Judges with Political Power

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Introduction

Within the Netherlands, the view held by many within the legal profession is that a judge should not be able to make what is considered a ‘political’ decision. Briefly said, this is a decision that considers political arguments and not legal arguments. However recently there have been a few decisions and developments that have gone against this view. A little over a year ago there was the ‘Urgenda’ case, in which the Dutch Hoge Raad ordered the Dutch legislator to create legislation to lower emissions within the Netherlands to keep the promises made in some international treaties[1]. More recently there was the infamous case surrounding the curfew installed for the corona crisis. In the lower court, the judge decided that the assessment made by the government to install the curfew was incorrect[2]. In appeal, the judge decided that this decision should not have been made by a judge, since the government has “a wide margin of appreciation”[3]. This appeal shows that the traditional view is still kept by at least some. They believe that the courts, especially the lower courts, are not equipped to make large scale political decisions. Thus they should always refrain from making these choices, political decisions should be left to one of the other powers since they are much better at making these choices[4]

This view is essentially a traditional view of Montesquieu’s trias politica. The idea that the three separate powers should not infringe on each other. In the Urgenda case, the judiciary makes a decision that should be made by the legislative power. In the curfew case, the judiciary makes what can be considered an executive decision. Thus if we would keep to the orthodox view of the trias politica, neither of these decisions should be allowed. Now, the Netherlands certainly does not keep such a strict interpretation of the trias politica anymore[5]. However, there is still the view that the judiciary should remain a separate and independent power. Even so, to take a look at whether the judiciary should remain separate and independent would likely take multiple books. Nevertheless, It is worth a look to see whether judgements such as the two mentioned should be allowed within a society such as ours. Therefore instead of looking at the role of the judiciary as a whole in society, I will limit myself to looking at these decisions within cases such as this.

Research question

I have now described what has put me up to this research. I will now formulate my research question. As I will limit myself to similar cases such as described above my research question will be:

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[1] ECLI:NL:HR:2019:2006
[2] ECLI:NL:RBDHA:2021:1100
[3] ECLI:NL:GHDHA:2021:285
[4] M. Helmich, “Restraint as a Source of Judicial ‘apoliticality’”, *Netherlands Journal of Legal Philosophy 2020/2:* 188-189.
[5]A.D. Belinfante & J.L. de Reede, *Beginselen van het Nederlandse Staatsrecht*, Wolters Kluwer: Deventer, 2015: 9-10.

-Within the Dutch democratic rechtsstaat (rule of law) should judges be allowed to make 'political' decisions?

To attempt to answer this question I have formulated three sub-questions:
-In what situations would it be possible for a judge to make a 'political' decision?
-What arguments in favour or against a 'political' decision could be made from a democratic viewpoint?
-What arguments in favour or against a 'political' decision could be made from a rechtsstaat (rule of law) perspective?

Structure

This thesis will be made up of three chapters each dealing with one of the sub-questions.

I will start with the first question, in which I will discuss the situations in which a judge can make such a 'political' decision. Here I will mainly discuss the ideas of H.L.A. Hart and Ronald Dworkin. Hart's view of the 'open texture' of the law and the problem of 'penumbra', this view shows what decisions are part of 'law'[6]. Hart however considers these to still be 'legal' decisions[7]. Ronald Dworkin has expanded on this view and shown that there are 'hard cases' in which a judge cannot apply normal law and therefore should make a 'political decision'[8]. With this, I will have answered the first question.

Then I will answer the second question. Here I will discuss the view of this problem from a democratic perspective. Here there is again an orthodox view, that political decisions should only be made by those with a democratic mandate. Judges do not have a democratic mandate and therefore should not be allowed to make political decisions. However, there are some arguments against this. Firstly that judges can improve democracy because from a practical perspective it is much easier and quicker to get a decision by the court than it is to get this decision through either executive or legislative procedure[9]. Moreover, a judge can often be much more nuanced, this can assist with for example minority rights[10].

Lastly, I will discuss the last question. What could be said about this problem from a rule of law (rechtsstaat) perspective. Here I will discuss the viewpoints from a positivist and non-positivist viewpoint. Legal positivists would argue that law can only say something about law and that

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[6] H.L.A. Hart, "Positivism and the Seperation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 31-32.
[7] H.L.A. Hart, "Positivism and the Seperation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 34-35.
[8] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 81-87.
[9] J. Waldron, "A Right-Based Critique of Constitutional Rights", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 448-451.
[10] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 204-207.

legal decisions can only be made through legal argumentation and based on written rules[11]. Non-positivists argue that law is connected to a higher law based on morality and therefore decisions that would fall outside the purview of written law are possible, examples of this are Fuller's principles and Dworkin's rights[12]. This debate is what I will discuss here.

