discretion and as the basis for welfare rights. Legal reasoning entered the field anew and with this the importance of legal expertise.

2.3. The Judiciary

Judges participate in utopian law. Again, Scandinavia is a good illustration of this. That judges engage in result-oriented judging, not to pursue their private goals, but to pursue fairness and the good of society, is part of the conventional wisdom of the Norwegian branch of legal realism. The rise of the welfare state influenced both the social role of the courts and the reasoning employed by judges in reaching their decisions. Throughout the twentieth century the role of the judiciary declined in social importance. Between 1814 and 1950 the number of legal practitioners in Norway increased by a factor close to 20, while the number of judgeships no more than doubled.[14] While the potential for conflicts between citizens and between citizens and the state vastly increased, the judiciary, in relative terms decreased. Several other institutions developed to fulfil the functions of the courts outside of the court hierarchy. Many of these were under direct control of the administration and the executive power. Many also had participation from organized interests of civil society, where the trade unions and the associations of employers and businesses had dominant roles.

The prevailing legal methodology in Scandinavia in the middle and latter parts of the twentieth century was well adapted to the program of reform through law. In basic terms, it can be characterized as pragmatic and policy-oriented. Conforming with the tenets of Scandinavian legal realism, the sources of law were predominately formal 'social facts' coupled with a strong policy orientation. In areas regulated by legislation, the statute was the starting point of legal reasoning. Since the statute was an instrument of policy, great emphasis was put on the realization of this policy through legal interpretation. For this reason, both the purpose of the legalization and the legislative history with the documents preparing and proposing the legislation, were important sources of law. The pragmatic approach sometimes even led to interpretations of legislation in contradiction to its express wording if this was warranted by the general aims of the law or the purpose expressed in the *travaux préparatoires.* A study undertaken of cases in the Supreme Court of Norway from 1967–1999 showed that in cases where there was conflict between the wording of a statute and opinions expressed in the preparatory documents about its interpretation, the opinion expressed in the preparatory

14 V. Aubert, *Continuity and Development in Law and Society*, p 377.

documents prevailed in 75% of the cases.[15] In Sweden, the emphasis on the preparatory material was even greater, at least in the legal doctrine. The approach to interpretation of statutes matches with what had been described by David Dyzenhaus as the 'plain facts approach' to legal interpretation of South Africa.[16] A major difference was that where the Scandinavian judges were engaged in a project of building an inclusive society with welfare and security for all, the South African judges were engaged in protecting apartheid.

Court decisions are also social facts. The factual approach thus led to the development of a doctrine of precedent in Scandinavia and separated Scandinavian law from its origins in continental civil law. Until the middle of the nineteenth century, records and reasons of the Supreme Court were kept secret in Norway. By 1970, legal doctrine had established a refined theory of precedent with many of the features of common law.[17]

The factual approach stimulated to a redefinition of central legal concepts such as the concept of rights and the rule of law. Inspired by the logical analysis of rights by the American theorist Wesley Hohfeldt, Scandinavian theory reduced the concept of a legal right to privileges, claims, powers and immunities. These had to have a positive legal basis, and a 'right' was just a short-hand expression of such privileges, claims, powers and immunities, nothing more. Invoking a right could therefore not in itself be the basis of a legal claim or the defence against a legal duty if there was not a positive legal basis for the claim or power or for the privilege or immunity that was invoked. Similarly, the rule of law, or legal certainty (*rettssikkerhet*) as was its equivalent expression in Scandinavian law, was conceived as a formal and procedural requirement; state power was bound by rules and should be predictable.[18] Decisions by the public authority should be taken by unbiased and impartial civil servants on a formal legal basis, and the enactment of such acts had to accord with the procedural rules. The Parliament had its legal basis to enact legislation in the Constitution, and apart from a prohibition against retroactive legislation and a duty to pay compensation for the expropriation of property, there were few substantial restrictions of the powers of the legislature. The executive and the administration had to have a legal basis for its decisions in legislation, in other words they had to be empowered by the Parliament.

There was a norm stating that the executive should not be given wider powers than necessary for the purpose, and that the powers would not be used beyond the necessary, but these were not enforceable as legal limits on the powers

15 K. Bergo, *Høyesteretts forarbeidsbruk* (Cappelen 2000), p 583.

16 D. Dyzenhaus, *Hard Cases in Wicked Legal Systems Pathologies of Legality* (Oxford University Press 2010), p 48.

17 See S. Eng, 'The doctrine of precedent in English and Norwegian law: Some Common and Specific Features', *Tidsskrift for Rettsvitenskap* 1993.

18 See V. Aubert, *Continuity and Development in Law and Society*, pp 68–69.

of the legislature nor executive. The requirement of legal certainty should also be a safeguard against arbitrariness and subjective opinions or whims of the administrators. Judicial review of administrative decisions by an independent judiciary was a central part of legal certainty, but the review was restricted to a check of the legal basis and the procedural correctness of the decision.[19] The protection against arbitrariness was strictly a safety valve. Judicial review of legislation, recognized in Norwegian law since the nineteenth century, degenerated from a situation in the 1920s where it was conceived by some political parties as a threat to democracy, to a state in the 1960s where legal theorists could pronounce that it had lost its practical importance in the modern legal order.

