The Making, Meaning and Application of Civil Codes in the Netherlands

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Abstract The early Dutch codifications must be considered as a means to achieve unification. At the beginning of the unitary State, the latter claimed a monopoly on law making, and its laws became the only formal source of law. The next codification, the Dutch Civil Code of 1838, which was the product of the beliefs of the bourgeoisie class, led to a formalistic attitude of the courts and legal doctrine. Only in the early twentieth century did the primacy of law formation slowly shift from the legislature to the courts. Then, it became clear that the Dutch civil law codification was not unique and complete. However, law making by judges led to a lack of uniformity and legal certainty. A drafting process that started in 1947 led to a new Civil Code in 1992, which codified previous case law and solved the remaining lacunae and technical ambiguities. This code did not, however, have a constitutional, unifying role, nor did it lead to a fundamental change in practice. Due to its corrective mechanisms, such as open norms, future developments can be more easily dealt with, and courts are given free leeway in law making. Although this Civil Code is still the cornerstone of private law, actual law making, at least in tort law, is largely performed by the courts. The Code lacks the element of exclusiveness or completeness. In the long run, it is a question whether a national codification is the best way forward.

1 Introduction

The introduction of codifications is regarded as a major turning point in law: the period of *ius commune* ended, and various all-encompassing codifications came into existence.[1] Codifications were introduced in the Netherlands and abroad in various areas of law, including private law. They were promulgated by the government, which exercised authority over its subjects, and with exclusive force issued by that

[1] Zimmermann (2000, p. 1) and Milo et al. (2014, pp. 5–6).

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M. Graziadei and L. Zhang (eds.), *The Making of the Civil Codes*,
Ius Gentium: Comparative Perspectives on Law and Justice 104,
https://doi.org/10.1007/978-981-19-4993-7_6

government.[2] The Dutch Civil Code (*Burgerlijk Wetboek*), like other codifications such as the French *Code Civil*, in addition to being a (more or less) exclusive source of law, is also a source of knowledge of the law and a systematic arrangement of the law. In specific cases, courts must decide not on the basis of judicial precedents but by applying and interpreting the Civil Code. However, the role of the judge as '*la bouche de la loi*', as formulated by Montesquieu in his *De l'Esprit des lois* (1748; if ever understood in that way), changed in the Netherlands following the establishment of this system. Although Dutch codifications still hold a central place in the Dutch legal system, for hundreds of years, judges have also begun making law.

To understand the making and meaning of codifications of private law in the Netherlands, this contribution will start with a discussion of Dutch codifications in the nineteenth century, including the role of legal sources and the three legal actors ('legal formants'[3]): the courts, the legislature and legal doctrine. Subsequently, the changing role of the courts, of case law and the codifications up to 1992 will be discussed, including legal formalism (*legisme*), the changed perception of the task of the courts in relation to 'law finding', legal reasoning, and the impact of European private law and fundamental rights. A key focus in this contribution will be the relationship between the legislature and the judiciary: the maker and the user of the Civil Code. The judiciary can regard its decisions as a form of dispute resolution but also as the creation of a legal norm, taking into consideration the implications of legal judgments for the (development of the) law. However, this is only possible when legal decisions are considered a source of law, so this issue will also be discussed. In discussions on the relationship between the legislature and the judiciary, the question of judicial activism is often raised, although this is not something that is easy to define. Multiple definitions can be found in the literature.[4] Activism is often contrasted with judicial restraint. Nevertheless, the term activism is sometimes used as a mask for a substantive position—the favored position being sound and the alternative position being 'activist'.[5] Therefore, because this term is so unclear and vague, it will be avoided where possible. The Urgenda case will be discussed further in the article, a case that has received much attention in the Netherlands and abroad. Finally, a conclusion will be provided on the (future) role of the Civil Code and the role of the judiciary in the Netherlands.

2 Dutch Nineteenth Century Codifications: The Dawning of a New Era

The story of Dutch codification projects begins immediately after the establishment of the Batavian Republic (in 1795). A codification movement emerged, and a committee

[2] Lokin and Zwalve (2014, p. 20).

[3] Sacco (1991, pp. 1–34).

[4] Waele (2009, pp. 45ff).

