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Elaine Mak

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A code of judicial ethics as a signpost and a beacon: on virtuous judgecraft and Dutch climate litigation

Elaine Mak

Chair of Jurisprudence, Utrecht University, Utrecht, Netherlands

ABSTRACT

This paper analyses the role of a code of ethics for judges in connection to a contemporary definition of responsive 'T-shaped' judicial professionalism and the professional-ethical questions which can arise in judicial decision-making regarding politically and societally controversial issues. The paper's case study focuses on climate-change related litigation in Dutch courts. First, a theoretical framework which conceptualises practical and ethical elements of T-shaped judicial professionalism as 'virtuous judgecraft', building on the work of Kritzer and Van Domselaar, addresses the knowledge, skills, and ethical mindset that judges need for fulfilling their roles in relation to this notion of professionalism. Next, the paper analyses to what extent connections with guidelines of the Dutch Guide to Judicial Conduct (GJC), considered in light of the developed framework of virtuous judgecraft, can be recognised in the approaches of judges in the landmark Urgenda judgments. Based on this analysis, the paper presents conclusions regarding the value of the GJC for enhancing judicial performance and for explaining judgments, in particular those which involve complex societal issues, to parties and the general public.

KEYWORDS

Judicial virtues; codes of ethics; global challenges; Urgenda case

1. Introduction

Codes of ethics for judges have been developed and published around the world in particular over the past twenty-five years, both at the level of states and the level of regional and international organisations. The emergence of these codes can be explained in light of the increased societal impact and substantive complexity of the judicial role in modern welfare states. This development has led to a 'search for adequate means to render the judiciary more accountable and efficient while at the same time safeguarding its independence'.[1] Despite this rise to prominence of codes of ethics, not much is known currently about the specific impact they have, both in terms of providing guidance for judicial performance and for clarifying the judicial function to members of society. In my

CONTACT Elaine Mak e.mak@uu.nl

[1]G. Di Federico, 'Judicial Accountability and Conduct: An Overview' in A. Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 88.

professional contacts with judges in the Netherlands, inter alia in training sessions, some judges have expressed feelings of unfamiliarity or scepticism regarding the Guide to Judicial Conduct (GJC) published by the Dutch Association for the Judiciary (NVvR) in 2011.[2] These judges considered that a code was not going to teach them what it means to act with integrity. They argued that their education, training and practical experience had helped them to internalise the professional-ethical norms for Dutch judges, which reflect the national legal culture and constitutional framework for judicial performance. From a societal perspective, furthermore, judicial ethics and the GJC are not highlighted in debates in the political arena and in the wider society in the Netherlands. Yet, topics which touch upon professional ethics of judges do come to the fore in these political and societal debates. For example, some right-wing politicians have made it a prominent point on their agenda to discredit the integrity of the judiciary and individual judges by raising concerns about judicial activism and partiality towards left-wing political views, arguing that the liberal government of the Netherlands entails the risk of the emergence of a rule of judges: a 'dicastocracy'.[3]

Against this background, the central question which this paper will explore is what judicial ethics requires of judges in a contemporary liberal-democratic society, taking the Netherlands as an example, and whether a code of judicial ethics can provide guidance for a 'good' judicial performance in hard cases, meaning those cases in which a judge has to use her discretion to interpret the law in order to reach a judgment.[4] The analysis will consider to what extent a published code of ethics can be helpful for guiding judges' decision-making (a signpost function) but also for communicating to parties in court cases and to the general public what expectations they may have of the judiciary (a beacon function).

Among the most difficult cases for judges in contemporary societies are cases which introduce a novel legal question regarding a complex societal challenge, in particular if this challenge is of a 'global' nature. In such cases, the novelty and complexity of the subject matter, including its non-legal aspects, generate professional-ethical questions on which an answer is not so straightforward even for judges who have internalised the ethical norms of their professional community and legal order.[5] As a case study for this paper, an example from this category of very difficult cases was selected with the expectation to be able to develop a rich analysis regarding relevant guidelines of judicial ethics. Focus will be on litigation in climate change-related cases. A prime example is the case of the Urgenda Foundation against the State of the Netherlands, which concerned the issue of whether the government was taking sufficient action for protecting Dutch citizens against dangerous climate change. The claimants lodged a first claim in 2013 and were vindicated in three consecutive judicial procedures.[6] While the legal argumentation in the three Urgenda judgments has become a topic of many scholarly

[2]Nederlandse Vereniging voor Rechtspraak, 'NVvR-Rechterscode' (2011) <https://nvvr.org/uploads/documenten/nvvr-rechterscode.pdf> accessed 3 April 2022. A translation in English was published in: Judges for Judges, 'Matters of Principle' (2012) <https://www.rechtspraak.nl/sitecollectiondocuments/matters-of-principle.pdf> accessed 3 April 2022.

[3]P. Blokker, 'Populist Understandings of the Law: A Conservative Backlash?' (2020), Partecipazione e conflitto <https://www.researchgate.net/publication/346548193_Populist_Understandings_of_the_Law_A_Conservative_Backlash> accessed 3 April 2022, 15.

[4]R. Dworkin, *Taking Rights Seriously* (Duckworth 1978) 81.

[5]See also Davies and Henderson in this special issue.

[6]District Court of the Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7145; Court of Appeal of the Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591; Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2006.

contributions, less attention has been given so far to the professional-ethical performance, understood in a broad sense, of the individual judges in these procedures.

Attention for judicial ethics in connection with cases on global societal challenges, such as climate litigation, is warranted because of the high stakes involved for judges and for the judiciary as an institution as well as for society. In climate change-related cases, judicial decision-making needs to be forward-looking and,[7] therefore, a continuous necessity exists to break new ground with regard to the interpretation of legal norms and the weighing of interests of different stakeholders. At the same time, courts in these cases – and sometimes also individual judges – need to prepare themselves for a close scrutiny from politicians and the wider society, including comments on their judgments in the media and on social media.

This paper's focus on codes of judicial ethics relates to a scholarly interest regarding the function, content, and practical influence of these documents.[8] A certain guiding and clarifying potential of a code of judicial ethics can be expected to exist because of the aim of assisting judges in acting professionally in the complex legal and societal contexts of the twenty-first century and the aim of clarifying the judicial role for members of society.[9] Yet, this potential cannot be sketched in general terms. Firstly, a judge will find general points of reference but no clear-cut options or solutions in the values and principles which are outlined in a code of ethics. Secondly, a code of ethics can only be fully understood within the legal culture and constitutional framework in which it functions. A legal culture, and more precisely a judicial culture, encompasses political and organisational aspects of judging as well as a developed tradition of judicial performance, including a view and practice regarding the scope for judicial law-making.[10] A constitutional framework provides an elaboration of institutional arrangements, which in contemporary liberal democracies is underpinned by the principle of the rule of law and formalised in a balance of powers between the legislative, executive, and judicial branches of government.[11] A code of judicial ethics can only serve as a signpost for an individual judge or as a beacon for a member of society if they are aware of this legal-cultural background and constitutional framework in which the judiciary fulfils its role.

The analysis in this paper addresses developments in the Netherlands as an example of a liberal-democratic society in which norm-setting and education on judicial ethics are topics of debate in legal scholarship and legal practice. Also, Dutch courts are at the forefront of developments in climate change-related cases, such as the Urgenda case and more recently successful claims of Milieudefensie against Shell,[12] which feature prominently in political and societal debates. Besides the illustrative character of the Dutch context for the analysis presented in this paper, there is a pertinent connection with other contributions to this special issue which also zoom in on developments in law and policy-making in the Netherlands.[13]

[7]W. Veraart, 'Klassiekers democratische rechtsstaat #21: De toekomst en het verleden' (*Nederland Rechtsstaat*, 2 September 2021) <https://www.nederlandrechtsstaat.nl/21-de-toekomst-en-het-verleden/> accessed 3 April 2022.
[8]Di Federico (n 1) 90; E. Mak, 'Researching Judicial Ethical Codes, or: how to eat a mille-feuille?' [2018] 9(3) International Journal for Court Administration.
[9]Compare J. Lichtenberg, 'What Are Codes of Ethics For?', in M. Coady and S. Block (eds.), *Codes of Ethics and the Professions* (Melbourne University Press 1996), 15-16.
[10]J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006).
[11]B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2012).
[12]ECLI:NL:RBDHA:2021:5337.
[13]See Hegger et al, Van Domselaar and De Bock, and Davies and Henderson in this special issue.

As concerns its research methodology, this paper presents a legal-theoretical inquiry into the nature of judicial ethics and codes of ethics for judges in connection to a contemporary definition of so-called 'T-shaped' judicial professionalism, which encompasses the knowledge, skills, and ethical mindset that judges need for fulfilling their roles.[14] The analysis maps the ethical norms embedded in the Dutch Guide to Judicial Conduct in relation to a definition of judicial professionalism as 'virtuous judgecraft', building on the work of Kritzer and Van Domselaar.[15] The paper then analyses to what extent this framework's guidelines for professional-ethical decision-making can be recognised in the Urgenda judgments of the Dutch courts and it explores the value of this framework for explaining judgments on global societal challenges to parties and the general public.

In section 2, the nature of judicial ethics and the role of codes of ethics in guiding judges' ethical conduct are outlined in more detail. Section 3 sketches a sociological background to the increased attention for judicial ethics in the Dutch judiciary and society by describing the changed conditions for societal legitimacy of institutions, including judiciaries. This section also presents a conceptualisation of practical and ethical elements of contemporary T-shaped judicial professionalism derived from theories of judgecraft and judicial virtues. This analysis is contextualised for the Dutch legal order through references to the core values outlined in the GJC. The theoretical framework which emerges from this analysis is put to the test in section 4, which outlines the characteristics of climate-change related cases and presents an analysis of judicial approaches in the Urgenda judgments in relation to the concrete guidelines provided by the GJC, considered in light of the framework of virtuous judgecraft. The paper ends with concluding remarks in section 5.