2.4. Legal Doctrine

In the 1970s critical legal scholars in the Nordic countries called for a new strategy of legal interpretation (*legalstrategi*).[20] Their basis for this claim was the utopian legislation of the welfare state, and the rising gap between law in the books and law in action. The legal order was infused with a new set of radical values, benefiting workers, consumers, students, welfare recipients and social deviants, through the enactment of regulatory measures and social welfare legislation. Legal thought was seemingly uninfluenced by this and was steeped in the values of the old system; freedom of contract, market liberalism, adversarial procedure and a refusal to recognize the substantive differences between formally equal roles such as property ownership and buyers and sellers of different goods and services. This created a tension between the reality of law and its possibilities, which could be utilized in a dialectic way to reshape law and society.[21]

One of the first scholars to explore this more systematically in a legal dogmatic way was the Finnish legal scholar Thomas Wilhelmsson.[22] Based on studies of welfare state legislation within in particular contract law and consumer law, Wilhelmsson set out to formulate a legal theory for the welfare state. In this he focussed on the person-orientation of welfare law as opposed to the traditional abstract legal form. A crucial element was the introduction of the *concept social force majeur* and the claim that a consumer could be relieved of contractual obligations if he or she were affected by some special occurrence such as an unfavourable change in his health (physical or mental illness, personal injury), work (unemployment, reduced work, strike and

19 To the doctrine of judicial review at the time see T. Eckhoff, 'Impartiality, Separation of Powers and Judicial Independence', 9. *Scandinavian Studies in Law* 1965, pp 9–48.

20 See to this H. Hydén, 'Sociology of Law in Scandinavia', 13. *Journal of Law and Society* 1986(1), pp 137–140.

21 L. D. Eriksson, 'Det värkilgas och det möjligas dialektik' (The dialectics between the real and the possible).

22 T. Wilhelmsson, *Critical Studies in Private Law. A Treatise on Need-Rational Principles in Modern Law* (Dordrecht 2010). The original Swedish version appeared in 1987.

lockout), housing (termination of lease) or family (divorce, death or injury of family member). In Norway, Anne Robberstad performed a similar type of study of the law of criminal procedure, arguing for participatory rights in criminal trials for victims of the crime, and for the restructuring of foundations of criminal procedural law.[23] Beate Sjåfjell analysed EU company law to show how the structuring feature should not be shareholder value and corporate control, but rather stakeholder rights and sustainable development.[24] She has later elaborated on this in competed and on-going research project with national and EU funding.[25]

This type of scholarship uses instances of legal sources with a forward-looking perspective to reconstruct the whole body of law. The doctrine thus becomes prospective instead of retrospective, and it enables law to become a driving force for social change instead of its usual stabilizing and conservative role. A recent example within European Human rights law is the study by Catherine Dupré on the role of human dignity in the constitutionalism of Europe.[26] In her view, human dignity is the new foundation for human rights and democracy, shaping the theoretical understanding of European Constitutionalism.

Such studies, and many others are important as theoretical endeavours. They show diverse ways of systematizing law, and that many 'chain novels' in a Dworkinian sense may be written from a given body of legal material. In a way, they show that law is a multiverse where different systematic constructs based on the same sources exist in parallel. This increases the scope of utopianism in application of the law. It need no longer be based on particular statutes with a reformist objective. These systematic constructs make it possible to expand the reformism into other fields, based on arguments of a general and systemic kind.

3. Climate Litigation and Utopian Judges

A main area that calls for judicial innovations and an active role for the judges today is the field of climate change. There are some rather more fundamental problems to our legal order posed by the challenge of the environment to law. These are not trivial and challenge the constitutional structure of our law as we know and cherish it. We see recognition of this in that modern constitutional reforms often include provisions on the environment. Overall, approximately 130 countries around the world have constitutional provisions that reflect policy directives or procedural rights regarding the environment, and about 60 of these include an express

23 A. Robberstad, *Mellom tvekamp og inkvisisjon Straffeprosessens grunnstruktur belyst ved fornærmedes stilling* (Universitetsforlaget 1999).

24 B. Sjåfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law* (The Netherlands 2009).

25 Latest the project Sustainable Market Actors for Responsible Trade, http://www.smart.uio.no/ (accessed 12 August 2020).