[5] Easterbrook (2002, p. 1401).

was installed in 1798 to put an end to the legal diversity left over from the *Ancien Régime*, known as the Committee of Twelve. Codification was considered a means to achieve unification, and the movement was not only a response to local diversity but also an expression of faith in the ordering power of rational thinking—the guiding principle of the Enlightenment.[6] The introduction of Codes in 1798 was the final act to complete the unitary State. The State thus claimed its monopoly on lawmaking, and its laws became the only formal source of law.[7] The political situation soon changed, however, when in 1806 a new kingdom was created by the Treaty of Paris. Louis Napoleon, the brother of the French emperor, became the King of Holland. On 1 May 1809, the Code Napoléon for the Kingdom of Holland (*Wetboek Napoleon ingerigt voor het Koningrijk Holland*) came into force. This Code was formally declared to be exclusive and brought about legal unity, not only as a practical instrument but also as a constitutional tool that was intended to forge the political identity of the new 'nation'.[8] This codification was based on the French *Code Civil* but adapted specifically to the Dutch situation by a committee of legal practitioners. The introduction of this Code led to a fundamental change in the practice of law: judges and lawyers now had to base their decisions on a provision in this Code, and it abolished all former law that was rooted in the Roman law tradition. Mandatory interpretation by law led to the disciplining of judges who were previously independent. At the same time, the doctrine was also dethroned from its position as the oracle of justice.[9] A transition to an exclusive, national codification occurred: the dawning of a new era.[10] However, this code had little practical significance, and legal doctrine hardly welcomed it either, which can be explained by the conservative attitude of legal scholars and practitioners. The new code was not in line with the spirit of the times; it was too different, too new, and worst of all not truly 'Roman'.[11]

Soon, however, on 1 March 1811, the French codes, including the Code Napoléon, came into force as a result of the annexation of the Netherlands by France. The exclusivity of the codifications, an important political and procedural function, also served to subject judges to the primacy of the law and to achieve legal unity and legal certainty. (Dutch) legal doctrine first only explained and, later, annotated the Code.[12] Following the defeat of Napoleon and the restoration of the Kingdom of the Netherlands of 1815, French codes continued to apply until the national Dutch codes had been constructed. Following the independence of Belgium in 1830, another codification in civil law was introduced in the Netherlands in 1838. The French Civil Code served as an important source for this new code, and thus continuity was assured. The new code was legally comprehensive and exclusive. Furthermore, it fit well within

[6] Grosheide (2010, p. 22).

[7] Jansen (2014, p. 21).

[8] Van den Berg (2014, pp. 48, 51, 69).

[9] Lokin (2010, pp. iv–v).

[10] Van Dievoet (1943, p. 3).

[11] Grosheide (2010, pp. 29–30).

[12] Brandsma (2010, p. 41).

the political-constitutional perspective of national unity and within philosophical and legal philosophical tendencies such as rationalization and universalisation.[13]

3 The Role of the Judiciary in the Nineteenth Century

Although the Dutch Constitution might currently resemble a judicially enforced constitution, it was originally a politically enforced constitution. The constitution originally features reluctance about any role for judges with respect to the enforcement of constitutional values.[14] The notion of division of powers was laid down in Article 115 of the Dutch Constitution of 1848, which states that laws are inviolable, i.e., the so-called prohibition to review the constitutionality of legislation (statute law). Previously, in the period between 1815 and 1848, formal laws were tested materially, which might lead to a denial of the binding force of legal provisions. The prohibition of constitutional review, introduced by the Constitution of 1848, thus represented a break with existing practice.[15] The display of judicial restraint shown by the prohibition of courts to review the constitutionality of legislation expresses a tradition of scepticism about the role of the courts in a democracy, originating from the post-French Revolution idea that 'a proper government demands a clear and rigid separation of powers'.[16] The French notion of separation of powers brought with it a modest role for the courts. British ideas on parliamentary sovereignty also influenced the notion of the prohibition of judicial constitutional review in the constitutional reforms of 1848.[17]

Codes such as the French *Code Civil* and the Dutch Civil Code of 1838 are products of the ethical and economic beliefs of the bourgeoisie class, which in the course of the nineteenth century gained sufficient power to occupy key positions in the State apparatus. They are also tailored, or at least applicable, to the economic reality of that time, which makes the focus on codification understandable.[18] The efforts of Dutch lawyers up to 1870/1880 were mainly focused on becoming accustomed to the legal provisions and their connections. The formalistic attitude of the courts and legal doctrine form the practical side of the liberal, bourgeois State governed by law. It was only a decade after the birth of the Dutch Civil Code in 1838 that formalism became dominant in legal doctrine.[19] Formalism adopted a political-constitutional point of view, based on the idea of the *trias politica*, that the primacy of the creation of law should lie as far as possible with the legislature, not with the courts.[20] The

[13] Milo (2010, p. 11).
[14] Uzman (2018, pp. 257, 259).
[15] Bos (2010).
[16] Claes and Van der Schyff (2008, p. 128).
[17] See Uzman (2018, pp. 261–262).
[18] Kop (1982, p. 6).
[19] Ibid., p. 31.
[20] Van den Bergh and Jansen (2011, p. 132).

