THESIS

URGENDA VS. THE DUTCH STATE
THE CASE FOR ETHICAL JUDICIAL ACTIVISM

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Summary

This thesis has a twofold aim: to argue that judicial activism in the face of climate change is morally just thereby demonstrating the moral soundness of the verdict in the Urgenda lawsuit against the Dutch state. To be more precise, the claim that will be made is that judicial activism as a means for combatting climate change is morally justified and that the reservations usually in place against judicial activism should be omitted in the face of climate change. In order to do this, the issue of climate change will be examined by describing the fact of the court case, after which Gardiner's three moral storms will be used in order to show the need and potential for the judiciary to take an active attitude towards solving climate change. Afterwards, the verdict of the court will be investigated to set the stage for possible counterarguments to my claim, which mainly revolve around Montesquieu's doctrine of the separation of powers. This doctrine, the application of it in the Dutch constitution and the counterarguments will be the topic of the next section, in which the relevant counterarguments will be rejected if necessary. Following this, I will present my own arguments that validated the moral rightness of the judicial activism used in the Urgenda case. These four arguments are the *harm principle* argument, the *international law argument*, the previous examples of *just judicial activism* argument, and the *final resort* argument. In the one but last section I show that the issue of climate change fits all these arguments, making judicial activism a valid and morally just alternative in the fight against negative climate change. Finally, the paper will end by looking back one last time on the potential issues that judicial activism has and the ways in which this can be overcome, and second, by analyzing my position as an applied ethicist in the field of environmental ethics.

Introduction

There is widespread agreement on the severity of climate change. Many people have at least some knowledge of the dangers of greenhouse gases, fossil fuel consumption or something else related to climate change. Additionally, there are but a few who do not believe the majority of scientists, who claim that global warming could lead to a very destructive and dangerous situation. Especially when looking at the international community of world leaders and politicians, there seems to be near global consensus on the severity of climate change and the need for a solution.[1] Most politicians openly say that something should be done, preferably sooner than later. This global consensus has manifested itself throughout the United Nations framework convention on climate change (UNFCCC) that came into existence in 1992 with the aim of 'stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[2] The Paris Conference of 2015, which was the last major conference of parties (COP), was held to discuss progress and to further implement changes, in order to come closer to solving the problem of climate change. All parties who were attending aimed at creating goals to limit global warming well below two degrees Celsius, as compared to pre-industrial levels. In the adoption of the Paris Agreement, again, the urgency and importance of coming up with a solution now and establishing a solid framework for the future of this endeavor was present.[3] A whopping 196 countries have sent representatives to this last COP, who arrived at a consensus on how climate change should be dealt with.

Although this all sounds very promising and seems to show that the international community, and every country individually, is willing to implement the changes necessary to combat climate change, there are several remaining issues. The most prevalent of these problems are connected to ideas about political inertia, resulting from institutional inadequacy in solving problems associated with climate change.[4] In other words, the intention of solving

[1] United Nations Framework Convention on Climate Change. "United Nations Framework Convention on Climate Change." United Nations Framework Convention on Climate Change. May 08, 2017. Accessed May 15, 2017. http://unfccc.int/2860.php.
[2] Ibid., 9
[3] FCCC/CP/2015/L.9/Rev.1
[4] See for example: Boston, Jonathan, and Frieder Lempp. "Climate Change: Explaining and Solving the Mismatch Between Scientific Urgency and Political Inertia." *Accounting, Auditing & Accountability Journal* 24, no. 8 (2011): 1000-021. doi:10.1108/09513571111184733.
Peters, Glen P., Robbie M. Andrew, Tom Boden, Josep G. Canadell, Philippe Ciais, Corinne Le Quéré, Gregg Marland, Michael R. Raupach, and Charlie Wilson. "The Challenge to Keep Global Warming Below 2 °C." *Nature Climate Change* 3, no. 1 (2012): 4-6. doi:10.1038/nclimate1783.

climate change is there, and this aim is globally recognized as being of utmost importance. However, there are no institutions in place that can guarantee the implementation of the necessary policies to keep global warming below two degrees Celsius.[5]

The objective of this thesis is to investigate a potential alternative way of implementing policies that will help in combatting climate change. To be more precise, will argue that judicial activism as a means for combatting climate change is morally justified and that the reservations usually in place against judicial activism should be omitted in the face of climate change. This entails that infringement of the separation of powers are sometimes warranted, in particular when dealing with climate change.[6]

In order to do this, I will first explain the situation of climate change in the Netherlands and the institutional inadequacy of dealing with the issue, by explaining how Urgenda, an NGO group of environmentalist activists, came to sue the Dutch state. This lawsuit will be used throughout the thesis as an example in which judicial activism showed itself to be a morally right alternative for addressing climate change. In the second section, I will provide arguments explaining the unique status of climate change issues. These arguments will be based on the features specific to climate change that situate climate change as an issue highly susceptible to moral corruption. This will then be used to provide evidence that we are in dire need of an alternative way of solving this problem, and that indeed, judicial activism could function as such. The third section will provide the verdict of the judges who decided on the court case. This has two reasons: it provides an insight into the ways that judges may put legally binding regulations in place, in order to help solving climate change, and it sets up the framework of judicial activism, making it easier to understand counterargument specifically. In the fourth section I will provide an interpretation of Montesquieu's separation of powers, its position within the Dutch constitution, and the way judicial activism ought to be understood. Following this, criticisms against the validity and moral justness of judicial activism in this court case will be provided and rejected where necessary. The fifth section of this thesis is used to supply

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Or Gardiner, Stephen M. "A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption." *Environmental Values* 15, no. 3 (2006): 397-413. doi:10.3197/096327106778226293. They all make similar arguments on the issues behind institutional inadequacy when trying to solve climate change. Some propose solutions, while other don't.

[5] There is a widespread acknowledgement of the fact that an increase in global temperature of more than 2 degrees Celsius will lead to such a damaging degradation that will lead to dangerous feedback loops, making it impossible to stop the further effects of dangerous climate change. This will, in the end, lead to severely harming consequences for all human beings.

[6] Throughout this paper I will use the definition of judicial activism as described in *Black's Law Dictionary*, which is the: 'philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions. Campbell, Henry. "Black's Law Dictionary." *St Paul Minn: West Publishing Co* (1990), 850.

additional arguments for the moral justness of judicial activism in a general sense. I distinguish the *harm principle* argument, the *international law argument*, the previous examples of *just judicial activism* argument, and the *final resort* argument. I will conclude by arguing that climate change does not only have unique features that call for judicial activism as a solution, but that climate change issues also fit the other arguments for judicial activism in general, further backing up my claim.

This thesis has a twofold purpose: first, to show that judicial activism is a morally just solution in combatting climate change, and second, that the verdict given by the judges in the Urgenda case is morally sound. The aim of this paper can thus best be described as an attempt to show the moral justification of the judicial activism of the judges in the Urgenda case, and thereby making the claim that combatting climate change in fact needs judicial activism, as it is one of the only tools that can help overcome the issues intrinsic to climate change.

1. Urgenda and the Issue of Cimate Change

Throughout the paper the lawsuit of the environmentalist group Urgenda against the Dutch state will be used as a case study of morally just judicial activism, because this provides insights into the way judicial activism can be an alternative way of solving climate change issues. This first section of the paper will explain the reasons behind Urgenda's motivation to sue the Dutch state, thereby uncovering the problematic ways in which climate change issues are being dealt with now. Before going into the details of the case, I will start with some general information.

The Urgenda vs. the State of the Netherlands court case took place on June 24th 2015 at the court of The Hague. The case revolved around Urgenda, who sued the Dutch state for its deficient policies with regard to climate change generally, and the reduction of greenhouse gas (GHG) emission specifically. The court of The Hague ruled that the Dutch state indeed created policies that were insufficient, forcing the government of the Netherlands to make changes to their policies according to the minimum reduction that was agreed upon within the European Union (25% reduction before 2020 compared to 1990 levels).[7] However, the Dutch state is currently in the process of going into appeal, as it does not agree with the verdict.[8] Together

[7] C/09/456689/HA ZA 13-1396, Judgment of 24 June 2015: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>; hereinafter, all paragraph numbers refer to those in this judgment unless otherwise stated. This agreement was not legally binding, so it is not the case that the Dutch state was acting illegally according to European law.

[8] Milieu, Ministerie Van Infrastructuur en. "Cabinet Begins Implementation of Urgenda Ruling But Will File Appeal." News item | Government.nl. September 02, 2015. Accessed May 19, 2017.

with the Dutch government there have been several scholars that have criticized the verdict based on the doctrine of the separation of powers. Their claims mostly rely on the argument that by giving a verdict that dictates specific requirements for policies that need to be created by the government, an infringement on the legislative and executive power has been made by the judiciary.[9] Most of the criticism on the verdict has been based on wrongful judicial activism, because it purposefully conflicts with the way that Montesquieu envisioned the separation of powers as the basis for contemporary democratic states. This may sound appealing at first, but when taking a closer look there is much to be said about the status of the separation of powers doctrine in the Netherlands and on the idea of judicial activism. This criticism will be dealt with in depth in sections four and five.

The Urgenda case is widely noted as one of the most import legal actions against a state, in an endeavor to combat climate change, political inertia, and bad policy making.[10] One would have expected global efforts to reduce GHG emissions ever since the near universal scientific acknowledgement of the detrimental effects of climate change on human well-being. However, this has not been the case and the different nation states have been stuck in a collective action problem. States have so far been unable and unwilling to implement progressive strategies aimed at combatting GHG emissions.[11] This has created a situation of global political inertia[12]: states are reluctant to be on the forefront of combatting climate change as there are lots of short term losses to be taken up by them, such as exploitation by other countries, costs of litigation and enforcement, and the potential loss of a competitive advantage leading to companies removing their factories or headquarters and placing them in countries that do not pose severe environmental restrictions on production. Because of this, environmental NGO's have resorted to litigation as a final means that can be used to overcome the inaction of the executive and legislative powers. Urgenda is one of those NGO's that wishes to use litigation as means to force the Dutch state to act beyond what they are willing to do, thereby saving the Dutch people from the potentially disastrous effects of climate change and hopefully providing an incentive for NGO's in other countries to follow. Before delving into the specifics of the Urgenda vs. the

https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal.