2. From judicial ethics to codes of ethics for judges

This section contains relevant background information for the analysis. It addresses the nature of judicial ethics (2.1) and the characteristics of codes of ethics for judges (2.2).

2.1. Judicial ethics: norms, skills, and professional environment

2.1.1. Norms

Ethical norms for judges concern the conduct in their professional role and in situations outside of the courtroom, where a judge's personal conduct could have an impact on the reputation of the judiciary. The ethical norms for judges range from abstract values and principles to more practical professional standards.[16] These norms concern the role of a judge in interpreting and applying the law in concrete cases, but they extend also to personal integrity and reliability in a more general sense. Indeed, a strong conceptual separation of the private and professional spheres would be artificial: 'There is a tension between the perception of self in private life and the performance of the duties attached

[14]E. Mak, *The T-shaped Lawyer and Beyond: Rethinking Legal Professionalism and Legal Education for Contemporary Societies* (Eleven International Publishing 2017).
[15]H.M. Kritzer, 'Toward a Theorization of Craft' [2007] 16(3) Social & Legal Studies, 321; I. van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' [2015] 44(1) Netherlands Journal of Legal Philosophy 24.
[16]Mak, 'Researching Judicial Ethical Codes' (n 8) 59.

to the job. The personal character of the individual judge is of major importance in upholding the reputation of the judiciary and the dignity of this office'.[17]

In a legal system organised on the basis of the principle of the rule of law, ethical norms for judges incorporate the achievement of a fair trial in concrete cases. Basic requirements in this respect are laid down in international treaties and national constitutional and procedural laws. The guarantee of a fair trial corresponds to an individual enforceable right of citizens. In concrete cases, '[i]t is the judge who gives substance to this right and applies corresponding principles'.[18]

2.1.2. Skills

The handling of professional-ethical questions in practice is not primarily a matter of respecting laws. First and foremost, it requires the use of skills, including for example insights into psychological biases which can influence decision-making.[19] A typology of relevant aspects for judicial performance in practice can be derived from socio-legal studies. In particular, studies which have conceptualised the notion of 'craft' provide a starting-point for describing characteristics of professional occupations, such as the work and working situation of judges. Kritzer distinguishes six dimensions of this so-called 'judgecraft'. Three dimensions are external to the judge as a 'craftsperson', that is: they focus on the clientele or the outcome of judicial work.[20] These are: (1) consistency, which concerns the aim of treating 'like cases alike' in judging; (2) utility, which regards the purpose of the judicial function in the society which it serves; (3) responsiveness to the clientele of the judiciary, which is diverse: parties to a case, other legal actors, and the wider society.[21] Three other dimensions are internal to the judge as a craftsperson, that is: they focus on the judge as a 'producer' of outcomes. These are: (4) skills and techniques, which concerns legal skills as well as broader capabilities, e.g. on the management of cases; (5) problem solving, which concerns the actual practice of achieving a decision in concrete cases; (6) aesthetic, which concerns aspects of creativity in the legal analysis in a case and the handling of court proceedings as well as aspects of communication in the proceedings and the conveying of a judicial decision.[22] The specific meaning of 'judgecraft' in each of these dimensions is dependent on the type of legal procedure and the particularities of the legal order, and its underlying legal culture, in which a judge fulfils her office. This meaning, furthermore, is not set in stone. It develops on the basis of changing societal views on the judicial function and the conditions for its legitimacy.

2.1.3. Professional environment

Professional-ethical choices, at the end of the day, concern a judge's individual use of her skills. Yet, a judge is not alone in reaching these choices. She can use different types of

[17] A. Brenninkmeijer and D. Bish, 'Professional Ethics for Judges – Lessons Learned from the Past. Dialogue as Didactics to Develop Moral Leadership for Judges' [2021] Law & Method 3.
[18] ibid 4.
[19] A.R. Mackor, 'Juridische beroepsethiek. Over macht en moral, *soft law* en *soft skills*, T-vormige juristen en kansenrechters' in A. Berlee, M. Bovens, J. Buiting, A.R. Mackor, E. Mak, J. Silvis and E. Tjong Tjin Tai, *De toekomst van de jurist, de jurist van de toekomst* (Wolters Kluwer 2020) 87.
[20] Kritzer (n 15).
[21] Kritzer (n 15) 329 and 332-34.
[22] ibid 334-37.

dialogue as a tool for 'setting the ethical compass'.[23] A judge's internal dialogue gives the basis for her personal and professional integrity. Dialogues within the judicial organisation enable collegial deliberations on the deciding of cases in judicial panels and, more broadly, in intervision with colleagues on experiences with specific cases. At the constitutional level, finally, dialogue can be found in the interactions of the judiciary with the other branches of government.[24]

It will only be possible for judges to live up to professional-ethical norms if the other branches of government respect the position of the judiciary in the balance of powers. Furthermore, the judicial organisation and court management form an important enabling factor for 'good' judicial performance.[25] Forms of support can concern organisational arrangements, e.g. the appointment and training of 'press judges' for external communication on mediatised cases or a representative role played by a head of the judiciary. Elements of judicial training and (permanent) education can address knowledge and skills which are needed to keep up with the times, e.g. digital skills or mediation skills. Finally, court management has a responsibility in ensuring that the daily working conditions of judges allow for a good performance, e.g. by setting and evaluating standards for case management while respecting the autonomy of judges to organise their work.[26]

2.2. Codes of judicial ethics: role, types, and stakeholders

2.2.1. Role of codes of ethics

The duties and expected conduct of judges are delineated by binding legal norms, which can be found in particular in a national constitution, laws on judicial organisation and procedural laws. In addition, codes of ethics have been established to provide guidance for shaping the daily practice of judging by outlining core values, principles, and ethical guidelines for judicial performance. Moreover, codes of judicial ethics have a symbolic function as a public expression of adherence of the judicial community to these values, principles, and guidelines.[27]

In the Netherlands, judges have complemented the available ethical guidelines with professional standards, which have a more practical character and are sometimes described as 'best practices'. These professional standards are formulated per field of law by judges themselves with the aim of ensuring the quality of court proceedings.[28] The standards for judicial panels in civil appeal cases, for example, address the added value of collegiate decision-making, inter alia based on insights from social psychology, and provide recommendations for ensuring the quality of the process of decision-making and drafting of judgments.[29]

[23]Brenninkmeijer and Bish (n 17) 2.
[24]ibid 3.
[25]This is highlighted for the Dutch judiciary in section 3 of the GJC.
[26]P.M. Langbroek and M. Westenberg, *Court Administration and Quality Work in Judiciaries in Four European Countries: Empirical Exploration and Constitutional Implications* (Staempfli Verlag 2018).
[27]Lichtenberg (n 9) 15-16.
[28]The professional standards developed within the Dutch judiciary are available here: https://www.rechtspraak.nl/Organisatie-en-contact/Rechtspraak-in-Nederland/Rechters/Paginas/De-professionele-standaarden-van-de-rechters.aspx accessed 3 April 2022.
[29]https://www.rechtspraak.nl/SiteCollectionDocuments/professionele-standaard-meervoudig-beslissen.pdf accessed 3 April 2022.

2.2.2. Types of codes of ethics

A main distinction between two types of codified ethical norms concerns those which have the character of enforceable rules for disciplinary proceedings and those which have an aspirational character, i.e. 'an ideal guide of judicial behaviour'.[30] Despite an apparent contradiction between these two purposes, many published codes strive to combine them.[31]

The GJC presents itself as fitting in the category of aspirational documents. A main purpose of this guide, as specified in its introduction, is to provide guidance to Dutch judges on legitimate ways of handling choices regarding their professional conduct inside and outside of the courtroom. The code also aims to facilitate a shared understanding of the judicial function and, in this way, to manage expectations of parties in court cases and the wider society. Despite its aspirational purpose, several instances have occurred in which the GJC was invoked as a source of reference in complaints or disciplinary proceedings against a member of the judiciary. This has led some authors to categorise the code as 'soft law'.[32]

Different policy goals, serving one or both of the two identified purposes, can be pursued with the establishment of a code of ethics for judges.[33] The first one is a motivating function, that is: an incentive for a judge to perform as well as possible. Secondly, a code can assist judges in accounting for their conduct to parties and the general public. With regard to both functions, a judge can respond to them for different reasons: the aspiration to meet an ideal or a motivation to not get involved in disciplinary proceedings. Thirdly, a code can have an educational function, for example as a source of reference for judicial intervision or dilemma training. Finally, the codification of ethical norms can be used as an instrument to push for innovation within the judiciary in order to meet changing societal demands or to guide judges in transitional contexts in meeting the standards of a new regime.[34] When used as a source of reference or an instrument for innovation, a code of ethics provides judges with a guideline for individual reflection as well as with the conceptual resources to articulate their motivation and professional-ethical reflection.

2.2.3. Stakeholders

Pursued policy goals will be chosen in relation to the institutional role and political interests of the drafters of codes of judicial ethics. In some countries, codes were developed within a judiciary to empower individual judges to ensure the quality of their professional performance. In other countries, a government or judicial council was in the lead and aimed to realise a stronger organisational control of the judiciary.[35] In the Netherlands, the development of a code of ethics occurred against the background of a dynamics of power between the Council for the Judiciary, which is in charge of governance and

[30]Di Federico (n 1) 97.
[31]ibid 99.
[32]S. Dijkstra, 'De pratende, schrijvende en twitterende rechter: terughoudendheid troef' [2017] 1 Rechtstreeks, 15-16.
[33]Mak, 'Researching Judicial Ethical Codes' (n 8), 59.
[34]ibid; P.M. Gyöngyi, 'The Obligation of Judges to Uphold Rules of Positive Law and Possibly Conflicting Ethical Values in Context: The Case of Criminalization of Homelessness in Hungary' [2020] 49(2) Netherlands Journal of Legal Philosophy 196.
[35]D. Kosar, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' [2018] 19(7) German Law Journal, 1567.

central management for the judiciary, and the Dutch Association for the Judiciary, which represents the interests of judges and public prosecutors in political and societal debates. For the Council, the establishment of a code of conduct – for judges and for court staff more generally – fitted within the logic of New Public Management theories as a framework for judicial organisation, which had become dominant in the 1990s and which emphasises standards of transparency, effectiveness, and efficiency of judicial functioning.[36] The association of judges felt urged to respond in order to finetune the Council's guidelines for court staff to the particularities of the judicial office (GJC, 1.2). With this aim in mind, it developed the GJC, in which judicial autonomy has an important place, and judges in specific fields developed professional standards. The GJC emphasises a judge's own role in ensuring a good judicial performance: 'In this Code of Conduct, emphasis will be on judges' own responsibility and their own awareness of the consequences and the impact of their deeds and conduct as judges. This code should serve as a reference framework for judicial conduct, one which judges can refer to in the exercise of their duties' (GJC, 2).