courts had to apply the law, clarify it using interpretation methods, and, where the law was silent, administer justice.[21] To the formalists, judicial decisions were not considered a source of law; that was something reserved for legislation. The all-encompassing position of formalism only emerged in the Netherlands in the second half of the nineteenth century. Interpretations by the courts did occur, of course, but added no new elements to the existing law. Nor did *communis opinio* of legal doctrine or prevailing lines of thought in case law constitute positive law. The fact that the task of legal doctrine was regarded as being clarification of the law must be placed in a time and a jurisdiction in which private law codifications, in a period of relative social stability, were seen as the main means of regulation in the government-free sphere.[22]

As already stated, around 1870, legal doctrine obtained a better grip on the codification. A new response to the dominant position of formalism took place around 1880. This movement of free interpretation of the law (*vrije rechtsvinding*) then became the mainstream, although it had already existed before.[23] At the same time, a desire for radical legal reform emerged, spurred on by developments in modern transport, the so-called 'social issue' and the many technical errors in the Civil Code. In these times of social unrest when the legislature did not take action, a model in which only the legislature makes the law no longer appeared to be an adequate regulatory model for solving social conflicts.[24] Consequently, the interpretation of the law by the courts took on the character of law making.

4 The Changing Role of the Judiciary in the Early Twentieth Century

Around the turn of the century, a movement emerged in legal doctrine, which showed more interest in developments in the judiciary. In the period after the Dutch Civil Code of 1838, the primacy as to the role of law formation slowly shifted from the legislature to the courts. Over time, partly due to thorough study and partly as a result of social developments, new flaws came to light. The legislature failed to act, and as the consequences for the judicial community became more serious, the courts were asked to try to develop a fairer legal system. This call was answered by the Dutch Supreme Court in 1919. However, to interpret this case in the correct context, we should start with another case that occurred before in 1910.

In the 1910 *Zutphen neighbor* case, a person living above a storage house that had a water leak refused to shut down the main water supply. As a result, the owner of the property inside the storage house suffered damage from the water. In this case, mere negligence was regarded as insufficient grounds to establish unlawfulness and

[21] Cf. Art. 13 of the General Provisions Act of 1829. See Jansen (2015, p. 67).

[22] Kop (1982, p. 34).

[23] Jansen (2015, pp. 119, 133).

[24] Kop (1982, pp. 6-7).

liability.[25] Although the result in this case was unjust, the president of the Supreme Court, Justice Aernout Ph.Th. Eyssell (1837–1921), in his contribution in *Themis* in 1911, argued that by accepting that mere carelessness would lead to unlawfulness, freedom of competition in general would be negatively affected.[26] It could be argued that this alarming and prominent case in 1910 was not formalistic but actually displayed 'activism'. The Supreme Court, under the presidency of Eyssell, ruled in an activist way on the grounds of pronounced purposes of legal policy. There was much agreement among colleagues that at times of extraordinary criticism, the Supreme Court had to take on a political role in the fight against emerging socialism and the ongoing attacks on bourgeois society.[27] The strict approach taken by the Supreme Court led to criticisms, which were in line with the plea of Utrecht professor Molengraaff (1858–1931) to fight unfair competition (thus calling for a less narrow view of Art. 1401 of the Dutch Civil Code) in his article in the *Rechtsgeleerd Magazijn* of 1887.

Before the legislature could take action, the Supreme Court had already changed its position as to the interpretation of unlawfulness pursuant to Article 1401 of the 1838 Dutch Civil Code. In the famous *Lindenbaum/Cohen* landmark case in 1919, the Dutch Supreme Court, dealing with unfair competition, ruled that—next to acts that violated a written rule or a subjective right—acts contrary to unwritten rules of conduct can be regarded as unlawful.[28] The decision was made under the presidency of a new president, W.H. de Savornin Lohman (1864–1932). In this case, no legal provision existed that prohibited provoking a breach of duty of confidentiality. Although it could be thought that this was a loophole in the law, this is incorrect since there was still a solution present—namely, denial of the claim. Nevertheless, it could be said that the need for a particular result sometimes creates a loophole,[29] as in this case. The decision by the Supreme Court in the *Lindenbaum/Cohen* case in 1919 was made at the time of a legal proposal in a similar vein to change the legal provision on unlawful acts and thus crossed this legislative process with the formal legislature. This decision was therefore debatable at that time from the point of view of the power relationship between the legislature and the judiciary in a democratic constitutional state.[30]

This decision is often considered a novelty: a break with formalism and a breakthrough toward a freer interpretation of law or of 'law finding'—in contrast to the famous 1910 case of the *Zutphen neighbor*. However, to say that the (general) approach taken by Dutch law was formalistic is incorrect or in any case incomplete. Already by the end of the nineteenth century, jurists were searching for ways to create more freedom for the courts to enable them to take more account of societal

[25] Supreme Court (*Hoge Raad*, HR) 19 June 1910, *W*. 1910, 9038.

[26] Van Maanen (1999, p. 39).

[27] Van den Bergh and Jansen (2011, p. 140).

[28] HR 31 January 1919, *NJ* 1919, 61.