[9] De Boer, N. I. K. "Trias Politica Niet Opofferen voor Ambitieuze Klimaat-Politiek." *Socialisme en Democratie* 73, no. 1 (2016): 40-48.; 40-48. & Bergkamp, Lucas. "A Dutch Court's 'Revolutionary'Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science." *Journal for European Environmental & Planning Law* 12, no. 3-4 (2015): 241-263.

[10] Gestel, R.a.j. Van. "Urgenda: Een Typisch Gevalletje Rechter, Wetgever of Politiek?" *RegelMaat*30, no. 5 (2015): 384-96. Accessed May 7, 2017. doi:10.5553/rm/0920055x2015030005006.

[11] UNEP 2014. The Emissions Gap Report 2014. United Nations Environment Programme (UNEP), Nairobi

[12] Gardiner, Stephen. "A Perfect Moral Storm".

Netherlands court case, I will examine the history of international climate change litigation that eventually led to Urgenda's motivation to sue the Dutch state.

In 2009 the COP decided in the United Nations Framework Convention of Climate Change (UNFCCC) in Copenhagen to aim to limit global temperature rise by no more than two degrees Celsius compared to pre-industrial levels.[13] This has become internationally accepted as the focus for climate policy discourse because a global temperature rise of more than two degrees Celsius is widely acknowledged to lead to devastating global ramifications. Moreover, this has been accepted by many countries to be the basis of their future emission policy in the Cancun Agreements[14], wherein Annex 1 parties (including the Netherlands) agreed to uphold an emission reduction target of 25-40 per cent by 2020, compared to 1990 levels.[15] At first the EU set their target at a reduction of 30% by 2020, but later decided to use the 30% as an incentive to create political will and vowed to reduce its emission by at least 20% and even by 30% if more developed countries were willing to commit themselves to comparable emission reductions.[16] This European decision caused the Netherlands to revise its earlier target of 30% reduction to a target of 14-17 per cent reduction. However, the EU, together with the Netherlands, committed to reducing by 40 per cent by 2030 and 80 per cent by 2050[17]. Additionally, there are many who believe that aiming for a global temperature rise of less than two degrees Celsius requires intensive action before 2020 and that it would be more than four times as expensive to take these measures after 2020 than to take them now.[18]

In November 2013, this obvious reluctance of political institutions to start taking measures to cut down GHG emissions motivated Urgenda to start the lawsuit against the Dutch

[13] Decision 2/CP.15 Copenhagen Accord: Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009; <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.
[14] Decision 1/CMP.6 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session; <http://unfccc.int/documentation/decisions/items/3597.php?such=j&volltext=%22cancun%20agreements%22#beg>.
[15] Lin, Jolene, The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (July 2, 2015). Climate Law (Brill), 2015 Forthcoming; University of Hong Kong Faculty of Law Research Paper No. 2015/021. Available at SSRN: https://ssrn.com/abstract=2626113
[16] European Commission, Letter to the UNFCCC, "Subject: Expression of Willingness to Be Associated With the Copenhagen Accord and Submission of the Quantified Economy-Wide Emissions Reduction Targets for 2020", <http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/europeanunioncphaccord_app1.pdf>.
[17] C/09/456689/HA ZA 13-1396, Judgment of 24 June 2015: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>; hereinafter, all paragraph numbers refer to those in this judgment unless otherwise stated.
[18] *Redrawing the Energy-Climate Map: World Energy Outlook Special Report*. Paris: OECD/IEA, 2013.

state, for their inadequate climate mitigation measures.[19] The legal dispute that they started specifically concerned the speed at which the Dutch government proposed to reduce GHG emissions up until 2020, which Urgenda found insufficient. When looking at the international climate litigation and the scientific consensus on the potential dangers of climate change and the urgent need for adequate measures and policies, Urgenda did not think that the Netherlands was putting in their best effort. In fact, Urgenda found that if the Netherlands was going to continue in a similar vein, it would become impossible to be entirely fossil fuel free by 2050.[20] Urgenda provided three grounds on which the Dutch state could be attacked with regards to its GHG reduction policy:

1. The Netherlands failed to fulfill its duty to protect and improve the country's environment and its livability pursuant to article 21 of the Dutch Constitution.[21]
2. Article 2 (right to life) and article 8 (right to respect for private and family life) of the European Convention on Human Rights imposed a positive duty on the Netherlands to take measures to guarantee these rights which are threatened by climate change.
3. The Netherlands owed Urgenda and the rest of Dutch society a duty of care, the breach of which violated article 6:162 of the Dutch civil code.[22]

2. The Unique Conditions of Climate Change

Before discussing the verdict of the court and my arguments for why the court's rulings specifically are morally justified, I will examine the unique features of climate change issues and the effects they have on the possibility for solving these issues. In fact, when looking at these unique characteristics it becomes clear that climate change should be seen as a unique instance of the tragedy of the commons[23], which requires innovation to solve it, as regular political means are unable to cope with the unique conditions of this tragedy of the commons. The features of climate change and the unique problems they create are taken from Gardiners *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral*

[19] Urgenda, 'The Urgenda Climate Case Against the Dutch Government', <www.urgenda.nl/en/climatecase/>. Lin, Jolene, The First Successful Climate Negligence Case, 5.
[20] "The Urgenda Climate Case Against the Dutch Government." Naar de Nederlandse website. Accessed May 18, 2017. http://www.urgenda.nl/en/climate-case/.
[21] Article 21 states that: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment".
[22] Lin, Jolene, The First Successful Climate Negligence Case, 5-6
[23] For more on tragedies of the commons see: Ostrom, Elinor. "Tragedy of the Commons." *The New Palgrave Dictionary of Economics* (2008): 3573-3576. Schmidtz, David. "Tragedy of the Commons." *The International Encyclopedia of Ethics* (2003). And Hardin, Garrett. "The Tragedy of the Commons∗." *Journal of Natural Resources Policy Research* 1, no. 3 (2009): 243-253.

Corruption [24], where he argues that these same features "pose substantial obstacles to our ability to make the hard choices necessary to address it [the problems that follow from climate change]".[25] He claims that there is a convergence of three moral storms that make up this 'perfect moral storm'. Eventually, he provides insight into the special features of climate change that make up three distinct groups of problems, or 'moral storms', that lead to moral corruption. The convergence of these three moral storms lead to an environment in which it becomes extremely hard to act morally, hence there being a 'perfect moral storm' in the case of climate change. The first two storms rely on three important characteristics of climate change, whereas the latter relies on contemporary theoretical incompetence. He names his three storms the *global*, the *intergenerational*, and the *theoretical* storm. They will be dealt with separately, after which I will argue that they are adequate reasons for the moral rightness of a more activist judiciary when confronted with the possibility to help in the endeavor of combatting climate change. The first two storms rely on three characteristics of climate change problems: the dispersion of causes and effects; the fragmentation of agency; and institutional inadequacy.

The First Moral Storm: The Global Storm. The Global storm appears when the above characteristics are seen from a spatial perspective. The dispersion of causes and effects are easy to understand, because the emission of GHG anywhere in the world has global effects. This makes it hard to pinpoint the precise contribution that is being made per person and the exact effects of that contribution. The amount of GHG present in the upper layer of the atmosphere simply increases and the effects of it are felt everywhere in the world, making it a truly global issue. The second feature points towards the idea that climate change is caused by an extensive amount of institutions and individuals worldwide. Although unified in their contribution to the problem, they lack a central governing agency, which complicates the possibility for universal cooperation and thus the capability to respond to the problem. Gardiner argues that this problem is best explained in terms of a prisoner's dilemma (PD)[26] or a tragedy of the commons.[27] He explains this problem by providing the following example:

> Suppose that a number of distinct agents are trying to decide whether or not to engage in a polluting activity, and that their situation is characterized by the following two claims:

[24] I use Gardiners paper as my main source for this part of the thesis because he is widely acclaimed to be one of the leading experts in the field of climate change and environmental ethics.
[25] Gardiner, Stephen. "A Perfect Moral Storm", 398
[26] For a thorough overview of the idea of the prisoner's dilemma with insightful examples, see Barron, Emmanual N. *Game Theory: An Introduction*. Vol. 2. John Wiley & Sons, 2013.
[27] Hardin, Garrett. 1968. 'Tragedy of the Commons'. Science 162: 1243-8.

(PD1) It is collectively rational to cooperate and restrict overall pollution: each agent prefers the outcome produced by everyone restricting their individual pollution over the outcome produced by no one doing so.