26 C. Dupré, *The Age of Dignity. Human Rights and Constitutionalism in Europe* (Hart 2015).

recognition of a substantive right to a quality environment.[27] Climate change and resource depletion is often presented as one of the 'Grand Challenges' of our time. In presenting climate action and environment as a grand challenge for Horizon 2020, the EU Commission writes:

> *The 20th century's era of seemingly plentiful and cheap resources is coming to an end. The ability of the economy to adapt and become more climate change resilient, resource efficient and at the same time remain competitive depends on enhanced abilities of eco-innovation, of a societal, economic, organisational and technological nature.*[28]

Most courts have never regarded constitutional provisions on the environment as justiciable. According to May and Daly, 'the body of judicial opinions applying constitutionally entrenched environmental rights is still quite limited given the prevalence of such provisions globally'.[29] For instance the Norwegian Supreme Court has interpreted the environmental provision as an aspiration and guiding principle for the legislator and the executive. The Supreme Court has also used it as an argument when balancing other rights, for instance when deciding the proportionality of regulation to protect the environment in relation to property rights. However, it has stopped short of extracting rights for individuals from the provision. One may conclude that including a provision on the environment in national constitutions have until now had little effects for constitutional law or for law, as we know it as such. There are, however, signs of a development in the direction of recognizing justiciable rights for the environment. Some have argued that the concept of human dignity that several national and international courts have recognized could be the basis of constructing obligations towards entities such as unborn generations and the environment. Even if such entities cannot themselves be holders of rights, we demean our own dignity as humans if we harm the environment and cause untold suffering to those that come after us.[30]

From the inaction and incapability of our political systems to produce the decisions that more and more people deem necessary to turn the trend of global warming, voices arise that demand that our courts take the necessary decisions. There is a call for 'climate litigation'. Climate litigation encompasses several different issues. According to a report made by the Climate Justice Programme,

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27 J. May & E. Daly, 'Constitutional Environmental Rights Worldwide', in J. May (eds), *Principles of Constitutional Environmental Law* (American Bar Association 2011), pp 331–332.

28 https://ec.europa.eu/programmes/horizon2020/en/h2020-section/climate-action-environment-resource-efficiency-and-raw-materials (accessed 12 August 2020).

29 J. May & E. Daly, in *Principles of Constitutional Environmental Law* p 336.

30 See D. Townsend, 'Taking Dignity Seriously? A Dignity Approach to Environmental Disputes Before Human Rights Courts', 6. *Journal of Human Rights and the Environment* 2015(2), p 220.

Australia, climate litigation presently includes cases where claimants seek compensation for climate damages. Second, it includes cases where claimants seek the development and implementation of comprehensive climate recovery plans to achieve more ambitious, science-based targets for climate mitigation, better implementation of existing laws or to force fossil fuels to remain in the ground. Third, it encompasses cases where claimants are seeking immigration permits to respond to their displacement due to climate impacts.[31] Currently there have been brought more than 20 cases worldwide against governments with calls for new laws and policies or halts to existing ones.[32]

Cases are brought in several jurisdictions such as Belgium, Germany, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Sweden, Switzerland and the US, and also in international courts and tribunals.[33] The potentially most radical cases are those where there is an action against government in order to obtain a court order for the development and implementation of necessary policies with determined goals to reduce greenhouse gas emission. In an action raised by an NGO (Non Governmental Organization) in the Netherlands, *Urgenda*, the Hague District Court ruled on 24 June 2015 that the State of the Netherlands must take more action to reduce the greenhouse gas emissions in the Netherlands and must ensure that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990.[34] The decision was upheld by the Hague Court of Appeal in a ruling on 9 October 2018.[35] An appeal for cassation was rejected by the Supreme Court on 20 December 2019.

Urgenda claimed that the joint volume of the current annual greenhouse gas emissions in the Netherlands is unlawful and that the State is liable for the joint volume of emissions. The State as defendant argued that Urgenda lacked cause of action as far as it acted for current and future generations in foreign countries. The

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31 K. Boom, J. Richards & S. Leonard, 'Climate Justice: The International Momentum Towards Climate Litigation', *Climate Justice Programme* 2016, p 15, https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf (accessed 12 August 2020).

32 M. Nachmany, S. Fankhauser, J. Setzer & A. Averchenkova, 'Global Trends in Climate Change Legislation and Litigation', http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/04/Global-trends-in-climate-change-legislation-and-litigation-WEB.pdf (accessed 12 August 2020).

33 On the litigation of climate cases in international courts, see P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', 28. *Journal of Environmental Law*, 2016, pp 28, 19-35 and E. Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?', 35. *Journal of Environmental Law* 2017, pp 98–144.

34 English translation of the ruling, http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf (accessed 12 August 2020).

35 See L. Burgers & T. Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v. The Netherlands', in R. A. Wessel, W. Werner & B. Boutin (eds), *Netherlands Yearbook of International Law* 2018 (T.M.C. Asser Press 2019) for a presentation of the judgment.

state recognized the need to reduce emissions but denied having a legal obligation towards Urgenda. It claimed that the decision on how to achieve the objective of limiting the global temperature rise to less than 2 degrees is within the discretionary power of the State. According to the State, the State cannot be forced at law to pursue a different climate policy from the one adopted by the political institutions.

The Hague Court of Appeal held that Urgenda had standing to bring the action under Dutch law, and that the state had failed to protect the rights of the citizens under Articles 2 (right to life) and 8 (protection of family life, private life and the home) by not taking sufficient measures to contribute to preventing a rise in global temperature with more than 2° C. This understanding of the Convention was upheld by the Supreme Court in its decision. It therefore ordered that the State should reduce emissions by at least 25% by the end of 2020.