[29] Van der Linden (2013, p. 98).

[30] Rijpkema (2007, pp. 53–57).

developments. Decisions by lower courts allowed compensation for the infringement of patents.[31] Strict formalism was not practiced throughout the whole nineteenth century. Regarding the requirement of 'unlawfulness' (in Art. 1401 DCC (1838)), the majority of writers of legal doctrine pleaded for a broad interpretation of 'unlawfulness', and until 1883, broad liability would apply in decisions of the Dutch Supreme Court.[32] This only changed under the presidency of Justice Eyssell, especially in 1905, when the Supreme Court decided to put a stop to the way lower courts were fighting unfair competition. This came from the belief that rapid industrialisation was best served by a restriction on appeals to unfair competition, which also involved a strict interpretation of unlawfulness.[33]

The *Lindenbaum/Cohen* case shows that the Dutch codification was only partially a description of the law and that this was not unique and complete.[34] Furthermore, when interpreting the reason for change concerning the role of the courts, the view of one of the justices in the *Lindenbaum/Cohen* case, Rhijnvis Feith (1868–1953), is relevant. He believed that judges must play a role in the development and creation of the law. Simultaneously, another justice, Bernard C.J. Loder (1849–1935; one of the justices ruling in the famous 1910 case) opposed free interpretation of the law.[35] Free interpretation of the law, however, was not what happened in *Lindenbaum/Cohen* but what was argued by, among others, Isaac H. Hijmans (1869–1937), professor at the University of Amsterdam. In his *Het recht der werkelijkheid* (1910), he advocated judicial activism, in which law finding took 'reality' as a starting point and that the law should not be seen as directive when establishing the law. The 'law of reality', as Hijmans called it, was, however, not at the forefront of legal doctrine in private law during the first half of the twentieth century.[36] Nevertheless, the 1919 judgment marked a new era. The ease with which the courts were able to remedy a number of flaws in legislation was very encouraging. Confidence in the actions of the courts grew, even to the extent that for a long time calls for law review were few and far between.[37]

[31] Van den Bergh and Jansen (2011, p. 140).

[32] Van Maanen (1999).

[33] HR 6 January 1905, *W.* 8163; see also Van Maanen (1999).

[34] Kop (1982, p. 53).

[35] Florijn (1994, p. 69).

[36] Van Boom (2013, p. 44).

[37] Florijn (1994, p. 89). Furthermore, in the first decades of the twentieth century, it became accepted that settled case law is not only a source of knowledge of the law, but can also be a source of law. See Jansen (2015, p. 258).

5 Reform of the Code: The New (Un)Completed Civil Code of 1992

The Dutch Civil Code of 1838 had many lacunae, many unclear wordings and inner contradictions, which led to calls for these deficiencies to be remedied. Due to lacunae and technical ambiguities, the law was formed by the judiciary, which led to a lack of uniformity and legal uncertainty.[38] The increase in judicial decisions that had to be consulted before one could establish one's rights and obligations was another reason for the recodification of the Civil Code.[39] For a long time, political necessity for recodification was lacking, and there was little interest in it besides from private law practitioners. This only changed after World War II, when the political elite became more receptive toward innovation.[40]

Already in 1938, the Leiden professor Eduard Meijers (1880–1954)—a jurist closer to legal formalism than to free interpretation of law—pleaded for a complete recodification of the Civil Code.[41] Paul Scholten (1875–1946), professor at the University of Amsterdam, pleaded the contrary, however; namely, that recodification was impossible and gaps had to be filled in by the judiciary.[42] Both professors had a lasting influence on legal science. It was Scholten's *General Method of Private Law* (1931), in particular the chapter on the methods of private law, with which he gained great fame. Scholten opposed legal formalism and the purely legal-dogmatic method. His view of law finding was a synthesis between the application of law (legal formalism) and law finding.[43] In doing so, he anticipated subsequent Dutch case law and legislation. In 1947, Meijers was assigned the task of drafting a new civil code, probably due to the personal interest and influence of the Minister of Justice, Johannes H. van Maarseveen (1894–1951). To create the new civil code, the old 1838 Civil Code was explicitly taken as a starting point. When Meijers died in 1954, the project had almost been completed.[44] He was succeeded by J. Drion, professor at the University of Leiden, J. Eggens, Advocate-General at the Supreme Court, and F.J. de Jong, Justice at the Supreme Court. Following the death of Meijers, the progress of the project slowed down.[45]

It was not until the year of the European unification in 1992 that the Netherlands acquired a national codification, i.e., a truly Dutch-made codification, albeit with a high degree of academic learnedness.[46] After a book on Family Law and the Law of Persons (book 1—already in force in 1970) and on Legal Persons (book 2—already

[38] Engelhard and Giesen (2012, pp. 148–149).
[39] Smits (2014, p. 247).
[40] Lokin and Zwalve (2014, p. 377).
[41] Jansen (2015, pp. 226 ff).
[42] Engelhard and Giesen (2012, p. 149).
[43] Langemeijer (1950, pp. 135–136).
[44] Hondius (2002, p. 21).
[45] See also Florijn (1994, esp. Ch. 4).
[46] Lokin (1994, pp. 111–142).

in force in 1976), books followed Patrimonial Law (book 3), Inheritance Law (added in 2003), Property Law (book 5), Law of Obligations (book 6), Specific Contracts (book 7), Transport (book 8) and International Private Law (added in 2012).