(PD2) It is individually rational not to restrict one's own pollution: when each agent has the power to decide whether or not she will restrict her pollution, each (rationally) prefers not to do so, whatever the others do.[28]

In this example, there is an obvious tension; on the one hand, every agent wants to mutually limit their pollution to safeguard the existence of the earth, while on the other hand every agent wants to free ride on the limitations put in place by the other agents -- a classical instance of a tragedy of the commons. The third feature, institutional inadequacy, further complicates this tragedy of the commons, limiting the possibilities for solving climate change. Introducing enforceable penalties for free riding can solve regular tragedies of the commons or prisoner's dilemmas. However, this cannot be done with respect to climate change, as there is no effective international institution capable of governing and enforcing regulations worldwide. It thus seems as if climate change is a tragedy of the commons that can, by no means, be solved in the traditional way. Gardiner takes this argument further by claiming that although a system of global governance still makes it possible for motivated countries to join hands and put these mutual restrictions in place, there are still more arguments why even this is unlikely. He adds that there is scientific uncertainty as to the exact contribution and amount of effects on a national level. Additionally, countries might try to be relatively better off than the countries they joined hands with, further complicating the game theoretic situation. Moreover, the source of anthropogenic climate change is deeply embedded in contemporary society. This means that trying to solve it involves critically looking at what society can do without. In other words, there is a need to question the hegemonic powers that are currently in place as these have structured society in such a way that brings about the current levels of GHG emissions. This further implicates solving climate change.[29]

The global storm argument shows why there is a high chance that the problem of climate change will not be solved in the international arena. There are simply too many features of the problem that work against the creation of a global solution. This adds to the complexity of solving climate change through the regular means of solving international problems by national and political means. The fact that climate change can be seen as an international tragedy of the commons embodying a myriad of ways that complicate solving this tragedy in an ordinary

[28] Gardiner, Stephen. "A Perfect Moral Storm", 400
[29] Ibid., 401-402

manner, this issue calls for a different and innovative approach to come to a solution. Allowing judges to become more active in their verdicts when deciding on cases initiated by environmental activists who want to force the government to change their climate policies, seems to overcome all the difficulties that arise from the global storm features of climate change. It is a way in which, unilaterally, domestic courts *can* enforce specific measures to be taken by the government in combatting climate change, overcoming much of the problems associated with the prisoner's. So, judicial activism provides an alternative that can deal with the issues associated with the global storm argument. Additionally, once there have been some court rulings, based on an activist stance of the judges, that makes the implementation of a specific target of GHG reduction legally enforceable on the government of a country; a precedent is created, making it easier for courts of other countries to follow. Because of this, I argue that judicial activism in the pursuit of combating climate change can be morally justified. It overcomes the difficulties created by the global features of the problem and brings back an element of enforceability, making sure that the prisoner's dilemma can be solved. Of course, there are some valid points of criticism to be given against judicial activism. Those points are discussed in the fourth section of this paper. What I am trying to do here is to point out that the issues of climate change have unique features that can be overcome by judicial activism. One issue that judicial activism does not overcome, however, is the fact that there is scientific uncertainty, since the judiciary is not capable nor allowed to conduct research on its own. So, in this respect, it is also difficult for a court to decide on the precise measures or policies that need to be implemented. Even judicial activism is not fully able to tackle all the issues unique to climate change following from the first moral storm, but it remains a considerable alternative solution.

The Second Moral Storm: The Intergenerational Storm. Gardiners second storm, the intergenerational storm, also uses the three features of the climate change problem that have been provided in the previous paragraph. This storm comes into existence when looking at these features from a temporal perspective. Considering the first feature (the dispersion of causes and effects), Gardiner claims that the effects of anthropogenic climate change take time before they become visible. The reasons for this is twofold: the effects occur long before they are fully realized (think about sea level rise and the rise of global temperature), and because the main GHG emitted by human beings, carbon dioxide, can spend a very long time in the upper

atmosphere.[30] This last fact has three important aspects. First, "climate change is a resilient problem".[31] There is no way, yet, to reverse the upward trend of carbon dioxide accumulation in the upper atmosphere. "Second, climate change impacts are *seriously backloaded* [original emphasis]".[32] This means that we are not currently experiencing the effects of our GHG emission, but the effects of past emissions. It is uncertain from what exact time in the past we are currently experiencing the effects. And third, we do not currently know the full effects of the greenhouse gasses that we have emitted up until this point. This means that climate change is a severely delayed process, which also leads to several problems. First, there are issues with the resilience of climate change, which limits the possibilities and abilities to come up with solutions to the issue. Second, it imposes epistemic difficulties, especially for political actors. On the one hand, the motivation to act is undermined by an inability to understand the causal link between the emission of GHGs and their effects. On the other hand, when the effects are realized and political players are willing to act, there has already been a commitment to much more change. Third, political will to act is further undermined by the fact that politics revolves in relatively short cycles. This makes it significantly harder for political institutions to deal with long-term deferential issues. Consequently, this lack of will to act causes a situation in which the negative effects are passed on to the next generation.

Additionally, there is an important issue to be uncovered when looking at the temporal fragmentation of agency, the second feature of climate change. Again, a prisoner's dilemma situation will occur. However, the two agents to the dilemma are now the current and the next generation. The paradox still is that it is collectively rational to restrict pollution, but that it is individually rational not to. This time around, however, no institution can address it adequately. Moreover, the problem becomes reiterated when no solution is found, because then no generation will limit their pollution and they will all push the problem onto the next generation, thereby leading to kind of domino effect. Furthermore, each generation does not merely pass on the problem, but adds to it, making matters worse and the problem even more challenging to solve. Every generation that does not solve the issues increases the burden of transitioning, as policies to restrict emissions need to become ever more rigorous when matters become worse and worse every year.[33]

[30] For more information on both claims see Intergovernmental Panel on Climate Change (IPCC). 2001b. Summary for Policymak- ers. Climate Change 2001 : Impacts, Adaptation, and Vulnerability. Cambridge: Cambridge University Press. Available at <www.ipcc.ch>.
[31] Gardiner, Stephen. "A Perfect Moral Storm", 403
[32] Ibid.
[33] Ibid., 404 - 407

Gardiner makes two additional arguments about the increase of burdens and harm on future generations, but they can be omitted here because the point is clear: a temporal view contextualizes climate change as an issue that is even more complex then previously thought. Additionally, these multiple facets of the intergenerational storm expose our contemporary institutional inadequacy to solve the problem of climate change even further.

The intergenerational tragedy of the commons is a kind of prisoner's dilemma resistant to the regular way of solving these issues.[34] It is impossible to include future generations in an institution that penalizes behavior, internationally, which brings about a situation in which climate change issues become worse for the generations to come. Future generations can neither control nor regulate the acts of those that live today. In fact, Gardiners second storm contributes to the urgent need for an alternative way of creating solutions that can solve climate change. If there are no institutional agencies that can exist or can be created in order to enforce the policies that need to be implemented for climate change to be combatted, because an intergenerational view cannot be included, there is only room for solutions from without the regular political channels.

An argument similar to the one provided for the way in which the judiciary can overcome the global storm, can be provided here. Unique to the intergenerational storm, however, is the clear fact that matters will only become worse and harder to solve as a result of inaction, leading to a domino effect in which subsequent generations will reiterate the problem. This can only be overcome when a generation starts with making changes and implementing policies that will help solve the issue, which is not being done by regular political means because of the features of the problem. This is where judicial activism can come in. It is the only institution that can implement rules that have some possibility of enforcement, which is necessary to overcome the features specific to this intergenerational tragedy of the commons. There may be widespread institutional inadequacy to overcome the issues of climate change because of the unique features of the problem, however, the institution of the judiciary is the only one that can be used in a different way in order to overcome this institutional inadequacy. Because the judiciary appears to present an opportunity for overcoming the unique difficulties of climate change issues in the face of Gardiners intergenerational storm, judicial activism with the aim of solving climate change issues is morally justified. At least when it is being done as a result of the actions of individual(s).

[34] These regular means are further elaborated on in Barron, Emmanual N. *Game Theory: An Introduction*.

The Third Moral Storm: The Theoretical Storm. The final storm Gardiner addresses is the theoretical storm. He does not provide very detailed information on this storm, because he prefers to spend the rest of the paper on the moral corruption that flows from the convergence of these three storms. What this storm captures is our theoretical incapability of dealing with long-term problems. Climate change entails problems "such as scientific uncertainty, intergenerational equity, contingent persons, nonhuman animals and nature … and more".[35] These issues are problematic to such an extent that our current understanding and theoretical capacities are ill-equipped to solve them. In other words, no theories on how to solve these kinds of issues work well enough to provide guidelines that are strong enough. The fact remains, however, that there is international acknowledgement of the fact that something needs to be done to fight climate change. Again, this works in favor of morally justifying a more activist judiciary when it comes to lawsuits concerning climate change. The heart of the matter is that something needs to be done and that the judiciary can create national obligations, when acting in a more activist way when (groups of) individual(s) sue the government for inadequate policies in the endeavor of solving climate change. All by all, looking at Gardiners three moral storms that flow from the unique features of climate change, the pressing need for an alternative approach to solving it becomes prevalent. Judicial activism seems to be a well-equipped candidate, in particular because it is capable of putting in place enforceable regulations.

3. The legal situation

In this third section I will examine the final verdict of the court of The Hague. The aim of this section is to show how judicial activism was exerted by the court and to set the stage for critics of the verdict.

The verdict consists of several parts. First, a comment on the stance of the court on climate change was made. Based on the results of the research of IPCC and the fact that these results have been accepted by the countries that aligned themselves with the UN climate treaty, including the Netherlands, the court decided that the Dutch government was obliged to aim at limiting a global temperature rise to no more than 2 degrees Celsius. The court, thus, thinks that dangerous climate change will be present when no additional effort to reduce GHG emissions is made.[36] Second, the court commented on the possible breach of article 21 of the Dutch Constitution, which places a duty of care on the government. Although the court noticed the

[35] Gardiner, Stephen. "A Perfect Moral Storm", 407.
[36] Cox, Roger. "Klimaat, Veiligheid en het Recht." In *Groene Criminologie en Veiligheidszorg* , 197-213. 38th ed. Vol. 1. Apeldoorn: Maklu-Uitgevers.

fact that the government has discretionary power, it also argued that this is not unlimited and that certain restraints can, and should, be provided. So, the court ruled that more care should be given when "there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment" and that "the State has the obligation to protect its citizens from it by taking appropriate and effective measures."[37] However, how this care should be provided would still be decided by the State. Third, the court explained why international law and European union law were relevant to this case. Article 93 states that there is a direct effect of international law in the Netherlands, but that courts decide whether a specific treaty has this effect within the desired meaning of this article.[38] But this does not mean that international or EU law directly puts obligations on states towards their citizens. However, the treaty on international climate change that has been signed by the Dutch state has a 'reflexive' effect in national law.[39] This means that, although it does not put direct obligations onto the Dutch state, it is an important framework that should be used in the creation of policies. In other words, the state of the Netherlands cannot deviate completely from what has been asserted in international law. Fourth, the court stated that articles 2 and 8 of the ECHR were not directly violated, because Urgenda is a legal entity, which means that it does not have human rights. An individual could have sued the state for a violation of her human rights, because she would be a real and not a fictional legal entity. However, these two articles are relevant in the final decision of the court in their interpretation of the standard of care in the negligence claim, which will be discussed next.