The Norwegian case was brought by Greenpeace and the environmental group *Natur og Ungdom* against the decision by the government to open for exploration and extraction of sub-sea petroleum in the Barents Sea. It was argued that this activity would lead to increased greenhouse gas emissions, and to other consequences detrimental to the environment in the affected areas of the sea.

An important legal issue was whether the provision in the Norwegian Constitution on the protection of the environment entails individual rights that are enforceable in the courts, or whether the rights entailed were non-justiciable. The appeal court concluded that the constitution contains a justiciable right to the environment. It recognized that this right in principle also could be infringed by global warming and climate change. It nevertheless dismissed the plaintiffs' claim that the decision to open up new areas for extraction of oil and gas was invalid as contrary to the right to environment.

In the Swiss case the plaintiffs argued that global warming would lead to the increases in heatwaves with higher mortality rates, in particular for older people. As elderly women, they were therefore at danger from the government's lack of action. They therefore demanded that the authorities initiate a legislative procedure in order to increase the targets for reductions in emissions of greenhouse gases in 2020 and 2030 to 25% and 50%, and that the legislator and the public be informed of the necessity of such measures.

The court dismissed the claim holding that the plaintiffs are not sufficiently individually affected by the effects of global warming. Global warming is something that affects all citizens, albeit in different ways according to differences in their situation. Their claim was therefore not one of upholding or protecting an individual right but should be seen as a popular demand for a general legislative measure that was not admissible as a procedure in the courts. The court recognized that global warming could affect the plaintiffs' rights according to ECHR Articles 2 and 8 but held that there was not a sufficient connection between a demand for legislative measures in Switzerland and a mitigation of the risk of infringements of their rights. There is no obvious and direct connection between such legislative

activities by the Swiss legislator and the protection of the rights of the plaintiffs' life and private and family life. The convention could therefore not be used as a legal basis for such a claim against the government. The decision has been appealed to the High Court of the Federation.

The case in Sweden was brought by the organization PUSH Sweden (Power Shift Sweden) and a large group of engaged individuals, to seek damages for a decision by the Swedish government to allow the sales of coal plants owned by the Swedish company Vattenfall to a Czech company. They argued that the Czech company would exploit the deposited coal in a more expansive way, leading to a large increase of emissions from energy production based on German brown coal. The case was summarily dismissed by the district court (Stockholms Tingsrätt) in a decision that was upheld by the court of appeal (Svea Hovrätt).

The district court found the lawsuit manifestly ill-founded. The plaintiffs based their claim on the obligations resting on the state in the Swedish Constitution which states that the state shall pursue a sustainable development, and on Articles 2 and 8 of the European Convention on Human Rights (ECHR). The court recognized that Articles 2 and 8 ECHR entail a duty for the state to protect and act in certain circumstances. But it stated that in the present case, there was no clear or immediate danger to the plaintiffs that could follow from the transaction that the government allowed. The plaintiffs' claim was based on 'hypothetical reasoning based on possible scenarios'. The court also held that in a claim for damages a mere risk of damages is not enough, it must be shown that there is a concrete damaged that stands in a causal relationship to the claimed wrong.

We can already see some patterns in different approaches to climate litigation in these four cases. In the Dutch and the Swiss cases, the argument was that the government has broken a duty of care or a duty to protect, and the claim was for the court to order the government to enact and implement certain measures. The claimants in the Norwegian and Swedish cases attacked specific decisions by the authorities that they claimed constituted a breach of the government's obligations to reduce greenhouse gas emissions.

For any of such lawsuits to succeed it is necessary to establish that the government has a duty to reduce greenhouse gas emissions, and that this duty is so specific that it can in principle be enforced by a court of law. Since the Swedish and the Swiss cases were dismissed on technical grounds, the Swedish and the Swiss courts did not embark on this issue. The Dutch Supreme Court found that such a duty existed, based on the international conventions and agreements on combatting climate change, Articles 2 and 8 ECHR and the reports from the UN Climate Panel. The Norwegian Court held that the environmental provision of the Norwegian Constitution entailed an individual right to a healthy environment that can be enforced by the courts, and that this right may be infringed by the consequences of greenhouse gas emissions. On the other hand, the court found that the contribution to emissions that the opening of new petroleum fields in the Barents Sea

would have were limited, and that the risk that the measure itself would entail of infringing the citizens' rights was low.

Apart from establishing a duty of care on the government, there are additional legal hurdles that must be overcome for a claim to be sustained. These hurdles are different for suits for action and suits for invalidation of a specific measure. Suits for action must show how a specific action sought from the government is necessary and suitable to protect the rights of individual citizens. The Swiss case was dismissed by the administrative court because it constituted an actio popularis not admitted by Swiss law. In the findings of the court, the claimants were not affected by climate change in any way different from the way in which every citizen is affect by it. The claim that they, as elder ladies, would be more at risk by extreme heat waves, was dismissed with the reasoning that everyone is affected, albeit differently, depending upon their varying circumstances. The suit was therefore in effect a call on behalf of an unspecified part of the population, on the government to enact general measures, and therefore legislative in nature.