6 The Codification of 1992: Still the Central Focus of Attention

In the decades preceding the introduction of the new Civil Code, courts were already applying anticipatory interpretations in their decisions,[47] understanding the ruling law in light of the future Code of 1992. This method of interpretation places judicial activism in a different light. Law making by the courts is not the product of pure activism but because legitimation is possible, if not from a codification then from another objective angle, such as forthcoming legislation. In this sense, judicial activism should be understood in light of (a technique of) legal argumentation because a certain solution is desired (by society) using a different argument than had been used until that time.

The Civil Code of 1992 includes its own correction mechanisms, such as reasonableness and fairness, unjust enrichment, and open norms allowing for the incorporation of future developments.[48] In the twentieth century, the legislature had already begun to lose control of law making, a development that continues to this day. Although the Civil Code is still a cornerstone of the law, actual law making, at least in the area of tort law, is largely performed by the courts. In general, there is a division of tasks: the legislature makes suggestions for continuity through abstract and general formulations, and the courts adjust the law according to changes in society. In this way, the law is flexible, albeit not very sustainable (the paradox of codification).[49] Case law is accepted as a source of law, alongside codes and legislation. In the literature, the meaning of codification has changed visibly and may be understood as 'mere' legislation, without the element of exclusivity or completeness.[50]

The coherence of civil law that was present in 1992 has already crumbled as a result of the application of legal rules of European (Union) origin.[51] This has affected the established national private law structure, changing the framework for legal relationships between private parties through legislation as well as legal adjudication.[52] Based on Article 19(1) of the Treaty on the European Union, Member States shall provide remedies sufficient to ensure effective legal protection in the areas covered by Union law. It is therefore necessary to study the interconnections with the Civil Code to determine which remedies can be invoked in the event of a violation of Union law

[47] Hartkamp (1992, p. 7).

[48] Hartlief (2018, p. 1776).

[49] Van den Berg (2012, pp. 199–201).

[50] Vranken (2004, p. 2).

[51] Hartlief (2018, p. 1777).

[52] Mak (2016, p. 270).

in relation to private parties.[53] Dutch courts are obliged to interpret national law in conformity with EU directives. This is particularly important in private law because a directive has no direct effect between private individuals.[54] International legal standards arising from dialog between supranational judges and national Supreme Court judges are becoming increasingly important.[55] Furthermore, private regulations and private law also exist outside the Civil Code.[56]

In the Netherlands, fundamental human rights can be found in the Dutch Constitution and in international human rights treaties. The European Convention on Human Rights (ECHR) of 1950, in particular, is becoming increasingly important. At first, when the ECHR entered into force in the Netherlands in 1954, Dutch courts were extremely hesitant to apply the ECHR let alone use it to override parliamentary legislation.[57] Until the 1980s, there was hardly one case in which the Supreme Court found a violation of a Convention right, confirming its hesitant approach.[58] This changed in the 1980s,[59] which became a high point in the Dutch Supreme Court's decisions concerning fundamental rights review, considering the ECHR as an enforceable Bill of Rights. The rise in the impact of the human rights treaties was triggered by the fact that the European Court of Human Rights considered the ECHR to be a living instrument and was reading positive obligations into some of its provisions for the States that were party to the convention. In addition, the Netherlands became party to the International Covenant on Civil and Political Rights in 1979, which added some extra protection in addition to the ECHR.[60] After the 1980s, a slow retreat set in. From the 1990s onward, the Supreme Court did not see itself empowered to set aside national legislative provisions based on inconsistency with the ECHR, and a prevailing interpretation by the European Court was deemed necessary.[61]

Currently, Dutch courts tend to consider fundamental rights in private law disputes (i.e., in horizontal relationships) to a varying extent, depending on the field of law: its relevance is more acknowledged for tort law than for contract law, particularly for property law.[62] Fundamental human rights generally have only a subtle impact on private law relationships. Courts, when solving disputes, mostly apply fundamental rights as one of the factors to be taken into account. Fundamental rights are also used as a source of inspiration when tracing general law principles or when interpreting and applying open private law norms.[63] In the case of a violation of a fundamental rights provision, an injured party may file a claim based on a wrongful act, Article 6:162

[53] Ibid., p. 271.

[54] See Hartkamp (2019), no. 181 ff.