Lastly, I will conclude and attempt to answer the question I have posed myself.

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[11]H.L.A. Hart, "Positivism and the Seperation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 24-25.

[12] J. Raz, "The Rule of Law and Its Virtue" in "The Authority of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 188-189 & R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 194-195.

The possibility of a political decision

Before I discuss the arguments that discuss whether judges are allowed to make political decisions I will first discuss the situations in which this question may arise. Two main theories discuss when this question may come up. I will start by discussing the theory of H.L.A. Hart concerning the 'core' and 'penumbra' of the law. After this, I will discuss Ronald Dworkin's theory of 'hard cases'. Dworkin's theory builds upon the theory of Rawls thus I will discuss it in this order.

Core and Penumbra

To explain how the interpretation of law works and when we should discuss the problems of interpretation of a legal rule, Hart came up with the theory of the 'core and the penumbra'. This is essentially a two-step process. Linguistically a word has a 'core' meaning, this means that there is a certain general meaning the word has which is accepted by the general public[13]. However, when we use this word in a specific situation it takes on a specific meaning which might be disputed[14]. This can similarly be applied to legal rules. There is a general definition that a legal rule has, which is generally understood by all within the legal community. However, when we start to apply this rule to a specific situation we can discuss what this rule entails. This is the 'penumbra' of the law. The famous example that Hart uses is of a legal rule "that forbids you to take a vehicle into the public park"[15]. The problem here being with the word 'vehicle', the generally accepted use of the word prohibits cars and the like from entering the park[16]. However, should we apply this rule to more borderline cases as well? This is where we can discuss what the rule entails. When a judge is faced with someone taking a bike or an airplane into the park, is this then also illegal[17]. This for example constantly happens with legal rules that were written a long time ago, such rules could for instance not have foreseen technological development. Perhaps this legal rule that was written a long time ago was meant to prevent car gasses from polluting the park and for this reason, a judge could rule that an electric vehicle would be able to enter.

It is important to see Hart's theory of the 'core and penumbra' in light of earlier theories of the interpretation of legal rules. Hart is a positivist, now this means that he believes that law is simply law. Law cannot make a claim to morality, justice or the like on its own, what is law is

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[13] G. J. Postema, "Positivism and the Separation of Realists from Their Scepticism", in: P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century*, Hart Publishing 2010: 267-268.

[14] G. J. Postema, "Positivism and the Separation of Realists from Their Scepticism", in: P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century*, Hart Publishing 2010: 267-268.

[15] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 31.

[16] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 31-32.

[17] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 31-32.

decided only be social facts and not by anything else[18]. Previously to Hart positivism was mostly interpreted as a form of 'formalism', that we can only interpret the law as it is written[19]. For Hart's theory, this would essentially mean that only the 'core' of legal rules could be interpreted as a legal rule. This was a criticism often levelled against positivism. However it was clear that one could argue about the meaning of a legal rule, thus Hart came up with this theory. When we discuss the meaning of judicial rules we are merely arguing 'the penumbra' of the rule. Thus this theory is mostly linguistic in basis. Hart is essentially saying that in some cases it's easy to determine the meaning of the legal rule since it is clear that such a situation would fall under the purview of this rule. However, when we enter the penumbra of the rule, in this situation it is possible for the judge to interpret the rule in a specific way.

This theory is not without criticism. According to Fuller, we should focus on the aim of the legal rule and not simply the linguistic meaning of a legal rule[20]. He argues that a situation can linguistically fall within the 'core' of the rule, however, it would go against the intention of the rule. For example, a legal rule that says "it is not allowed to sleep in a train station". There are two men, one of whom has accidentally fallen asleep waiting on his train and the other has brought a full blanket and such, yet is not asleep[21]. The rule is quite clearly supposed to prevent the second situation, however only the first is in violation of the rule. Thus what should be concluded is that a judge can be faced with a 'political' decision both when the rule is not clear linguistically and when the rule is linguistically clear, however, it might go against the intention of the legislature.