The Dutch Supreme Court did not have difficulties in finding that the claimants were invoking rights protected by the European Convention on Human Rights and did not enter into an argument on whether it is necessary to establish a specific interest for individuals or a group of individuals in order to file a claim. Dutch law recognizes a right for NGOs to file claims as part of public interest actions. There is a difference, however, between cases against specific measures, such as the building of an industrial plant or the allowing of activities in a protected area, and cases where every citizen has an equal interest, and where none are affected more than others. In the first type of cases there are, in principle, interests that can be individualized in order to claim a specific connection to an individual right. In some jurisdictions, however, one has gone further and recognized legal standing for NGOs where there are no specific interests involved. Cases brought by Norwegian NGOs against the government for the allowance of felling of wolves are an example of this. A way to argue for this could be that animals and natural environments are in themselves individualized and afforded some measure of protection by the law, and that a claim is made on behalf of these rights. To go beyond such cases and to recognize a right for an NGO to file a case on behalf of us all without any connection to individualized rights may therefore be seen to take a step further.

The problem to be overcome in suits against specific measures such a licence to extract fossil fuels, is the question of causality and significance. Every little emission has an impact on the total amount of emissions. But every little increase in emissions does not necessarily have an impact on the life of a specific individual, or on his possibility to enjoy his private life in his home. Emissions have to be decreased radically, but how to establish that one new mine will be detrimental to this? It might be that other sources are unexpectedly phased out, or that compensatory measures are taken. Nor only do we have to establish that this specific measure amounts to an increase in the total or to a decrease in the total

reductions, we also have to establish a causal relationship between this and the infringement of the claimant's rights. Unless we are dealing with really large-scale sources of emission, this will prove difficult under traditional legal approaches to causality and risk. The same goes for the evaluation of compensatory measures to be ordered by the court in relation to a specific project. Will such a measure be necessary in the view of everything, and will it contribute in a significant way to the protection of the rights of the persons in question?

It is obvious that to deal with these issues, the courts have to go beyond the traditional approach of the law in most jurisdictions. One way to deal with this is to go beyond the issue of protection of individual rights, and to establish duties for the states independently of these rights. The courts have to enforce the international treaties and agreements that set the goal of limiting temperature rise to 2 °C and that set clear targets of reduction of emissions for each country. These goals and targets have to be found justifiable in national law by national courts. They then have to take the step and state that any measure that runs counter to this in more than an insignificant way, represents a breach of these obligations and is thus *contra legem.* This is legally possible, but it obviously requires an amount of legal creativity.

It follows from this that although the claim that courts exceed their powers by entering the political domain if they interfere with the government's policy on climate change, is ill founded. It is clearly the state of law under the European Convention on Human Rights that a right to a safe environment is protected. The same is the fact under many national constitutions. This being the fact, it is a legitimate task for the courts to determine the scope of this right, whether it is infringed by the government in a specific case, and the legal consequences of such a finding.

This is, however, not the whole story. The cases reviewed show that it is necessary for the courts to develop the law further to come to grips with the issues of climate change. The main challenges stem from the fact that climate change affects us all, and that the causal links between individual actions and inactions are hard to establish. Before there is a specific harm, such as a house that has been flooded or a person that has died in a heatwave, the establishment of sufficient interest for an individual claim will cause difficulties in many jurisdictions. Where there is a specific interest, or a challenge of a specific measure taken by the government, it is difficult to establish a causal relationship by traditional ways of reasoning. In both cases it can be difficult to establish how action sought by the government will in effect be necessary and suitable to protect the right in question.

The counter-argument to all this is that if these hurdles are not overcome, then an effective remedy in law against the global problem of climate change would be lacking.[36] Nevertheless, overcoming these hurdles will in many jurisdictions take some measure of legal creativity, or judicial activism in the view of some.

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36 See L. Burgers & T. Staal, *Netherlands Yearbook of International Law,* 2018 p 11.

4. Judging for Utopia and Its Critics

To what extent can legal creativity be deemed legitimate and even necessary in climate cases? To answer this question, we must examine the relations between the judiciary and the other organs of state more in general. When a judge engages in utopian judging he or she may have different relations to other central legal institutions. Although the separation of powers is a central element of the Western Legal Tradition, the specific relationship varies with different legal cultures.

In the building of the welfare state in Scandinavia, judges, legislators and the executive power of the state were operating hand in hand to transform society. Judges saw it as their task to aid the legislator in giving effect to their programs of reform. The legislator on its side, would often leave more complex issues unregulated, with the expressed intention that it should be up to the courts to work out the details in practise. This was based on a realization that judges are sometimes better placed than other actors to perceive and reflect interests for change and to respond to social needs. The relationship between the legislator and the judge need not be so cooperative. A judge may be in opposition to the legislator in wanting to realize a promise entailed in the law, as the judge sees it. This becomes critical if the other powers of the state engage in a systematic attack on individual rights and the rule of law.[37] Sometimes it is not clear what the legislator wants, and the conflict may between the judge and the executive power. Recent cases in Norway about immigration and human rights fall in this category. Finally, one may have a situation where the legislator or the executive is passive or indifferent. The situation within the European Community in the 1960s and 1970s may be an example of this, when developing the European integration further was left to the Court of Justice.