[55] Loth (2014).

[56] Smits (2015, pp. 536–538) and Giesen (2020, p. 15).

[57] Uzman (2018, p. 265).

[58] See for a notable exception, HR 23 April 1974, *NJ* 1973/272.

[59] Uzman et al. (2011, pp. 656–657).

[60] Gerards and Fleuren (2014, p. 225).

[61] Uzman et al. (2011, p. 658).

[62] Cherednychenko (2016, pp. 453–471).

[63] Ibid., p. 468.

Dutch Civil Code (DCC), which can serve as a gateway. In tort law, fundamental rights can also influence the rules for loss compensation, in particular immaterial losses. In the past, fundamental human rights did not convince the Dutch Supreme Court to award emotional distress damage compensation.[64] The issue of whether the mere infringement of a fundamental right constitutes a ground to award immaterial damage compensation is a topic of debate. Recently, the Dutch Supreme Court gave a clear, negative answer to this question in the *Heavy detention regime* case.[65] In this case, a person was sentenced to life imprisonment but had been wrongfully detained for 350 days in the highest security prison in the Netherlands instead of being detained under a less severe detention regime.

7 The Legislature and the Courts: 'Two Partners in the Business of Law'[66]

In 1959, in the famous *Quint/Te Poel* case, the Supreme Court had already created law by ruling that in cases not specifically laid down in statutory law, a solution that fits within the system of statutory law and is consistent with the cases laid down in the law must be found.[67] Accordingly, legal obligations do not have to be directly rooted in a legal provision. Subsequently, the Supreme Court supplemented and refined this rule further. The Supreme Court is cautious where the system of the law does not provide sufficient guidance; it has to choose between different solutions, and it is impossible to properly assess the consequences of its autonomous choice.[68] Initially, the courts' task was modest: fill in the gaps, i.e., lend a hand where the legislature has missed something. Gradually, this task extended to include not only what was not forgotten by the legislature but also what it found too difficult.[69] A greater appeal to the judicial role of the courts followed as a result of the increasing legalization of society and the periodic inability of politicians to agree on statutory regulation on important issues such as abortion, the right to strike, and euthanasia. These social issues are therefore submitted to the courts, as well as issues of international law, such as EU law and the ECHR.[70]

Lawmaking has become inherent in the judicial process. If needed, courts go further than strictly applying statutory provisions, for example, by deviating from the literal wording of the statutes to resolve cases and by creating new rules. Currently,

[64] This restrictive approach led to criticism in legal literature. Finally, a reform led to the acceptance of emotional distress damage which entered into force on 1 January 2019. See *Staatsblad* (*Stb*) 2018, 132.

[65] HR 15 March 2019, ECLI:NL:HR:2019:376.

[66] Taken from Vranken (2005), no. 9.

[67] HR 30 January 1959, ECLI:NL:HR:1959:AI1600.

[68] De Graaff (2019, pp. 9, 11).

[69] Boogaard and Uzman (2016).

[70] Kop (2011).

it is widely accepted that the legislature cannot deal entirely with all lawmaking and that lawmaking activities by the courts are indispensable. Creation of law has thus become a joint venture of the courts and the legislature, leading to a shared responsibility.[71] While the task of developing legal rules was originally a byproduct of the work of the Dutch Supreme Court, currently, it is considered one of its core tasks.[72] Questions are raised, from a constitutional law perspective, about the legal basis of the lawmaking task of the courts,[73] attracting both support and criticism. In his important work, Gerard J. Wiarda, president of the Supreme Court, ascertained a shift from the notion of a judge since 1838 as *bouche de la loi* (Montesquieu) to a judge as arbiter, deciding on fairness.[74] The shift from more heteronomous to more autonomous forms of law finding is the result of doctrine, case law and legislation, and the influence of European law.[75] The legislature's contribution to this shift can be found in the use of the role that vague norms (open concepts) in legislation and the role these vague norms started to play (see also below).[76] The *Lindenbaum/Cohen* and *Quint/te Poel* cases, discussed above, show fairness as a complementary source of unwritten law. It is interesting that Justice F.J. de Jong (1901–1974), a representative of Meijers' line of thought, drafted the *Quint/te Poel* decision and later became a member of the triumvirate that, after the death of Meijers, was charged with drafting a new Civil Code.[77]

The 'new' Civil Code of 1992 facilitated the courts becoming increasingly less restricted in relation to the law, allowing them to set aside statutory provisions under certain circumstances.[78] The task of the (supreme) court to develop and create law is desirable to keep the law up-to-date, enabling it to respond to current events in society and to be flexible and avoid injustice. Even after the introduction of the new Civil Code in 1992, activities on this front did not stop. In 2008, Abas wrote that since the introduction of the new Civil Code, the Supreme Court had brought about more substantive changes than the 1992 Code had brought in comparison to the old Civil Code of 1838.[79] In the new Civil Code, case law from the preceding period is codified, including the idea that the courts must perform a specific interpretation of open norms. In fact, by doing so, the legislature provided the courts with leeway, or even delegated them power, for law making, thus preventing a relapse to legal formalism.[80]

Due to the (continuing) silence of the (democratically legitimate) legislature (in the field of private law), it has been argued that the constitutional legitimation for courts

[71] Feteris (2016, pp. 17–18) and Giesen (2020, pp. 7, 10).