Hard Cases

Thus I will also discuss Dworkin's theory of 'hard cases', this theory builds upon Hart's theory. However it is a little different and might make it clearer when a judge might be faced with a 'political' decision. It is essentially a simple concept. According to Dworkin law is made up of both rules following from legal practice, which concerns written law, jurisprudence and similar grounds of law, and legal principles[22]. Whenever there is an absence of rules from legal practice when there is a conflict between a principle and the legal practice or even when legal principles are necessary to discuss a case this is a 'hard case' according to Dworkin[23]. This is slightly broader than the theory proposed by Hart, in Dworkin's theory the question of 'a political decision' may essentially come up whenever we can not find an answer in legal practice alone

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[18] L. Green & T. Adams, "Legal Positivism", in: E.N. Zalta, *The Stanford Encyclopedia of Philosophy,* Stanford University 2019.

[19] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009:32-33.

[20] L.L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 65-66.

[21] L.L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 66.

[22] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 26-27.

[23] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 27.

and must turn to legal principles. This is broader because in legal practice we also consider the legislative intent and thus the intention of the law and we also consider unwritten principles of law. Thus not only when there is linguistic confusion can we consider the question of a 'political decision'. Dworkin's theory however is non-positivist, positivists like Hart would not agree that legal principles should or can be used when judging a case[24]. I will return to this divide in a later chapter in this essay. However, both positivists and non-positivists can agree that situations in which a 'political decision' is possible can arise.

To conclude this part of the essay, it is possible for the question of a 'political decision' to come up. Both Dworkin and Hart seem to agree on when this situation may arise. There must be a legal rule or legal practice from which a rule follows that is not entirely clear. Both recognize that when this happens a judge must use his 'discretion' to decide on a case[25]. For Hart, this is only when there is something unclear about an existing rule and whether it may apply to a specific case. For Dworkin, this can happen in more situations, especially in cases where legal principles can play a role. Thus this essay will focus on this. If a political decision can be made, it should be in cases in which there is doubt about whether an existing legal rule may apply or in cases in which there is no legal rule to apply at all.

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[24] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 82-83.

[25] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 82.

Democracy

Now that I have explained the situations in which a judge may be faced with taking a 'political decision' I will start with whether he should. I will firstly discuss the argument from a democratic point of view. This stems from the view that political decisions in a democracy should be taken with a democratic mandate.

Apolitical Judges

First I will discuss those who believe that giving judges the freedom to make political decisions will lead to a dilution of the trias politica. Some believe that giving judges this freedom will lead to a breakdown of the separation of powers[26]. Furthermore, there might be a loss of legal certainty, which I will further discuss in the next chapter. The main argument made by opponents of a 'political decision' by a judge is this: within a democracy, we have decided that only elected officials that make up the legislative power should be able to make political decisions. Only they can make decisions about rights, laws and what rules a judge should be able to use in court. The courts are not intended to act as a legislature or executive. This often goes paired with the view that the courts are intended to be completely apolitical[27]. Judges are not elected, nor can they be dismissed by the people directly. This is of course intended, as the judicial power is intended to be impartial and independent from the other two powers[28]. However, this means that from a democratic point of view it should not be allowed to take political decisions since they do not have the democratic mandate to be able to take this decision[29]. A counter-argument to this could be that judges should be able to take a political decision since if they do they can be overruled by the legislative power, or not as a form of acceptance. However, this is not a good argument since the legislative power does not have an infinite amount of time to discuss these judicial rulings. Moreover, legislative decisions can take a very long time by which time the decision to go against the judicial ruling might have become impractical or unpopular[30]. Thus the fact that the legislative power can overrule the courts is not a good argument for political decisions, since in reality, it would not truly work. Furthermore, there is an argument to be made that if judges gain the power to take political decisions that this would lessen the respect people have for legal rules[31]. Since the people are not consulted in these decisions that have less incentive to then respect the law. From the most basic view judges should refrain from taking any political decision, since this should not at all be possible

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[26] M. Helmich, "Restraint as a Source of Judicial 'apoliticality'", *Netherlands Journal of Legal Philosophy 2020/2:* 177.

[27] M. Helmich, "Restraint as a Source of Judicial 'apoliticality'", *Netherlands Journal of Legal Philosophy 2020/2:* 188-189.

[28]Montesquieu, "The Spirit of the Laws", Cambridge University Press 1989, (first published 1748).

[29] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 200.

[30] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 200-201.