The conditions of the judge are different in these three constellations. A judge working in concert with the legislator runs the risk of extinguishing his role as an independent judge, and to become a mere instrument of a reformist policy. A judge in opposition to those in power of the legislator and the executive may be side-stepped or outmanoeuvred by the overwhelming power of those who control the physical forces of the state, and in this way extinguish judicial independence. The power-game between the executive power and the Constitutional Tribunal of Poland, leading to an elimination of judicial review, is a recent example of this.[38] The best condition for a judge to act independently for Utopia is therefore when he or she is acting in a field with a cooperative or a passive or indecisive legislator.

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37 See H. P. Graver, *Judges Against Justice* (Springer 2015), Ch. 5 on The Opposition in particular.

38 See K. Kovács & K. L. Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union', *Communist and Post-Communist Studies* 2018, pp 189–200 for details on this development in Poland and in Hungary.

In all such situations, it is common to accuse the courts of 'judicial activism'. The term 'judicial activism' is in fashion. Searches in the US Westlaw database reveal that in the past few years the term appears on average in more than 450 Articles in journals and law reviews per year.[39] At the heart of the concern over judicial activism is the fear that the judge will impose his own personal preferences in his decisions, but the issues raised also include the questions of separation of powers and the legitimacy of law as a source of legitimacy for decisions of policy. Internationalization of law has been accused of fostering judicial activism. Justices have started to cite foreign sources to justify the way they rule at home.[40] According to former US judge Robert Bork judicial activism is going global.[41] A liberal elite, or 'New Class', as he terms it 'will stop at nothing to impose its moral and legal framework on the rest of society, and is using foreign courts, multinational treaties and international law to achieve it'.

Judicial activism is by many perceived as a negative phenomenon; a usurpation of power by the judiciary. In the present US debate, the positions on judicial activism correspond to the left-right division in politics. Right-wing proponents have accused their opponents of advocating and defending judicial activism during the rights movement of the Supreme Court. Later the tide has changed. Conservatives and liberals alike seem to use judicial activism as shorthand for any ruling they dislike, accusing their opponents of reading their own policy preferences into the law.

There is high temperature over the issue of judicial activism, but there is no established consensus on what is covered by the term. In general terms, 'judicial activism' has been defined as the 'making of new public policies through the decisions of judges' or 'departure from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of judges'.[42] In a broad study on the use of the term in the US debate, Keenan D. Kmiec has tried to give the term a more analytical content. He found that the phrase 'judicial activism' has at least 'five core meanings': The

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39 K.D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"', 92. *California Law Review* 2004, p 1441. There is no Norwegian term corresponding exactly to the term 'judicial activism', the discussion on 'legalization of politics', following the research project 'Power and Democracy', covered many of the same topics that are covered by the controversies over judicial activism. See Ø. Østerud, F. Engelstad & P. Selle, *Makten og demokratiet. En sluttbok fra Makt- og demokratiutredningen* (Gyldendal Akademisk 2003) and for opposing views, M. Kinander (ed.), *Makt og rett om Makt- og demokratiutredningens konklusjoner om rettsliggjøring av politikken og demokratiets forvitring* (Universitetsforlaget 2005).

40 For an illustration of this in climate change litigation see E. Colombo, 35. *Journal of Environmental Law* 2017, pp 98–144.

41 R. H. Bork, *Coercing Virtue: The Worldwide View of Judges* (Aei Press 2003).

42 Definitions in The Harper Collins Dictionary of American Government and Politics and Black's Law Dictionary.

charge has been lodged when, according to the speaker, the court at issue has (1) invalidated an arguably legal action by another branch; (2) failed to adhere to precedent; (3) legislated from the bench; (4) departed from accepted interpretive mythology; or (5) engaged in result-oriented judging.[43] This list of meanings shows so many disparate issues bundled together under one label that that the label 'judicial activism' is unfruitful for analytical purposes.

Disagreement on the law is inherent to the role of the judiciary, and this disagreement will also sometimes be between branches of government. As pointed out by Tomasz Koncewicz, disagreements between branches of government make the system move forward and contribute to a refinement of the law.[44] Sometimes the legislation contains conflicting rules so that the judge in invalidating or limiting one, is giving effect to the other. This has specifically been argued in cases where there is conflict between obligations under international human rights regimes and national legislation. By incorporating the international human rights into national law, the national legislator has expressed am aim for national law to comply with these rights. Some argue that this entails a requirement directed to the national courts that these rights are interpreted in accordance with the way they are interpreted by international courts and tribunals.[45]

A more serious concern is the concern about the legitimacy of an active judicial role in opposition to or independent of the legislative and the executive powers. This is most fruitfully discussed under the label of judicial review. The literature on judicial review is also vast.[46] Some see judicial review as a transfer of power from democratic assemblies to the non-elected independent judiciary, answerable to no-one. They perceive judicial review of legislation as a negative phenomenon; a usurpation of power by the judiciary. Judicial review can also represent a distraction from the real issues at stake and transforms them to issues about precedents, texts and interpretation.[47] Judicial review has, however, also been seen in a more positive light. When the majority will of the legislator tries to undercut or impair the basic principles upon which democracy rests, namely, the free play of opposing views, practices, parties, etc., then the courts must step in. The law must, in this view, not tolerate democracy to be destroyed in its own name.