The final comment is on the claim of negligence and consists of multiple parts. The first part is the duty of care that the Dutch state has according to article 6:162 of the Dutch Civil Code. This article states that "A tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour."[40] If a court wants to make a decision on the duty of care of party A towards part B they need to consider what this proper social conduct requires of party A. In deciding this, the Dutch courts make use of the criteria put forward in the landmark 'cellar-hatch ruling' (*Kelderluik-arrest).*[41] These criteria can be described briefly as: "How apparent is the danger? How great is the chance that the danger will manifest itself? How serious is the

[37] Lin, Jolene, The First Successful Climate Negligence Case, 7
[38] Ibid.
[39] Ibid., 9
[40] Ibid., 10
[41] Ibid.

danger? And how costly or objectionable would it be for the defendant to take the necessary preventive measures?"[42] From these criteria the court developed an array of concerns that would be used to determine whether the Dutch state owed a duty of care to Urgenda:

(i) the nature and extent of the damage ensuing from climate change;

(ii) the knowledge and foreseeability of this damage;

(iii) the chance that hazardous climate change will occur;

(iv) the nature of the acts (or omissions) of the State;

(v) the onerousness of taking precautionary measures; and

(vi) the discretion of the State to execute its public duties...[43]

With regards to (i) and (iii) the court used and accepted a wide variety of internationally recognized sources on climate change, and they found that there was indeed a high chance for dangerous climate change that could lead to serious international harm. Concerning the second consideration (ii), the state found that the Netherlands was aware of the potential damage that can follow global warming of more than two degrees Celsius.[44] Furthermore, the court found that the Dutch state was involved in the emission of GHG and thus acted in way that contributed to the issue, thereby covering point (iv).[45] To comment on the fifth point the court considered both technical feasibility and cost-effectiveness of precautionary measures. According to the court, mitigation measures are the only and most effective way of dealing with climate change. Moreover, they stated that it would be more cost-effective in the long run to mitigate more now. Additionally, the court determined that implementing more ambitious climate mitigation measures would be a feasible thing to do, as the Dutch state had been planning to do so before 2010. During this time, the aim of the Dutch government was to reduce emission by 30% before 2020 as compared to pre-industrial levels, which were afterwards lowered to 16%, due to considerations about cost-efficiency and competitive advantages.[46]

The second part of the negligence claim was a comment by the court on some additional arguments that were put forward by the Dutch state. The first of these is the 'drop in the ocean' argument, used by the state in its defense, which entailed that the Netherlands' contribution to climate change is so small that it is negligible, thus leading to less obligations to reduce GHG emissions. The court determined that, although the Netherlands only contributes to 0.5% of the worldwide emissions, they are still compelled to do as much as they can because climate change

[42] Ibid.
[43] Para. 4.63
[44] Para. 4.65
[45] Para. 4.66
[46] Para. 4.70

is a global problem, because they do contribute to the issue of climate change. Getting rid of this 0.5% contribution already takes tremendous efforts. Moreover, the per capita emission of Dutch citizens is among the highest in the world, making this argument very weak. [47] Additionally, the court determined that two other arguments of the Dutch state, that carbon leakage would take place at a higher reduction rate and that there would be competitive concerns, were invalid as there was no proof of the former and no information specific enough to back up the latter.[48]

After this the court concluded that the standard of care would be to stay below the 450-ppm threshold that would lead to a rise of more than two degrees Celsius (which was decided on by research performed by the IPCC).[49] The court then determined that there is a breach of the duty to care, since the measures put forward by the state are inadequate to safeguard a rise of no more than two degrees Celsius.[50] After determining this, the court needed to demonstrate a causal link between the breach of the duty to care of party A and the injury that is caused by it on party B, in order to show that the Dutch state was indeed guilty of the charge. However, they did not do this, because the state of the Netherlands could not be shown to cause the injury of Urgenda, since climate change is caused by everyone globally. Because of this, the court decided to use the *Kalimijnen* case as an example, in order to nevertheless establish the guilt of the Dutch state.

In this case, multiple parties had polluted a river. All parties individually did not contribute enough to the pollution to lead to the destructiveness high amount of pollution present in the river. In other words, only the combined pollution led to the destruction. In this case, it was decided that every party was liable for their share, even though no direct causal link could be established between the acts of part A and the harm done to party B. In a similar way did the court apply this logic to the Urgenda case, and ruled that, because there was a cumulative contribution to the issue of climate change, all parties should be held liable for their share, including the Netherlands.[51] A final thing that is important to note is that the court did not comment on the separation of powers that the Dutch state brought up as in their defense, arguing that the court could not force the government to implement certain policies as this would not be

[47] Para. 4.78 & 4.79
[48] Para. 4.80 & 4.81; 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Policy Framework for Climate and Energy in the period from 2020 to 2030', <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN>.
[49] Para. 4.83
[50] Para. 4.85
[51] Para. 4.90

justified per the trias politica doctrine.[52] In the end, the court ruled that the state was guilty and that they needed to implement policies that would lead to an emission reduction of at least 25% by 2020 (as compared to 1990 levels) and to pay Urgenda's costs.[53] So, although the court does not claim to overrule the separation of powers doctrine, it did implement a benchmark reduction which had to be attained.

4. Is This Verdict Justified?

Let me take stock of the various counterarguments that authors have brought up against the moral justification of this verdict. The main issue that is taken with the final verdict of the Court of The Hague is the fact that it is regarded as a breach of the separation of powers doctrine, because the government is forced to accept different emission reduction targets by the judiciary power.[54] To understand this argument, it is important to firstly look at the doctrine of the separation of powers and the way it is applied in the Dutch legal system, after which the counterargument to the validity of the verdict will become much clearer.

Montesquieu's doctrine of the separation of powers is quite straightforward: to safeguard the inhabitants of a country from the abuse of power that may follow from the central organization of a country, this power needs to be divided into three – the legislative, the executive, and the judiciary power. These three branches of power all hold their own responsibility in upholding the democratic state and make sure that there cannot be one person or power to gain the upper hand and become a tyrannical force. So, the separation of powers is a model for the governance of a state, in which the state fulfills specific functions that are more difficult to be fulfilled by individuals alone because of collective action problems that are prone to occur in an unregulated 'state-less' society. Additionally, Montesquieu wanted to create a theory that would provide a viable and fairer alternative to the feudalist structure present in France when he was alive.[55] His ideas are central to an extensive canon of political philosophy that dates back to Aristotle and Plato and include authors such as Locke, Machiavelli, Madison, de Tocqueville, and Marx. According to Witteveen, however, even though there is such a substantive variety of literature that has influenced and is being influenced by Montesquieu, it is unclear if Montesquieu argued for a strict separation of powers or a more dynamic separation

[52] Para. 4.100
[53] Para. 5.1
[54] See for example: De Boer, N. I. K. "Trias Politica Niet Opofferen voor Ambitieuze Klimaat-Politiek." *Socialisme en Democratie* 73, no. 1 (2016): 40-48.; Bergkamp, Lucas. "A Dutch Court's 'Revolutionary'Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science." *Journal for European Environmental & Planning Law* 12, no. 3-4 (2015): 241-263.
[55] Montesquiedeu, Charles Secondat. "The spirit of the laws." (1989).

of powers.[56] This is an essential feature of the tripartite system that needs to be understood with regards to the Dutch legal system before a claim can be made on the moral rightness of the final verdict of the court of The Hague.

The strict version of the division of powers calls for a definitive distinction between the three powers, making sure that there can be nearly no influence between the powers. When critics of the verdict see the application of the separation of powers this strictly, it becomes easy to understand why they would oppose the decision. The argument of those would be that the judiciary has no business in legislating, since this is the business of politicians who are elected by the public, in a democratic manner. However, only in the United States of America the separation of powers seems to be nearly complete.[57] Although there is no strict consensus, the separation of powers seems to be on the more dynamic side of the spectrum in the Netherlands, and this will be assumed throughout this essay.[58] This means that the discussion is not about a breach of the doctrine of the separation of powers, but about the precise extent to which the judiciary may interfere with the legislative power.[59]

Dennis Broeder most adequately explains this interpretation of the application of the tripartite system in the Netherlands. He argues that the position of judges constantly shifts between judicial activism and judicial restraint, because they have the obligation to interpret the law and most of the times it is not completely clear how this should be done. This means that there is an element of freedom in being a judge. When a judge becomes more judicially activist she will move more into the territory of the legislator, but a judge who only acts judicially restraint (whether by force or by choice) will experience an infringement on the freedom that they need to execute their jobs in the best way possible and thereby experience the legislator taking over some of their judicial power. In other words, there is a constant struggle of deciding the extent to which judges should make use of their freedom.[60]

Obviously, critics of the verdict would then argue that the court of The Hague has taken their judiciary power too far in their decision. In the literature, this argument is made in several ways. Nik de Boer, for instance, argues that the judges should have remained on the

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[56] Witteveen, Willem Johannes. *Evenwicht van machten*. Zwolle: WEJ Tjeenk Willink, 1991.