[31] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 205.

within a democracy. When faced with a political decision by the legislative power, the people can try to vote them out or find different ways to democratically change this decision. To give judges this power would be problematic[32]. If a judge wishes to take a political decision he should resign and attempt to influence the people and the legislative through democratic means, not by taking this decision as a judge[33]. Thus it is clear that this is a strong argument that a judge should not be able to take a 'political decision', judges are not directly chosen by a democratic decision nor can they be removed by one. Within a democratic society, we believe that 'political decisions' require that the people are consulted, within the Netherlands this is through our representatives in parliament. Besides this, according to Waldron, there is no real reason why a judge can make a better decision than the legislative power[34]. There is no reason to believe that a judge has a better understanding of the law than someone who is a judge. Combined with the fact that the legislative power has democratic legitimacy because they represent the people whom the decision will influence. Because they are more connected to the people in this way they have a better appreciation of what the decision must be[35].

Politics as Protection

However, there are arguments to be made that within a democratic society judges should be able to take a democratic decision. There is an argument made by Dworkin that allowing judges to take a political decision would be good for democracy. It's important to note that for Dworkin a political decision is essentially about a decision about rights, whether people have rights and how those rights are expressed[36]. Rights are important for Dworkin in a democracy especially, because they act as "trumps" against decisions by the community[37]. Thus in a democracy they effectively work to protect minority interests and prevent a tyranny of the majority. Therefore the protection of those rights is very important in a democracy. Dworkin has a few arguments for why he thinks that political decisions are good for democracy, not only since they can serve to protect rights. Firstly similar to Waldron he says that there is no reason why the legislative power would be better in making a political decision[38]. However, Dworkin uses this argument to justify why judges should actually be able to make a political decision. There are no reasons why a legislator has a better and more accurate mind when it comes to making decisions. In any situation, they should likely come to a similar conclusion, since they will both be capable of reaching a rational conclusion. Furthermore, it might be that judges can reach a more accurate conclusion when it comes to rights. Judges, unlike legislators, are usually not under the

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[32] J. Waldron, "The Rule of Law as a Theater of Debate",in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 223.
[33] J.H. Ely, "Democracy and Distrust: A Theory of Judicial Review", *Harvard University Press* 1980: 182-183.
[34] J. Waldron, "The Core of the Case Against Judicial Review", *The Yale Law Journal* 2006*:* 1376-1377.
[35] J. Waldron, "The Core of the Case Against Judicial Review", *The Yale Law Journal* 2006*:* 1377-1378.
[36] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 204.
[37] R. Dworkin, "Rights as Trumps", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 335-336
[38] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 204.

influence of outside interests[39]. A legislator will more quickly yield to the influence of external groups. For example when discussing issues surrounding minorities or similar politically charged groups a legislator will be more hesitant to take action. A legislator would be more hesitant to stand up for minorities if that decision is unpopular with the majority of society, even if that would be the just decision from a rights perspective. Judges however are not subject to these influences, the political majority has no way of directly removing said judge or influencing them. Thus a judge would be able to make unpopular decisions that the legislator should make, but due to external factors is unable to. However, if a judge takes a decision that could be considered wrong, then there is no way to directly remove that judge or change this decision[40]. If they do make a decision that is so wrong then the people will likely lose respect for the law. However the 'legal practice' as a whole can then decide to disregard that decision if it turns out to be this deeply unpopular with the population. If it truly appears that the majority of the population is offended by this decision people might even consider disobeying this decision then other judges and lawyers must decide to disregard this decision as well[41]. In my opinion, this is the weakest part of Dworkin's argumentation. Even if almost the entire population disagrees with a decision, it will be upheld as long as the whole, or at least the majority, of judges and lawyers, agree with it. This is essentially a sort of technocracy and thus seems to supplant democracy. However, as stated before Dworkin believes that political decisions are decisions concerning the rights of people. He believes that if judges are guided by rights, they will not come to a wrong conclusion. If they would not make decisions in line with rights then this decision will always be disregarded. For example, when they face questions about government policy they can rule that this policy conflicts with rights, however, they should defer to the executive or legislative power to work out what this policy will be[42]. Thus judges should only be able to make political decisions concerning the rights of people, this Dworkin argues will be beneficial for democracy[43]. Since judges are not easily influenceable by powerful groups, they can take decisions to protect minorities and groups that are politically not very powerful, such as the poor. Moreover, legislation is often quite slow, judicial decisions are usually faster. When faced with a 'hard case' where there is no law to depend upon, a judge can make a decision based on political principles instead of having to wait on the legislative power to create laws concerning such a situation[44].