Besides institutional power dynamics in the development of codes of judicial ethics (input side), a relevant factor to take into consideration concerns the impact of codes (output side). Interestingly, codification of ethical norms has encountered criticism because of possible detrimental effects of 'integrity thinking' on the ability of individuals to make good ethical choices. Some authors, referring to empirical studies, have drawn attention to scientific evidence holding that thinking and discussing about ethics can intensify the influence of psychological biases – such as cognitive dissonance or the bystander effect – rather than protect judges against this influence.[37] Another concern is that judges could bypass a nuanced analysis of goals and values relating to a specific statute or legal provision if they base their judgement in a hard case (solely) on the core values and principles that are outlined in a code of judicial ethics.[38] These concerns should be taken seriously and they require further analyses. At the same time, potential beneficial effects of the codification of judicial ethics deserve scrutiny as well. In particular, a legal-theoretical analysis can clarify to what extent a published code of judicial ethics makes tangible for both judges and their audiences in the courtroom and in society what is required for a 'good' judicial performance in a contemporary society.

3. Contemporary judicial ethics: legitimacy and professionalism in the twenty-first century

The role and content of a code of ethics for judges can only be fully appreciated if we pay attention to the societal context in which the specific judiciary for which this code was established fulfils its role. In this section, a closer look will be had at the contemporary professional-ethical framework for judicial performance in the liberal-democratic context of the Netherlands, focusing on the core notions of judicial legitimacy (3.1) and T-shaped judicial professionalism (3.2).

[36]E. Mak, 'Judicial Self Government in the Netherlands: Demarcating Autonomy' [2018] 19(7) German Law Journal, 1801.
[37]A.R. Mackor, 'Onderwijs juridische beroepsethiek aan rechtenstudenten' [2021] 7 Law & Method.
[38]A.R. Mackor, 'Rechterlijke macht: geschraagd of ondermijnd door kernwaarden?' [2014] 1 Rechtsgeleerd Magazijn THEMIS, 9.

3.1. Judicial legitimacy in the twenty-first century: a call for responsive judiciaries

Institutions in contemporary liberal-democratic societies cannot rely anymore on a 'higher' source, such as religion or a developed tradition, to legitimise the authority vested in them. Indeed, secularisation has led to the decrease of religious influence in the public sphere and citizens have been empowered to contribute to societal and political debates through increased possibilities of democratic participation, e.g. in elections and legislative consultations, and the proliferation of enforceable individual rights. In this social constellation, authority of institutions is granted to them 'from below' by the citizens. Institutions are dependent on democratic consent to receive competences to wield public power and on societal trust and acceptance to maintain their position of power. At the same time, there is a societal demand for capable institutional actors to safeguard the public order and realise societal goals.[39] Elements of this capability are that institutions put knowledge and insights to use for the benefit of the society and that they meet requirements of transparency and accountability for their actions. In this respect, institutions will only be able to fulfil their roles properly if they are sufficiently anchored in society, meaning that they should have a view of the societal needs and be able to act in response to those needs. This view is central to calls for more responsive law and a more responsive problem-solving judiciary.[40] An important challenge in this regard still is how to enable broad insights into the needs which exist in pluralist societies, e.g. how to ensure inclusion of different groups in democratic deliberations.[41]

This changed basis of institutional legitimacy has consequences for courts. A main factor which requires balancing in the shaping of the judiciary as a contemporary societal institution concerns its distance vis-à-vis the society. In the traditional view on legitimacy of institutions, in which a higher source underpins the authority granted to these institutions, the judiciary operates at a figurative distance from society in two respects. On the one hand, a fictitious distance at the institutional level is considered to exist between the judicial function, as the role of applying the law in individual cases, and morality and politics, as fields of societal deliberation and normative development. On the other hand, distance in a metaphorical sense is generated towards society by a 'mystique' surrounding legal knowledge and the attributes and rituals associated with courts, such as robes of judges and lawyers and the established script of trials.[42] This cultivated figurative distance is often accompanied by literal distance in the sense of travel distances to courts and distance between judges and parties in the design of the courtroom.

This traditional view does not hold anymore. Regarding fictitious distance, the act of judging in contemporary societies is seen as less strictly separated from moral and political deliberations. In this respect, it has become accepted that courts do not deal only with dispute settlement but also contribute to the development of legal norms for society next to the legislative and policy-making activities of the other branches of

[39]T.R. Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?' [2001] 19 Behavioral Science and the Law, 215.
[40]P. Nonet and P. Selznick, *Law and Society in Transition: Towards Responsive Law* (Transaction Publishers 2005, first published 1978), Chapter 4.
[41]L.M. Henderson, 'Internalizing Contestation in Process-Based Judicial Review' [2019] 20(8) German Law Journal 1167.
[42]A. Garapon, *Bien juger: Essai sur le rituel judiciaire* (Odile Jacob 1996).

government.[43] The scope for this so-called 'judicial law-making' occurs in particular in constitutional adjudication, in which courts are called upon to interpret fundamental norms relating to the state organisation and human rights. Enforceable human rights provisions have created space for similar issues to be litigated in civil and administrative law cases.

With regard to its metaphorical distance to society, the judiciary has become less mystical because of its adherence to the values of transparency and accountability. This is visible in the way in which court procedures are shaped, e.g. an increased emphasis on the guarantee of elements of procedural justice,[44] and in ambitions regarding the clarity of the reasoning of judgments for parties and the general public. In a literal sense, courts are getting closer to litigants through initiatives such as neighbourhood courts[45] and online dispute resolution.[46]

3.2. T-shaped judicial professionalism in the twenty-first century: defining virtuous judgecraft

Judges may find it challenging to navigate this current complex legal and societal context and to respond to the stronger societal demands for transparency and accountability. Moreover, the changed basis of societal legitimacy and the more prominent role of judges in legal norm development necessitate a fundamental reflection on the substantive ethical norms and standards for 'good' judicial performance.

In this respect, the external dimensions of judgecraft, mentioned in section 2.1, are relevant points of attention. Judges should be aware of and respond to changes regarding the expected consistency and utility of their performance. General guidance for Dutch judges for approaching these external dimensions comes to the fore in the GJC. Regarding utility, a guideline on judicial autonomy underlines that judges should pay attention to organisational and executive demands, which can concern for example efficient case management. At the same time, judges are reminded of their internal independence. The guideline states: 'With due regard to the organisational and executive frameworks, the judge claims his entitlement to the way he organises his work' (GJC, 2.2).[47] With regard to consistency, the Guide mentions a judge's responsibility to guarantee the uniform application of law. In the Dutch context, this entails that a judge should pay attention to recommendations which were developed in the judicial practice, e.g. maintenance allocation norms, and will have a duty to motivate a decision which departs from this type of norms (ibid). Instances of such departures can occur in difficult cases. Furthermore, the external dimension of a judge's attention for the clientele of the judiciary should also be reconsidered in a contemporary society. Besides interactions with new types of parties which find their way to the courts, e.g. NGOs, judges need to develop

[43]D. Luban, 'Settlements and the Erosion of the Public Realm' [1995] 83 Georgetown Law Journal, 2619.
[44]L.F.M. Ansems, K. van den Bos & E. Mak, 'Speaking of Justice: A Qualitative Interview Study on Perceived Procedural Justice Among Defendants in Dutch Criminal Cases' [2020] 54(3) Law & Society Review, 643.
[45]S. Murray, 'Keeping It in the Neighbourhood? Neighbourhood Courts in the Australian Context' [2009] 35(1) Monash University Law Review, 74.
[46]G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004).
[47]In the GJC, it is indicated that: 'The masculine form is used as a generic term referring to both men and women' (footnote 5).

communicative skills for presenting themselves to the general public in mediatised cases or to adequately respond (or not) to comments on social media.