[57] Koopmans, Thijmen. *Rechter en Politiek in de Verenigde Staten*. No. 3. Koninklijke Nederlandse Akademie van Wetenschappen, 2002.

[58] De Boer, N. I. K. "Trias Politica Niet Opofferen voor Ambitieuze Klimaat-Politiek"., 44 & Prins, Corien JEJ, Henk Griffioen, Petra Jonkers, Meike Bokhorst, and Marijn Sax. *Speelruimte voor Transparantere Rechtspraak*. Edited by Dionysius Wilhelmus Johnnes Broeders. Amsterdam University Press, 2013.

[59] Bergkamp, Lucas. "A Dutch Court's 'Revolutionary'Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science." *Journal for European Environmental & Planning Law* 12, no. 3-4 (2015): 241-263.

[60] & Prins, Corien JEJ., et al., *Speelruimte voor Transparantere Rechtspraak*, p. 376

conservative side of their judicial freedom to interpret the legal sources because the lawsuit concerned a controversial social issue and considering the lack of real legal norms to provided support for their decision. According to de Boer, these conditions inevitably meant that the judges were pushed into the direction of judicial activism since they did not have solid guidelines for deciding the case. Because of this, they should have remained reserved in their will to make even more use of their possibility for judicial activism and should have limited the extent of judiciary power used. Additionally, he deems the judges to enjoy partly democratic legitimization, which he argues is another reason why the judges need to leave the task to the fully democratically justified legislator. Put differently, there is a difference in democratic legitimization between judges and legislator, making the latter the better party to solve disputes of this kind. Finally, he also considers the fact that there are many individuals and parties that have interests in the results of this case, making the judiciary not the right players to solve this multifaceted issue because it needs multiple perspectives and debates to come to the right conclusion.[61] Lucas Bergkamp, also a critic of the verdict by the court of The Hague, adds to these allegations that the court has taken their power too far because they have not regarded the potential backlash of making a precedent that could open the door for social justice litigation. According to him, this verdict may very well lead to a dangerous situation where it would become easier to sue the state for the policies that they make. So, he argues that the potential harm that could follow from this verdict is a valid argument against the legitimacy of this verdict. He even questions the extent to which the court was aware of the precedent they were creating for the potential increase of social justice litigation.[62]

These arguments are all relevant and important because they signify the essential features of the court's verdict that could make the extent of the court's use of judiciary power immoral. In reaction to the first part of de Boer's first argument, there is a straightforward rebuttal: why would a controversial social issue necessarily lead to a situation where judges need to limit the extent of the judiciary freedom used? A clear example where this was not the case is the segregation laws in the United States. If it weren't for years and years of judicial activism and making use of every tool they had, those laws could still be in place. In hindsight, it makes perfect sense that the judiciary power pushed the limits of their power and utilized every bit of freedom to fight for constitutional equality. Perhaps climate change is a similar problem that precisely needs powers from outside the litigation to solve it. This will be dealt

[61] de Boer, N. "Trias Politica Niet Opofferen voor Ambitieuze Klimaatpolitiek." *Socialisme en Democratie* 73, no. 1 (2016): 40-48.
[62] Bergkamp, Lucas. "A Dutch Court's 'Revolutionary'Climate Policy Judgment", p. 247

with more in depth in the fifth section of this thesis. The second part concerns the absence of clear legal norms and guidelines. Again, I want to question the reason why this would mean that the judiciary needs to act in a certain way. Does it not mean that court cases like these are precisely the reason why the judiciary power enjoys the freedoms they have? In the end, it is up to the court to decide how to deal with this and when there are no set guidelines or legal norms, they can – are even obliged to – deal with it and come up with a verdict. Perhaps the judges were pushed to provide a verdict on the more judicially activist side of the spectrum by all these different factors, but again, that does not mean that they should stop there. One could also look at every case as having a different set of conditions. The judges may then respond and come up with a verdict, which can be done in a more activist or restrained way. In fact, de Boer contradicts himself by claiming that the judges should remain on the conservative side because of the conditions of the case and at the same time claiming that there are no clear guidelines nor legal norms for this case. If there are no guidelines than he also cannot argue that the judges should make use of their powers in a specific way. Put bluntly, he has no grounded basis to make this claim on. Considering his second argument, there is a very strong refutation. Of course, there is a difference between the democratic legitimization of litigators and judges, the former being direct and the latter being indirect. However, this does not mean that there are issues that may only be solved by the one and not by the other because their legitimization comes into existence differently. The fact that litigators are chosen by the people, does not infer a right to them that overrules the rights of the judiciary. In fact, the judiciary is the only power that can guarantee the rule of law[63], which is one of the most important facets of a democratic state. So, the way that the judiciary obtains its legitimacy is indeed different, but this difference does not make the judiciary inferior to the litigators when it comes to solving issues. De Boer's final argument can be dealt with very briefly; a court case against the state will always mean that there are a lot of individuals and parties who have an interest in the outcomes. Nonetheless, the judiciary is sometimes needed to judge the legality of the acts of a state thus making them the sole party that can adequately address the issue.

Lucas Bergkamp's criticism revolves around the harm principle[64], as he claims that opening the door for more social justice litigation would be a damaging thing. He does not elaborate much on this argument, however, one can understand his fear. If this sole verdict leads

[63] Very briefly explained, the rule of law entails that nothing is above the law, that everyone is subject to the law and that everyone is treated as equal under the law. In other words, nobody can escape the rules put down in the laws of a country.

[64] This principle will be dealt with more in-depth in the fifth section. For now it is important to understand that the harm principles basically states that harm should be prevented whenever it is possible.

to a myriad of lawsuits against state made policies, it could undermine the whole idea of a separation of power and indeed to dangerous verdicts that legally oblige the litigators to make certain policies. There is one thing he overestimates, however, and that is the fact that the court case and the verdict concern climate change and nothing else than climate change. And although the thought that widespread social justice litigation would do more harm than good is understandable, the same is not true for an increase in social justice litigation with regards to climate change specifically. There has been international inertia when it comes to solving climate change, although it has been widely considered to be the prime issue for the decades to come.[65] So if this court case would lead to an increase in the amount of environmentally loaded social justice litigation, I would not call that a harmful effect. In fact, that would be a good thing, as it may help to save this world from its impending doom, as some would call it. If the assumption that the Netherlands has a dynamic form of the division of powers is accepted, then no valid arguments can be made against the validity of the extent to which the judiciary used their power and freedom. In the next part I will put forward my arguments why the way and the extent to which the judiciary used their power is morally right. That, in fact, it is one of the best things that could have happened for the global battle against climate change and the aim of reducing GHG gasses by radical amount over the next thirty years.

5. Why the Verdict *is* Justified

In the next part of this essay four arguments will be spelled out to show when it is morally right for the judiciary to push their use of power and freedom as far as they can in making their final verdict. Using John Stuart Mill's harm principle, which he articulated in his book *On Liberty*, the first argument will be made. Second, an argument will be made that is mainly based on the obligations that are created when international treaties are signed and ratified in a country. Third, an argument will be made by looking at other major social issues that needed a solution from social justice litigation, such as slavery, discrimination and woman's rights. Finally, an argument will be made in which litigation is proposed as the final means to solve climate change and the dangerous global consequences that it most likely will produce.

The Harm Principle Argument. To start off with the first argument it is essential to understand what Mill's harm principle is about. In his 1859 book *On Liberty,* Mill discusses the

[65] See, for example: Decision 2/CP.15 Copenhagen Accord: Report of the Conference of the Parties on its fifteenth session, which shows the global political will and attitude, expressed in an international law context, towards climate change.

nature of and the extent to which individuals and society may legitimately power or force.[66] His main conclusion is of a utilitarian nature, because he claims that power can only be exercised over anyone against their will when this will prevent harm being caused to others. In other words, others may only limit actions when harm can be prevented.[67] Although there has been a lot of critique on utilitarianism[68] it makes sense to accept the fact that limiting actions of individuals and parties that cause harm to others is a good thing. And additionally changing certain behavior into behavior that would lead to less harm to others is also a good thing, especially when looking from a policy perspective where compromises are made daily.

If there is a policy made by the state that will have deteriorating consequences on the lives of the citizens of that nation state one should ask himself whether this harm could be minimized. Because if there is a viable alternative that would bring about less harm, taking into considerations the multifaceted ways in which this alternative may bring about a different set of consequences, it would be straightforward for the country to implement this alternative policy. Choosing for the alternative course of action would even make sense when there is a chance that it will bring about a situation where less harm if being caused and at the very least bring about the same consequences as the other policy. In other words, the government of a country should always choose for the policy that will have the highest chance of leading to the best consequences with the least amount of harm. When it is obvious that a government is not doing this, it would be right for the judiciary to take this into consideration when it is examining this specific policy following a lawsuit against the state. Of course, there can be valid reasons to choose for a policy that seems to have consequences that bring about more harm, so it does not mean that the judges have the final say in what policy should be implemented by the government. It does, however, show that the judges should have influence on some basic requirements that policies need to adhere to, when it is obvious that some changes will lead to a better outcome.