Thus to conclude there are indeed quite good arguments against a political decision within a democratic system. Judges do not have the democratic mandate to make political decisions.

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[39] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 204-205.
[40] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 205.
[41] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 205-206.
[42] M. Helmich, "Restraint as a Source of Judicial 'apoliticality'", *Netherlands Journal of Legal Philosophy 2020/2:* 193.
[43] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 206-207.
[44] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 206-207.

There is no way to influence them through democratic means, they cannot be appointed or dismissed by a democratic decision. Thus from an absolute democratic view they should never be able to take a political decision. However, to reach a more just outcome it might be beneficial for judges to be able to take political decisions. They can take unpopular decisions since they are not subject to the same influences and restrictions as the legislative power. Therefore they are more effective in protecting minorities. However, this is greatly dependent on judges and lawyers limiting themselves to decisions surrounding rights and dismissing judicial rulings if they are rejected by a majority of society. Thus even though a democratic society should not allow judges to take political decisions, it might be more beneficial if they do.

Rule of Law

I will now begin with discussing this issue from a rule of law perspective. For this discussion, I will concern myself with positivism and non-positivism. According to legal positivism law is simply law and it can never make a claim to be anything more than that, it cannot claim a higher morality[45]. Non-positivism describes everything that is its opposite, all philosophies do not believe that law is simply law. Now both have their conceptions about the rule of law, which means how law governs itself and how it governs society[46]. Some argue that the rule of law completely resists political decisions by a judge, while others believe that there cannot be rule of law without giving judges the freedom to make political decisions[47].

Positivism

I will begin by discussing the viewpoints of some positivists, who mainly defend the view that judges should not be able to make political decisions. Since this often requires the use of legal principles or other moral reasoning. I will begin by discussing Hart's point of view. According to Hart, a judge should not consider whether a law complies with a higher moral law or principle[48]. Thus as was stated in the first chapter with the 'core and the penumbra', the judge must simply obtain his ruling from an existing written rule. A judge is limited by existing law. When judges make a decision based on principles or any other moral rule, then they are arguing about law as it ought to be[49]. This is not a decision that a judge can make and would not lead to consistent decisions. Legal decisions should therefore be based on known law. What this means is that in a case in which a political decision is possible, the judge should refrain from this. A judge should always only make decisions that are "bound by law", in positivism they should refrain from making judgements that cannot be founded in explicit law[50]. This means essentially that judges should refrain from a 'political decision'. A political decision means that there is no law to base the decision on or to go against existing law. Positivism does not provide for this, therefore according to positivism as proposed by Hart a judge should not be able to make a 'political decision'. Moreover, if we allow for this there might be a great loss of legal certainty, because judges would be able to base their arguments on something other than the explicit rules as they are laid down in the constitution and other such documents[51]. This is because they are no

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[45] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 25-26.
[46] J. Waldron, "The Rule of Law", in: E.N. Zalta, *The Stanford Encyclopedia of Philosophy,* Stanford University 2020.
[47] J. Waldron, "The Rule of Law", in: E.N. Zalta, *The Stanford Encyclopedia of Philosophy,* Stanford University 2020.
[48] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 34-35.
[49] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 34-35.
[50] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 27.
[51] J. Stam, "Moet de strafrechter ook de scheidsrechter zijn van het publieke debat?", *Netherlands Journal of Legal Philosophy 2020/2*: 177.

longer limited by written law, but argue towards a conclusion using moral principles that are not as certain as written law[52]Alongside this we have the theory of Raz, who is also a positivist. According to Raz the rule of law is nothing more than an instrument[53]. For Raz law similarly cannot make a claim to morality directly, a legal judgement can be moral, but it does not have to be[54]. However for law to be effective the rule of law must comply with a multitude of principles, of which Raz has named a few. These include that law should remain stable, the judiciary independent and that they should not be allowed to 'pervert the law'[55]. Thus Raz argues similar to Hart, law should not try to claim that it follows from some higher principles. However for it to be effective it must comply with some practical principles, law should always be able to direct and instruct the people of society. Therefore for it to be effective law has to be stable and reliable. If in this system judges were able to make 'political decisions', they would do this through unknown principles and the law would not be reliable[56]. Thus Raz also provides a strong argument against political decisions, since if they were allowed the rule of law would no longer be able to serve its purpose. However, Raz does believe there needs to be some form of constitutional court, which will inevitably have to answer political questions[57]. However a constitutional court still depends on the constitution, thus it is not completely free to make political decisions[58]. Moreover, this does not help in cases in which there is no law to depend on at all. Lastly, there is the view proposed by Waldron. Waldron is also a positivist, however, he differs quite a bit from the previous two. Waldron proposes a proceduralist account of the rule of law. For Waldron, how the law is applied is at least as important as the principles of law by Raz, such as stability[59]. How the procedure is laid down in most parliamentary systems is that the legislative power is the one that should settle political issues. This connects back to his theory of democracy, that the legislative power is empowered by the people. However Waldron does see some small part for the judiciary, arguments used in court might influence how the legislative power deals with the political issue[60]. Furthermore, he does not necessarily exclude judges making political decisions. In most countries, the judiciary will at some point have to make political decisions due to a multitude of factors[61]. For example due to the history and culture in a