With regard to the internal dimensions of judgecraft, the idea of T-shaped legal professionalism takes centre stage in contemporary debates on judicial performance. This idea entails that judges in contemporary societies need to combine in-depth legal knowledge and skills with broad insight into relevant elements from other disciplines, e.g. psychology or economics.[48] Such professionalism is needed for handling complex cases in which the legal questions are intertwined with an assessment of relevant economic, psychological, or other aspects. Moreover, in a market for legal services which has become very competitive, judicial dispute settlement in private law cases needs to distinguish itself on the basis of legal quality combined with a human-centred approach. This approach can take shape in a judge's social skills, e.g. the display of empathy towards parties, and in her adequate handling of a plurality of moral and social values whenever this is relevant in her judicial performance.[49]

This notion of contemporary judicial professionalism can be made more tangible with reference to the theoretical frameworks on judgecraft and judicial virtues. Taken together, these theories provide a nuanced overview of practical and ethical requirements of judicial performance, which can be connected to the elements of T-shaped judicial professionalism. Kritzer's conceptualisation of judgecraft encompasses relevant dimensions regarding the subjective qualities of the judge as a craftsperson: skills and techniques, problem solving, and aesthetic.[50] He acknowledges that this framework is not comprehensive, in particular with regard to the ethical aspect of judicial performance.[51] In this respect, virtue-jurisprudential accounts on adjudication provide complementary insights. Proponents of this approach have argued that the legitimacy of adjudication requires that the practice itself has moral quality. This concerns the idea that 'it must be a practice in which judges see to it that citizens who participate in a legal proceeding receive their due'.[52] A judge needs to have certain qualities, which are labelled judicial virtues, in order to ensure this quality of adjudication. Based on a neo-Aristotelean perspective, judicial virtues are conceptualised as dispositions of character which represent a middle ground between two extremes, e.g. courage as a middle ground between cowardice and recklessness. A judge develops these virtues through her education and practical experience. Van Domselaar makes a conceptual distinction between six judicial virtues and adds the notion of 'civic friendship' as an additional normative requirement for the realisation of good adjudication. She argues that this virtue-centred approach 'is in fact responsive to the concerns underlying the ideal of the rule of law, that is, to prevent abuse and arbitrary exercise of power. By proposing an ideal of a good judge in terms of the judicial virtues it protects citizens against the arbitrary influence of the subjectivity of the judge, an influence that rule- or principle-based approaches to adjudication underestimate'.[53]

[48]Mak, 'The T-shaped Lawyer and Beyond' (n 14) 7-8.
[49]ibid 16-19.
[50]Kritzer (n 15) 334-37.
[51]ibid 337.
[52]Van Domselaar, 'Moral Quality in Adjudication' (n 15) 24.
[53]ibid 39-40.

Based on the combined analysis of these two theoretical frameworks, the following practical and ethical aspects of contemporary T-shaped judicial professionalism come to the fore.

Skills and techniques. The judicial function encompasses a range of tasks, including adjudication, mediation, the management of a docket and courtroom, and the conduct of court proceedings.[54] Handling these tasks involves the use of different skills and techniques, which go beyond legal skills regarding the interpretation and application of the law in concrete cases. Mediation requires conflict-solving skills, the management of a docket requires management skills, and the conduct of court proceedings requires skills which relate to expectations of procedural justice, e.g. giving voice to and listening to parties. Yet, legal skills remain central in the contemporary notion of judicial professionalism.[55] These skills concern legal reasoning, meaning the interpretation of laws in relation to the facts of a case, and judgment, meaning the realisation of a reasoned decision based on the assessment of the facts and applicable legal rules in a case. These skills are of a complex nature, as they encompass legal-analytical aspects as well as 'soft skills', such as moral sensitivity and insight in social-psychological theories on moral behaviour and leadership.[56] Whereas theories on adjudication form a central element in legal scholarship and education, much less attention was paid until recently to the psychological process of judicial decision-making and the sociological shaping of a judge's skillset through training and practice. Empirical legal scholarship provides avenues for further clarifying these important aspects of the process of judicial decision-making.

Problem solving. This aspect of judgecraft touches upon the core of the judicial function. Connecting with the external dimension of utility, judicial problem solving has meaning in relation to the parties in cases and to the wider society. In concrete cases, a judge's decision provides parties with a judgment on a legal conflict which has arisen between them. Problem solving in this sense concerns the use of the skill of legal reasoning, in particular the way in which a judge makes use of her discretion in difficult cases. In contemporary societies, tendencies in legislation and policy-making can be observed which aim to make dispute settlement mechanisms more suitable for addressing the actual conflict between parties. Examples are the promotion of (court-annexed) mediation and the introduction of less formal judicial procedures, e.g. neighbourhood courts. In this respect, judgecraft has become more focused on addressing social conflicts, if possible without handing down a judicial decision. Besides this meaning for the parties in cases, problem solving also concerns the meaning of adjudication for society. This aspect of judgecraft requires an ability of judges to contribute to legal norm development in relation to new legal questions and changing normative views in society. In this respect, a judge fulfils a role in the 'public life' of the society.[57] As mentioned in section 3.1, this aspect of the judicial function has become more prominent as a consequence of the emergence of more morally and politically sensitive judicial competences, in particular the competence of judicial review.

[54]Kritzer (n 15) 335.
[55]ibid.
[56]Mackor (n 19) 83.
[57]Luban (n 43) 2632-633.

Aesthetic. This dimension of craft concerns the assessment of the quality of the work from the perspective of members of the professional community. This aesthetic is often not noticeable for lay persons.[58] With regard to the judicial function, judgecraft in this respect encompasses an ability to come up with creative ways of approaching the legal question in a case. Aesthetic also comes to the fore in the ways in which a judge communicates about her decision with the parties and the wider societal audience and in her communication in court proceedings. According to Kritzer, this entails 'an ability to communicate decisions in a way that both those affected by the decision and those simply interested in it perceive as reflecting serious and deep consideration. That is, the judge needs to be able to convey a sense of caring and concern'.[59]

Having outlined the basic dimensions of 'judgecraft', it is now possible to explore how the guarantee of moral quality of adjudication can be integrated in this analytical framework for understanding the meaning of contemporary T-shaped judicial professionalism. This analysis consists of a discussion of the six-pack of judicial virtues and the notion of civic friendship, as developed by Iris van Domselaar. References to the GJC clarify how these virtues and relating aspects of judgecraft have been made tangible for judicial performance in the Dutch context. It is worth bearing in mind that a reference to rules, such as the GJC, could seem to be at odds with the focus in virtue-ethical approaches on the cultivation of moral character as a basis for making ethical decisions. The analysis in this paper acknowledges that externally given guidelines focus not on influencing judges' characters. Yet, such guidelines can be useful in assisting also judges of good moral character in determining what is right in situations where this is not so obvious and, acknowledging that the 'virtuous judge' is an ideal, in giving reasons to judges for resisting temptations to act unethically.[60]

Judicial perception. This is an essential virtue for judges in order to adequately respond to the particulars of legal cases. It can be defined as a species of ethical perception, meaning the situational appreciation which 'allows an agent to have access and gain understanding of ethical reality'.[61] Judicial perception entails more than the intellectual capacity of applying a general rule or principle to a concrete case. It involves several other aspects: a character-dependent act of 'working through' the relevant legal concepts, the preliminary act of establishing the legally relevant facts of the case, and perceptiveness regarding non-legal aspects of the adjudication which require attention (e.g. a display of empathy towards the parties).[62] In terms of judgecraft, the virtue of judicial perception connects with the skills and techniques which a judge should have. In particular, this concerns the awareness of relevant legal aspects and other knowledge, e.g. on psychology or ethics. A virtuous judge will strive to develop her perception of these relevant aspects to a high-quality level. The GJC echoes this demand of sound legal as well as broader skills: 'A competent judge has the necessary knowledge and skills. In addition to a thorough knowledge of current law, other aspects such as technical skills are equally important alongside a professional manner' (GJC, 2.4). The GJC specifies that for Dutch judges this entails maintaining expertise on national and international developments and

[58]Kritzer (n 15) 326.
[59]ibid 336.
[60]Lichtenberg (n 9), 6-7.
[61]Van Domselaar, 'Moral Quality in Adjudication' (n 15) 29.
[62]ibid 31.

specialising within a certain area of law when necessary (ibid, 2.4.1). Judicial perception also relates to problem solving, in the sense of a judge's perceptiveness of relevant non-legal aspects of a case. In this respect, a virtuous judge will refer a case to (court-annexed) mediation if their assessment of the legal issue and the underlying social conflict indicates that a better outcome could possibly be achieved through alternative dispute resolution rather than a court procedure. Finally, there is a connection between the virtue of judicial perception and the dimension of aesthetic in judgecraft. A judge's ability to think of creative ways of approaching a legal issue requires a high degree of perception. In this respect, a virtuous judge will strive to develop her judicial perception through professional experience in order to enhance her creativity over time. Furthermore, judicial perception involves the capacity to discern what would be the right way to communicate the actual decision to the parties involved and to the wider public. Van Domselaar has argued that 'exactly which rules and principles a perceptive judge will use and in what way – for instance exclusively in one's judgments or also during a court session – and about what things to remain silent, is also a matter of situational appreciation and at least partly of judicial perception as well'.[63]

Judicial courage. This virtue can be seen in a judge who 'does the right thing' while being faced with personal risks, such as risks to the judge's career, appreciation by colleagues or society, or security.[64] Van Domselaar gives the example of a 'youngest' judge, meaning the judge who was appointed most recently, speaking up during the judicial deliberations in favour of granting a request for leave of a convicted person who serves time for a serious sexual offence. This judge takes a risk of possible criticism from her more senior colleagues who are more hesitant in light of mediatised incidents regarding similar cases in which leave was granted. The virtue of judicial courage connects with the dimension of problem solving in judgecraft. It adds an ethical layer to the judge's task of weighing individual and societal interests in a case. In this respect, a virtuous judge will not give in to pressure exerted by parties in the case or by external actors when deliberating and deciding on the outcome of a case. In the GJC, the virtue of judicial courage is mentioned explicitly in connection with the core value of independence: '[The judge] is aware that in certain cases professional courage is required on the part of the judge to take a decision which he thinks is just even though that decision may not enjoy widespread support in society' (GJC, 2.1). A connection is made with the overarching core value of integrity, on which the Guide states: 'This core value inspires a judge, even under pressure, to swim against the current and to stand firm, if that proves necessary' (ibid, 2.5).