Additionally, when looking from a contractualist perspective, there is no viable excuse to choose the option that may bring about the most potential harm. According to Scanlon, one cannot reasonably reject a principle when the burdens on you as a person are less than the burden posed on others for all other alternatives. He puts great emphasis on the human capacity to assess reason and justification, and bases his claim on this assumption. In other words, human

[66] Mill, John Stuart. "On Liberty." In *A Selection of his Works*, pp. 1-147. Macmillan Education UK, 1966.
[67] Ibid., 3
[68] See for instance: Williams, Bernard Arthur Owen. "Consequentialism and Integrity." In *Utilitarianism: For and Against*, 82-118. Cambridge: Cambridge University Press, 1973.

beings are capable of examining different reasons and justifications for specific acts and, when alternatives to the rejection of one of those acts put more burdens on others than the act that is being objected to puts on her who is objecting, there is no reason to act in an alternative way.[69] So, according to contractualism, there is a reason to object to policy A that has at least one alternative B that will bring about less harm or burden onto others than policy A would do. In this sense it would be a morally right thing to change policy A and replace it with the best possible alternative that has no reasonable objections to it, policy B. When this is the case, it is morally right for the judges to decide that the policy implemented by the government should be changed into one that aims for more GHG reduction and to act on the more activist side of the spectrum because it is the better option and it will bring about less potential harm in the future.

Finally, one can examine the aim of government action considering the harm principle. It is widely accepted that the core function of the state is to provide public goods to its citizens. Jonathan Anomaly argues that this idea, which comes from moral philosopher Adam Smith, has been anticipated on by both Thomas Hobbes and David Hume and that it is one of the best ways to describe the function of government.[70] After explaining the history of this idea, he comes up with a list of seven questions that should be asked when confronted with policies that produce public goods. Subsequently, he explains these questions, shows their importance in the creation of public goods and argues that it is extremely hard for the government to answer these questions in a way that is adequate and that provides insights into the reasons why these public goods are important, or should be implemented. He concludes that public goods creation through policy is a difficult enterprise to do well, because there is no mechanism that directly links the power of individuals to influence the range of public goods provided and what policy makers aim for. So, it is important for the government to make well-informed decisions, based on the demand for and consequences of the public goods in question.[71] This is precisely the point where an argument for judicial activism can be made, because the difficulty of making this well-informed decision makes government failure a probably consequence. When this happens, more harm can be caused then necessary and there are no institutions or mechanisms to rectify the mistakes that are made, except for the litigators and executives themselves. This is where judicial activism becomes a worthy and morally right possibility for correcting the situation.

[69] Scanlon, Thomas M. "Contractualism and Utilitarianism." *Utilitarianism and Beyond* 103 (1982): 110.
[70] Anomaly, Jonathan. "Public Goods and Government Action." *Politics, Philosophy & Economics* 14, no. 2 (2015): 109-128.
[71] Ibid., 123

The Violation of Intergovernmental Morality. A second argument comes from looking at international law. International law is the only intergovernmental tool that currently exists. It is used to overcome international collective action problems, solve global problems and create a world at peace. However, due to its dispersed nature and lack of enforcing agents, international law is mainly reliant on promises, mutual self-interest, and reciprocity.[72] Although there is widespread disagreement on the way that international law is best described, for this argument I will use John Austin's description of international law as 'positive morality' that is somewhat binding on states but as a matter of global morality and not as law per se.[73] In other words, I understand international law not as law as we know it, but as softer, more dynamic and less cut and clear. When international law is regarded from this perspective, intergovernmental morality (or near global morality) is derived from international agreements that are signed and ratified by state officials, making all states that are part of the convention or treaty part of the morality that follows from this legal document. One could say that acting in a way that does not comply with the morality derived from international law is immoral, as it is a breach of self-made moral norms that have been officially accepted. So, immoral behavior of litigators can be seen when they create policies that do not adhere or fully adhere to the moral norms accepted in international law. An essential requirement for this is to become an immoral act is that the citizens of a state must first agree with the morality that follows from the international documents signed and ratified. When litigators breach the morality from international law, there should be a possibility to fight this. However, no institutions capable or allowed to do this exist. In this sense, it would be moral for the judiciary to make as much use of their power and freedom to rectify the immoral behavior of the government officials who are litigating contrary to the international morality. When a state aligns itself within the international community to strive for specific ideals, it should do everything in its power to uphold these ideals. When someone who is part of a branch of the separation of powers is seen doing something that works contrary to these ideals there should be a possibility to fight this, when there are citizens who agree with the ideals and when they are not harmful.[74]

Additionally, there is something in international law that is called customary law. To put it simply, this is the creation of legal obligations derived from consecutive actions that are in-line with each other. There are two requirements for customary law to come into existence:

[72] Klabbers, Jan. *International Law*. Cambridge: Cambridge University Press, 2014.
[73] Austin, John. *The Province of Jurisprudence Determined*. Charleston, S. C.: Bibliolife network, 2013. P. 124
[74] It seems as if a justification for this requirement is needed, but it is most likely that moral norms following international law are not harmful as they are accepted by a myriad of states and the aim of these is to prevent harm.

it must concern a general practice and the practice must be accepted as law. This means that if a country is constantly trying to contribute to one cause, is always present at COP's making the same arguments and claims (general practice requirement), signing all the relevant conventions, protocols and agreements (practices accepted as law), it becomes impossible for that country to suddenly change their attitude on the issue.[75] Customary law is another way in international law to make the morality of a country visible through the ways that they act on an intergovernmental level.

To make the argument clearer, let me provide an example. Imagine there are 120 countries that were present at a conference of parties (COP) about gender equality. After talking for two days and discussing ways in which gender equality can be increased and ways in which progress can be monitored, 100 countries sign a convention stating that they will work towards the created goals. Two years after the first COP there is another one, to check on progress, revise some of the targets, and attract more countries. So, new targets are set, more countries get involved and 110 countries sign the amendments or the initial convention including the amendments. A few years later, the third COP is held and again, targets are revised, amendments are made and progress is discussed. So far every country that signed the convention has taken care of its duties and has invested great effort into gender equality. After the COP, even more countries participate by signing the convention and the amendments. After this COP, however, country A, who did sign everything so far and showed great interest in fighting for gender equality, starts to significantly reduce the measures taken to combat gender inequality. One policy change is particularly striking; the reduction from the number of women who need to fill governmental positions from 40 per cent to 20 per cent. This change is met with a lot of resistance from the citizens of country A, and a group of people combines its powers and sues the state for their policy, claiming that it is unlawful and unjust for the government to reduce this target. In this case, the judges who must decide on the case are morally entitled to invade the separate power of the litigators in their verdict because the litigators have indeed done something immoral, violating international customary law. So, when the government of a country and its citizens have accepted certain morals derived from international law, it is immoral for the state to act in ways contrary to this morality. When this does happen, the judiciary should be allowed to take this fact into consideration when making their final judgment, thereby forcing the judiciary to take a more activist role.

[75] Klabbers, Jan. *International Law*. P. 25

Argument from Previous Cases. Thirdly, an argument can be made by pointing to previous cases where the judiciary was needed and morally right to extent their power and freedom to the greatest extent possible. When looking at these cases and the ways in which this use of power by the judiciary is justified in these instances, rules or conditions that need to be in place before the judiciary may become activist can be extracted. The most prominent of these issues is – and to a certain extent still is – discrimination. There has been a longstanding history of judges fighting for equality and recognition of the wishes of the civil rights movement in the USA. Although discrimination is now widely frowned upon, segregation laws have been upheld in the USA until the 1960's and it took many years of grassroots movements and judicial activism to get litigation in place that would guarantee protection to everybody living in the United States.[76] Justice Stone is the first judge that discussed the different uses of judicial power and when they should be used. He claimed that there should be more judicial review (read judicial activism) in cases where the standard operation of political processes that need to be in place to protect everyone can be seriously curtailed by the conditions of the social issue. In the case of Justice Stone, he was referring to discrimination and segregation laws, as they were in place and created a situation with conditions that threatened the expected protection of everyone, including people of color.[77] Looking back at the idea behind the separation of powers it makes sense to claim that the judiciary must utilize their power to the greatest extent when the litigation or executive branch have created conditions that lead to an unjust state of affairs, including conditions that curtail the regular political process in such a way that these two branches cannot solve the injustice. Because if the litigation and executive powers cannot or are reluctant to solve a social issue, but there is a pressing and prevalent one, then everyone who is able and willing should try to resolve the issue. This somewhat depends on the answer given to the question what a judge is supposed to do. For the sake of the argument here it is assumed that a judge is not just a slave of the laws that are being made by the litigators, but that she is also able to make laws herself and that the final aim is to attain justice for everyone.

Another example where authors have justified the activism of judges is in securing socioeconomic rights in the Global South.[78] César Rodríguez-Garavito argues that there is an

[76] Hall, Kermit L., William M. Wiecek, and Paul Finkelman. *American Legal History: Cases and Materials*. New York: Oxford University Press, 1996.
[77] Cover, Robert M. "The Origins of Judicial Activism in the Protection Of Minorities." *The Yale Law Journal* 91, no. 7 (1982): 1287-1316.
[78] The Global South is used as a term that describes the groups of countries that are not part of the 'western' world or 'Global North'. So, this includes countries both in South America, South Asia, and the southern part of Africa. I use this instead of developing countries because this term does not seem to describe adequately the countries that are often included in it.

emerging trend in the Global South in which judicial activism is used against structural injustice. This structural component of injustice has, in the words of Rodríguez-Garavito, three components:

> Affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause: (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations: and (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various governmental agencies to take coordinated actions to protect the entire affect population and not just the specific complainants in the case.[79]

He claims that because of the structural nature of these injustices something besides the executive and litigation power needs to help solving it, the judiciary. There are many specific cases of courts that have used judicial activism to overcome bad litigation or un-democratic practices by country leaders. Two examples are the role of South African courts in enforcing socioeconomic rights in the 1996 constitution and the role of the courts in India in transforming non-justiciable socioeconomic rights into legally enforceable rights.[80] In the example of the courts in India there is disagreement about the activist role of the judges in the high courts. Nonetheless, there has been significant influence from the judges on the policies implemented by the parliament. By multiple verdicts, the courts established that a right could be treated as fundamental, even when it is not present as such in the constitution. The way that the courts in India interpreted the constitution in combination with international human rights, created a framework in which health, education and other socioeconomic rights became seen as fundamental rights that needed to be implemented and guaranteed by the state. [81] Making these socioeconomic rights legally enforceable was something the judges were almost obliged to do, as the litigation and executive branches of power were not able or reluctant to provide these basic human rights to all the citizens of India. If it were not for the judiciary power, it would have been impossible, or would have taken significantly longer, for all citizens of India to legally enjoy these rights. What these examples boil down to is the idea that judges should make most extensive use of their power when there are no other institutions that can help in overcoming the social justice issues at hand. Nonetheless, it needs to be very clear that the

[79] Rodríguez-Garavito, César. "Beyond the Courtroom: The impact of Judicial Activism on Socioeconomic Rights in Latin America." *Tex. L. Rev.* 89 (2010): 1669.
[80] Ibid p. 150; Sathe, S. P. 2002b. Judicial Enforcement of Socio-economic and Cultural Rights. Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, November 1–3.

litigation and executive branches are no longer able to do anything against the issues and that it concerns a pervasive and structural issue, before the judiciary is allowed – or even obliged – to become activist in their ways of utilizing their power.