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[52] J. Stam, "Moet de strafrechter ook de scheidsrechter zijn van het publieke debat?", *Netherlands Journal of Legal Philosophy 2020/2:* 177-178.
[53] J. Raz, "The Rule of Law and Its Virtue" in "The Authority of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 191.
[54] J. Raz, "The Rule of Law and Its Virtue" in "The Authority of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 189-190.
[55] J. Raz, "The Rule of Law and Its Virtue" in "The Authority of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 185.
[56] J. Raz, "The Rule of Law and Its Virtue" in "The Authority of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 184-185.
[57] J. Raz, "Rights and Individual Well-Being", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 353-354.
[58] J. Raz, "Rights and Individual Well-Being", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 354-355.
[59] J. Waldron, 'The Rule of Law and the Importance of Procedure', in *Nomos 50: Getting to the Rule of Law*, ed. J. Fleming (2011): 5-6.
[60] J. Waldron, 'The Rule of Law and the Importance of Procedure', in *Nomos 50: Getting to the Rule of Law*, ed. J. Fleming (2011): 23-25.
[61] J. Waldron, 'The Rule of Law and the Importance of Procedure', in *Nomos 50: Getting to the Rule of Law*, ed. J. Fleming (2011): 24-25.

country or if the constitution grants judges a substantial part in dealing with issues concerning rights and such. Therefore for Waldron there might be a possibility for a judge to take a political decision, however, this must not happen very often and greatly depends on the condition of the legislative system. In the majority of cases, the judiciary should still defer to the legislative power and wait for them to make a decision. It is simply not the role of the judiciary to make political decisions.

Non-Positivism

Now I will explain the arguments provided by Dworkin. Dworkin is a non-positivist and according to him, the law is made up of both legal practice and legal principles. He believes law is made up of more than law, legal principles are also included when one discusses the law. Dworkin calls the standard positivist view the "rule-book" conception[62]. This is because positivists believe law is made up only of explicit legal rules based on some form of constitution. Dworkin however defends a "rights" conception, which is much broader than the "rule-book" conception[63]. In the "rights" conception the law must flow from certain moral rights and principles. Law for Dworkin is not just based on a written constitution or something else that is socially determined. For Dworkin law is the expression of morality[64]. Thus when a judge considers a case in which they can make a political decision, he can do so. Because the judge can depend on these moral principles to help them make a decision. According to Dworkin this already happens quite often[65]. His argument against positivists is that there must be some principles that guide judicial decisions. Since they often make decisions where there is seemingly no applicable law, but the judges still believe themselves to be "bound by law"[66]. As I have discussed above, according to positivists judges can only make decisions that are based on explicit law. Dworkin however argues that it often happens that there is no 'explicit law', yet judges are still able to make a decision. The positivist argument against Dworkin is that if we apply his philosophy then it will lead to a loss of legal certainty[67]. Since judges can base their decisions on uncertain legal principles, they can essentially argue for any decision they believe to be right. In a positivist system, this does not happen according to them, since every decision must be based on some sort of explicit rule that one can find[68]. According to Dworkin, it is instead the positivist system that will lead to a loss of legal certainty. Since in practice judges often make decisions that are seemingly not based on "explicit law", according to legal positivism they are still somehow

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[62] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 195.
[63] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 195-196.
[64] S.J. Shapiro, "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 27-29.
[65] S.J. Shapiro, "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 26.
[66] S.J. Shapiro, "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 26-27.
[67] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 84.
[68] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 83-84.