Judicial temperance. This virtue concerns 'a capacity of self-restraint and self-abstention that protects agents from all kinds of excesses that may occur in response to personal urges, needs, and desires and that keep them from doing the right thing'.[65] Temperance can concern a judge's conduct in court, e.g. the avoidance of displays of inappropriate emotions. An example from the Dutch context where this was problematic concerned a judge who during a court session in a high-profile criminal case on real estate fraud felt inspired to cite a well-known poem by Hiëronymus van Alphen on a little boy

[63] I. van Domselaar, 'The Perceptive Judge' [2018] Jurisprudence 9(1) 85.
[64] Van Domselaar, 'Moral Quality in Adjudication' (n 15) 32.
[65] ibid.

who felt tempted to steal plums from his father's garden: 'John once saw plums hanging (in the tree), O! As big as eggs'.[66] The defendant did not share the judge's sense of humour and successfully requested his recusal from the case. The virtue of temperance does not fully preclude the display of emotions. Indeed, a judge who shows her emotion can sometimes do this to the benefit of the legal proceedings, too. For example, showing empathy can instil a sense of being seen and heard on parties, whereas showing anger when giving a criminal sentence can underline the severity of the committed crime. Temperance, furthermore, concerns a judge's incorruptibility, i.e. the capacity to refuse personal and financial gains which could result from abusing her power.[67] In terms of judgecraft, this judicial virtue connects with the dimension of skills and techniques, in the sense that a virtuous display of emotions will be an asset to the set of professional competencies of a judge. In a similar vein, judicial temperance as an ethical aspect of aesthetic comes to the fore in a judge's ability to show caring and concern in her communication with parties and the wider society.

Judicial justice. This is the virtue which 'indicates that a judge is disposed to secure the values of political morality as they are worked out in settled (procedural) law, permeate the legal system and figure in society at large'.[68] In the contemporary context of adjudication, this virtue entails a judge's engagement with moral and political debates whenever the decision-making in a case necessitates this. In terms of judgecraft, this judicial virtue adds an ethical layer to the aspect of problem solving which concerns the legal norm development in the society. A virtuous judge will establish a connection between her legal interpretation in a case and the moral and political values which underlie the applicable laws and case law in that case. In difficult cases, where the judge has discretion, she can refer to the virtue of judicial justice as a legitimation for her approach. Interestingly, the GJC establishes a direct connection between this virtue and the virtue of judicial courage: 'On occasions, the judge is required to explore the boundaries of the law in order to arrive at a just decision. The judge understands that his judgment may be a subject of discussion in society as a whole' (GJC, 2.1).

Judicial impartiality. This virtue and the virtue of independency are most specifically connected with the judicial function. Judicial impartiality concerns the neutrality of the judge towards the parties in the case at hand. It requires the ability of the judge to distance herself from personal interests and biases. This virtue does allow for giving attention to knowledge gained from personal experiences, which is important for living up to the virtue of judicial perception.[69] In connection with judgecraft, the virtue of judicial impartiality comes to the fore in a judge's neutral stance when engaging in problem solving in adjudication. The GJC specifies that impartiality concerns not just the judge's conduct but also the appearance of an absence of biases and personal interests (GJC, 2.3). In this respect, it echoes the adage that 'justice must not only be done, it must also be seen to be done'.

Judicial independency. This virtue concerns a judge's ability to pass judgment free from external influences, e.g. from politicians or litigants. It is connected with the

[66]'Jantje zag eens pruimen hangen, O! als eieren zo groot'. Full version and English translation available here: https://www.mamalisa.com/?t=es&p=2662 accessed 3 April 2022.
[67]Van Domselaar, 'Moral Quality in Adjudication' (n 15) 33.
[68]ibid.
[69]ibid 34.

virtue of judicial courage.[70] Whereas courage is a general moral virtue, judicial independency is more closely linked with the professional role of judges and the institutional context in which they fulfil their role. The virtue of judicial independency connects with the dimension of problem solving in judgecraft. A virtuous judge will make sure to maintain an autonomous role in the political balance of powers and in the judicial organisation when deciding cases. In the GJC, the meaning of these aspects of virtuous judgecraft in the Dutch context is clarified in relation to the core values of independence and autonomy. These core values can be understood as expressions of the national legal culture and institutional arrangements, which have developed historically on the basis of the principle of the rule of law. The described value of external independence aligns with descriptions of this value which can be found in many national and international codes: 'Independence is a reflection of the constitutional division of powers between the legislative, executive and judicial bodies. Judicial independence guarantees that the decision of a judge is determined independently of social, economic or political pressure and is based on the judge's own appraisal of the relevant facts and legal principles in a specific case. The judge offers the independence invested in him in service of society and gives substance and content to this, always mindful of the rights and privileges of citizens' (GJC, 2.1). The described value of autonomy seems to reflect the debate in the Dutch context in relation to the introduction of more centralised structures of court management: 'Autonomy – which is also referred to as internal independence – relates to the judge's room for manoeuvre within his own organisation. He substantiates this autonomy in his independent performance and independent passing of judgment while, at the same time, forming part of an organisation which is required to comply with the precepts of efficiency and lawfulness' (GJC, 2.2).

Civic friendship. In addition to the set of six judicial virtues, the legitimate exercise of judicial power in a contemporary liberal-democratic society demands equal respect between the judiciary and citizens, meaning that this exercise of power 'must be based on reasons that all (affected) citizens can endorse'.[71] This demand corresponds with the notion of societal legitimacy 'from below', as described in section 3.1. It connects with the external dimension of consistency in judgecraft, which requires that 'the vast discretion granted judges [is exercised] in a way that achieves a just consistency'.[72] A judge who lives up to the six judicial virtues will not automatically meet the demand of equal respect in this sense. After all, in the virtue-ethical approach '[r]ightness (…) has an inherently personal touch to it. Each virtuous judge may have his own individual way of perceiving and valuing the relevant facts and of assigning weight to the relevant (legal) considerations'.[73] The demand of equal respect requires that citizens, in particular those who are negatively affected by a judicial decision, are given a sufficient reason to accept this decision.[74] To give shape to this requirement, Van Domselaar proposes to add the Aristotelean idea of 'civic friendship' as a complement to the judicial virtues in order to ensure the moral quality of adjudication. This idea encompasses that 'in a political community 'animated by civic friendship, each citizen has a certain measure of

[70]ibid.
[71]ibid 40.
[72]Kritzer (n 15) 333.
[73]Van Domselaar, 'Moral Quality in Adjudication' (n 15) 40.
[74]ibid 41.

interest in and concern for the well-being of each other citizen just because the other *is* a fellow-citizen".[75] A judge who acts as a civic friend in the exercise of her office will 'have an emphatic attitude towards the concrete good that is at stake for the citizens involved' and make 'a genuine effort to limit the violations of the concrete interests of the citizens involved'.[76] In judgecraft, a judge's attitude of a civic friend will come to the fore in the dimension of aesthetic in the form of her communication with caring and concern. Van Domselaar mentions in this respect the considerations in judgments 'in which a judge addresses the concrete good of the litigating parties where this is not indicated by settled law'.[77] Aspects of procedural justice, e.g. giving voice to parties, giving due consideration to their arguments and explaining the proceedings and reasoning of the judicial decision,[78] can be considered to fit well with this judicial attitude too. The GJC relates the core value of professionalism to perceptions of procedural justice. It outlines guidelines on a judge's attitude towards parties, such as listening to their arguments and explaining the procedure (2.4.3). On a general level, the GJC advances the idea that judicial professionalism in this sense can contribute to the trust of citizens in the judicial system (ibid, 2.4). Importantly, the idea of civic friendship as a display of equal respect entails that parties affected by court proceedings should also adopt this kind of attitude in order to be responsible citizens: 'By their cooperative attitude and by accepting the judicial decision litigants or defendants can express their commitment to the common good, to the political order and the values it aims to protect'.[79]

Table 1 provides an overview of the outcomes of this theoretical analysis on judgecraft and judicial virtues as a concretisation of practical and ethical elements which fit with expectations of contemporary T-shaped professionalism. This overview demonstrates that 'good' judicial performance in a contemporary society is assessed in relation to a demanding set of judicial virtues and skills.

4. Implementing virtuous judgecraft: a case study on climate litigation in the Netherlands

This section will test the potential of a code of judicial ethics for providing guidance to judges and insight into the judicial role for the judiciary's audiences. To achieve this aim, the analysis in this section focuses on climate litigation as an example of judicial decision-making which entails legal complexities relating to a global societal challenge and which is scrutinised closely by politicians and the general public (4.1). The analysis will consider the GJC in light of the theoretical framework of T-shaped judicial professionalism concretised in virtuous judgecraft, as presented in the previous section. It will explore to what extent the guidelines provided by the GJC can be recognised in the approach of the Dutch judges in the Urgenda judgments (a guiding 'signpost' function) and how these guidelines could assist in clarifying the judgments to parties and the general public (a symbolic

[75]ibid 42, citing J.M. Cooper, 'Aristotle on the Forms of Friendship' in J.M. Cooper (ed.), *Reason and Emotion: Essays on Ancient Moral Psychology and Ethical Theory* (Princeton University Press 1999), 371.
[76]ibid 42-43.
[77]ibid 43.
[78]Ansems, Van den Bos and Mak (n 44) 655.
[79]Van Domselaar, 'Moral Quality in Adjudication' (n 15) 43.

Table 1. Virtuous judgecraft.

	Skills and techniques	Problem solving	Aesthetic
Judicial perception	Awareness of relevant legal and other aspects (ethics, psychology)	Conflict resolution	Creativity in legal reasoning
Judicial courage		Weighing of individual and societal interests regardless of pressures	
Judicial temperance	Professional display of emotions		Communication with caring and concern
Judicial justice		Alignment with societal development of legal norms	
Judicial impartiality		Adjudication from a neutral point of view	
Judicial independency		Autonomous role in political balance of powers	
Civic friendship			Communication with caring and concern

'beacon' function). This analysis will address both the content (4.2) and context (4.3) of the judicial decision-making.

4.1. The nature of climate litigation

In 2015, the District Court of the Hague gave a ground-breaking judgment in a case brought by the Urgenda Foundation and almost 900 citizens against the State of the Netherlands. The claimants argued that the Dutch government had acted unlawfully by setting goals for a reduction of the emission of greenhouse gases which were insufficient for preventing dangerous climate change. They asked for a court order obliging the State to reset its goals in line with earlier ambitions which had been let go of over time. The District Court granted this claim, therewith establishing a novel interpretation of the norm of liability under tort law. The Court of Appeal reached the same outcome three years later, albeit with a different argumentation which introduced human rights in the legal assessment. This judgment was upheld by the Supreme Court of the Netherlands in 2019.