The Final Resort Argument. The last argument has as its main point that judicial activism is morally right when there is no other way of resolving a social issue that needs a solution within the framework of the separation of powers. It builds on the previous argument, but it does not essentially rely on previous examples. The argument itself is quite straightforward: when there is no other option to address or solve a social issue, it is morally right for judges to become more active in their use of power. However, there are a lot of assumptions and requirements that lie in the background of this idea. For example, the assumption is taken that it is better to have judicial activism than the continuation of the issue that might be solved by the judges. This means that the social issue that can be solved needs to be of such a severe and urgent nature that the potential for a solution outweighs all the potentially negative consequences that judicial activism might bring with it. Additionally, assumed is that a situation where no other possibilities to solve a social issue can exist, which, more than likely, is impossible. So, to specify this need in a way that is likely to occur, a situation is necessary where all other possibilities are so clearly immoral that they would not count as real options at all.[82] Moreover, there are several requirements that need to be in place before this argument can take hold. For instance, there needs to be clarity on the way that this judicial activism could lead to a solution and that the situation created by judicial activism will indeed be better than the situation before. It needs to be clear how judicial activism may help in solving the issue, because a certain boundary between the three branches of power needs to be respected. If the judiciary can only come up with a solution by overruling the necessities that need to be respected for a democratic state to be upheld, it is not morally right. In other words, whichever way the judiciary may be able to solve an otherwise irresolvable issue, it needs to respect the foundation of the separation of powers and the democratic state. Lastly, the judiciary should be a final resort for individuals who want to fight a social issue. It should not act on its own accord and sue the state for wrong policies, since individuals must do this. However, when this is done, the court should be activist in their decision when they see the social issue that is being addressed as an urgent one, in which the court is the last resort for solving the issue.

[82] Think of mass murder, grave human rights violations, starting a nuclear war, saving only a specific minority etc.

6. Why Judicial Activism in the Face of Climate Change is Morally Right

In the final part of this essay I will show that climate change does not only fit all the criteria that make judicial activism morally right, but that it is a one of a kind problem that needs the judiciary to bring a solution. First I will show that climate change fits all the arguments provided in the previous part, thereby showing the moral justification for the judges of the Urgenda case to do what they did. After this I will argue that, although there might be some sever limitations for allowing judicial activism, the costs do not weigh up to the benefits.

Considering the first argument in the previous section that mainly revolved around Mill's harm principle, there are a few points to be made with respect to climate change. First and foremost is the near global scientific and political consensus that something needs to be done very soon to combat climate change. There is widespread acknowledgement that temperatures may not rise more than two degrees Celsius, measured from 1990. Currently we are already at a rise of 0.5 degrees Celsius, meaning that we are talking about a maximum rise of 1.5 degrees Celsius before certain 'tipping points' are reached, at which point there is no return and many scientists argue that the world as we know will change drastically. So, taking into account the long-term benefits that would follow from rigorous policy making that will severely reduce the amount of greenhouse gases emitted, it seems to produce the least amount of harm. In other words, it does not matter what the short-term losses are when huge cuts in emissions are made, because the alternative of not cutting greenhouse gas emissions will lead to a doomsday scenario that will be much worse. In order to implement policies that will minimize harm, it is necessary to aim for a significant reduction of GHG emission in the short-term, thus validating the morality of the judicial activist stance of the judges who ruled in the Urgenda court case. Additionally, policy B, reducing GHG emission by at least 25% instead of 17%, seems to be the better alternative as it brings about a situation with less burdens on everyone, albeit in the long run, thus also fitting Scanlon's contractualism. Finally, in light of Anomaly's argument on the function of the state being the provision of public goods, a policy aiming to save the world as we know it would be morally better than one that does not do this because the latter would lead to a situation where the state may not be able to provide public goods at all anymore. When it is true that the function of a state is to provide public goods, the state should also provide a context in which it can provide these public goods. Implementing policies that do not fight climate change as scrupulous as possible seem to undermine the state's ability to provide public goods in the long term, thus making it morally right for judges to make sure that the state is forced to safeguard its ability to provide public goods.

The second argument, which considered the importance of international law in making morals for a state, also counts for climate change. There has been a longstanding tradition of international conventions aiming to combat climate change, starting with the 1992 United Nations Framework Convention on Climate Change (UNFCCC) treaty, which has been accepted and ratified by 197 countries today.[83] The aim of this treaty was to bring together all countries willing to combat climate change, by reducing greenhouse gas emissions, setting specific targets and implementing more protocols and conventions in the future. The next big step in the international law endeavor of combatting climate change was the Kyoto protocol, which entered into force in 2005. This protocol aimed to put specific mechanisms in place that could aid in the battle against climate change, such as international emissions trading, which created an economic incentive to reduce GHG emissions. Additionally, the Kyoto protocol makes use of the term 'common but differentiated responsibilities', meaning that everyone has their share of responsibilities in combatting climate change, but that the developed countries, which have had more than their fair share of GHG emission in the past, need to do more in their reduction of greenhouse gasses. Of the 197 countries, 181 countries signed and ratified the Kyoto protocol.[84] The last big step in this endeavor was the Paris Agreement of 2015, which was formed by the countries present at the conference of parties in Paris. The main outcome of this agreement was that there should be a global effort to keep temperature rise well below 1.5 degrees Celsius.[85] In order to achieve this, nationally determined contributions had to be created and implemented by the parties who signed and ratified the document. At this moment 195 countries signed, and 144 ratified the Paris agreement.[86] This means that there is global acceptance of the importance to combat climate change and near global political will to do something about it. In other words, following the line of thought of the second argument, there is global acceptance of the moral importance to do something about climate change. This means that any country that has been signing and ratifying all the documents so far has a moral obligation to do something in order to reduce GHG emission. When a country is reluctant to do so, or has policies that are not ambitious enough to prevent a global temperature rise of more

[83] United Nations Framework Convention on Climate Change. "First Steps to a Safer Future: Introducing The United Nations Framework Convention on Climate Change." Introduction to the Convention. August 16, 2016. Accessed May 08, 2017. http://unfccc.int/essential_background/convention/items/6036.php.
[84] United Nations Framework Convention on Climate Change. "Kyoto Protocol." Kyoto Protocol. May 30, 2013. Accessed May 08, 2017. http://unfccc.int/kyoto_protocol/items/2830.php.
[85] Although it seems as if this is a deviation from the initial target of global warming of no more than 2 degrees Celsius, it is, in fact the same. Because they incorporated the knowledge that temperatures have already risen by 0.5 degrees Celsius, measured from pre-industrial levels up until 2015.
[86] United Nations Framework Convention on Climate Change. "Status of Ratification." The Paris Agreement - main page. February 01, 2017. Accessed May 08, 2017. http://unfccc.int/paris_agreement/items/9485.php.

than 1.5 degrees Celsius, they are breaking their internationally created morality. Because the Netherlands has signed and ratified all documents, whether by itself or by the European Union, they have the obligation to implement policies that will significantly reduce GHG emissions before 2050. So, the judges of the Urgenda case were morally and legally correct in their infringement on the power of the litigators, since the policies created by them were not in line with the morality that the Dutch state showed to have in the international arena.

Thirdly, as I have shown, climate change seems to be a pervasive and extremely difficult problem to solve. Although there are international agreements and promises to do something about it and to reduce the emission of GHG's tremendously, not much is being done to achieve this.[87] Some countries are worried that acting upon the promises made in the international community will weaken their economic conditions, while others are worried that rigorous action will lead to the abuse of goodwill by other countries, and again others are unwilling to address it in their policies because they have the power for only four years and do not wish to work on such a long-term and structural problem that involves choices that won't be liked by everyone.[88] Whatever the reasons, the political players that are usually counted on to solve problems are not capable of doing so when it comes to climate change. So, as with making socioeconomic rights legally enforceable and fighting segregation laws, there seems to be a call for some other player who can help solve the issue at hand. Besides grassroots movements that call for a decrease in meat consumption or in fossil fuel usage in order to combat climate change bottom-up, there is room for the judiciary to put in place legal obligations for the government to take climate change seriously. Because there is global consensus that something needs to be done in order to keep the earth from warming up and additional 1.5 degrees Celsius, the judiciary is morally right to become activist in supporting solutions to this problem, especially when the other two state powers seem incapable to do so for a myriad of reasons.