"bound by law"[69]. According to positivists such as Hart this is due to the penumbra since a general legal rule can't account for every specific situation. Thus the judge must try to clear up what the rule is in a specific situation[70]. This however only accounts for situations in which there is a rule that does not completely fit the current situation. Thus a political decision is not possible, since it is still simply arguing that a specific situation falls under the purview of an existing rule. Nevertheless, this does not account for 'hard cases' in which there is absolutely no explicit law that is applicable, but where judges still can make a decision and not doing so would be unjust[71]. So for Dworkin, the rule of law essentially means that judges should be able to make political decisions. The example that he uses is that of the *Henningsen* case[72]. In this case, Henningsen had bought a defective car and had also signed a waiver that said that the car company was not liable in case of a defective product. The car then crashed because of this defect. No law said that such a waiver could be ignored, however the court argued that not ignoring this waiver would be wrong. They ruled that according to legal principles they should ignore the waiver and find the car company liable. A positivist view can not account for a case such as this[73]. For Dworkin judges constantly make political decisions and it would be wrong for them to not do this since it would lead to unjust outcomes. It would be wrong to say that judges should remain 'apolitical', they have to be political otherwise they cannot effectively adjudicate in 'hard cases'[74]. Therefore Dworkin's argument comes down to the fact that positivism has no real argument for what happens in 'hard cases' as he describes them. One 'counter argument' exists, which is that judges are actually 'repairing' the law and trying to fill up the gaps that the legislators forgot and obscure this by using arguments based upon legal principles[75]. This is easily refutable, if judges are often taking the seat of the legislator and "filling up the gaps" in legislation why is this not known by the population at large[76]. Furthermore, it seems when such a decision takes place there is a lot of criticism from the legal community, such as with Urgenda. Thus it is certainly not decided that the judge should simply take the place of the legislator when there is no explicit law to apply. Moreover, if we were to assume that judges do try to act as legislators, they are unbound. They can try to argue towards a conclusion they believe to be just and not one that follows from clear principles. This is why Dworkin believes that in a positivist

[69] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 83.

[70] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 30.

[71] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 27-28.

[72] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 76-78.

[73] R. Dworkin, "The model of Rules", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 79-80.

[74] M. Helmich, "Restraint as a Source of Judicial 'apoliticality'", *Netherlands Journal of Legal Philosophy 2020/2:* 194-195.

[75] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 39.

[76] S.J. Shapiro, "The "Hart-Dworkin"Debate: A Short Guide for the Perplexed", in: A. Ripstein (ed.), *Ronald Dworkin*, Cambridge University Press 2007: 39-40.

system there is less legal certainty[77]. Within his "rights" conception judges are always bound by legal principles[78]. This is because even when there is no explicit rule in the "rulebook", a judge must argue with legal principles that lie at the foundation of that "rulebook". A judge cannot argue towards a conclusion in this way. First, he must find which principles apply in a specific case and then see if they do not conflict with other more fundamental principles and the rulebook itself[79]. The same applies to a case in which there is existing law to apply, however doing so would lead to an unjust outcome that is not in line with the underlying moral principles. In these situations, a judge can make a decision contrary to the written law, because he is bound by the underlying law of the legal principles.Thus a judge is always bound by the law, even if there is no clear written law that applies in a situation. This is why Dworkin allows judges to make political decisions. There is no danger of judges 'perverting' the law since they cannot argue contrary to the legal principles. The legal rules that are in effect in society are based upon those same principles, thus any well-argued position will never be contrary to written law. It also does not go against the effectiveness of the law for this same reason. The law will remain stable and reliable since the legal principles are always the guiding light. This is why for the protection of the rule of law, judges should be allowed to make political decisions.

Thus positivism is (mostly) resistant against political decisions by judges, since a judge should only speak law as it is, as law is written down in the statutes. Moreover, allowing judges to make political decisions would cause the law to be less effective and people would lose faith in the law. The exception amongst the positivists is Waldron, who allows for political decisions. However only in specific situations depending on the circumstances of the case. From this viewpoint therefore the conclusion would have to be made that we should not allow political judgements. Nonetheless, there is also the viewpoint defended by Dworkin, that judges should be able to make political decisions. Allowing political decisions would be an improvement to the rule of law, since it allows us to account for decisions in 'hard cases'. Even in cases where there is no law to apply, or when applying existing law would be very unjust, the judge is bound by moral principles. Therefore political decisions should be allowed if they are bound by rights. If judges are always bound by rights they are never completely free to 'usurp' the legislator and they are even more restricted than they would be if we would stick to the positivist view. From the rule of law perspective, we should consequently allow judges to make political decisions.

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[77] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 198-199.