[72] See Feteris (2014, pp. 71 ff).

[73] Kortmann (2005, pp. 250–252).

[74] Wiarda (1999, p. 15).

[75] Van Gerven and Lierman (2010, pp. 226–227).

[76] Bruning (2016, pp. 76–77).

[77] Klomp and Steenhoff (1998, p. 14), Zwalve (2007, p. 208, note 3), and Bruning (2016, p. 85).

[78] Kop (2011).

[79] Abas (2008, pp. 193–198).

[80] Giesen (2020, pp. 15, 24, 82).

to operate is growing.[81] However, this sometimes goes even further—for example, in cases where courts argue that the legislature did not choose the best solution and thus they argue it away.[82] Although the Netherlands does not have a formal system of precedents, in practice, precedent decisions made by the same or higher courts are very important. According to Article 12 of the General Provisions Act of 1829, judges are forbidden to render verdicts in the form of a general decree, disposition or regulation. However, at present, this rule seems to have had its day.[83] Furthermore, although the Supreme Court starts from an individual dispute, it currently looks to some extent 'beyond the individual dispute'.[84] As a result of the Act on Requests for a Preliminary Ruling to the Dutch Supreme Court in civil law matters, which came into force in 2012, it can now perform its judicial task sooner and more frequently, which may lead to a (slightly) altered understanding of its task.[85] Apart from this change and the possibility created by Protocol 16 to the ECHR, continuing on the path of Article 80a of the Dutch Judiciary Act, increasing contacts between the Supreme Court and lower courts will lead to more lawmaking by the Supreme Court in the future.[86]

8 Enforcement of Constitutional Values: The Urgenda Case

The current shift in ideas on climate policy and climate change, both social and political, recently stepped into the limelight in the Urgenda case.[87] The Dutch perceptiveness of the idea of public interest litigation as a way to enforce constitutional values will be touched upon here. A court that openly intervenes in the political process is at odds with the Dutch tradition of a politically enforced constitution, according to which it is the task of Parliament to implement constitutional values. The Urgenda case, although procedurally a matter of private law, is similar to the earlier 'activist' or politically controversial Reformed Political Party (*Staatkundig Gereformeerde Partij*) case in 2010,[88] which was essentially a public/constitutional law issue of general government policy.

Urgenda requested that the Dutch State take measures to reduce CO2 emissions in the Netherlands by 40% before the end of 2020, or at least by a minimum of 25%, compared to the level of emissions in 1990. The targets of the Dutch State are lower, which would imply insufficient action to prevent climate change. Urgenda brought

[81] Uzman (2013, p. 161) and Giesen (2020, p. 25).

[82] See, e.g., HR 27 May 2005, *NJ* 2005/485.

[83] Jansen (2008, pp. 2, 29).

[84] Giesen (2020, p. 101).

[85] Ibid., p. 43.

[86] Feteris (2016, pp. 19–22).

[87] HR 20 December 2019, ECLI:NL:HR:2019:2006. The following text is based on Van Dongen and Keirse (2020), no. 45 ff., where this case is dealt with more elaborately.

[88] HR 9 April 2010, ECLI:NL:HR:2010:BK4549; Uzman (2018, pp. 267–268).

a collective action (cf. Art. 3:305a DCC) against the Dutch State, arguing that the Dutch State is knowingly exposing its citizens to danger and is thus committing an unlawful act (Art. 6:162 DCC). Urgenda asked the court to oblige the State to reduce emissions by at least 25%. The Court of Appeal upheld the decision of the court of first instance, although it changed the grounds for liability by applying Articles 2 and 8 ECHR as the basis for its judgment. The Supreme Court, upon appeal in cassation, based its judgment on the UN Climate Convention (1992) and on the State's legal obligation to protect the lives and well-being of citizens in the Netherlands. The Netherlands is included among the Annex I countries that must take the lead in combatting climate change and be committed to reducing greenhouse gas emissions. These legal obligations are anchored in Articles 2 and 8 ECHR. According to the Supreme Court, the State has not explained why a lower reduction can be considered justified and still lead, over time, to the reduction targets accepted by the State.