Finally, there are many who argue that the judiciary is the final resort in solving the issues around climate change.[89] Because the only semi-binding agreements are made in international law, there is no real obligation for governments to indeed act upon the conventions signed in the international arena. In other words, no official institution is capable of solving the problem; there is simply not enough enforcement, political will nor international incentive for

[87] Cox, Roger. "Klimaat, Veiligheid en het Recht." *Cahiers Politiestudies* 7, no. 38 (2016): 197.
[88] Gardiner, Stephen M. "Ethics and Climate Change: An Introduction." *Wiley Interdisciplinary Reviews: Climate Change* 1, no. 1 (2010): 54-66.
[89] See for instance: Cox, Roger HJ. *Revolution Justified*. Planet Prosperity Foundation, 2012. & Lin, Jolene. "The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands." (2015).

national governments to implement the big changes necessary to stop global warming.[90] Therefore, solutions need to come from a different direction: the judiciary. Because only the judiciary can put enough pressure on a national government to implement policies with a specific aim. So, if one is looking for a top down solution for climate change, the final option is to resort to judicial activism in lawsuits that are being made against national governments. There are no other official ways in which this can be accomplished. I say top down solution specifically, because there are of course several ways in which climate change could be solved by bottom up or grass-root solutions. However, judicial activism is the way that is most effective, however, it requires strong grass-root movements to start lawsuits against the state, because the judiciary itself cannot do this. This implicates judicial activism in a bottom up solution, where it enables the possibility for individuals to create a top-down solution.[91] So, climate change also fits the conditions proposed in the last resort argument. This, in turn, can be understood as an argument for the moral rightness of judicial activism of the judges in environmental court cases against the state in general and in the Urgenda case specifically.

7. Additional Problems and Remarks

Before concluding this paper, I wish to briefly address two things. First, I want to touch upon the understandable doubt that some might have towards judicial activism, especially when looking at individuals like Putin, Trump, and Erdogan, who all seem to abuse their powers in ways that deteriorate the basic premises of a democratic state. In other words, I want to stress the limitations of this thesis and how this paper attempts to overcome the issues that people might have with judicial activism. Second, I wish to briefly examine the legacy of environmental ethics in the endeavor of researching environmental ethics and attempting to aid in the endeavor of solving climate change.

Judicial activism, at first, sounds like something that does not fit the underlying ideas of a democratic state. Why would judges be allowed to act in ways that deviate from purely interpreting the laws? Interpreting laws is their ultimate obligation, right? And I agree that it would be a very bad idea to accept the practice of judicial activism in general, where judges can decide themselves, at any given lawsuit, whether to base their verdicts on things other than the law. There would not be any control over the ways in which the judges would engage in

[90] Gardiner, Stephen. "A Perfect Moral Storm".

[91] The distinction between top-down and bottom-up simply can be explained in the following way: top-down means put in place by an institution, different from an individual, whereas bottom-up comes from individuals who, separately or commonly, try to bring about a change.

judicial activism although it can have far reaching consequences. In the 'wrong' hands, judicial activism can lead to a deterioration of democratic values, or social justice. What if companies, or anyone who can pay for it, can start to lobby, in order to persuade judges to deliver a certain verdict? This would have a negative effect on the objectivity and independence of the judges. Although I am arguing for judicial activism with the aim of combatting climate change, you can never fully know how lawsuits will be interpreted or what they will be used for in the future. So, in this sense, it could open the doors to more judicial activism on other topics. I understand the issues associated with judicial activism and the ways in which they can lead people to believe that all judicial activism is morally wrong and harmful. However, there are three important considerations I would like to provide for those who are skeptical, which might change their minds, or at least provides them with enough reasons to take the arguments I have made in this paper into consideration.

First, the potential costs of judicial activism do not weigh up to the benefits it can bring in the fight against climate change. Of course, I would prefer to live in a world where there is no conflict between the different powers making up the democratic state, with a perfect division of powers. However, a primary need for this kind of world to exist at all is overcoming climate change, as it is very likely to become extremely destructive in the near future if we do not act now. Judicial activism, as I have argued, can be a strong asset in this endeavor. Second, I think that it might be possible to implement regulations that allow the judiciary to be more activist when it comes to environmental issues, though more research would be necessary to put this in place. Finally, there are some who believe that judges can never provide a fully objective interpretation of the laws, and that they always take their personal ideas and history with them when deciding on a court case.[92] When this view is accepted, the step to judicial activism is less harsh, because it is being performed at every lawsuit. The discussion then becomes about how far judges can go. With regards to this I would argue that they should be allowed to go further with regards to climate change court cases.

Finally, there is the issue of anthropocentrism. Although interesting as a philosophical debate, trying to overcome anthropocentrism in order to establish an ethical theory safeguarding the environment from too much human interference does not seem like a productive enterprise. Engaging in this debate is, of course, interesting and relevant, however, it does not help society to overcome the climate change issues we are living with today. So, in this regard, I agree with

[92] Tamanaha, Brian Z. *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*. Princeton University Press, 2009.

Andrew Light's position, which he calls "methodological environmental pragmatism".[93] He claims that philosophers should also become more engaged in public life, with a focus on policy specifically. I strongly agree with him, because there seem to be many ways in which philosophers can and should contribute to making this world a better place. In other words, I do not regard philosophy as an external, objective, or academic way of looking at the world philosophically, but, like Heidegger, I regards philsoophy "as a path along which we are travelling" translating the Greek word philosophia [φιλοσφία] in its literal sense, as the love of wisdom.[94] The importance of this is the way that it has shaped the aim and position of this thesis, as I have attempted to engage with philosophical debates, and at the same time tried to come up with tangible solutions that can follow from a philosophical examination of the issues of climate change and judicial activism.

Conclusion

The aim of this thesis was twofold: I wanted to show that judicial activism in the face of climate change can be morally just and thereby demonstrate the moral soundness of the verdict in the Urgenda case. I started with an in-depth examination of the facts and history of the Urgenda court case, in order to understand the issue of climate change in the Netherlands. Subsequently, I explained the unique features of climate change, by using Gardiner's three moral storms, which showed the need and potential for the judiciary to take an active attitude towards solving climate change. The global storm showed the institutional inadequacy of addressing climate change, by framing it as an international tragedy of the commons. Due to an absence of an internationally governing body that can enforce rules, there is no possible way out of this prisoner's dilemma, symbolizing the need for a solution from without regular political channels. The intergenerational storm showed how a temporal perspective made the tragedy of the commons look even more hopeless, since there really is no way in which the interests of future generation can be included in institutions. Additionally, it showed how a domino effect is created by each generation that does not address the problem but instead reiterates and adds to the problem of climate change. Finally, I discussed the theoretical storm, which signifies issues like scientific uncertainty and contingent persons that are part of the unique features of climate change issues. Again, I called for the need to accept judicial activism as a valid and morally right attempt of solving climate change, because it seems to be able to overcome most of the intrinsic issues that climate change has. After this I clarified the verdict

[93] Light, Andrew. "Contemporary Environmental Ethics from Metaethics to Public Philosophy." *Metaphilosophy* 33, no. 4 (July 2002): 426-49. doi:10.1111/1467-9973.00238. P. 446.
[94] Heidegger, Martin. "What is Philosophy?, trans." *W. Kluback and JT Wilde. New Haven* (1956), P. 29.

of the court for insights into the way that judicial activism may work and to better understand the counterarguments to judicial activism. Next I clarified Montesquieu's doctrine of the separation of powers and the two different ways it can be interpreted: either as strict or as dynamic systems of organizing centralized powers, so the counterargument would be clear. I argued that the separation of powers is on the more dynamic side of the spectrum, when looking at the Netherlands, overcoming some of the arguments that claimed the verdict of the court of The Hague to infringe on the original ideas of Montesquieu. Additionally, I refuted the arguments that were still relevant. Responding to de Boer, I showed that there are no valid reasons for him to neither argue that the judiciary should remain on a more conservative side nor to interpret the facts of the case in a certain way when legal norms are absent. Moreover, I argued against his interpretation of judges as being of semi-democratic status. The judiciary is the sole institution responsible for the rule of law, which is an incredibly important idea in upholding a democratic state. With regards to Bergkamp's social justice litigation leading to harm argument, I proposed that social justice litigation with the aim of solving climate change would, in fact, not lead to a harmful situation, because action needs to be undertaken as soon as possible, which is internationally accepted as true. Following this, I presented my own arguments that validated the moral rightness of the judicial activism used in the Urgenda case. I started with the harm principle argument that mainly concerned Mill's utilitarian notion of the harm principle. I argued that less harm will follow by aiming for more reduction of GHG emissions, that there are no reasonable objections to the implementation of higher reduction standards, and that the potential for government failure in the creation of public goods, especially with regards to climate change, all add to the moral justness of judicial activism. In the international law argument, I claimed that a correct interpretation of international law is 'positive morality', which can be derived from multilateral treaties and customary law. Consequently, acting against the 'morality' created in international law is immoral and should be prevented, which is in this case only possible for the judiciary to do. Looking at previous examples of just judicial activism, I derived another argument for just judicial activism: when there is a lack of institutions that have the potential to solve a pressing issue, the judiciary, when possible, should be allowed to extend their power and become more active in trying to solve that problem. The last argument I provided, builds on the third argument and adds premises to the context in which judicial activism ought to be morally just. Afterwards I showed that the issue of climate change fits all these arguments, making judicial activism a valid and morally just alternative in the fight against negative climate change. I ended the paper by first, looking back one last time on the potential judicial activism has and the ways in which this can be

overcome, and second, analyzing my position as an applied ethicist in the field of environmental ethics.

Throughout this paper, I have hopefully shown that the Urgenda court case is indeed groundbreaking. Not only does this case create a precedent that can be used by others to start a similar lawsuit, it is also a pristine example where judicial activism can make a positive contribution to solving dangerous climate change. In the face of climate change the potential costs of making judicial activism a morally just thing, do not weigh up to the possible benefits. And, although I understand that some might fear a less checked judiciary, I urge them to at least consider the moral reasoning laid out in this thesis, since we do not have much time left.

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