[78] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 195.

[79] R. Dworkin, "Political judges and the Rule of Law", in: A. Kavanagh (ed.) & J. Oberdiek (ed.), *Arguing About Law,* Routledge 2009: 199-200.

Conclusion

I will now conclude and attempt to answer the question which I posed in the introduction. I will first give a quick summary of what I have discussed in each chapter.

Firstly there is the situation in which a judge might have the possibility of making a 'political decision'. There is firstly the view of Hart, with the 'core and penumbra'. Each legal rule has a 'core' meaning, which is its general meaning to the public. However when those rules are faced with their 'penumbra', it will not be immediately clear how or if the rule would be applied. Therefore in these situations, the judge may be faced with a political decision. Even though this was an improvement of the view before Hart, there was still some criticism. For example with the criticism provided by Fuller, that there could also be situations in which the intention of the rule is not clear. In these situations, the judge could also be faced with a political decision, since then also there is no clarity about what the rule exactly means. Finally, this led to Dworkin's view of 'hard cases'. When there is an absence of rules, there is a conflict with legal principles or the rules are very vague on what decision must be made, then we speak of a 'hard case'. These cases cannot be easily answered by interpretation of statute law alone and therefore provide an opportunity for a judge to make a political decision.

Now that it is clear in which cases a political decision is possible I looked at whether the judge should have the freedom to make such a decision.

Secondly, I discussed whether this should be allowed from a democratic perspective. There is the view that allowing judges to make political decisions would be too big a departure from the trias politica and this should not be allowed in a democracy. In the democratic system, it is decided that political decisions must have a democratic mandate. When the legislative or executive power takes a decision that is unpopular or considered wrong by a majority of the population, they have a democratic means to remove them. The population also can install representatives in the other two powers. Judges are not directly chosen by democratic decision nor can they be removed through democratic means. Political decisions often have far-reaching consequences, thus this should not be allowed. For Dworkin, a judge should be able to make a political decision since this would guard democracy. There is a problem with democracy, in that it could lead to a tyranny of the majority, rights according to Dworkin can guard against this. Moreover, judges can guard these rights through political decisions. Furthermore, a judge is not subject to the same outside influences as a democratically elected representative and is therefore able to make decisions that would be impossible for the legislative power. The most important thing is that judges can protect vulnerable groups within society since they are not subject to outside pressure nor are they restricted by the legislative process. However it is important to note that they should only base their decisions on political principles and have these principles guide them toward a decision.

Lastly, I discussed this problem from a rule of law perspective. From a positivist view, such as the one proposed by Hart, a judge should not make a political decision. If they are no longer

“bound by law”, they then base their judgements on how the law ought to be. This will lead to a reduction in legal certainty. Moreover, the rule of law would not be as effective since people would not trust in the law anymore. Law would then be too random to trust the rule of law. However, in the view proposed by Dworkin, allowing for political decisions would strengthen the rule of law. According to Dworkin judges already make many political decisions whenever a ‘hard case’ presents itself. If we allow for political decisions then judges are still “bound by law” in these situations. In the positivist point of view, the judge has nothing to rely on in a ‘hard case’. However, in Dworkin’s system judges are always bound by legal principles and cannot argue against them. Therefore they are always bound by some form of principle and this will lead to an improvement of legal certainty and a more just legal system.

Thus I will now answer my research question: Within the Dutch democratic rechtsstaat (rule of law) should judges be allowed to make 'political' decisions? When faced with a situation as I have described in chapter 1 I do believe that a judge should be able to make a political decision. Even though it is not completely democratic, nor in line with the standard interpretation of the trias politica, I think that a judge should be able to make such a decision. They can make decisions that are just, even though they are not agreed upon by the democratic majority. Moreover, it would serve to improve the rule of law.

To conclude I have presented the arguments in favour and against political decisions in a democratic rechtsstaat. I believe the arguments I have provided are the strongest available discussing our current societal structure. However these are not the only arguments, there are for example also more radical views such as the one expounded by Carl Schmitt, according to whom the rule of law is at most illusionary and will not prevent a tyranny of the majority[80]. Thus the debate concerning ‘political judges’ will likely continue for quite a while.

[80] D. Dyzenhaus, “The Concept of the Rule-of-Law State in Carl Schmitt’s *Verfassungslehre*”, in: J. Meierhenrich (ed.) & O. Simons (ed.), *The Oxford Handbook of Carl Schmitt,* Oxford University Press 2014:
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