The perspective taken by the state is a constitutional perspective, stating that decisions on the reduction of gases must be made by politicians. According to the Supreme Court, however, the State has a constitutional duty to apply the rulings of the European Court of Justice. The courts must provide legal protection as an (essential) element of democracy and must protect the limits of the law. The Supreme Court therefore ruled that the Court of Appeal thus agreed with the ruling of the Court of Appeal, namely, that the State is obliged to take measures to actualise a 25% reduction by the end of 2020, due to the risk of climate change that could seriously affect the residents of the Netherlands in their right to life and well-being.

This decision demonstrates the continuing constitutionalisation of civil law.[89] Furthermore, as already stated, it serves as an example of public interest litigation based on Article 3:305a DCC. Although the Urgenda decision can be questioned from the *trias politica* perspective, one could also argue, with Van Gestel and Loth, that public interest litigation may well be seen as an expression of democratic legitimation, as long as the State and the courts sufficiently respect the policy freedom of the State and objectify and justify their normative actions.[90] In fact, this is the core element in the discussion on lawmaking and judicial activism. I agree with Van Gestel and Loth that there is no infringement of the policy freedom of the State in this case. The courts did not make up this minimum percentage—for years, the government had agreed on it as the minimum requirement to stop irreversible climate change, and it had signed climate agreements in Paris.[91] With regard to lawmaking, the fact that this decision essentially concerns public law issues of general government policy makes a difference for the context and nature of lawmaking. This is not to say that judicial lawmaking is no longer legitimate. From an institutional perspective, it does make a difference whether the Supreme Court engages in far-reaching law making in an area where the political bodies are silent and the law making is limited to the mutual relationship of mutual groups or persons in society or legal judgments such

[89] Giesen (2020, p. 111).

[90] Van Gestel and Loth (2019, p. 647).

[91] Ibid., p. 655.

as the Urgenda case, which deal with highly politicized issues and raise questions about the allocation of values in the public interest.

9 The Future of the Dutch Civil Code

The Dutch Civil Code is a collection of recent legislation as well as remnants of past legislation, of Dutch as well as European origin, of case law and of doctrinal thought. Introduced in 1992, it is a relatively recent civil code. Nevertheless, it seems that the notion of presenting law in an all-embracing and systematic way is as prominent as it was two centuries ago. Shortly before the introduction of the new Code, the European Parliament in 1989 had even called for the elaboration of a European civil code,[92] an indication that this trend toward codification was even present at the European level.

One reason for the (re)codification of 1992 was to make the whole private law system more consistent and to reduce the huge amount of case law that had to be consulted to establish the specific rights and obligations of subjects.[93] The new Code did not have a constitutional, unifying role—as it did at the time when nation states began to emerge—nor did it lead to fundamental changes in legal practice. It was rooted in past legal tradition, thereby assuring continuity. At the time of its promulgation, the Code encompassed all norms in a systematic and clear way, although some parts (whole books, as well as lesser reforms) were added later and some parts are still to be included. Formally, it replaced all previous statutory laws, customs and authorities, although the strength and continuity of legal tradition remains evident in case law. This strength was facilitated by anticipatory interpretations by the judiciary in rulings given in the decades preceding the new Civil Code.

In the literature, the meaning of codification has shifted visibly and can be read as 'mere' legislation, without the element of exclusivity or completeness.[94] The Civil Code is not a universally binding code but elaborates generally accepted legal principles and standards in a way that reflects the socioeconomic needs of the time.[95] Some have argued that the current situation no longer fits the exclusiveness of codifications. The Civil Code nevertheless remains the center of gravity of private law in the Netherlands (thereby suggesting continuity), although the main emphasis in relation to lawmaking, for example in the area of tort law, has shifted to the judiciary, which adjusts the law to the changing society.[96] Perhaps as a result of such developments and the division of tasks between the legislature and the judiciary, it will be possible for the new Code to pass the test of time.

That said, the question of whether a national codification is the best way to go forward in the long run still applies. The old argument that it is better to ensure one

[92] Official Journal of the European Communities 1989, No. C 158/400.

[93] Smits (2014, pp. 245, 247).

[94] Vranken (2004, p. 2).

[95] Cf. Hirsch Ballin (2018).

[96] See also Van den Berg (2012, p. 200).

law for one market and/or community is no longer a relevant motive for a national codification,[97] considering the international character of the market, nor is the argument of creating constitutional unity. It has been suggested that in a post-Westphalian world, new forms of legitimacy need to be found outside the familiar forms developed for nation states, i.e., law developed by national parliaments.[98] A Code could be considered from the perspective of accessibility and predictability of the law as a means to manage information. It is indeed questionable whether a codification is the best way forward to achieve the goals of accessibility and predictability. These goals might be better reached, as Smits argues, by moving toward ways of digital legal information management, including the essential electronic means to achieve this.[99]

Acknowledgements The author would like to thank Dr J.M. Milo and Professor J. Uzman for their critical remarks on a draft version of this article.

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[97] See Smits (2012, pp. 296–310).

[98] Smits (2011, pp. 119 ff).

[99] Smits (2014).

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