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43 K. D. Kmiec, 92. *California Law Review* 2004, p 1441.

44 T. T. Koncewicz, 'On the Separation of Powers and Judicial Self-Defence at Times of Unconstitutional Capture', *VerfBlog* 2017/6/04, http://verfassungsblog.de/on-the-separation-of-powers-and-the-judicial-self-defence-at-times-of-unconstitutional-capture/, DOI, https://dx.doi.org/10.17176/20170604-130942 (accessed 12 August 2020).

45 See G. Ulfstein & A. Føllesdal, 'The European Court of Human Rights and the Norwegian Supreme Court: Independence and Democratic Control', in N. A. Engstad, A. L. Frøseth & B. Tønder (eds), *The Independence of Judges* (T.M.C. Asser Press 2014).

46 See for an overview and a defence of judicial review A. Kaufman & B. Runnels, 82 *Brooklyn Law Review* 2016.

47 J. Waldron, 'The Core of the Case against Judicial Review', 115. *Yale Law Journal* 2006, p 1353.

A more activist approach to constitutional and international legal instruments is hailed by some as necessary to bring old and often fragmented constitutions and treaties in accordance with the values and requirements of modern society.[48]

The most influential argument against judicial review is the one presented by Jeremy Waldron. His reservations concern what he calls 'strong' judicial review, that is where courts decline to apply a statute in a particular case. His argument rests on four important assumptions; that society has functioning democratic institutions that represent the interests and opinions of the society as a whole, it has a well-established and independent judiciary in a good working order, that there is a strong commitment to rights on the part of most members of society, and that there is a disagreement about rights and that the commitment to rights do not put them above the general disagreement about major political issues.[49] If any of these assumptions fail, there may be a case for judicial review.

For example, it may be argued that in the situation of present-day Hungary and Poland the majority no longer has the strong commitment to rights and to upholding an independent judiciary, that is necessary for a legitimate demand that the courts exercise restraint in their review of legislative measures. A moderate case for judicial review could be that the courts have a role in monitoring that the four assumptions are met in a given society, and a role in reviewing substantive legislation when they are not met. When they are not met, there is a likelihood that the outcomes of the political process will not be good or acceptable applications of rights, and the process does not have the political legitimacy of democratic institutions representing the whole of society. This also increases the risks that those who lose out in the political process are subject to tyranny.

5. Climate Litigation, Judicial Review, and Utopian Judging

Traditionally, judicial control has been concerned with the active state, guarding individuals and minorities against excesses in the use of legislative and executive powers. With the rise of social and economic rights, courts have also endeavoured into enforcing these under doctrines of equal protection and human dignity.[50] Such lawsuits can create a new dynamic in the relationship between the political and judicial powers of the state. It can be argued that a main argument for judicial review is that courts can contribute to the frameworks for deliberation and consensus building in society. Judicial action can press citizens and political actors to deliberate on issues in a particular way and trigger both debates over moral understandings of rights and legal discussions on how these should be adjudicated.[51]

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48 See the discussions in E. Smith (eds), *Constitutional Justice Under Old Constitutions* (Kluwer Law International 1995).

49 J. Waldron, 115. *Yale Law Journal* 2006, pp 1359–1369.

50 See e.g. A. Sachs, *The Strange Alchemy of Life and Law* (Oxford 2009), pp 169–170.

51 See further M. Langford, pp 81–83 for these arguments.

An example of this from Norway can be found in the controversy of the 1970s over the damming of the Alta-Kautokeino river to build hydro-electrical power. This attracted widespread protests, initially from environmental and local groups. Since the damming would affect reindeer herding of the local Sami population, it was soon identified with the fight for Sami autonomy. The conflict escalated to demonstrations at the site, as well as a hunger strike outside of the Norwegian Parliament in Oslo. The case was also fought in the courts and ended with a decision in the Supreme court that was won by the Norwegian government. The case showed that the Sami had rights as Norwegian citizens, but not collective rights as a people, although the Supreme Court recognized Sami rights as falling under Article 27 of the ICCPR (International Covenant of Civil and Political Rights). The battle prompted the government to appoint a commission to examine the rights of the Sami people in Norway. Based on the reports of this commission, Sami rights were recognized in the constitution, a Sami Parliament was established and Norway signed and ratified the 1989 ILO (International Labour Organization) Convention No 169 concerning Indigenous and Tribal People.[52]