The Urgenda case provides a prime example of litigation relating to a global societal challenge. The challenges at stake in this type of litigation are issues or developments which affect national societies around the world simultaneously and in similar ways and the handling of which requires political and legal decision-making based on multidisciplinary insights. Examples of such challenges are new technologies and climate change.[80] Cases are brought against governments but also increasingly often against private actors, such as big tech companies or companies in the fossil fuel industry.

Climate litigation has risen to prominence around the world in the 2010s. Setzer and Higham observe an impressive global increase from 800 climate change-related cases filed between 1986 and 2014 to 1,000 cases between 2015 and 2021.[81] While the large

[80]See also Davies and Henderson in this special issue.

[81]J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: A Snapshot (Policy Report, July 2021)* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2021).

majority are cases brought before courts in the United States, examples of climate litigation were found in 39 other countries including jurisdictions in the Global South.[82] An important category of cases concerns claims against governments regarding systemic climate change mitigation. Following the example of the ground-breaking case of the Urgenda Foundation against the Dutch government, claimants in these cases take issue with alleged inaction or lack of ambition of national governments with regard to climate goals and commitments.[83] Another category consists of claims against private parties, including major emitters as well as financial market actors. The focus of these claims ranges from corporate liability to fiduciary duties regarding inter alia deliberate disinformation ('greenwashing') and corporate human rights responsibilities.[84] Overall, the number of claims built on human rights arguments is on the rise. While this concerns mostly litigation against governments, there are notable examples of cases against businesses too.[85]

Court cases concerning global societal challenges have a number of features which make them prone to raising professional-ethical questions for judges. These features relate to the complex legal questions which come to the fore in this type of litigation, the answering of which involves an assessment of legal, scientific, ethical, and political considerations. This complexity entails that judges deciding in this type of case will need to position themselves in relation to normative pluralism in society on the subject matter of the case as well as the institutional balance of powers with the legislative and executive branches of government in public decision-making. Also, judges handling this type of litigation will need to ensure their professional ability to assess scientific insights in the process of their legal decision-making. Even though time allocation models for the courts grant more time for deciding this type of 'mega case' than for ordinary cases, judges will also need to take into account organisational demands regarding their management of cases.

4.2. The GJC as a signpost and a beacon for the content of climate litigation

On a substantive level, first of all, the challenge of climate change gives rise to legal questions for which no clear answer is available in the existing laws and case law and which connects with controversies in political and societal debates. Elements of virtuous judgecraft can be considered in relation to the following aspects: the judicial contribution to legal norm development in society, the scope for judicial law-making, interactions in the balance of powers, the inclusion in a judgment of different affected stakeholders, and the judicial assessment of scientific expertise. For each of these elements, this section will analyse its concrete manifestation in the Urgenda case as well as the guidelines of the GJC which may have been of assistance to the judges for addressing this element (signpost function of the code) and for the parties and general public in understanding the judicial approaches (beacon function of the code).

[82]ibid 5.
[83]ibid 6.
[84]ibid.
[85]ibid.

4.2.1. Legal norm development in society

Firstly, the legal decision-making in climate change-related cases requires an assessment of values which underpin the existing laws. Both the global and transgenerational aspects of climate cases relate to questions of equality and solidarity in society. A relevant development for legal decision-making on these questions concerns the emergence of 'environmental constitutionalism' as a new paradigm. This notion refers to the framing of societal questions regarding the environment in terms of human rights claims, which can be noticed in an increasing number of climate change-related court cases.[86] This development can be linked to the judicialization of politics as a more general phenomenon, mentioned in section 3.1.

A legal assessment of the developed norms in society with regard to climate change requires judgecraft in the form of skills, problem solving, and aesthetic. The connecting virtues which are especially relevant for this legal assessment are judicial perception and judicial justice. Specifically, virtuous judgecraft in relation to claims based in environmental constitutionalism requires awareness of relevant legal aspects, alignment with the societal development of legal norms, and creativity in legal reasoning.

Regarding judicial perception as well as judicial justice, the GJC confirms the scope for considering the societal development of legal norms. A relevant guideline is: 'The judge ensures that he is aware of developments in society and points of view, and includes them in his decision, where necessary' (GJC, 2.1). With regard to climate litigation, several nuances are important to highlight in this respect. Firstly, cases are usually initiated because of augmented support in society regarding the environmental claim that is made. At the same time, the legislature and executive branch are slow or reluctant to take action, often because of political and economic interests, including pressure from lobby groups (e.g. the fossil fuel industry). This was the situation in the Urgenda case too. Against this background, it remains to be seen how 'widespread' the support in society for a judgment will be, also taking into account the sometimes unpredictable impact of media coverage on the way in which judgments are received by the general public. Furthermore, expert commentaries can influence the views on the legal quality of a judgment and the level of support for this judgment in the legal community, composed of judges, lawyers, scholars, and other legal professionals. Predictions of legal experts regarding the Urgenda judgments underline that the outcomes of the Urgenda litigation were not foreseen by many. For example, professor of international and European environmental law Jonathan Verschuuren commented in 2013: 'I am very confident that the court will not grant [Urgenda's claim of 40 percent reduction]' and 'The claimants invoke very general legal principles. But Dutch judges are very pragmatic. They are afraid to sit on the chair of the executive or just to be accused of doing that'.[87] Moreover, the judgments received appreciation from legal scholars but also criticism.[88] Another judicial virtue which was important in the Urgenda case, therefore, is judicial courage. A virtuous judge in climate litigation needs to have the courage to face the

[86]L.E. Burgers, *Justitia, the People's Power and Mother Earth* (PhD dissertation Amsterdam UvA 2020), 63.

[87]J. Mommers, 'Het proces: de mensheid versus de Nederlandse staat' *De Correspondent* (10 December 2013) <https://decorrespondent.nl/466/het-proces-de-mensheid-versus-de-nederlandse-staat/51357394-7e0b1be2> accessed 3 April 2022; my translation.

[88]G. Boogaard, '*Urgenda* en de rol van de rechter. Over de ondraaglijke leegheid van de trias politica', [2016] 65(1) Ars Aequi 26; Burgers (n 87) 45.

uncertainty relating to the progress made with legal norm development in society and to 'stand firm' (GJC, 2.5) if it turns out that her decision is met with criticism. The judgments in the Urgenda cases displayed this kind of courage.

4.2.2. Judicial law-making

This brings us to a second feature of climate litigation, which concerns its connection with aspects of judicial law-making. Elements of virtuous judgecraft which come to the fore most prominently in this regard are judicial perception regarding the scope for law-making and judicial independency and judicial courage in relation to the political branches of government. The relevant guidelines in the GJC are: 'The judge (…) always takes the independent assessment of relevant facts and the interpretation of legal precedents and the law as his guiding principles. (…) On occasions, the judge is required to explore the boundaries of the law in order to arrive at a just decision. The judge understands that his judgment may be a subject of discussion in society as a whole' (GJC, 2.1).

Climate cases in liberal democracies have been brought before courts in private law and administrative law cases. Although judges in these cases are called upon to engage in judicial law-making, the scope of their competence is delimited in two ways,[89] which connect with the framework described in the GJC. A first delimitation is that the judicial reasoning should fit within the framework of existing laws, which have democratic legitimacy through their basis in legislative procedures. In contemporary societies, this often goes together with an expectation of discursive processes for legislation and policy-making, in which societal debates are integrated in the political deliberations.[90] Human rights provisions provide judges with an important tool to set aside decisions of a democratic majority, but for these provisions as well changes in their interpretation should come about in the public sphere of societal and political deliberations. In this respect, claimants in climate cases advance the argument that the law has developed already based on the societal discourse on environmental protection. According to these parties, environmental constitutionalism provides judges with a legal basis to confirm this shift.[91] A second delimitation of the judicial competence concerns the particularities of fact-finding in legal procedures. In private law cases, a judge bases her judgment on the facts put forward by the parties and takes these facts at face value unless there is a contestation by the other party.

Climate litigation against governments provides a challenging territory for judges in terms of the scope for law-making. Generally, societal and political debates on the societal challenge are ongoing and lead to controversy between different groups in society. A judge in climate litigation will have to demonstrate a high degree of perception, i.e. to take into account in her assessment whether the legal norm development in society has progressed to such an extent that it demands a novel interpretation of the applicable laws. Criticism of a judicial decision in a climate case can be that the court has overstepped its competence and has bypassed processes of democratic deliberations in the public sphere. Yet, the accepted view in the Dutch legal system, i.e. that judges contribute to legal development through the interpretation of legal rules in concrete cases,

[89]Burgers (n 86) 50.
[90]See also below, section 3.1.
[91]Burgers (n 86) 63.

demonstrates that the courts are not obliged to completely withhold judgment on issues of societal norm development in deference to the legislature. In this respect, the Urgenda judgments could be considered to fit particularly well with views on judicial law-making in private law cases.[92] Still, the judicial reasoning in a specific case should make clear that the judgment is based on an established shift in social norms, which underpin the applicable legal rules and principles in that case. In the Urgenda case, a relevant fact was that the government itself had outlined necessary goals for the reduction of greenhouse gas emissions to prevent dangerous climate change, but had subsequently lowered its ambitions. The judgment did not introduce a new commitment for the government, but demanded a return to the goals which the government itself had supported as necessary earlier on.

In addition to this legal perspective, it could be argued from a policy-making perspective that a judicial contribution to societal norm development was legitimised because of political stalling which arguably occurred as a result of strategic behaviour, e.g. an unwillingness to take a stance on issues which could raise criticism from the electorate of the governing parties, while knowledge on dangerous climate change was already widely available.[93] This background could have underlined the judges' need to be 'aware of the major influence that [their] decision may have on the lives of those immediately affected by it and on society' (GJC, 2.4.2).