Writing about the litigation over housing mortgages that arose from the financial crisis in Spain, Chantal Mak has shown how litigation and courts actually can provide citizen access to legal development, how it can open up deliberative processes and how courts sometimes are in a better position to represent citizen's interests than other institutions.[53] In critical times, and where other institutions fail or are unable to come up with solutions, judicial law-making can be the first-best solution, also from the point of view of democratic legitimacy. Compelling arguments can be made for the necessity and urgency of reframing the way society deals with the climate issue. In climate cases, there is no disadvantaged individual or minority in the classical sense. Actions are on behalf of us all, and behalf of future generations and the environment. There are precedents for this kind of judicial review in countries with constitutional courts that allow suits from interested citizens against adopted laws with a claim that they are unconstitutional without the need to show a specific right infringement. But to demand that courts fill the role of political bodies to take leadership and establish the necessary institutions and policies because of an inability of the political bodies to act adequately to the challenges of climate change, is to call for a new judicial role.

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52 See I. Bjørklund, T. Brantenberg, H. Eidheim & J.A. Kalstad, 'Sapmi – Becoming a Nation: The Emergence of a Sami National Community', 7. *Australian Indigenous Law Reports* 2002, pp 1–14 and H. S. Aasen, 'The Sami People and the Right of Self-Determination: Developments in International and Norwegian Law', 22. *Nordisk Tidsskrift for Menneskerettigheter* 2004, pp 462–479.

53 C. Mak, 'First or Second Best? Judicial Law-Making in European Private Law' (2016). Centre for the Study of European Contract Law Working Paper Series No. 2016–12; Amsterdam Law School Research Paper No. 2016–48.

Climate litigation is an area where the arguments that have been put forward against judicial review fail. Climate litigation is a 'non-core' case of judicial review in the meaning of Jeremy Waldron in his powerful argument against judicial review. One of Waldron's four assumptions is that there is a strong commitment to rights on the part of most members of a given society.[54] This assumption does not hold for climate cases as those that are most affected are persons outside of the national polity where decisions are taken. For most countries in Europe, the people who are most affected live in other parts in the world. To this comes that the most affected are people yet unborn. The rights of these two groups are not properly recognized and there is no real commitment to take such rights into account in the political process in line with the rights of regular citizens and inhabitants of the polity. There is also no mechanism in place to ensure that these groups are represented in the political process.

One can also question the effectiveness of the political institutions in this field. The decision-procedures of these institutions seem unable to come up with answers that uphold the right of citizens to a sustainable future. Climate litigation is an effect of the fact that the political institutions are unable to enforce climate rules in a convincing way. Despite over 30 years of international rule-making there is not yet an international enforcement mechanism. Domestic application of international climate rules is therefore a necessary substitute for such lack of enforcement.[55] The situation today is a neglect of enforcement both in the political and the judicial institutions. This must change, and utopian judging may be an input that can bring the system forward on the right track. Such a role for the courts is not altogether unprecedented. A well-known instance was during the political crisis of the European Community in the 1960s, when the European Court of Justice stepped in to hold the European construct together.[56] This example is illustrating, but still limited in scope compared to what may happen now under the auspice of saving the planet.

6. Conclusions

In this article, I have shown different conditions under which judges seek to strive for Utopia through the exercise of their judicial role. We have seen that law in one sense has an inevitable utopian dimension. Active use of the law to realiser a better world is, however, something that relates to a modern, instrumental approach to law. In the law of the twentieth century, all the main actors of the legal order engaged in building Utopia with legal means.

Utopian judging is therefore not something that as such distinguishes judges from other legal actors. In many countries of Europe during the latter part of the

54 J. Waldron, 115. *Yale Law Journal* 2006, pp 1364–1365.

55 E. Colombo, 35. *Journal of Environmental Law* 2017, p 101.

56 J. H. H. Weiler, *The Constitution of Europe* (Cambridge 1999), p 32.

last century, judges were encouraged by the legislator to reach for Utopia. We saw this in the welfare states of the Nordic countries, and in the creation of a court of human rights in Europe with the task of realizing the promises entailed in the European Convention of Human Rights.

The controversial issues of utopian judging arise when there is disagreement in society over the direction the judiciary is taking, or when the judiciary is taking a separate way from the legislator or the executive power. In such situations, utopian judges may come under criticism for judicial activism or excessive judicial review. Disagreements and differences are not something that should be avoided; they drive the system forward in the exercise of checks and balances. Given that the judge respects certain basic assumptions of the role of the different actors of a legal order, such criticism is unfounded.

Judges should exercise restraint in taking a different path from the one taken by the legislator in a society with well-functioning institutions and with a culture of widespread respect of individual rights. Judges should contribute to maintaining such conditions in society. Once these conditions fail in a serious matter, the role of the judge becomes more important, and judges should show the way more directly. This does not only entail that judges should strike down legislation that manifestly infringes upon the rights of individuals and minorities. It also entails a duty to continue the path to a better future, to re-align the social debate onto a constructive track. Climate change litigation is an example where there is a need for this today.