4.2.3. Interactions in the balance of powers

The competence of judicial law-making also stands in connection with the virtue of independency. As a third feature of climate litigation, the interaction of the judiciary with the other branches of government comes to the fore as important. The GJC provides the following guideline: 'The judge applies the law in every individual case he hears, immune to fear or external coercion. … The judge must be able to base his decision on his own judgement without inappropriate influence on the part of parties to the proceedings or government bodies and without his judgment being subject to another organisation (which is not independent in the same sense). The judge allows himself to be directed by the law and his own conscience, and his sense of justice. The judge ensures that he is aware of developments in society and points of view, and includes them in his decision, where necessary, but always takes the independent assessment of relevant facts and the interpretation of legal precedents and the law as his guiding principles' (GJC, 2.1).

With regard to the Urgenda case, the response of the Dutch government to the judgments of the courts raises some concerns in relation to the realisation of this virtue. Several politicians expressed doubt and criticism regarding the judgments of the courts in the first instance and on appeal. The government ultimately accepted the judgment of the Supreme Court. This was expressed by Minister Wiebes, who clarified that the government wanted to verify whether the trial courts had not overstepped their judicial competence and that 'the Supreme Court has judged that that was not the case'.[94]

[92]G. Boogaard, 'De lessen van de Urgenda-uitspraak' (2020) Binnenlands bestuur <https://www.binnenlandsbestuur.nl/bestuur-en-organisatie/de-urgenda-uitspraak> accessed 19 April 2022; Burgers (n 87) 33.
[93]See Mommers (n 87) for a detailed overview of the history of the Urgenda saga.
[94]NOS News, 20 December 2019, <https://nos.nl/artikel/2315589-afkeuring-bewondering-en-vragen-over-urgenda-vonnis-bij-de-politiek> accessed 25 October 2022.

Regarding judicial courage, it is interesting that comments on the first Dutch Urgenda judgment zoomed in on the role of one person: the president of the judicial panel, Hans Hofhuis. A constitutional legal scholar wrote: 'Hofhuis is the kind of judge which you wish every state governed by the rule of law had, and that includes bold rulings like this one'.[95] A former politician was less enthusiastic: 'Judge Hofhuis disrupts the trias politica'.[96] Several comments mentioned that Judge Hofhuis had shown courage in reaching the ground-breaking judgment in the Urgenda case and these comments contextualised the judgment in relation to Hofhuis' visible role in the judiciary and in scholarship on the judicial system.[97] For sure, the societal and political responses to the judgment will not have come as a surprise to Hofhuis and his fellow judges on the panel.

4.2.4. Inclusion of affected stakeholders

A fourth feature of climate litigation, such as the Urgenda case, concerns the types of affected stakeholders which are involved. In this regard, three types of stakeholders come to the fore which as yet do not have a well-established voice in national democratic decision-making, namely people in other countries, future generations, and non-human entities (e.g. animals, plants, ecosystems).[98] With regard to geographical boundaries, climate change is a challenge which can only be confronted adequately through joint efforts of states around the world. A judgment of a domestic court will need to take into account this global aspect and reflect on the responsibility of a national government. Moreover, the expectation of inclusive democratic deliberations requires an effort to enable different types of stakeholders to participate in the public debate. With regard to the assessment of new types of stakeholders, a complexity for legal decision-making is how to include the interests of people from other countries, future generations, and non-human entities, and how to weigh these interests against the interests of national citizens. The Urgenda judgment of the Supreme Court of the Netherlands sets an interesting example for inclusion of people elsewhere by its inquiry into a European common ground between contracting states regarding the interpretation of Articles 2 and 8 of the European Convention on Human Rights, an interpretative method copied from the European Court of Human Rights (ECtHR).[99] Academic literature, policy documents and court cases around the world provide further points of reference for shaping the inclusion of future generations and non-human entities in democratic debates and legal mechanisms, e.g. through 'rights of nature'.[100]

Elements of virtuous judgecraft which are relevant in this respect are impartiality, temperance, and civic friendship. With regard to impartiality, the GJC states that '[t]he judge will treat parties even-handedly with consideration for the individuality of each person' (GJC, 2.3.2). A connection is made with the virtue of temperance, which allows for a display of appropriate emotions: 'In his approach to the parties, the judge adopts the position of an objective spectator who manifestly treats them equally.

[95]Boogaard (n 92); my translation.
[96]H. Wiegel, 'Rechter moet niet zeggen wat de staat moet doen' *NRC Handelsblad* (1 July 2015); my translation.
[97]F. Jensma, 'En dit is de rechter die het vonnis wees. Hans Hofhuis: opinieleider en zeer ervaren' *NRC Handelsblad* (26 June 2015); F. Jensma, 'Over een fout vonnis moet je niet blijven tobben. Interview Hans Hofhuis' *NRC Handsblad* (16 September 2016).
[98]Burgers (n 86) 26.
[99]ibid 163-64.
[100]D.R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Ingram Publisher Services 2017).

Impartiality is not synonymous with indifference' (GJC, 2.3.1). The GJC also addresses the impact of judicial decisions and in this respect echoes the idea of civic friendship. It gives as a guideline: 'The judge is aware of the major influence that his decision may have on the lives of those immediately affected by it and on society. For this reason, the judge pays the necessary care and attention to each case' (GJC, 2.4.2). And: 'The judge behaves in a prudent and respectful manner and shows this in the way he behaves towards parties in court. The judge treats litigants and other participants in legal proceedings tactfully, politely and fair-mindedly' (GJC, 2.5.3).

With regard to new types of stakeholders, the realisation of virtuous judgecraft in these respects can raise several questions.[101] In a collective action, such as the Urgenda litigation, the judge will need to address a group defending a public interest as well as other entities who are given a voice by this party to the procedure, e.g. citizens in other jurisdictions, future generations, or non-human entities. Legal frameworks, in particular procedural laws and human rights provisions, provide a starting-point for the judge's assessment of legal standing and protection of individual and collective interests in climate cases. Yet, the paradigm of environmental constitutionalism necessitates a rethinking of these aspects. On the one hand, this concerns the delimitation of the types of stakeholders whose interests should be taken into account in the judicial decision-making. On the other hand, this concerns the identification and weighing of their interests, which can be difficult regarding the treatment of previously non-acknowledged entities and regarding the assessment of various and possibly conflicting interests. With regard to impartiality and the appearance thereof, a judge will need to establish to what extent she should consider the individuality of these different stakeholders. She will also need to determine how this can be done as well as seen to be done (GJC, 2.3.2). With regard to civic friendship, a judge will need to ensure that her communication with stakeholders shows caring and concern for their interests, even if these cannot be legally acknowledged (e.g. if the legal framework does not allow for this or if the interests of other stakeholders take priority). A challenge for the display of civic friendship can also be seen in the difficulty of judicial engagement with citizens in other jurisdictions, non-human entities, and future generations (who can only read the judgment in many years from now).[102]

4.2.5. Assessment of scientific expertise

A fifth feature concerns the interdisciplinary assessment which the judges in cases such as the Urgenda litigation needed to make. Indeed, the claim of the Urgenda Foundation that the Dutch government was not taking sufficient action to prevent dangerous climate change required of the courts to explore insights from climate science. Importantly, it should be noticed that the legal arena enables a different kind of debate between the parties than the public sphere and holds different demands regarding their input. Whereas the public debate is dominated by opinions, parties in a court case on climate change will have to substantiate claims with reference to scientific facts and figures and policy analyses which underpin their legal argumentation.[103]

[101]See also Davies and Henderson in this special issue.
[102]Regarding animals, see e.g. J. Vink, *The Open Society and Its Animals* (Palgrave Macmillan 2020).
[103]Mommers (n 87).

The professional task of the judges in this respect concerned a more general complexity of dealing with scientific expertise in court cases. This regards the complexity of understanding a multifaceted subject matter, including asking the right questions to experts, and of integrating this expertise in the answering of the legal question of the case. The GJC provides as a guideline in this respect: 'The judge is, at all times, responsible for the quality of his judgments. The judge knows when to consult external experts, the appropriate questions to be posed to them and how to assess their contribution on its merits' (GJC, 2.4.2). Interestingly, some courts in the Netherlands have hired non-judicial staff with scientific expertise, acknowledging that they need this assistance to provide the relevant expertise for the judgment of cases.

In terms of the substance of decision-making, a judge deciding a difficult case could find further support in the guideline that she may consult her colleagues in the judiciary, notwithstanding her own responsibility for her decisions (GJC, 2.2). A guideline emphasises the beneficial contribution of this kind of interaction to the judge's professionalism: 'The judge is conscious of the fact that professionalism also implies that he is mindful that consultation with colleagues and peer review can improve the quality of his own performance, and so he is open to feedback from fellow judges. In return, he is prepared to do the same for his colleagues' (GJC, 2.4.2). Still, some debates have arisen regarding a possible conflict of this guideline with the principle of secrecy of deliberations. A prominent example concerned the practice at the Supreme Court to have all judges of a section sit in on the discussion of pending cases. This practice was challenged through a criminal complaint, but the Public Prosecutor's Service dismissed this complaint with reference to the importance of the practice for ensuring the uniform application of the law.[104] As a starting-point, nevertheless, a judge is allowed to seek general advice among colleagues outside of the judicial panel on questions of legal interpretation in a more abstract sense, which could assist the decision-making in the case she is deciding. This could involve asking advice from deputy judges with a main function in academia. As the Urgenda judgments follow the Dutch civil-law style of legal argumentation, further empirical research would be required to find out whether the judges used these possibilities for consultation with colleagues and academia.

4.3 The GJC as a signpost and a beacon in the context of climate litigation

For a broader understanding of climate litigation as a phenomenon in the sphere of public decision-making, it is useful to consider its relationship to the notions of strategic litigation and legal empowerment. Also in this perspective, specific demands and expectations of contemporary T-shaped judicial professionalism can arise. This section will analyse relevant elements of virtuous judgecraft and the guidance and clarification which the GJC may have offered to judges (guiding signpost) and their audiences (symbolic beacon) in the context of the Urgenda litigation, in particular regarding judicial engagement with the societal trends of strategic litigation and legal empowerment.

On a procedural level, cases relating to global societal challenges generally involve fundamental reflections on the role of litigation as a means to achieve changes in society.

[104] *Advocatendblad*, 8 November 2017, <https://www.advocatenblad.nl/2017/11/08/klacht-doliveira-hoge-raad/> accessed 25 October 2022.

With regard to climate-change related cases, 'the number of 'strategic' cases is dramatically on the rise'.[105] In terms of judgecraft, the external dimensions of utility of the judicial function for society and responsiveness to a new clientele come to the fore in this respect. 'Strategic litigation', also referred to as 'public interest litigation', has developed in the form of legal cases brought by citizens and interest groups with a goal of achieving social change, in particular through the promotion of human rights. The aim of this type of litigation is to prompt the development of legal precedents which will have an impact on legislation, policy-making, public awareness as well as further court cases at national or above-national levels.[106] NGOs are important initiators and enablers of strategic litigation, with activities mentioned by for example Amnesty International, the Open Society Justice Initiative, and TRIAL International.[107] Their activities are geared to a specific political and social context and take into consideration the long-term perspective as well as available other mechanisms of change, such as direct advocacy with governments.[108] With regard to climate change, the desired social change relates to so-called 'environmentalist claims', meaning pleas made before judicial institutions for a legal and/or policy response to legally recognised ecological needs.[109]

Strategic litigation can fulfil a role as an instrument of legal empowerment. 'Legal empowerment' is a notion which has emerged in the field of (international) development of law and justice in the early 2000s. The term has been used to categorise instances in which 'poor or marginalised people use the law, legal systems and dispute resolution or redress mechanisms (formal and informal) to improve or transform their social, political or economic situations, to hold power holders to account or to contest unjust power relations'.[110] In this regard, strategic litigation can result in material benefits as well as in a changed perception of individuals and communities regarding their status and power as rights.[111] With regard to climate litigation, it is noteworthy that the litigants are not necessarily 'poor or marginalised people'. On the contrary, climate cases in liberal-democratic states, including the Urgenda case, have been initiated by citizens from more privileged social backgrounds.

Strategic litigation will only be able to flourish in a society if there is willingness within the judiciary to engage in legal decision-making which qualifies as judicial law-making, in the sense as described in section 4.2. In cases which touch upon controversial societal and political issues, such law-making entails a risk for courts of being labelled as 'activist'. In this vein, criticism of litigation on systemic mitigation of climate change has focused on the scope of the judicial competence for deciding this type of case, as discussed also in section 4.2. The Urgenda case was controversial in the Dutch society because of opposing views on the legitimacy of strategic litigation, in particular regarding its implications for the balance of powers between the judiciary and the executive branch of government. At

[105]Setzer and Higham (n 81) 4.
[106]Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (Open Society Foundations 2018), 25; H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing 2018); A. Sarat and S.A. Scheingold (eds.), *Cause Lawyers and Social Movements* (Stanford University Press 2006).
[107]See also the websites of NGOs: https://trialinternational.org/topics-post/strategic-litigation/; https://www.justiceinitiative.org/tools/strategic-litigation.
[108]Open Society Justice Initiative (n 106) 25.
[109]Burgers (n 86) 28-31.
[110]P. Domingo and T. O'Neil, *The Politics of Legal Empowerment: Legal Mobilisation Strategies and Implications for Development* (Overseas Development Institute 2014) 4.
[111]Open Society Justice Initiative (n 106), 42.

the same time, this type of litigation was welcomed because of the opening it provided for different stakeholders to be included in the norm development for society.

From the perspective of judicial virtues, a judge confronted with strategic litigation will need to be aware of her impartiality and the appearance thereof. The GJC indicates that the judge has a personal responsibility to ensure that she is free from prejudices and preconceptions when deciding cases, that she treats parties equally, and that her conduct does not create risks regarding the public's perception of judicial impartiality. The GJC gives further guidelines on extra-judicial activities. Judges should prevent actual or perceived conflicts of interest from coming into being. This includes being transparent about extra-judicial activities (GJC, 2.3.3). Living up to the virtue of impartiality also requires not doing certain things in order to avoid the appearance of partiality. In particular, this concerns the requirement that a judge steps down from a case if there is a connection with her personal relations or if there are other concerns with regard to her impartiality (GJC, 2.3.4). For judges in the Netherlands, a document on Guidance on Ancillary Positions was developed already in the early 2000s under the auspices of the Association of Judges and Prosecutors and the Assembly of Presidents of the District Courts and Courts of Appeal.[112]

In strategic climate litigation, a possible concern could arise if a judge has visible left-wing political sympathies. This concern relates to the idea that climate change features more prominently on the agenda of left-wing political parties and it can be exacerbated by doubts about scientific evidence for the occurrence of climate change. As an example, a look can be had at the work of the Foundation Climate Intelligence (CLINTEL), which presents itself as 'an independent foundation that operates in the fields of climate change and climate policy'.[113] In August 2021, CLINTEL founder and science communicator Marcel Crok requested to be admitted as a third-party intervenor in the Duarte climate case at the ECtHR, which was lodged by six young Portuguese against Portugal and 32 other states. CLINTEL is highly critical of climate cases such as Urgenda and Duarte, stating on its website: 'The DUARTE case illustrates how climate activists have found an ally in partisan judges with whom they share an ideological affinity. Under the guise of human rights, climate policy is being reduced to an irreversible judicial dictate based on flawed pseudo-science, over which no democratic control is possible.'[114]

For judges to deal with this kind of criticism, the GJC's guideline on political activity is a first point of reference: 'A judge, like any other citizen, is naturally free to be a member of a political party. In several international codes of principles for judges, active political involvement is strongly discouraged and it is, in fact forbidden in a number of countries. Although it is not forbidden in the Netherlands, the judge should not accept any representative position because he is aware that this could create the appearance of partiality' (GJC, 2.3.3). Furthermore, a judge should consider whether other extra-judicial activities could endanger her impartiality, e.g. because of a connection with the realisation of climate goals. With regard to the assessment of scientific evidence, the guidelines discussed in section 4.2 are again relevant.

[112]See Judges for Judges (n 2).
[113]clintel.org.
[114]https://clintel.org/clintel-goes-to-court/

Furthermore, institutional support is required to effectively respond to expressed doubts regarding the impartiality of judges. Judicial performance in accordance with professional-ethical norms cannot be ensured by a judge alone, but requires a joint effort of a judge with her colleagues and court managers and an enabling environment guaranteed by the legislature and executive branch of government (GJC, section 3).[115]

5. Conclusion

The analysis of the Urgenda judgments from the perspective of virtuous judgecraft, as concretised in the GJC for Dutch judges, brings to the fore a nuanced picture of virtues and skills that are required for a 'good' judicial performance in a complex contemporary type of litigation. Firstly, this analysis confirms that ethical guidelines for judges do not give specific practical support for handling cases, including this kind of complex and high-profile litigation. Judges can make a variety of different, justifiable choices on the content and with regard to the context of their decision-making. In this respect, criticism of the usefulness of codes of judicial ethics, mentioned at the beginning of this article, can be understood. At the same time, however, the analysis demonstrates that these guidelines help clarify the different elements of a 'good' judicial performance, relating to specific societal demands and expectations of judicial professionalism, in a comprehensive manner and that they highlight points for reflection and debate. In this way, a code of judicial ethics is able to contribute to the understanding and concretisation of different elements of judicial professionalism, which can be particularly helpful in complex cases and cases which are closely scrutinised by politicians and citizens.

Section 2 of this paper outlined functions of codes of ethics and policy goals which are pursued with codes of judicial ethics. Taking these functions and policy goals into account, the comprehensive and concretised insights presented in sections 3 and 4 with regard to the guidelines of the GJC, considered from the perspective of virtuous judgecraft, could contribute to motivating Dutch judges to perform as well as possible in accordance with the aspirations expressed in this code. Also, this analysis provides an example of how the guidelines could be of assistance in the learning of judges through reflection and intervision with regard to complex cases such as the Urgenda litigation. In this respect, the guidelines could serve as points of reference in internal discussions in the judiciary about the scope and ways for judicial contributions to societal norm development. Furthermore, the guidelines on judicial ethics help to communicate which aspects of judging come into play in complex cases and which shared points of reference judges use for reaching and communicating their judgments in these cases. Bearing the analysed example of Judge Hofhuis in mind, an interesting angle to further develop, e.g. in the training of judges, could concern a discussion about the increased visibility of individual judges in society and ways of approaching their role, in particular when dealing with politically and societally controversial cases. In this respect, a code of judicial ethics and shared reflection of judges on its guiding role in concrete cases can contribute to enhancing the transparency and accountability of the judiciary towards parties and the general public in the contemporary Dutch society.

[115]See also above, section 2.1.

With these conclusions, the analysis demonstrates that a code of judicial ethics in practice can be able to fulfil functions as a signpost for judges and a beacon for judicial audiences in the courtroom and in society. Judiciaries and judges could consider ways of enhancing the beneficial effects of such a code of ethics, e.g. by including and mentioning the ethical guidelines more explicitly in the daily business of judging and in professional discussions and trainings. With regard to climate litigation, it emerges from the analysis that a code of judicial ethics, combined with the theoretical perspective of virtuous judge-craft, can go a long way in providing guidance on the use of judicial discretion, even when the subject matter of litigation connects with a 'global' societal challenge.

Yet, it should be kept in mind that guidelines of judicial ethics differ from jurisdiction to jurisdiction, based on legal, societal, political, and historical influences. In this regard, this paper's conclusions based on the case study on the Netherlands may not be, or only partly be translated to other national contexts. When exploring the potential of a code of judicial ethics for guiding and explaining judicial conduct in other jurisdictions, both the type of code – i.e. more open aspirational or more concrete enforceable norms – and the local notion of judicial professionalism – e.g. regarding demands for responsive law or the position of the judiciary in the balance of powers – should be taken into account.

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